# Notes

CONFLICT OF LAWS — FULL FAITH AND CREDIT — SISTER STATE JUDGMENT THAT CONFLICTED WITH PRIOR ARIZONA JUDGMENTS NOT ENTITLED TO FULL FAITH AND CREDIT IN ARIZONA. — *Porter v. Porter* (Ariz. 1966).

In 1959 Gladys Porter, here appellee, obtained an Arizona separate maintenance decree and an award of alimony and support. She subsequently had judgment for unpaid alimony and attorney's fees. Her husband was not personally served and did not appear in any Arizona action. The Arizona Hotel, alleged by Mrs. Porter to be community property, was placed in receivership *pendente lite* and subsequently sold under an execution issued pursuant to her judgment for fees and alimony in arrears.[1] She bought her husband's interest at the resulting sheriff's sale. Pearline Porter, Pauline Leonard and George Kemble, appellants in the instant case, had intervened in the separate maintenance suit, claiming the hotel to be the property of Continental Hotel Systems, a partnership owned by Gladys and Arnold Porter, Pearline Porter, and Pauline Leonard.[2] This issue of ownership was not determined in the separate maintenance suit. Some days after the Arizona decree was issued, but prior to the execution and sale, Arnold Porter sued Gladys Porter for divorce in Idaho. Mrs. Porter appeared and was awarded a divorce and alimony on her counterclaim. Appellants in the instant case also intervened in the Idaho suit. The Idaho court found the Arizona Hotel to be partnership property and Mrs. Porter quitclaimed her interest therein to her husband and appellants, pursuant to court order.[3] Appellants then filed a supplemental complaint in intervention in the Arizona action, praying that the court give full faith and credit to the Idaho divorce decree. The trial court refused to admit the Idaho decree and findings of law and fact in evidence, and directed the jury to return a verdict for Mrs. Porter. This judgment was reversed and remanded by the Arizona Court of Appeals.[4] On petition for review, *held,* opinion of the Court of Appeals vacated and judgment of the trial court affirmed. Since the Idaho judgment failed to give full faith and credit to prior Arizona judgments and to the execution and sale of the Arizona Hotel property, the Idaho judgment was not entitled to full faith and credit in Arizona.[5] *Porter v. Porter,* 101 Ariz. 131, 416 P.2d 564 (1966), *cert. denied,* 87 Sup. Ct. 1028 (1967).

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[1] Kemble v. Porter, 88 Ariz. 417, 357 P.2d 155 (1960).

[2] Porter v. Stanford, 86 Ariz. 402, 347 P.2d 35 (1959), *cert. denied,* 371 U.S. 829 (1962); Kemble v. Stanford, 86 Ariz. 392, 347 P.2d 28 (1959).

[3] *Aff'd on appeal,* Porter v. Porter, 84 Idaho 400, 373 P.2d 327 (1962).

[4] Porter v. Porter, 1 Ariz. App. 363, 403 P.2d 298 (1965).

[5] The instant case could have considerable effect on Arizona law in several areas, including appellate practice, community property, divorce and separation, judgments and partnership. Unfortunately, space limitations preclude a discussion of

Federal law provides that the public acts, records, and judicial proceedings of each state must be given full faith and credit in every other state.[6] A final judgment on the merits decided by a competent court with jurisdiction is entitled to full faith and credit,[7] but if a court acts without jurisdiction, the resulting judgment is not entitled to full faith and credit.[8] The issue of the jurisdiction *vel non* of the first court to decide a case may be litigated in the courts of a sister state.[9] Where one appears personally in the first litigation, however, he generally may not in a later suit attack the resulting judgment on jurisdictional grounds.[10]

In cases that involve real estate, such as the instant case, the power of the situs is formidable.[11] The courts of a sister state are without power to try title to local land.[12] In an in personam action, however, the rights of the parties thereto may be determined, and a sister state judgment in such a case merits full faith and credit in the courts of the situs state.[13] Conveyances of local realty by decree of a foreign court are generally not recognized by the situs,[14] but where a party to a foreign law suit conveys local land at the instance of the foreign court, even under judicial duress, such conveyance merits recognition by the situs courts.[15]

The instant case involves two judgments, (1) the Arizona separate maintenance decree and subsequent execution and sale, and (2) the Idaho divorce decree. The final Arizona judgment awarded the disputed property to Mrs. Porter (here appellee) pursuant to the terms of the first Arizona judgment. It is generally held that when a judgment in a prior action is disregarded in a second suit, the judgment entered in the *second* suit is res judicata and entitled to full faith and credit in a third suit, notwithstanding that the court rendering the

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the significance of the case in these areas. For a comprehensive treatment of these problems, see Porter v. Porter, 101 Ariz. 131, 139-50, 416 P.2d 564, 572-83 (1966) (dissenting opinion).

[6] U.S. CONST. art IV, § 1; 28 U.S.C. § 1738 (1948).

[7] For a definitive discussion of these requirements, see Sumner, *Full Faith and Credit for Judicial Proceedings*, 2 U.C.L.A. L. REV. 441, 451.

[8] Estin v. Estin, 334 U.S. 541 (1948); Williams v. North Carolina, 325 U.S. 226 (1945); Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1874).

[9] Williams v. North Carolina, 325 U.S. 226 (1945); Adam v. Saenger, 303 U.S. 59 (1938); Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U.S. 287 (1890).

[10] *See, e.g.*, Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931).

[11] Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954); Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Propert Litigation: The Supreme Court and the Land Taboo*, 18 STAN. L. REV. 1299 (1966).

[12] Olmstead v. Olmstead, 216 U.S. 386 (1910); Fall v. Eastin, 215 U.S. 1 (1909); Carpenter v. Strange, 141 U.S. 87 (1890). *See also* Hancock, *supra* note 11.

[13] Kennedy v. Morrow, 77 Ariz. 152, 268 P.2d 326 (1954); Farley v. Farley, 227 Cal. App. 2d 1, 38 Cal. Rptr. 357 (1964), *cert. denied*, 379 U.S. 945 (1964); Rozan v. Rozan, 129 N.W.2d 694 (N.D. 1964).

[14] *See generally* Fall v. Eastin, 215 U.S. 1 (1909); Clarke v. Clarke, 178 U.S. 186 (1900); Rozan v. Rozan, 49 Cal. 2d 322, 317 P.2d 11 (1957).

[15] *See* Fall v. Eastin, 215 U.S. 1 (1909); Rozan v. Rozan, 49 Cal. 2d 322, 317 P.2d 11 (1957); Weesner v. Weesner, 168 Neb. 346, 95 N.W.2d 682 (1959).

second judgment was in error in denying full faith and credit to the first judgment.[16] It is reasoned that the proper forum for litigation of the res judicata, a fortiori the full faith and credit issue, is the first court in which that issue appears.[17] Indeed, the proposition could not be in issue unless there were a second action. Therefore, the first opportunity to litigate the res judicata effect of a prior judgment of necessity arises in the second forum. The question being there litigated, it serves the policy of swiftly terminating litigation to sustain the second judgment as being res judicata and entitled to full faith and credit.[18]

The majority opinion in the instant case clearly rejects the doctrine as announced in the Restatement[19] that the second of two conflicting judgments is res judicata and entitled to full faith and credit. The court did not discuss the doctrine, but simply enunciated the rule that where the courts of a sister state fail to accord full faith and credit to prior Arizona judgments, the resulting judgment of such court will not be entitled to full faith and credit in Arizona.[20]

The court devoted the bulk of its opinion to setting forth reasons why the Idaho court was without jurisdiction to determine what interest the parties before it had in the Arizona Hotel property. The court reasoned that had the Idaho court given full faith and credit to the prior Arizona proceedings, it would have been without jurisdiction over the subject matter, *i.e.*, the Arizona Hotel. Under Idaho law, the courts of that state are without power to distribute the spouses' separate property in a divorce action.[21] Since Mrs. Porter had purchased her husband's interest in the hotel property at the Arizona sheriff's sale, the court reasoned that the property had become her separate property and therefore was not subject to the jurisdiction of the Idaho court.

It is settled that a judgment rendered by a court acting without jurisdiction is not entitled to full faith and credit.[22] It should be noted, however, that if any proceeding in Arizona determined the ownership

[16] Sutton v. Leib, 342 U.S. 402, 408 (1952); Morris v. Jones, 329 U.S. 545, 552 (1947); Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 439a (Ten. Draft 10, 1964); RESTATEMENT OF JUDGMENTS § 42 (1942).

[17] Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Note, *Res Judicata and Jurisdiction: The Bootstrap Doctrine*, 53 HARV. L. REV. 652 (1940); 40 COLUM. L. REV. 523 (1940).

[18] *See generally* Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Stoll v. Gotleib, 305 U.S. 165 (1938); Southard v. Southard, 305 F. 2d 730 (2d Cir. 1962). *But cf.* Kessler v. Fauquier Nat. Bank, 195 Va. 1095, 81 S.E.2d 440 (1954), *cert. denied*, 348 U.S. 834 (1954).

[19] RESTATEMENT OF JUDGMENTS § 42 (1942).

[20] Porter v. Porter, 101 Ariz. 131, 135, 416 P.2d 564, 568 (1966); *accord*, Colby v. Colby, 78 Nev. 150, 369 P.2d 1019 (1962), *cert. denied*, 371 U.S. 888 (1962); Dixon v. Dixon, 76 N.J. Eq. 364, 74 A. 995 (Ch. 1909).

[21] IDAHO CODE § 32-712 (1965); Heslip v. Heslip, 74 Idaho 368, 262 P.2d 999 (1953).

[22] Estin v. Estin, 334 U.S. 541 (1948).

of the contested property, it was the execution and subsequent sheriff's sale at which Mrs. Porter purchased the property. Prior to the sale, the Arizona courts had not finally determined whether the property was the Porters' community property or partnership property.[23] It is well settled that an execution upon property not belonging to the judgment debtor is void.[24] An execution is likewise void if it is based upon a judgment that has not finally disposed of the rights of all interested parties.[25] It is difficult to comprehend how such an execution and sale could merit full faith and credit.

The court also reasoned that the Idaho suit was in the nature of a suit to quiet title to Arizona land, and therefore not entitled to recognition by local courts. It is certainly true that foreign courts are without power or authority to try title to local land.[26] Where the parties *appear* in a foreign action, however, their rights may be there determined and, as *between the parties,* such determination is res judicata at the situs.[27] The Arizona court approved these principles but reasoned that the sheriff's sale, "which fact must have been brought to the attention of the Idaho court,"[28] had already vested title to the disputed property in Mrs. Porter.

The reasoning employed by the majority opinion to defeat the Idaho court's jurisdiction to entertain litigation involving the Arizona property relied in the main upon the assumption that the Arizona sheriff's sale was entitled to recognition by the Idaho court. This assumption, of course, is also the foundation upon which the doctrine of the case is predicated. Whether or not the underlying assumption is correct, it appears that under the instant case a sister state judgment which conflicts with a prior Arizona judgment will be denied full faith and credit by Arizona courts. While this doctrine is not without

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[23] *See* Porter v. Porter, 101 Ariz. 131, 139-50, 416 P.2d 564, 572-83 (1966) (dissenting opinion); Porter v. Stanford, 86 Ariz. 402, 347 P.2d 35 (1959), *cert. denied,* 371 U.S. 829 (1962).

[24] Fay v. Harris, 64 Ariz. 10, 164 P.2d 860 (1945); Burney v. Lee, 57 Ariz. 41, 46, 110 P.2d 554, 556 (1941); Steinfeld v. Copper State Mining Co., 37 Ariz. 151, 290 P. 155 (1930); 33 C.J.S. *Executions* § 51 (1942).

[25] Merlands Club, Inc. v. Messall, 238 Md. 359, 208 A.2d 687 (1965); McMillan v. McMillan, 67 S.W.2d 342 (Tex. Civ. Ct. App. 1933); 33 C.J.S. *Executions* § 6(c) (1942).

[26] Olmsted v. Olmsted, 216 U.S. 386 (1910); Fall v. Eastin, 215 U.S. 1 (1909).

[27] Durfee v. Duke, 375 U.S. 106 (1963); Kennedy v. Morrow, 77 Ariz. 152, 268 P.2d 326 (1954); Butterfield v. The Nogales Copper Co., 9 Ariz. 212, 80 P. 345 (1905). *See also* Miller v. Kearnes, 45 Ariz. 548, 46 P.2d 638 (1935), where the Arizona Supreme Court affirmed the judgment of the trial court which, having personal jurisdiction over both parties, ordered the conveyance of California real property by mortgagee, notwithstanding a prior California foreclosure judgment in which action the mortgagor did not appear.

[28] Porter v. Porter, 101 Ariz. 131, 137, 416 P.2d 564, 570 (1966).

support,[29] it has been criticized by the writers, [30] and appears to be contrary to decisions of the United States Supreme Court.[31] The rule is certainly contrary to the Restatement[32] which the Arizona court has stated it will normally follow in the absence of local precedent.[33]

The motivation of the court appeared to be retaliation, *i.e.*, Idaho refused to give our trial court judgment full faith and credit; consequently, we will not give full faith and credit to the later Idaho judgment. This is unfortunate. The reasoning employed by the majority is based upon a mistake as to the legal effect of an execution and sale, and contains dicta[34] that is disturbing in view of previous Arizona decisions, especially in partnership[35] and community property law.[36] Even more disturbing, it is clear that in Arizona the constitutional mandate of full faith and credit is not absolute, at least where the situs court is given the opportunity to utter the last word.

*Richard C. Anderson*

CONSTITUTIONAL LAW — UNAUTHORIZED PRACTICE OF LAW — DECREE PROHIBITING EMPLOYMENT OF COUNSEL BY UNION TO REPRESENT MEMBERS IN STATE WORKMEN'S COMPENSATION CLAIMS DOES NOT VIOLATE FIRST AND FOURTEENTH AMENDMENTS. *Illinois State Bar Ass'n v. U.M.W.* (Ill. 1966).

The United Mine Workers of America employed certain attorneys on a salary basis to represent members and their dependents in claims for personal injury and death under workmen's compensation acts. The union, acting through district boards, selected an attorney for each district, with the understanding that he would have no interference by the union, and his obligations would be to the client, not the union.

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[29] Colby v. Colby, 78 Nev. 150, 369 P.2d 1019 (1962), *cert. denied*, 371 U.S. 888 (1962); Dixon v. Dixon, 76 N.J. Eq. 364, 74 A. 995 (Ch. 1909); Hanna v. Stedman, 230 N.Y. 326, 130 N.E. 566 (1921).

[30] 63 COLUM. L. REV. 560 (1963); 31 GEO. WASH. L. REV. 648 (1963); 15 STAN. L. REV. 331 (1963); 16 VAND. L. REV. 193 (1962).

[31] Sutton v. Leib, 342 U.S. 402, 408 (1952); Morris v. Jones, 329 U.S. 545, 552 (1947); Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).

[32] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 439a (Tent. draft 10, 1964); RESTATEMENT OF JUDGMENTS § 42 (1942).

[33] *See, e.g.*, MacNeil v. Perkins, 84 Ariz. 74, 324 P.2d 211 (1958); Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953); Ingalls v. Neidlinger, 70 Ariz. 40, 216 P.2d 387 (1950).

[34] Porter v. Porter, 101 Ariz. 131, 134, 135, 136, 138, 416 P.2d 564, 567, 568, 569, 571 (1966).

[35] *See* Olds Bros. Lumber Co. v. Marley, 72 Ariz. 392, 236 P.2d 464 (1951); Cummings v. Weast, 72 Ariz. 93, 231 P.2d 439 (1951); ARIZ. REV. STAT. ANN. § 29-225(B)3 (1956); ARIZ. REV. STAT. ANN. § 29-228 (1956).

[36] *See* Spector v. Spector, 94 Ariz. 175, 382 P.2d 659 (1963); Kingsbery v. Kingsbery, 93 Ariz. 217, 379 P.2d 893 (1963); Porter v. Stanford, 86 Ariz. 402, 347 P.2d 35 (1959), *cert. denied*, 371 U.S. 829 (1962); Cummings v. Weast, 72 Ariz. 93, 231 P.2d 439 (1951).

In return for his agreement to represent the members, the attorney's salary would be paid by the union. Injured members filled out forms which were sent to the legal department of the union. The claims were prepared by union secretaries using those forms, under direction of the attorney. They were then sent directly to the Industrial Commission, in most instances without any conference between the client and the attorney, there usually being no such meeting until the hearing. The state bar association filed suit seeking an order restraining the union from this practice and the trial court granted summary judgment to that effect. On appeal, *held*, affirmed. It is unauthorized practice of law for a union to employ an attorney on a salary basis to represent an individual member's claims before the Industrial Commission, and a decree prohibiting such practice does not impair the rights of freedom of speech and association guaranteed by the first amendment and extended to the states by the fourteenth amendment because there is a compelling state interest in controlling standards of professional conduct. *Illinois State Bar Ass'n v. UMW*, 35 Ill. 2d 112, 219 N.E.2d 503 (1966), *cert. granted*, 35 U.S.L. WEEK 3304 (U.S. Feb. 28, 1967) (No. 884).

Courts in nearly all jurisdictions have, until recently, prohibited arrangements where the attorney is employed by a business or social organization, not to represent the organization, but as a service to represent its individual members or clients.[1] As a rule, this has been accomplished under the authority of the particular state's highest court to regulate the practice of law in that state,[2] either under state statutes which make certain practices illegal, or local canons of ethics derived from the American Bar Association canons 35[3] and 47[4] which make

[1] *E.g.*, State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961) (corporation); *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958) (union); People *ex rel.* Chicago Bar Ass'n v. The Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935) (non-profit club); *In re* Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272 (1936) (corporation); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 A. 139 (1935) (association).

[2] *See, e.g.*, Hildebrande v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950); *In re* Thibodeau, 295 Mass. 374, 3 N.E.2d 749 (1936); Doughty v. Grills, 37 Tenn. App. 63, 260 S.W.2d 379 (1952); and all cases cited note 1 *supra*.

[3] ABA CANONS OF PROFESSIONAL ETHICS No. 35:

> The Professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such an intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to his client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.
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> A lawyer may accept employment from any organization such as an association, club, or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

[4] ABA CANONS OF PROFESSIONAL ETHICS No. 47:

some practices unethical. Employment practices similar to that in the instant case have been held unauthorized practice of law and prohibited in litigation involving automobile clubs,[5] automobile-legal associations,[6] real estate taxpayer's associations,[7] banks and trust companies,[8] and labor unions.[9] The American Bar Association's Standing Committee on Unauthorized Practice of Law in 1950 considered the question in general and interpreted the canons as precluding such arrangments.[10]

Cases involving labor union plans have come before the courts frequently since it is the nature of unions to foster group activity to aid the individual. Aiding the member's workmen's compensation litigation can be a substantial part of the service. Probably the model for union-counsel plans is that of the Brotherhood of Railroad Trainmen.[11] Using a plan of regional or district counsel, the Brotherhood provides legal services for members concerning claims made to the various state workmen's compensation boards. It has been widely imitated, but with different unions adopting different methods of furnishing counsel.[12] When the practice was attacked, it was generally on the ground that the attorney was engaging in solicitation of business by having it channelled to him through the exclusive recommendations of a third party.[13]

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No lawyer shall permit his professional services, or his name, to be used in the aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

[5] People *ex rel.* Chicago Bar Ass'n v. The Chicago Motor Club, 362 Ill. 50, 199 N.E. 1 (1935); People *ex. rel.* Chicago Bar Ass'n v. The Motorist's Ass'n of Ill., 354 Ill. 595, 188 N.E. 827 (1933); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 A. 139 (1935).

[6] *In re* Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272 (1936). This was an association formed not for general automobile needs like towing, route advice, and insurance, but specifically for providing legal defense work for drivers and car owners.

[7] People *ex rel.* Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933).

[8] State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961); People *ex rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); *In re* Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935).

[9] Atcheson, T. & S.F. Ry. v. Jackson, 235 F.2d 390 (10th Cir. 1956); *In re* O'Neill, 5 F. Supp. 465 (E.D.N.Y. 1933); Hildebrande v. State Bar, 36 Cal. 2d 504, 225 P.2d 508 (1950); *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E2d 163 (1958); Hulse v. Brotherhood of Railroad Trainmen, 340 S.W.2d 404 (Mo. 1960); State *ex rel.* Beck v. Lush, 170 Neb. 376, 103 N.W.2d 136 (1960); Columbus Bar Ass'n v. Potts, 175 Ohio St. 101, 191 N.E.2d 728 (1963); *In re* Petition of the Committee on Rule 28 of the Cleveland Bar Ass'n, 15 Ohio L. Abs. 106 (Ct. App. 1933); Doughty v. Grills, 37 Tenn. App. 63, 260 S.W.2d 379 (1952).

[10] ABA COMM. ON UNAUTHORIZED PRACTICE OF THE LAW, OPINIONS, No. A (1950), reported in 36 A.B.A.J. 677 (1950).

[11] All cases cited *supra* note 9 are Brotherhood plan cases except *Columbus Bar Ass'n v. Potts*, which deals with a similar plan for the Transport Worker's Union.

[12] The Transport Worker's Union recommends lawyers and they are paid by the client. The United Mine Workers employs and pays the counsel.

[13] *See, e.g., In re* O'Neill, 5 F. Supp. 465 (E.D.N.Y. 1933); Hulse v. Brotherhood of Railroad Trainmen, 340 S.W.2d 404 (Mo. 1960); *In re* Petition of the Committee on Rule 28 of the Cleveland Bar Ass'n, 15 Ohio L. Abs. 106 (Ct. App. 1933).

Courts denounced this solicitation practice and its corollary systems of union financial connection with the attorneys.[14]

Two decisions of the United States Supreme Court have caused re-examination of the *ethical policies* of the canons in terms of the *legal right* constitutionally guaranteed by the first amendment, and extended to the states by the fourteenth amendment, of men to band together to further their own interests.[15] The first case was *NAACP v. Button*,[16] decided in 1963, where the court considered the custom of the NAACP and its legal section of locating appropriate clients for litigation designed to aid the civil rights movement, and held such a practice protected by the constitutional right to associate to pursue legitimate aims,[17] and that no compelling state interest had been shown to justify any infringement on that right. Three factors probably induced the court to reach such a decision: First, the importance of the civil rights litigation in which the NAACP was engaged was vital; second, there was no monetary stake to tempt the attorney toward disloyalty to the client; and third, as a practical matter there was a need to obtain lawyers for these purposes because of a scarcity of willing individual attorneys in the state involved.[18]

One court considering a labor union case after *Button* distinguished it on the ground that it applied to litigation seeking the constitutionally protected ends of the civil rights movement and held that state restriction of union-counsel plans did not violate the fourteenth amendment.[19] In 1964, the *Virginia Railroad Trainmen*[20] case applied the *Button* doctrine to the Brotherhood counsel plan and held that it was proper to recommend particularly qualified lawyers, even if this would result in channelling all the union member business to them.[21] In that case no specific mention was made of the right of a union to employ an attorney, but it was noted that in England labor unions retain attorneys to prosecute compensation claims, "a practice similar to that which we recently upheld in *NAACP v. Button* . . . ."[22] With these words, the Court

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[14] *In re* Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E.2d 163 (1958); Hulse v. Brotherhood of Railroad Trainmen, 340 S.W.2d 404 (Mo. 1960); State *ex rel.* Beck v. Lush, 170 Neb. 376, 103 N.W.2d 136 (1960).

[15] U.S. CONST. amend. I: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances." This provision was made binding on the state governments as well as the federal government by the fourteenth amendment, as was decided in the cases of, *e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Gitlow v. New York, 268 U.S. 652 (1925).

[16] 371 U.S. 415 (1963).

[17] *Id.* at 437.

[18] *Id.* at 443.

[19] Columbus Bar Ass'n v. Potts, 175 Ohio St. 101, 191 N.E.2d 728 (1963).

[20] Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U. S. 1 (1964).

[21] *Id.* at 5.

[22] *Id.* at 7.

implied that, in addition to the union's recommendations of qualified outside counsel, its payment of counsel to protect the rights of union members in compensation cases might also be proper.[23] The instant case is the first state test of this point since then.[24]

Arizona has no cases on point dealing with unions or other voluntary associations. The only case which involves unauthorized practice of law by intermediaries deals with corporations organized for profit.[25] In holding against the practice, Arizona agreed with other jurisdictions concerning corporations for profit which have employed counsel to do a customer's legal work, because of the fear of commercialization of the law and conflict of interest.[26] The principal significance of the instant case for Arizona is that it concerns national practices of a union that operates in Arizona.[27] Further, there are many similar national plans in other unions which operate in Arizona.[28] Practice under this or similar plans would almost certainly be ended by a judgment in the United States Supreme Court upholding the instant case.

When restricted to its facts of recommendation of qualified attorneys, as the Supreme Court apparently intended,[29] the decision in *Virginia Railroad Trainmen* would not *require* a reversal of the instant decision. There is no infringement in the instant case on the right to recommend qualified persons. The reference to the British system in *Trainmen* is clearly dictum and need not control. It is arguable that such employment was allowed by *Button*, but that argument ignores the absence in the instant case of the very factors which induced the *Button* decision.[30] No fundamental problems of a broad nature are involved, such as the "class action" civil rights activity of the NAACP. In addition, monetary stakes are the heart of workmen's compensation litigation. Finally, there is no scarcity of qualified attorneys willing to do the work for the member. These factors, all of which are the anti-

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[23] Commentary in legal periodicals generally said that the restricted holding would not be extended to employment situations: 50 CORNELL L.Q. 344, 353 (1965); 40 NOTRE DAME LAW. 477 (1965); and that in spite of the implication, the court would not extend its decision: 59 NW. U.L. REV. 821 (1965).

[24] *Petition for cert. filed*, 35 U.S.L. WEEK 3221 (U.S. Dec. 27, 1966) (No. 884); *cert. granted*, 35 U.S.L. WEEK 3304 (U.S. Feb. 28, 1967).

[25] State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961). The trust company supplied lawyers to prepare documents affecting land titles for customers and to give legal advice about land transactions solely for the benefit of the customers.

[26] *E.g.*, People ex *rel.* Illinois State Bar Ass'n v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); *In re* Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272 (1936).

[27] The United Mine Workers has a small number of members in Arizona. The union's principal strength lies in coal mining outside Arizona.

[28] The Brotherhood of Railroad Trainmen and the Transport Worker's Union have both already been mentioned. Both operate in Arizona.

[29] Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 8, 5 n.9 (1964).

[30] 371 U.S. at 443.

thesis of the *Button* situation, mean that the Supreme Court has not yet been confronted with the precise situation of the instant case. Therefore, it appears that the controlling doctrine for this type of case is that accepted by the Court in *Trainmen,* that state regulation of constitutionally protected conduct is permissible if a *sufficiently compelling state interest* is shown.[31] In *Trainmen,* the court felt that no such interest against recommendations had been shown.[32]

The practice involved in the instant case is salaried employment,[33] not recommendation. If a union can hire an attorney for its members for one purpose, why not for another? If a union can hire an attorney to further every aim of its members, why not another voluntary association, like an automobile club? If a voluntary association can do this, why not a corporation upon which people rely, like a bank or title company? The conclusion of the Illinois court that commercialization of the practice of law would result if a line were not drawn here seems inescapable. Commercialization, resulting in a depreciation of the personal, fiduciary duty of the attorney to the client, would seem to be an evil sufficiently compelling to allow an infringement upon a right when that infringement, if it exists at all, is slight. Since the right protected in *Trainmen* was the right to *refer* someone to a competent lawyer and thus see that he gets adequate legal services, the existence of an infringement becomes doubtful when *employment* by the association is prohibited.[34] The *Virginia Railroad Trainmen* recognition of the *compelling state interest* test indicates that the Supreme Court will search carefully for such an interest.[35] In the instant case, the finding of a potential evil serious enough for the state to have a compelling interest in its prevention is consistent with *Trainmen* and *Button.* Therefore, the United States Supreme Court could on certiorari justifiably affirm the instant decision.

*Michael Mulchay*

CORPORATIONS — DISREGARDING THE CORPORATE ENTITY — STOCKHOLDER-DIRECTORS PERSONALLY LIABLE ON AN ULTRA VIRES CONTRACT. — *Lurie v. Arizona Fertilizer & Chemical Co.* (Ariz. 1966).

The defendants were sole stockholder-directors of Allied Yuma Farms, Inc., a Washington corporation licensed to do business in Arizona. Having engaged in an unsuccessful joint farming venture, they were sued individually on a contract for fertilizers supplied the venture by the

[31] Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 6, 8 (1964).
[32] *Id.* at 8.
[33] Illinois State Bar Ass'n v. UMW, 35 Ill. 2d 112, 219 N.E.2d 503, 510 (1964).
[34] 219 N.E.2d at 509.
[35] Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 6 (1964).

plaintiff. Defendants' corporation, one of twenty corporations in which the defendants were controlling or sole stockholders, was not specifically authorized by its articles of incorporation to engage in farming. The corporation was undercapitalized and had no separate offices, no stationary, and little other outward indicia of existence. Defendants at no time had indicated to plaintiff that they were engaged in the farming venture otherwise than as individuals. The trial court directed a verdict against the defendants as individuals. They appealed, admitting the debt of their corporation to plaintiff, but disclaiming any personal liability. On appeal, *held,* affirmed. Where an undercapitalized corporation had no express or implied charter power to carry on farming operations or to enter into a fertilizer purchase contract, and its stockholder-directors led the plaintiff seller to believe they were acting only as individuals, and it was not until after their farming venture had failed and liability to the seller had accrued that defendants claimed corporate rather than individual liability to plaintiff, the stockholder-directors were properly held personally liable on the contract. *Lurie v. Arizona Fertilizer & Chemical Co.*, 421 P.2d 330 (Ariz. 1966).

A principal purpose and advantage of doing business in corporate form is the insulation of the shareholder-owners from personal liability for the debts of the enterprise.[1] Thus, where the statutory incorporation requirements have been fulfilled, and the corporation has otherwise been invested with the indicia of separate existence, the courts are reluctant to ignore the separate corporate entity and impose personal liability on its owners.[2] However, it is well settled that, under certain circumstances, the corporate veil will be pierced.[3] In so doing, courts at times speak of agency[4] or characterize the corporation as being

[1] *See* Alfred P. Sloan Foundation, Inc. v. Atlas, 42 Misc. 2d 603, 248 N.Y.S.2d 524 (Spec. T. 1964); Horowitz, *Disregarding the Entity of Private Corporations,* 14 WASH. L. REV. 285, 286 (1939).

[2] ". . . [T]he rule of piercing the fiction of corporate entity should be applied with great caution." Banks v. Jones, 390 S.W.2d 108, 110 (Ark. 1965). ". . . [C]ourts, acting cautiously and only where the circumstances justify it, may disregard the fiction of corporate entity." Jolley v. Idaho Securities, Inc., 414 P.2d 879, 887 (Idaho 1966). "The piercing of the corporate veil should not be lightly regarded in view of far reaching effects it has on the extension or limitation of corporate liability." Klapowitz v. Mar-Lee Constr. Corp., 43 Misc. 2d 268, 250 N.Y.S.2d 872, 874 (Trial T. 1964). "Courts will not disregard the corporation fiction . . . except where it appears that individuals are using the corporate entity as a sham to perpetrate fraud, to avoid personal liability, or in a few other exceptional situations." Radio KBUY, Inc. v. Lieurance, 390 S.W.2d 16, 19 (Tex. Civ. App. 1965).

[3] *E.g.,* Taylor v. Standard Gas & Elec. Co., 306 U.S. 307 (1939); David Moore Dev. Co. v. Higgins Indus., 163 So. 2d 139 (La. 1964); Schriock v. Schriock, 128 N.W.2d 852 (N.D. 1964); Abbott v. Bob's U-Drive, 222 Ore. 147, 352 P.2d 598 (1960).

[4] *See* McKay v. Vesley, 163 So. 2d 121 (La. 1964) where the corporation was held to be an agent acting for an undisclosed principal and the individuals were personally liable. Technically, the application of agency law does not "disregard the corporate entity" in finding that the corporation was an agent for the individuals,

merely the "alter ego" of its individual shareholder-owners.[5] To justify a court's disregarding the corporate entity, some degree of fraud or injustice must be shown, as well as a situation where the corporation can be regarded as having no separate existence from its owners.[6] Ultra vires transactions alone do not warrant piercing the corporate veil,[7] nor is the fact of undercapitalization alone sufficient, although it is an important consideration.[8] Whether the corporate identity will be ignored by the courts depends upon the facts and circumstances of the particular case and the combination of factors present that convinces the court that the veil must be pierced to accomplish a just result.[9]

In the instant case, two primary factors appear to have largely influenced the decision: (1) The lack of substantial corporate attributes and the method of corporate management permitted an inference that defendants' corporation had, in fact, no separate existence and was a mere dummy used to avoid personal liability, and (2) defendants' guiding their corporation into farming activities, in the course of which the indebtedness for fertilizer was incurred, was clearly ultra vires the

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but the result is the same — personal liability. *See* Horowitz, *Disregarding the Entity of Private Corporations*, 14 WASH. L. REV. 285, 290 (1939).

[5] *E.g.*, Platt v. Billingsley, 234 Cal. App. 2d 577, 44 Cal. Rptr. 476 (1965); Alfred P. Sloan Foundation, Inc. v. Atlas, 42 Misc. 2d 603, 248 N.Y.S.2d 524 (Spec. T. 1964).

In an unusual case that purported to apply neither agency nor alter ego, it was held that, where directors or officers contract with one who is ignorant of the existence of the corporation and to whom no disclosure of the corporation's existence is made, they are personally liable. Carlesimo v. Schwebel, 87 Cal. App. 2d 482, 197 P.2d 167, 170 (1948). This case seems to be an example of a piercing of the corporate veil by estoppel, although that term is not used. Likewise the term "estoppel" is not used in the instant case, but there are distinct overtones of estoppel present in the language of the instant case. See discussion note 13 *infra*.

[6] *See* Home Builders & Suppliers v. Timberman, 75 Ariz. 337, 256 P.2d 716 (1953); Tiernan v. Sheldon, 191 So. 2d 87 (Fla. Dist. Ct. App. 1966). But actual fraud is not necessary. Platt v. Billingsley, 234 Cal. App. 2d 577, 584, 44 Cal. Rptr. 476, 483 (1965). The injustice required must be more than the mere fact that plaintiff will not be able to recover unless the corporate entity is disregarded. Auer v. Frank, 227 Cal. App. 2d 396, 404, 38 Cal. Rptr. 684, 693 (1964); National Educators Life Ins. Co. v. Master Video Systems, Inc., 398 S.W.2d 358, 364 (Tex. Civ. App. 1965). But the corporate entity will be disregarded when the debt or obligation was one existing at the time of incorporation. Tiernan v. Sheldon, 191 So. 2d 87, 89 (Fla. Dist. Ct. App. 1966); 18 AM. JUR. 2d *Corporations* § 16 (1965).

[7] *See* City of Kiel v. Frank Shoe Mfg. Co., 245 Wis. 292, 14 N.W.2d 164 (1944). Very few cases even mention the ultra vires factor as a point to be weighed, probably because the ultra vires doctrine is normally asserted as a shield to protect stockholders' rights rather than as a sword for the benefit of creditors. 19 AM. JUR. 2d *Corporations* §§ 969-70 (1965).

However, a few cases have held defendants personally liable to creditors or other third parties for having guided the corporation knowingly into an ultra vires field. *See* Mandeville v. Courtright, 142 F. 97 (3d Cir. 1905), Nettles v. Sottile, 184 S.C. 1, 191 S.E. 796 (1937); Cunnyngham v. Shelby, 136 Tenn. 176, 188 S.W. 1147 (1916); Staacke v. Routledge, 175 S.W. 444 (Tex. Civ. App. 1915).

[8] *E.g.*, Anderson v. Abbott, 321 U.S. 349 (1944); Mayo v. Pioneer Bank & Trust Co., 274 F.2d 320 (5th Cir. 1960); Garden City Co. v. Burden, 186 F.2d 651 (10th Cir. 1951); Automotriz Del Golfo De California v. Resnick, 47 Cal. 2d 792, 306 P.2d 1 (1957); *see* Annot., 63 A.L.R.2d 1051 (1959).

[9] *See* Platt v. Billingsley, 234 Cal. App. 2d 577, 44 Cal. Rptr. 476 (1965); H.A.S. Loan Service, Inc. v. McColgan, 21 Cal. 2d 518, 133 P.2d 391 (1943).

corporate powers.[10] The fact of corporate undercapitalization appears also to have influenced the court's decision.[11]

The court speaks in terms of piercing the corporate veil, and recognizes that normally ultra vires acts are raised only in defense of stockholders' interests.[12] Yet, in the instant case, the court has not really applied the alter ego doctrine, nor in fact has it really purported to pierce the corporate veil. Rather it appears to have held the defendants personally liable to creditors for having guided the corporation into a field of ultra vires activity for their personal benefit.[13]

In thus holding the defendants personally liable to creditors for ultra vires actions on behalf of the corporation, the court in the instant case has gone further than any previous Arizona decision had indicated it would.[14] Arizona has long held that the corporate entity may be ignored when justice requires it,[15] but virtually all of these decisions

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[10] 421 P.2d at 334.

[11] *Id.*

[12] *Id.* at 322.

[13] The court states:

> The contract being ultra vires, it is plaintiff's contention, and presumably the theory on which the trial court granted the directed verdict, that the Luries should be personally liable as directors. The proposition that the directors will be held personally liable for acts done in behalf of the corporation which were outside of its charter powers finds support . . . . 421 P.2d at 334.

The court then cites and describes at some length the 1905 case of Mandeville v. Courtright, 142 F. 97 (3d Cir. 1905). After comparing the instant case to the *Mandeville* decision, the court summarizes: "The question then is whether this ultra vires act is binding on the Luries personally. *The result is, in effect,* a piercing of the corporate veil." 421 P.2d at 344 (emphasis added). Thus the court itself indicates it is not in fact piercing the corporate veil, but accomplishing the same effect by other means.

To further complicate determination of the theory under which the court found the defendants personally liable, the court's final summary has distinct overtones of estoppel, although the term is not used by the court.

> In the light of the Luries' total disregard of the corporate entity, both in their actions and representations in conducting this venture, and in disregard of the charter which they now attempt to stand behind, the law and equity must intervene to protect the rights of third persons . . . . 421 P.2d at 335.

A similar situation characterizes Carlesimo v. Schwebel, 87 Cal. App. 2d 482, 197 P.2d 167 (1948). See discussion note 5 *supra.*

[14] However, the language used by the court was very broad and general in Whipple v. Industrial Comm'n, 59 Ariz. 1, 5, 121 P.2d 876, 877 (1942). "When this fiction of the law is urged and carried on for an intent not within the reason and purpose for which it is allowed by law, the form should be disregarded . . . ." The instant case cites heavily from *Whipple* and relies on its broad language to help support the instant holding. *See* 421 P.2d at 335.

[15] *Cf.* Employer's Liab. Assur. Corp., Ltd. v. Lunt, 82 Ariz. 320, 313 P.2d 393 (1957); Whipple v. Industrial Comm'n, 59 Ariz. 1, 121 P.2d 876 (1942); Walker v. Southwest Mines Dev. Co., 52 Ariz. 403, 81 P.2d 90 (1938); Gonzalez & Co., Brokers, Inc. v. Thomas, 42 Ariz. 308, 25 P.2d 552 (1933); Mosher v. Salt River Valley Water Users' Ass'n, 39 Ariz. 567, 8 P.2d 1077 (1932); Mosher v. Bellas, 33 Ariz. 147, 264 P. 468 (1928); Mosher v. Lee, 32 Ariz. 560, 261 P. 35 (1927); Phoenix Safety Inv. Co. v. James, 28 Ariz. 514, 237 P. 958 (1925); Rice v. Sanger Bros., 27 Ariz. 15, 229 P. 397 (1924); Hitching Post Lodge, Inc. v. Kerwin, 3 Ariz. App. 94, 412 P.2d 91 (1966).

were based on application of the alter ego doctrine.[16] Arizona has held directors personally liable to the *corporation* for ultra vires acts,[17] but no previous Arizona decision has held individual stockholder-directors personally liable to *creditors* for ultra vires acts even where, as here, there were additional factors influencing the court to so hold.[18]

The instant case would appear to be a strong warning to the officers, directors, and stockholders of closely-held "dummy" corporations that if they manipulate corporate affairs too freely, ignoring limitations placed upon them by their charters, they will have no sanctuary from personal liability for corporate debts and obligations incurred in ultra vires activities.[19]

*William C. Porter*

CRIMINAL LAW — ARREST — SOME OBSERVATIONS CONCERNING ARIZONA'S NEW ARREST STATUTE. ARIZ. REV. STAT. ANN. § 13-1403(5) (1967).

Recently, the Arizona legislature amended its "arrest without a warrant statute" to provide that such an arrest may be lawfully made "when, at the scene of a traffic accident, based upon personal investigation, the officer has probable cause to believe that the person to be arrested has violated any section of title 28. The Arizona traffic ticket and complaint shall be utilized and the person so arrested shall be released as provided in section 28-1054 in all cases not covered in section

[16] Only Whipple v. Industrial Comm'n, 59 Ariz. 1, 121 P.2d 876 (1942), did not apply alter ego directly or by implication. See discussion note 14 *supra*. In applying the alter ego doctrine, Arizona has adopted the usual requirement that there must be more than a mere showing of unity of ownership or interest. Cooper v. Industrial Comm'n, 74 Ariz. 351, 249 P.2d 142 (1952); Hitching Post Lodge, Inc. v. Kerwin, 3 Ariz. App. 94, 412 P.2d 91 (1966). There must also be some fraud or injustice present. Home Builders & Suppliers v. Timberman, 75 Ariz. 337, 71 P.2d 716 (1953).

[17] Tovrea Land & Cattle Co. v. Linsenmeyer, 100 Ariz. 107, 412 P.2d 47 (1966); Fagersburg v. Phoenix Flour Mills Co., 50 Ariz. 227, 71 P.2d 1022 (1937).

[18] Although the ultra vires doctrine probably has more potency in Arizona than in many states because of the narrow language of ARIZ. CONST. art. 14, § 4 which provides: "No corporation shall engage in any business other than that *expressly* authorized in its charter or by the law under which it may have been or may hereafter be organized." (Emphasis added.) This provision has been implemented by ARIZ. REV. STAT. ANN. § 10-171 (1956). Thus, broad blanket provisions that might be effective in some jurisdictions are of no effect in Arizona. Trico Elec. Cooperative, Inc. v. Ralston, 67 Ariz. 358, 196 P.2d 470 (1948). In the *Lurie* case the court noted that the fact that the articles of incorporation of Allied Yuma Farms, Inc., might be more broadly interpreted under Washington law was of no import since ARIZ. CONST. art 14, § 5 provides that no foreign corporation may stand in a better position than an Arizona corporation when doing business in Arizona. 421 P.2d at 333.

[19] However, the court weakens its warning by somewhat circuitous language and surface adherence to the alter ego doctrine. Also, the court did not make clear what degree of ultra vires activity would be required. In the instant case, the entire field of activity — farming — was outside the charter powers of Allied Yuma Farms, Inc., but the court seems to indicate that a lesser degree of ultra vires activity, such as entry into an ultra vires partnership or joint venture in furtherance of a valid power to engage in farming, would not give a creditor grounds to seek to impose personal liability. 421 P.2d at 332.

28-1053."[1] Primarily, the new statute was enacted to include circumstances heretofore unprovided for in Arizona's original "arrest without a warrant for a misdemeanor statute," and eliminate the difficulty given law enforcement by *State v. Nixon*,[2] a recent Arizona decision. *Nixon* held that a city police officer may not, without a warrant, lawfully arrest a person for the misdemeanor of driving while under the influence of intoxicating liquor when the alleged commission of the offense did not occur in the officer's presence. This presents obvious problems when the officer, arriving at the scene of a traffic accident which he did not witness, finds one or both drivers intoxicated, but not sufficiently so to allow an arrest for being drunk and disorderly.[3]

A noted British legal historian has stated:[4]

> The common law did not authorize the arrest of persons guilty or suspected of misdemeanours, except in cases of an actual breach of the peace . . . . In such cases the arrest had to be made not so much for the purpose of bringing the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in fact or immediately after its commission.

Today, throughout the United States, the most common statute provides that "an officer may, without a warrant, arrest a person for a public offense committed or attempted within his presence."[5] Other statutes term lawful arrests for any "offense,"[6] any "indictable offense,"[7]

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[1] ARIZ. REV. STAT. ANN. § 13-1403 (1956), *as amended*, ARIZ. REV. STAT. ANN. 13-1403(5) (1967). Title 28 is the Motor Vehicle Code and sets forth the various traffic offenses. ARIZ. REV. STAT. ANN. § 28-1054 (1956) substantially states that upon signing the traffic complaint, and promising, by signature, to appear in court at a later date, the arrested person shall be released from custody. ARIZ. REV. STAT. ANN. § 28-1053 (Supp. 1966), sets forth the various offenses which may be excepted from § 28-1054, one of which is driving while under the influence of intoxicating liquors or narcotic drugs.

[2] 423 P.2d 718 (Ariz. 1967).

[3] ARIZ. REV. STAT. ANN. § 13-379 (Supp. 1966).

[4] 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883).

[5] ALA. CODE *tit.* 15, § 154 (1940); ARK. STAT. ANN. § 43-403 (1947); CAL. PEN. CODE § 836 (West 1956); IDAHO CODE § 19-603 (1948); IOWA CODE ANN. § 755.4 (1950); MINN. STAT. ANN. § 629.34 (1947); MONT. REV. CODES ANN. § 94-6003 (1947); NEV. REV. STAT. § 171.235 (1963); OKLA. STAT. *tit.* 22, § 196 (1951); S.D. CODE § 34.1069 (1939); TENN. CODE ANN. § 40-803 (1955); UTAH CODE ANN. § 77-13-3 (1953). *See generally* 33 N.C.L. REV. 17 (1954).

[6] CONN. GEN. STAT. ANN. § 6-49 (Supp. 1961) (Connecticut seems to eliminate the requirement of presence); D.C. CODE ANN. § 4-140 (1951); GA. CODE ANN. § 27-207 (1953); HAWAII REV. LAWS § 255-5 (1955) (Hawaii also seems to have eliminated the requirement of presence); KAN. GEN. STAT. ANN. §§ 13-623, 13-625 (1964) (first class cities); N.M. STAT. ANN. §§ 14-17-6, 64-22-10 (1954); N.D. CEN. CODE § 29-06-15 (1960) (arrest for misdemeanor without a warrant may not be made at night).

[7] MISS. CODE ANN. §§ 2470 (1957), 9352-52 (1953) (Mississippi has construed "indictable offense" to include misdemeanors). *See generally* Paramount-Richards Theatres, Inc. v. City of Hattiesburg, 210 Miss. 271, 282, 49 So. 2d 574, 579 (1950).

any "criminal offense,"[8] any "crime,"[9] any "misdemeanor,"[10] or for violation of "any law,"[11] or any "criminal law"[12] committed in the officer's presence.

The requirement of "presence" in modern statutes is a result of codifying the common law.[13] However, in attempting to apply the statutes to contemporary automobile problems, namely traffic accidents, certain difficulties appear. Various solutions have been employed. Most common is a liberal construction of the word "presence."[14] Generally, courts have termed the officer as "present" when the crime is apparent to any of his senses, though not always within his view. Still more lenient in construction were courts which construed the officer to be "present" when he heard the disturbance, proceeded at once to the accident, and made the arrest.[15] Other courts have fulfilled the requirement of "presence" when the officer received reliable information from a third party[16] or when the defendant, prior to his arrest, admitted driving the car.[17] There are also cases at the opposite end of the spectrum which have strictly construed the "presence" requirement and

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[8] COLO. REV. STAT. ANN. §§ 39-2-20, 13-5-136 (1963); ILL. ANN. STAT. § 37-102 (Smith-Hurd 1964).

[9] ALASKA STAT. § 12.25.030 (1962); N.Y. CODE CRIM. PROC. § 177 (McKinney 1963); ORE. REV. STAT. § 133.310(1) (1965) (this Oregon statute is essentially the same as the new Arizona statute).

[10] ARIZ. REV. STAT. ANN. § 13-1403 (1967); DEL. CODE ANN. *tit.* 11, § 1906 (1953); FLA. STAT. ANN. § 901.15 (1944); KY. REV. STAT. ANN. § 431.005 (Supp. 1962); LA. REV. STAT. § 15:60 (1951); MICH. STAT. ANN. § 28.874 (1954); N.H. REV. STAT. ANN. § 594:10 (1955); N.C. GEN. STAT. § 15-41 (1965); R.I. GEN. LAWS ANN. § 12-7-3 (1957); TEXAS CODE CRIM. PROC. *art.* 14.01 (Vernon 1966) (must be a breach of the peace); VA. CODE ANN. § 19-73 (1954); WIS. STAT. ANN. § 954.03(1) (1958).

[11] IND. ANN. STAT. § 9-1024 (Burns 1956); MASS. ANN. LAWS *ch.* 90, § 21 (1954), statute deals with arrests for vehicle code offenses, but Mass. has held drunk driving to be a breach of the peace and within the common law arrest statutes. *See* Commonwealth v. Gorman, 288 Mass. 294, 192 N.E. 618 (1934); ME. REV. STAT. ANN. *ch.* 15, § 704 (1965); MO. REV. STAT. § 85.230 (1949); NEB. REV. STAT. § 29-401 (1948); OHIO REV. CODE ANN. § 13432-1 (Baldwin 1964); WYO. STAT. ANN. § 7-155 (1959).

[12] S.C. CODE § 17-253 (1952); W. VA. CODE ANN. § 6291(a) (1961).

[13] Carroll v. United States, 267 U.S. 132 (1925).

[14] *In re* Sterling, 45 Cal. Rptr. 280 (Dist. Ct. App. 1965), *reversed on other grounds*, 407 P.2d 5, 47 Cal. Rptr. 205 (1965); People v. Burgess, 170 Cal. App. 2d 36, 338 P.2d 524 (1959); People v. Catavdella, 31 Ill. 2d 382, 202 N.E.2d 1 (1964); Cowan v. Commonwealth, 308 Ky. 842, 215 S.W.2d 989 (1948); Commonwealth v. Murin, 112 Pitt. L.J. 72 (Ct. Quarter Sess. of Peace 1964).

[15] Cowan v. Commonwealth, 308 Ky. 842, 215 S.W.2d 989 (1948); Kennington-Senger, Inc. v. Wicks, 168 Miss. 566, 151 So. 549 (1933).

[16] People v. Cedrano, 218 Cal. App. 2d 213, 32 Cal. Rptr. 246 (1963) (an excellent discussion of what is or is not reliable information); State v. Hoover, 219 Ore. 288, 347 P.2d 69 (1959); Fletcher v. State, 164 Tex. Crim. App. 321, 298 S.W.2d 581 (1957).

[17] State v. Williams, 98 Ohio App. 513, 130 N.E.2d 395 (1954); State v. Murphy, 4 N.J. Misc. 957, 134 A. 900 (Sup. Ct. 1926); People v. Belcher, 302 N.Y. 529, 99 N.E.2d 874 (1951); Ervin v. State, 196 Tenn. 459, 268 S.W.2d 351 (1954). In light of recent developments in constitutional law, there is some doubt whether these cases are still the law.

held the arrests to be illegal when the officer did not actually witness the accident.[18]

Many jurisdictions have eliminated part of the "presence" problem by amending the arrest statute or enacting a new one. One of these states provides for a lawful arrest where the misdemeanor was committed in the officer's presence *or* amounted to a breach of the peace, and designated driving while intoxicated as a breach of the peace.[19] Other states have enacted statutes against "public drunkenness" or being "drunk and disorderly." This latter method is employed by arresting the offender for being drunk and disorderly in public, and then subsequently charging him with driving while intoxicated.[20]

It is readily apparent that in a state which strictly construes its "presence" requirement none of the aforementioned solutions and considerations adequately justify the arrest of an intoxicated driver for driving while intoxicated when the arresting officer arrives at the accident scene without having witnessed the accident's occurrance. Likewise, we may assume that the common law courts never anticipated the importance of today's automobile and the necessity for "curbing" the drunken driver.

In addition to Arizona, two other states have enacted similar statutes,[21] and the three together now comprise the somewhat "enlightened view" of jurisdictions which have chosen not to torture and twist old statutes to make them meet relatively new but increasingly important problems. Although the new statute allows an arrest for any violation of Arizona's Vehicle Code, companion statutes, referred to in the principal enactment, provide for the release of the defendant in minor infractions upon his written promise to appear in court to answer the charge. Further, the statute provides that there must be probable cause to believe that the person has committed the crime. Courts have drawn no distinction between the tests of "probable" and "reasonable" cause,[22] but it is widely accepted that mere suspicion will

[18] State v. Nixon, 423 P.2d 718 (Ariz. 1967); Hill v. State, 298 P.2d 1066 (Okla. Ct. Crim. App. 1956).

[19] Muniz v. Williams, 327 Mass. 353, 99 N.E.2d 37 (1951). *See also* Commonwealth v. Gorman, 288 Mass. 294, 192 N.E. 618 (1930).

[20] Mardis v. Superior Court, 218 Cal. App. 2d 70, 38 Cal. 263 (1963); State *ex rel.* Kelley v. Yearwood, 204 Miss. 181, 37 So. 2d 174 (1948); Fletcher v. State, 164 Tex. Crim. App. 321, 298 S.W.2d 581 (1957); State v. Bryan, 16 Utah 2d 47, 395 P.2d 539 (1964).

[21] N.Y. VEHICLE & TRAFFIC LAWS § 1193; ORE. REV. STAT. § 133.310(3) (1965).

[22] Draper v. United States, 358 U.S. 307 (1958); United States *ex rel.* Eidenmuller v. Fay, 240 F. Supp. 591 (S.D.N.Y. 1965), *cert. denied,* 384 U.S. 964 (1966); State v. Wilson, 153 Conn. 39, 212 A.2d 75 (1965); Edwardson v. State, 231 Md. 332, 190 A.2d 84 (1963); State v. Harris, 265 Minn. 260, 121 N.W.2d 327, *cert. denied,* 375 U.S. 867 (1963); State v. McWeeney, 216 A.2d 357 (R.I. 1966).

not suffice in meeting the test.[23] This requirement may well be difficult to meet where the accident has rearranged the occupants so that at the time of the officer's arrival the driver has involuntarily changed positions with a passenger in the back seat.

While it is not necessary to expressly provide for every fact situation which might arise, it is vital that the law alter itself to meet the problems of modern living. The nature of the law of arrest and its reason for being is no longer the same today as it was at common law. Then, courts were more concerned with protecting the peace of the city than they were with punishing anyone who jeopardized that tranquility. Now, it appears that an arrest for a misdemeanor is made as much for the purpose of bringing the offender to justice as it is for keeping society moving in an orderly flow.

Obviously, evidence is essential for any conviction, and if there are to be convictions for driving while intoxicated, it is desirable to subject the arrestee to various tests professedly determinative of his legal sobriety. Among others, the drunkometer test and the extraction of body fluids are the methods of examination most generally used. These samples of blood,[24] breath,[25] and urine[26] are often necessary to prove the elements of the alleged crime, and the tests given to obtain them have been held by both state and federal courts to be admissible in evidence and nonviolative of any federal constitutional guarantees when properly administered.[27] But, of course, if this evidence is obtained as the result of an unlawful arrest it is inadmissable on federal constitutional grounds.[28]

The Arizona statute allows the law enforcement officials to arrest for the offense committed, rather than "come in the back door" by utilizing the arrest for "drunk and disorderly" approach. Granted, there seems to be no reason why one lawfully arrested for being "drunk and disorderly," and then later also charged with "driving while intoxicated,"

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[23] Brown v. State, 229 Ind. 470, 99 N.E.2d 103 (1951); Parrott v. Commonwealth, 287 S.W.2d 440 (Ky. 1956); Barfield v. Marron, 222 La. 210, 62 So. 276 (1952); Griffin v. State, 200 Md. 569, 92 A.2d 743, *cert. denied*, 345 U.S. 907 (1952); Goldberg v. Fleischer's Confidence Food Store, 102 N.Y.S.2d 176 (Trial T. 1950).

[24] Schmerber v. California, 384 U.S. 757 (1966), *noted in* 16 AM. L. REV. 136 (1966), 33 BROOKLYN L. REV. 129 (1966), 19 OKLA. L. REV. 417 (1966), and 41 TUL. L. REV. 132 (1966); Breithaupt v. Abrams, 352 U.S. 432 (1957), *noted in* 17 HASTINGS L.J. 139 (1966).

[25] State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1953); Toms v. State, 239 P.2d 812 (Okla. Ct. Crim. App. 1952). *See generally* Annot., 25 A.L.R. 2d 1407 (1952).

[26] Novak v. District of Columbia, 49 A.2d 88 (Mun. Ct. App. 1947), *rev'd on other grounds*, 160 F.2d 588, 82 U.S. App. D.C. 95 (1947); Columbus v. Thompson, 55 Ohio L. Abs. 302, 89 N.E.2d 604 (Ct. App. 1949); Martell v. Klingman, 11 Wis. 2d 296, 105 N.W.2d 446 (1960). *See generally* Annot., 25 AL.R.2d 1407 (1952).

[27] See authorities noted *supra*, notes 24, 25, 26.

[28] *See* Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 40 (1963) (dissenting opinion, Justice Brennan).

could not then be given these same examinations. However, situations can be envisioned when the offender will be sufficiently intoxicated so as to be incapable of properly controlling an automobile, but yet not so inebriated and uncontrollable as would allow his arrest for being "drunk and disorderly." For these two reasons: to prevent improper application of the "drunk and disorderly" statute to accidents not occurring within the officer's presence, and to aid police officers in their investigatory process, the new statute is necessary and reasonable.

*Peter J. Rathwell*

EVIDENCE — JUDICIAL NOTICE — SCIENTIFIC ACCURACY OF PRINCIPLE OF SPEED MEASUREMENT BY RADAR IS PROPER SUBJECT OF JUDICIAL NOTICE. *State v. Tomanelli* (Conn. 1966).

Defendant was convicted of speeding on the basis of evidence obtained through the use of a radar speedmeter by the state police. This evidence was admitted over defendant's objection that it must be preceded by expert testimony establishing the accuracy and ability of the radar principle to measure speed. On appeal, the Appellate Division affirmed. On certification to the Supreme Court of Connecticut, *held*, affirmed. The scientific accuracy of the Doppler-shift *principle*[1] for the measurement of speed is a proper subject of judicial notice but such notice does not extend to the accuracy of the *particular instrument*. The latter must be demonstrated to the satisfaction of the court before evidence obtained through the use of the instrument is admissible. *State v. Tomanelli*, 153 Conn. 356, 216 A.2d 625 (1966).

During the past fifteen years, the general reliability of the radar speedmeter as a device for measuring the speed of a moving vehicle has gradually come to be recognized by both courts[2] and legislatures.[3] When radar was first used by the police, the courts required expert testimony as to its underlying principles and reliability before allowing

[1] The Doppler-shift principle which is used by police radar is technically not radar at all. Under this system a continuous rather than a pulse type wave is emitted, and neither direction nor distance can be determined. Devices using this principle, however, can determine speed more accurately than an ordinary speedometer and when operating properly are accurate within one or two miles per hour. *See* Kopper, *The Scientific Reliability of Radar Speedmeters*, 33 N.C.L. REV. 343 (1955).

[2] *E.g.*, Everight v. City of Little Rock, 230 Ark. 695, 326 S.W.2d 796 (1959); Honeycutt v. Commonwealth, 408 S.W.2d 421 (Ky. Ct. App. 1966); People v. Sarver, 205 Misc. 523, 129 N.Y.S.2d 9 (Spec. Sess. 1954). *See generally* 7 AM. JUR. 2d *Automobiles & Highway Traffic* § 327 (1963); Baer, *Radar Goes to Court*, 33 N.C.L. REV. 355 (1955).

[3] MD. CODE ANN. art. 35, § 91 (1957); PENN. STAT. ANN. tit. 75, § 1002(d.1) (Supp. 1966); VA. CODE ANN. § 46.1-198 (repl. vol. 1967); *see* 36 C.F.R. 3.29(d) (1960) (applicable to federal parks, etc.); OHIO REV. CODE ANN. 4511.091 (Baldwin 1964).

admission of evidence obtained through the use of the speedmeter.[4] Judges expressed concern over the growing problem of policing this nation's highways,[5] but they indicated that the admission of a radar speed reading would be in violation of the rules of evidence unless it was preceded by the testimony of expert witnesses.[6]

As the use of radar in traffic enforcement became more common, however, courts began to allow the admission of speedmeter readings as evidence without requiring expert testimony.[7] A majority of the courts in which radar evidence of speed has been offered have expressly taken judicial notice of the scientific accuracy of the radar speedmeter in principle.[8]

Judicial notice has long been recognized as an exception to the ordinary trial procedure of establishing facts by formally presenting evidence, and where it is applicable it takes the place of proof.[9] Originally, judicial notice was taken only of facts commonly known by members of the community,[10] but an important recent trend has been an expansion of this doctrine to encompass those matters which are verifiable with certainty,[11] including technological and scientific facts.[12]

[4] City of Buffalo v. Beck, 205 Misc. 757, 130 N.Y.S.2d 354 (Sup. Ct. Erie County, Sp. T. 1954); People v. Offermann, 204 Misc. 769, 125 N.Y.S.2d 179 (Sup. Ct. Erie County, Sp. T. 1953); People v. Jamison, 8 Misc. 2d 408, 165 N.Y.S.2d 906 (Westchester County Ct., Sp. T. 1957); City of Rochester v. Torpey, 204 Misc. 1023, 128 N.Y.S.2d 864 (Monroe County Ct. 1953).

[5] People v. Offermann, 204 Misc. 769, 125 N.Y.S.2d 179 (Sup. Ct. Erie County, Sp. T. 1953) (indicating that radar is a "much needed weapon" in law enforcement); People v. Jamison, 8 Misc. 2d 408, 165 N.Y.S.2d 906, 908 (Westchester County Ct., Sp. T. 1957) which says: "The court fully appreciates the problems of the municipalities in connection with speeding violations and hesitates to increase this burden, however . . . ."

[6] People v. Offerman, 204 Misc. 769, 125 N.Y.S.2d 179 (Sup. Ct. Erie County, Sp. T. 1953); People v. Jamison, 8 Misc. 2d 408, 165 N.Y.S.2d 906 (Westchester County Ct., Sp. T. 1957). *See generally* Carosell & Coombs, *Radar Evidence in the Courts*, 32 DICTA 323 (1955).

[7] *E.g.*, People v. Magri, 3 N.Y.2d 562, 147 N.E.2d 728, 170 N.Y.S.2d 335 (1958); City of East Cleveland v. Ferell, 108 Ohio St. 298, 154 N.E.2d 630 (1958); Cromer v. State, 374 S.W.2d 884 (Tex. Crim. App. 1964).

[8] *See, e.g.*, Everight v. City of Little Rock, 230 Ark. 695, 326 S.W.2d 796 (1959); Honeycutt v. Commonwealth, 408 S.W.2d 421 (Ky. Ct. App. 1966); State v. Graham, 322 S.W.2d 188 (Mo. Ct. App. 1959); State v. Dantonio, 18 N.J. 570, 115 A.2d 35 (1955).

[9] *E.g.*, Utah Const. Co. v. Berg, 68 Ariz. 285, 205 P.2d 367 (1949); Varcoe v. Lee, 180 Cal. 338, 181 P. 223 (1919); Piechota v. Rapp, 148 Neb. 443, 27 N.W.2d 682 (1947); *see* UNIFORM RULE OF EVIDENCE 9; C.T. MCCORMICK, EVIDENCE § 323 (1954) [hereinafter cited as MCCORMICK]; 9 J.H. WIGMORE, EVIDENCE § 2565 (3d ed. 1940) [hereinafter cited as WIGMORE].

[10] Varcoe v. Lee, 180 Cal. 338, 181 P. 223 (1919); Lickfett v. Jorgenson, 179 Minn. 321, 229 N.W. 138 (1930). *See generally* Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944).

[11] Phelps Dodge Corp. v. Ford, 68 Ariz. 190, 203 P.2d 633 (1949); Nichols v. Nichols, 126 Conn. 614, 13 A.2d 591 (1940); Roden v. Connecticut Co., 113 Conn. 408, 155 A. 721 (1931); *see* MCCORMICK § 325; 9 WIGMORE § 2571.

[12] Electric Storage Battery Co. v. Shimadzu, 123 F.2d 890 (3d Cir. 1941) (that heated oxygen will combine with lead to form lead oxide); Schlenker v. Board of Health, 171 Ohio St. 23, 167 N.E.2d 920 (1960) (that harmful bacteria are often found in raw milk and pasteurization is an effective way to destroy such deleterious germ life).

Before the court does take judicial notice, either party may properly offer evidence as to whether or not such notice should be taken,[13] but once a fact is judicially noticed, the prevailing view, with which Arizona concurs,[14] is that the matter is then indisputable.[15]

While the courts generally have taken judicial notice of the principle of radar,[16] most have refused to give such notice to the accuracy of the particular instrument used and have required this to be shown by competent evidence.[17] There is now general agreement that police officers with a minimal amount of training and experience in the use of radar, can testify as to whether the machine was working properly.[18] The courts, however, differ widely as to the number and the types of tests which must be performed to establish the accuracy of the machine.[19] After the accuracy of the speedmeter is established *prima facie*, the possibility of error goes only to the weight of the evidence and does not render it inadmissible.[20]

Although radar speedmeters have been in use for several years in Arizona, there are no reported cases involving radar evidence. The Arizona Supreme Court has, however, taken judicial notice of scientific principles in the past[21] and, thus, will presumably follow the prevailing doctrine and take judicial notice of the radar speedmeter when it has the opportunity.

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[13] *See* UNIFORM RULES OF EVIDENCE 10(1), 12(4); MCCORMICK § 330.

[14] Utah Const. Co. v. Berg, 68 Ariz. 285, 205 P.2d 367 (1949); Phelps Dodge Corp. v. Ford, 68 Ariz. 190, 203 P.2d 633 (1949). *See generally* UDALL, ARIZONA LAW OF EVIDENCE § 201, at 442 (1960).

[15] *E.g.*, State *ex. rel.* Landis v. Thompson, 121 Fla. 561, 164 So. 192 (1935); Commonwealth v. Marzynski, 149 Mass. 68, 21 N.E. 228 (1889); *see* MCCORMICK § 330. at 710; Morgan, *The Law of Evidence* 1941-1945, 59 HARV. L. REV. 480 at 482-86 (1946). *But see* K. C. DAVIS, ADMINISTRATIVE LAW TEXT § 15.09 (1959); J.B. THAYER, PRELIMINARY TREATISE ON EVIDENCE 308 (1898); 9 WIGMORE § 2567.

[16] *E.g.*, United States v. Dreos, 156 F. Supp. 200 (D. Md. 1957); Honeycutt v. Commonwealth, 408 S.W.2d 421 (Ky. Ct. App. 1966); State v. Graham, 322 S.W.2d 188 (Mo. Ct. App. 1959). *See generally* 7 AM. JUR. 2d *Automobiles & Highway Traffic* § 327 (1963).

[17] City of St. Louis v. Boecker, 370 S.W.2d 731 (Mo. Ct. App. 1963); Wilson v. State, 168 Tex. Crim. 439, 328 S.W.2d 311 (1959). *See generally* 7 AM. JUR. 2d *Automobiles & Highway Traffic* § 327 (1963).

[18] Honeycutt v. Commonwealth, 408 S.W.2d 421 (Ky. Ct. App. 1966); State v. Graham, 322 S.W.2d 188 (Mo. Ct. App. 1959); Cromer v. State, 374 S.W.2d 884 (Tex. Crim. App. 1964). *See generally* Kopper, *The Scientific Accuracy of Radar Speedmeters*, 33 N.C.L. REV. 343, 353 (1955).

[19] State v. Graham, 322 S.W.2d 188, 197 (Mo. Ct. App. 1959). *Compare* City of St. Louis v. Boecker, 370 S.W.2d 731 (Mo. Ct. App. 1963), *with* Cromer v. State, 374 S.W.2d 884 (Tex. Crim. App. 1964). *See also* Note, *Radar Speed Enforcement in St. Louis and St. Louis County: Accuracy of Testing and Current Practices*, 1964 WASH. U.L.Q. 385 (1964).

[20] State v. Graham, 322 S.W.2d 188 (Mo. Ct. App. 1959); State v. Dantonio, 18 N.J. 570, 115 A.2d 35 (1955); City of East Cleveland v. Ferell, 107 Ohio App. 256, 145 N.E.2d 134 (1957); *cf.* Hardaway v. State, 202 Tenn. 94, 302 S.W.2d 351 (1957).

[21] City of Phoenix v. Breuninger, 50 Ariz. 372, 72 P.2d 580 (1937) (the value of the process of pasteurization in destroying bacteria); State v. Duguid, 50 Ariz. 276, 72 P.2d 435 (1937) (urine test for intoxication); Moon v. State, 22 Ariz. 418, 198 P. 288 (1921) (fingerprinting as a valid method of identification).

In the instant case, the Connecticut court follows the established rule by taking notice of the general reliability of radar in detecting speed. It also clearly states what judicial notice is, what its results are, and why this particular scientific principle is an appropriate subject for such notice.[22] The court, however, goes on to say that even after judicial notice of this principle has been taken, the defendant can still present evidence disputing it.[23] In saying this, the court has apparently temporarily lost sight of the reason for and the function of judicial notice.[24] In any event, this case adheres to the prevailing view in refusing to extend the notice of the court to the accuracy of the machine that was used.[25] The Connecticut court found that a test of the machine's accuracy by means of three tuning forks, both before and after the reading in question, was sufficient to render the evidence admissible.[26]

While judges as a general rule have emphasized the need for caution in applying judicial notice,[27] the great writers on evidence, who perhaps have a wider view of the needs of judicial administration, have advocated that this doctrine be used more extensively.[28] As research into all fields of human knowledge continues to expand and specialization in technical fields becomes more and more common, the emphasis in the field of judicial notice will continue to shift from the older basis of "common knowledge" to the new and more fruitful basis of being verifiable with certainty.[29] This will enable the court to accept new scientific findings such as the radar principle as soon as they are generally accepted by the scientist. In certain technical areas, judicial notice may well prove to be a more acceptable method of proof than a contest before a jury involving expert testimony which is completely beyond their comprehension.[30]

As "certainly verifiable" judicial notice becomes more widely accepted as a new system of proof of facts that lie within a particular area, its procedural aspects must become more refined.[31] If a fact is to be treated as indisputable after it has been judicially noticed,[32] the

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[22] State v. Tomanelli, 153 Conn. 365, 216 A.2d 625, 628-29 (1966).
[23] *Id.* at 629-30.
[24] See authorities cited note 15 *supra.*
[25] State v. Tomanelli, 153 Conn. 365, 216 A.2d 625, 629-30 (1966).
[26] *Id.* at 630. See authorities cited note 19 *supra.*
[27] Varcoe v. Lee, 180 Cal. 338, 181 P. 223, 226 (1919); State *ex. rel.* Remick v. Clousing, 205 Minn. 296, 285 N.W. 711 (1939). See cases cited note 4 *supra,* concerning the reluctance of the courts to take judicial notice of radar.
[28] *See* McCORMICK § 323, at 689; J.B. THAYER, PRELIMINARY TREATISE ON EVIDENCE 300 (1898) (pointing out how more extensive use of the doctrine of judicial notice would help shorten and simplify trials); 9 WIGMORE § 2583.
[29] *See generally* McCORMICK § 331. *See also* authorities cited note 11 *supra.*
[30] *See* Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949). *See generally* 9 WIGMORE § 2583.
[31] *See generally* McCORMICK § 330.
[32] See authorities cited note 15 *supra.*

court must give both parties adequate opportunity to present evidence as to the propriety of such notice before ruling as to whether or not it will be taken.[33] Counsel for each side must assume the responsibility of producing reliable sources, and the court must take the primary responsibility for the reliability of the sources it relies upon and for the adequacy of the research.[34] The result of this expansion of the doctrine of judicial notice and further refinement of its procedural safeguards is that the courts will be able to handle technological and scientific data in a faster and more efficient manner.

*J. Dee Flake*

MASTER AND SERVANT — VICARIOUS LIABILITY — MASTER NOT LIABLE FOR ASSAULT BY SERVANT WHERE SERVANT HAS DEVIATED FROM THE COURSE AND SCOPE OF EMPLOYMENT. *Maddex v. Ricca* (D. Ariz. 1966).

The plaintiff was involved in an altercation with an employee of the defendant in the parking lot of the latter's bar. The defendant's bartender had originally entered the parking lot to assist in extinguishing an apparent fire in plaintiff's automobile. After the danger had ceased, defendant's bartender remained in the parking lot where the altercation developed in which the plaintiff was injured. The court found[1] that the bartender was the aggressor and that the altercation was brought about by a combination of pre-existing animosity, an exchange of profanity, the plaintiff's drunken condition, and the failure of the bartender to leave the scene when his presence was no longer required by the apparent danger to the master's property.[2] In the trial court, *held,* the employee had deviated from the course and scope of his employment when he continued to remain near the plaintiff's automobile after the need for his presence had ceased; therefore, the defendant-employer was not vicariously liable under the doctrine of *respondeat superior. Maddex v. Ricca,* 258 F. Supp. 352 (D. Ariz. 1966).[3]

The basis of liability most often invoked against a master for assaults by a servant upon a third party is that of *respondeat superior.*[4] Other

[33] *See* UNIFORM RULES OF EVIDENCE 10(1), 12(4); MCCORMICK § 330. *See also* Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 300-03 (1937).
[34] *See* MCCORMICK § 331.

[1] The bartender switched off the engine of the plaintiff's automobile which was overheating and causing a great deal of steam. The steam was believed by some observers to be smoke and at first a fire was feared. After turning off the engine the bartender again reached into the automobile in order to adjust the hood latch, an exchange of profanity took place, the plaintiff got out of the automobile, and the altercation took place.
[2] The instant case involved a non-jury trial on the basis of liability alone.
[3] The employee was held liable for the assault in the same case.
[4] *See generally* Annot., 34 A.L.R.2d 372, 395 (1954).

theories used to sustain liability for such assaults have included personal participation by the master;[5] direction, authorization, or ratification of the assault by the master;[6] a violation of the master's duty to protect his patrons;[7] and the master's negligence in selecting or retaining the employee.[8]

Use of the doctrine of *respondeat superior* necessitates a showing that the assault was committed within the course and scope of the servant's employment.[9] An employee can be acting within the scope of his employment as he is going about the business of his employer, but, at the same time, the employee's actions can be such as will result in a deviation from the course of his employment, and the master will not be liable for the result of these actions.[10] Where an employee assaults a third person, in order to determine whether the action was within the scope of employment, courts have considered, *inter alia*, the motivation of the servant,[11] whether the servant was the aggressor,[12] and the relation in time and space of the servant's action to the activities of his master.[13] Where the motivation is both to serve the master and simultaneously to serve personal ends of the servant, it is a general rule of law that the mixture of motives does not release the master from liability for the

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[5] Curtis v. Siebrand Bros. Circus & Carnival Co., 68 Idaho 285, 194 P.2d 281 (1948); Feger v. Concrete Materials & Const. Co., 172 Kan. 75, 238 P.2d 708 (1951); Daniels v. Parker, 119 Vt. 348, 126 A.2d 85 (1956).

[6] Novick v. Gouldsberry, 173 F.2d 496 (9th Cir. 1949); Caldwell v. Farley, 134 Cal. App. 2d 84, 285 P.2d 294 (1955); McChristian v. Popkin, 75 Cal. App. 2d 249, 171 P.2d 85 (1946); Jameson v. Gavett, 22 Cal. App. 2d 646, 71 P.2d 937 (1937); Shandor v. Lischer, 349 Mich. 556, 84 N.W.2d 810 (1957); State *ex rel.* Kansas City Public Service Co. v. Shain, 345 Mo. 543, 134 S.W.2d 58 (1939).

[7] Berger v. Southern Pac. Co., 144 Cal. App. 2d 1, 300 P.2d 170 (1956) (rape); Frewen v. Page, 238 Mass. 499, 131 N.E. 475 (1921) (assault); Clancy v. Barker, 71 Neb. 83, 98 N.W. 440 (1904) (assault). *But see* Smothers v. Welch & Co., 310 Mo. 144, 274 S.W. 678 (1925).

[8] Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956) (murder); Murray v. Modoc State Bank, 181 Kan. 642, 313 P.2d 304 (1957) (assault); Baldwin v. Wiggins, 289 S.W.2d 729 (Ky. 1956) (assault).

[9] Abernathy v. Romaczyk, 202 Va. 328, 332, 117 S.E.2d 88, 91 (1960):

> A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment . . . .

RESTATEMENT (SECOND) OF AGENCY § 219 (1958):

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment . . . .

[10] Kinndard v. Rock City Const. Co., 39 Tenn. App. 547, 286 S.W.2d 352 (1955).

[11] Kissaday v. Albanese, 194 F. Supp. 157 (E.D.N.Y. 1961); Lane v. Safeway Stores, 33 Cal. App. 2d 169, 91 P.2d 160 (1939); Community Theatres Co. v. Bentley, 88 Ga. App. 303, 76 S.E.2d 632 (1953); Miera v. George, 55 N.M. 535, 237 P.2d 102 (1951).

[12] McCurdy v. City Cab. Co., 32 So. 2d 720 (La. 1947).

[13] McCauley v. Steward, 63 Ariz. 524, 164 P.2d 465 (1945); Peters v. Pima Mercantile Co., Inc., 42 Ariz. 454, 27 P.2d 143 (1933); Schneider v. McAleer, 39 Ariz. 190, 4 P.2d 903 (1931); Riley v. Standard Oil Co., 231 N.Y. 301, 132 N.E. 97 (1921); Lunn v. Boyd, 403 Pa. 231, 169 A.2d 103 (1961).

tort committed by his servant.[14] The requirement of a relation in time and space of the servant's actions to the activity of his master is coupled with a requirement of intending to serve the master in order to be within the scope of employment.[15]

In Arizona the only vicarious liability cases involving assault have either involved workmen's compensation[16] or a common carrier.[17] In other cases involving vicarious liability, the Arizona courts have established the rule that before the master can be held liable for the negligent or wrongful acts of his servants, it must appear that the servant was engaged in the performance of the duties of his employment.[18] If the servant were so engaged and the wrongful acts were performed in connection with such duties and in apparent furtherance of their accomplishment, the act is in the scope of employment.[19] Liability is imposed even though the acts are in excess of the servant's express authority or even in violation of the master's express directions so long as the acts were not done in furtherance of the servant's personal ends alone.[20]

The court in the instant case invoked two of the factors which are utilized in determining the scope of employment;[21] the motives of the servant and the relation of the servant's actions to those of his master in time, space, and intent. Although the servant was acting within the scope of his employment when he first approached the plaintiff's automobile, his remaining on the scene after there was no need, coupled with his personal motivation in assaulting the plaintiff, kept his actions from falling within the scope of his employment. The dual motivation which was present is a factor which has made the

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[14] Nelson v. American-West African Line, Inc., 86 F.2d 730 (2d Cir. 1936).

[15] RESTATEMENT (SECOND) OF AGENCY § 237 (1958):
A servant who has temporarily departed in space or time from the scope of employment does not re-enter it until he is again reasonably near the authorized space and time limits and is acting with the intention of serving his master's business.

[16] Peter Kiewit Son's Co. v. Industrial Comm'n., 88 Ariz. 164, 354 P.2d 28 (1960). In Throop v. Young & Co., 94 Ariz. 146, 153, 382 P.2d 560, 564 (1963), *noted in* 6 ARIZ. L. REV. 150 (1964), the court stated: "Workmen's Compensation cases and cases arising under similar social legislation are not necessarily authority for principles giving rise to common-law liability under the doctrine of respondeat superior."

[17] Southern Pac. Co. v. Boyce, 26 Ariz. 162, 223 P. 116 (1924).

[18] Otero v. Soto, 34 Ariz. 87, 267 P. 947 (1928).

[19] Johnston v. Hare, 30 Ariz. 253, 246 P. 546 (1926).

[20] McCauley v. Steward, 63 Ariz. 524, 164 P.2d 465 (1945); Schneider v. McAleer, 39 Ariz. 190, 4 P.2d 903 (1931); Conchin v. El Paso & S.W.R.R., 13 Ariz. 259, 108 P. 260 (1910).

[21] *See* S. Birch & Sons v. Martin, 244 F.2d 556 (9th Cir. 1957); Georgia Power Co. v. Shipp, 195 Ga. 446, 24 S.E.2d 764 (1943); Reinhart v. Ideal Pure Milk Co,, 135 Ind. App. 338, 193 N.E.2d 655 (1963); Hamilton v. Neff, 189 Kan. 637, 371 P.2d 157 (1962); Tockstein v. P. J. Hamill Transfer Co., 291 S.W.2d 624 (Mo. App. 1956); Allison v. Gilmore, Gardner & Kirk, Inc., 350 P.2d 287 (Okla. 1960); Stone v. Hurst Lumber Co., 15 Utah 2d 49, 386 P.2d 910 (1963); Nelson v. Broderick & Bascom Rope Co., 53 Wash. 2d 239, 332 P.2d 460 (1958). *See generally* Annot., 34 A.L.R.2d 372 (1954).

results of such cases difficult to predict.[22] This case might be explained on the basis that the dual motives originated at different times; the original motive of the servant was to serve the master, but at the time of the assault the motivation was entirely personal.

The court in the instant case seems to have deviated from the theory proposed by some writers that the purpose of vicarious liability is to impose liability upon the defendant with the deepest pocket.[23] To this writer this deviation is fortunate as it establishes liability on the basis of fault rather than on the basis of ability to pay.

*T. Scott Higgins*

PUBLIC LANDS — TRUST LANDS — ACQUISITION BY STATE — STATE HIGHWAY DEPARTMENT MUST COMPENSATE THE TRUST IN MONEY FOR THE FULL APPRAISED VALUE OF TRUST LANDS TAKEN FOR HIGHWAY PURPOSES. — *Lassen v. Arizona ex rel. Arizona Highway Department* (U.S. 1967).

In a prohibition proceeding in the Arizona Supreme Court, the Arizona Highway Department challenged the application of a State Land Department rule which provided for payment by the highway department for rights of way over, and material sites on, trust lands obtained from the federal government. The trust lands were granted to Arizona in trust for the benefit of the public school system by the Arizona Enabling Act, and the State Land Commissioner, as statutory trustee, promulgated the rule to enforce compliance with the provisions of the enabling act.[1] The Arizona Supreme Court held the rule invalid and determined that the Land Commissioner must grant such lands to the highway department without compensation.[2] On certiorari,[3] the United States Supreme Court, *held,* reversed. Under

[22] Nelson v. American-West African Line, Inc., 86 F.2d 730 (2d Cir. 1936). RESTATEMENT (SECOND) OF AGENCY § 236 (1958): "Conduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person."

[23] 2 F. HARPER & F. JAMES, THE LAW OF TORTS, 1361-74; Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts,* 70 YALE L.J. 499 (1961).

[1] STATE LAND DEPARTMENT RULE 12:
State and County Highway Rights-of-Way and Material Sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the Right-of-Way or Material Site has been made to the State Land Department. The appraised value of the Right-of-Way or Material Site shall be determined in accordance with the principles established in ARS 12-1122.

[2] State *ex rel.* Arizona Highway Dep't v. Lassen, 99 Ariz. 161, 407 P.2d 747 (1965).

[3] The fact that the Court granted certiorari in this case presents an issue of substantial importance. However, because of the local importance of the decision on the merits, the substantive aspect of the case, rather than the procedural issue is emphasized in this casenote. The Court, in granting certiorari, departed from

the Arizona Enabling Act, trust lands sought by the State Highway Department for rights of way and material sites must be compensated for, in money, at the full appraised value undiminished by the amount of any enhancement in value of remaining trust lands. *Lassen v. Arizona ex rel. Arizona Highway Department*, 87 S. Ct. 584 (1967).

The instant case involves a construction of the Arizona Enabling Act[4] which granted to Arizona large blocks of land to be held in trust for the benefit of the public school system.[5] The act provides that the trust lands may be sold or leased only to the highest bidder at public auction[6] and that any funds derived shall be held subject to the same trust.[7] The act further provides that disposition of the trust assets for any purpose, or in any manner, contrary to the provisions of the act would constitute a breach of trust.[8] The provisions are thus clear that any sale of trust land or an interest in trust land can be made only by public auction.[9] The terms of the grant, although more restrictive, are similar to those in the enabling acts of seven other states[10] and identical to those of New Mexico.[11] The provisions of the act requiring sale only at public auction have not been disputed where the land was sought by private interests for private purposes, but where the party seeking the land was the state itself or some other public entity desiring to use the land for public purposes, the decisions are not uniform.[12]

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the normally strict procedural rules of requiring a clear "case or controversy," presented on a clear record, between parties with clearly adverse interests. Procedurally the case is another illustration of the inclination of the current activist court to decide, rather than defer decision of, important and undecided issues. *See* Reiblich *Summary of October 1965 Term* 86 S. Ct. 241 (1966).

[4] Arizona Enabling Act, ch. 310, §§ 24-30, 36 Stat. 572-76 (1910).

[5] *Id.* § 24.

[6] Arizona Enabling Act, ch. 310, § 28, 36 Stat. 574 (1910):
> Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction . . . .

[7] Arizona Enabling Act, ch. 310, § 28, 36 Stat. 574 (1910):
> [T]he natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

[8] Arizona Enabling Act, ch. 310, § 28, 36 Stat. 574 (1910):
> Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

[9] Arizona Enabling Act, ch. 310, § 28, 36 Stat. 574-75 (1910).

[10] *See e.g.*, Idaho Admission Act, ch. 656, § 5, 26 Stat. 216 (1890); Montana Enabling Act, ch. 180, § 11, 25 Stat. 679-80 (1889); North Dakota Enabling Act, ch. 180, § 11, 25 Stat. 679-80 (1889); Oklahoma Enabling Act, ch. 3335, § 9, 34 Stat. 274 (1906); South Dakota Enabling Act, ch. 180, § 11, 25 Stat. 679-80 (1889); Washington Enabling Act, ch. 180, § 11, 25 Stat. 679-80 (1889); Wyoming Admission Act, ch. 664, § 5, 26 Stat. 223 (1890).

[11] New Mexico Enabling Act, ch. 310, § 10, 36 Stat. 563-65 (1910).

[12] *See, e.g.*, State *ex rel.* Conway v. State Land Dep't, 62 Ariz. 248, 156 P.2d 901 (1945); State *ex rel.* Galen v. District Court, 42 Mont. 105, 112 P. 706 (1910); State *ex rel.* Johnson v. Central Neb. Pub. Power & Irrigation Dist., 143 Neb. 153,

Whether trust lands are subject to the state's power of eminent domain was early resolved in opposite ways by Idaho[13] and Montana.[14] As a result, the Montana Enabling Act was amended to permit the taking of such lands through proceedings in eminent domain without a public sale.[15]

Two theories of compensation for the land taken have developed.[16] One line of decisions requires that the trust be compensated for the value of the land taken on the ground that a grant of government lands in trust must be strictly construed,[17] and since the purpose of the grant was to preserve the benefits derived from the property exclusively for the school system, a taking without compensation frustrates the purpose of the grant and constitutes a breach of the trust.[18] New Mexico adopted this view in *State ex rel. State Highway Commission v. Walker*[19] where the highway commission sought and was denied a declaratory judgment that the Commissioner of Public Lands must grant easements across trust lands for highway purposes without compensation. The second theory, as expressed in *Ross v. Trustees of University of Wyoming*,[20] is that no money compensation is required since the natural tendency of improvements, such as streets and highways, is to enhance rather than depreciate the value of trust lands as a whole, and that to interpret the provisions to apply to the acquisition of rights of way for public highways would inhibit the development of the state and the trust lands.[21]

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8 N.W.2d 841 (1943); State *ex rel.* State Highway Comm'n. v. Walker, 61 N.M. 374, 301 P.2d 317 (1956); Ross v. Trustees of Univ. of Wyoming, 30 Wyo. 433, 222 P. 3, *aff'd on rehearing*, 31 Wyo. 464, 228 P. 642 (1924); *cf.* United States v. Railroad Bridge Co. 27 F. Cas. 686 (No. 16,114) (C.C.N.D. Ill. 1855); Grossetta v. Choate, 51 Ariz. 248, 75 P.2d 1031 (1938); Lawver v. Great N. Ry., 112 Minn. 46, 127 N.W. 431 (1910) (dictum).

[13] Idaho held that they were in Hollister v. State, 9 Idaho 8, 71 P. 541 (1903), reasoning that eminent domain was one of the inalienable rights of sovereignty which could not be denied by the United States and that Congress did not intend to proscribe the use of this power by the enabling act.

[14] Montana held in State *ex rel.* Galen v. District Court, 42 Mont. 105, 112 P. 706 (1910), that trust lands could not be condemned because the method of disposition set forth in the enabling act was exclusive and did not include condemnation.

[15] Act of Aug. 11, 1921, ch. 61, 42 Stat. 158-59.

[16] *Compare* Ross v. Trustees of Univ. of Wyoming, 30 Wyo. 433, 222 P. 3, *aff'd on rehearing*, 31 Wyo. 464, 228 P. 642 (1924), *with* State *ex rel.* State Highway Comm'n v. Walker, 61 N.M. 374, 301 P.2d 317 (1956).

[17] *See, e.g.*, Ervien v. United States, 251 U.S. 41 (1919); Caldwell v. United States, 250 U.S. 14 (1919); Slidell v. Grandjean, 111 U.S. 412 (1884).

[18] State *ex rel.* Galen v. District Court, 42 Mont. 105, 112 P. 706 (1910); State *ex rel.* Johnson v. Central Neb. Pub. Power & Irrigation Dist., 143 Neb. 153, 8 N.W.2d 841 (1943); State *ex rel.* State Highway Comm'n v. Walker, 61 N.M. 374, 301 P.2d 317 (1956); *cf.* Ervien v. United States, 251 U.S. 41 (1919); State v. Fitzpatrick, 5 Idaho 499, 51 P. 112 (1897); State *ex rel.* Ebke v. Board of Educ. Lands & Funds, 154 Neb. 244, 47 N.W.2d 520 (1951); State Highway Comm'n v. State, 70 N.D. 673, 297 N.W. 194 (1941).

[19] 61 N.M. 374, 301 P.2d 317 (1956).

[20] 30 Wyo. 433, 222 P. 3, *aff'd on rehearing*, 31 Wyo. 464, 228 P. 642 (1924).

[21] *Accord*, State *ex rel.* Conway v. State Land Dep't, 62 Ariz. 248, 156 P.2d 901 (1945); *cf.* United States v. Railroad Bridge Co., 27 F. Cas. 686 (No. 16,114)

The United States Supreme Court considered the question of enhancement in another context and rejected it in *Ervien v. United States*[22] when it invalidated a New Mexico statute[23] which provided that a percentage of the income from trust lands be used for advertising the resources and advantages of the state. The United States brought suit to prevent the diversion of trust funds,[24] and the state defended on the basis that the advertising would benefit the trust by encouraging the development of the lands by settlers, thereby enhancing the value of trust lands. The Court rejected that contention and held such expenditures to be a violation of the enabling act.

The Arizona court in the instant case was committed by prior case law to the enhancement theory.[25] In *Grossetta v. Choate*[26] the court held that the land department could grant a right of way for public highways to the several counties since the enabling act did not limit the right of the legislature to grant rights of way easements over public lands.[27] The question of compensation for such use was determined seven years later in *State ex rel. Conway v. State Land Department*[28] where the court held that the state was not required to pay any purchase price, rental, or other charge for the taking or use of school lands or the natural products thereof for the establishment, construction, maintenance, or repair of state highways. In the instant case, the Arizona court quoted the *Ross* case with approval, then considered and rejected the *Walker* case. The court contrasted the effect of highway construction on relatively small private tracts, where the value of the right of way taken is frequently out of proportion to the benefit to the owner, with the effect on the value of extensive trust lands. It concluded that the value of the large tracts of trust land was greatly enhanced by the building of a highway system, and the Commissioner must, therefore, grant such lands to the highway department without compensation.[29]

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(C.C.N.D. Ill. 1855); Grossetta v. Choate, 51 Ariz. 248, 75 P.2d 1031 (1938); Lawver v. Great N. Ry., 112 Minn. 46, 127 N.W. 431 (1910) (dictum); Henderson v. City of Atlantic City, 64 N.J. Eq. 583, 54 A. 533 (Ch. 1903) (dictum).

[22] 251 U.S. 41 (1919).

[23] Ch. 60, [1915] N.M. Laws 78.

[24] The authority of the Attorney General of the United States to enforce the provisions of the trust is granted by the New Mexico Enabling Act, ch. 310, § 10, 36 Stat. 563-65 (1910) and by the Arizona Enabling Act, ch. 310, § 28, 36 Stat. 574-75 (1910).

[25] *But see* Murphy v. State, 65 Ariz. 338, 181 P.2d 336 (1947) (strict application of the terms where land acquired by state on foreclosure of mortgage securing loan from trust funds was sold without complying with the enabling act and constitution).

[26] 51 Ariz. 248, 75 P.2d 1031 (1938).

[27] *Id.* at 254, 75 P.2d at 1033.

[28] 62 Ariz. 248, 156 P.2d 901 (1945).

[29] State *ex rel.* Arizona Highway Dep't v. Lassen, 99 Ariz. 161, 168, 407 P.2d 747, 752 (1965).

The Supreme Court of the United States reversed and held that the state must compensate the trust in money for the full appraised value of any rights of way or material sites which it obtains over or on trust lands.[30] The Court found that the clear purpose of Congress was that the act's designated beneficiaries receive the full and exclusive benefit of the grant, and that the conclusive presumption of enhancement set forth in the opinion of the Arizona court did not satisfy the act's requirements.[31] However, the Court reasoned that the purpose of the enabling act did not require a public auction when the trust land was being procured by the state[32] for highway purposes and that to require such procedure would be to "sanction an empty formality" because:

> There would not often be others to bid for the material sites and rights of way which the State might seek. More important, even if such bidders appeared and proved successful, nothing in the grant would prevent Arizona from thereafter condemning the land which it had failed to purchase; the anticipation of condemnation would leave the auction without any real significance.[33]

The decision is sound in that it eliminates the public auction requirement where it would serve no real purpose, while preserving the full value of the trust property for the intended beneficiaries. The opinion carefully limits the decision to the acquisition by the state of property for highway purposes, but it would seem that in stressing the importance of the possibility of condemnation, the Court left the door open for other state[34] agencies to assert an extension of the doctrine to avoid the public sale requirement in *any* case where the procuring agency has the power of condemnation. It is submitted that application of the doctrine should be restricted to acquisitions where the property desired is unmarketable for any private purpose. A public sale of land in long narrow strips for irrigation canals or power line construction would be meaningless. On the other hand where the land desired is in a compact parcel, the purposes of the trust would best be served by sale at public auction.[35] The determination

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[30] 87 S. Ct. 584, 590.

[31] *Id.* at 589-90.

[32] The purpose of the restrictive provisions of the act requiring the public sale was to prevent the exploitation of the trust lands for private advantage and thus guarantee that the trust received just compensation for trust lands. Since the dangers inherent in a transfer of land to a private party do not exist in a transfer from one state agency to another, the requirement of a public sale serves no purpose and should not be imposed.

[33] 87 S. Ct. 584, 587.

[34] The Court's emphasis on the silence of the act regarding *State* acquisitions would seem to preclude extension of the doctrine to other than state agencies.

[35] Amendment of the enabling act to permit procurement of any trust land by governmental agencies without competitive bidding is urged in Comment, *Arizona's Enabling Act and the Transfer of State Lands for Public Purposes*, 8 ARIZ. L. REV. 133 (1966).

that compensation must be paid assures that the trust assets will not be depleted for the benefit of other interests.

*Loren W. Counce*

TORTS — CONTRIBUTORY NEGLIGENCE — PLAINTIFF'S FAILURE TO USE AUTOMOBILE SEAT BELT IS NOT CONTRIBUTORY NEGLIGENCE. *Brown v. Kendrick* (Fla. 1966).

The plaintiff was injured in an automobile accident while riding as a guest in an automobile owned by the defendant and driven by the defendant's son. Defendant contended that the plaintiff did not avail herself of the use of seat belts provided in the automobile, claiming this to be contributory negligence. This defense was stricken by the court and judgment entered pursuant to the jury verdict for the plaintiff. On appeal, *held,* affirmed. The plaintiff's failure to use seat belts provided in the automobile does not constitute contributory negligence, as a matter of law. *Brown v. Kendrick,* 192 So. 2d 49 (Fla. 1966).

The question of whether the failure to use automobile seat belts should constitute negligence is becoming one of interest to the Bar in the light of the increased public awareness of the importance of seat belts,[1] and the recently enacted federal legislation dealing with traffic safety.[2] While the federal legislation gives strength to the argument that not to use seat belts is unreasonable, and as such constitutes negligence, this strength is drawn only from implication; for, while providing for *installation* of seat belts in new automobiles, there is no provision requiring that they be *used.*[3] Many states, like the federal government, have enacted legislation requiring the installation of seat belts, but only one, Rhode Island,[4] provides in the statute that passengers must use the seat belts.

Whether the failure to use seat belts might constitute contributory negligence, thereby barring the plaintiff's recovery for injury, seems to have been first raised in 1964.[5] To date, the question has been *squarely* presented to three courts: the instant case, *Kavanagh v. Butorac,*[6] and

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[1] *See generally* Tourin, *Ejection and Automobile Fatalities,* 73 PUBLIC HEALTH REP. 381 (1958); National Safety Council, Accident Facts, *Smart Drivers Use Seat Belts,* Stock No. 329.96-18.

[2] National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718 (Sept. 9, 1966); Highway Safety Act of 1966, 80 Stat. 731 (Sept. 9, 1966); Government Motor Vehicles-Safety Standards, 78 Stat. 696 (August 30, 1964).

[3] National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718 (Sept. 9, 1966).

[4] R.I. GEN. LAWS. ANN. § 31-23-41 (Supp 1966).

[5] Stockinger v. Dunisch, (Wis. Cir. Ct. 1964), *reported in* FOR THE DEFENSE, Dec. 1964, at 79.

[6] 221 N.E.2d 824 (Ind. 1966).

*Sams v. Sams.*[7] In *Kavanagh*, it was held, as a matter of law, that the failure to use the seat belts did not constitute contributory negligence. However, that opinion indicated that the time may be coming when failure to use seat belts may constitute negligence.[8] In *Sams* it was held that the trial court *erred* in striking a portion of the defendant's answer which alleged the failure of the plaintiff to fasten a seat belt to be contributory negligence, reasoning that this should be a question for the trier of fact.[9] In the instant case the *Sams* case was mentioned but not followed.

In a recent California case,[10] the plaintiff sought to recover under the provisions of the Federal Employer's Liability Act[11] for the death of her husband. It was claimed that the failure of her husband's employer, the defendant, to *provide* seat belts in the company vehicle constituted negligence. The court, in reversing the trial court's granting of the defendant's motion for non-suit, held that due to the frequency of highway collisions and the common knowledge of such frequency, a collision is forseeable; therefore, it would be reasonable to supply seat belts, and it should be for the jury to decide whether the failure of the employer to supply the seat belts constituted negligence.[12] While not directly on point with the instant case, the California case does suggest a line of reasoning that may be persuasively used to establish as negligence, the failure to use seat belts.

The question of the consequences of failure to use other safety devices has been before the courts many times. Most courts have taken the position that failure to make use of available safety devices, if such failure is willful, is a bar to recovery.[13] In cases where the failure to make use of the safety device resulted from the negligence of the injured party and the failure proximately caused the injury, courts have either completely barred recovery,[14] or reduced the amount of

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[7] 247 S.C. 467, 148 S.E.2d 154 (1966).
[8] Kavanagh v. Butorac, 221 N.E.2d 824, 831 (Ind. 1966).
[9] Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966).
[10] Mortensen v. Southern Pac. Co., 245 Adv. Cal. App. 248, 53 Cal. Rptr. 851 (1966).
[11] 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1964).
[12] Mortensen v. Southern Pac. Co., 245 Adv. Cal. App. 248, 53 Cal. Rptr. 851 (1966).
[13] *See, e.g.*, Herman v. Aetna Cas. & Surety Co., 71 Ga. App. 464, 31 S.E.2d 100 (1944) (refusal to use rubber shoes and gloves while working on high voltage equipment); Liberty Mut. Ins. Co. v. Perry, 53 Ga. App. 527, 186 S.E. 576 (1936) (refusal to use device for removing metal particles from an operating punch press); *cf.* Pitcairn v. Devlin, 111 F.2d 735 (6th Cir. 1940) (implied that had goggles been available, and plaintiff failed to use them, contributory negligence would have resulted); Ferrara v. Boston & M.R.R., 338 Mass. 323, 155 N.E.2d 416 (1959) (implied that had protective helmets been available, and not used, contributory negligence might have resulted).
[14] *See, e.g.*, Kirk v. United States, 161 F. Supp. 722 (D. Idaho 1958), *aff'd*, 270 F.2d 110 (9th Cir. 1959) (failure of deceased to secure a safety belt used on a construction site); Cincinnati Seating Co. v. Neiry, 40 Ind. App. 144, 81 N.E. 216

recovery by the amount of harm which could be attributed to the failure to use the safety device.[15] The difference in the treatment accorded the cases dealing with failure to use saftey devices in general and that treatment accorded cases dealing with failure to use seat belts in automobiles seems to result more from the courts' inability to find proximate cause in the seat belt cases, than from the fact that the failure to use one is unreasonable and the failure to use the other is not.[16]

In meeting the basic problem involved in the instant case (primarily whether failure to use seat belts constitutes negligence, and secondarily whether such failure satisfies the requirement of proximate cause to make the negligence "actionable"), the court reasoned that circumstances did not exist which would justify the jury's finding negligence in the failure to use the seat belt.[17] In so reasoning, the court refused to consider the editorials or news letters offered by the defendant in support of the contention that the failure to use the belts was unreasonable. The court justified this refusal by saying, "We cannot accept the editorials or news letters as having the weight of law."[18] The court further reasoned that considering the quandary surrounding the use of seat belts, and the lack of legislative action in the area, it would have been "conjectural and of doubtful propriety" to allow the plaintiff and the defendant to argue the question.[19] On the issue of proximate cause, the court said that the defendant had not shown, except by conjecture, that the "use of the seat belts would have prevented the injury complained of."[20] The court felt that in the absence of precedent this was a proper matter for legislative, not judicial, action.[21]

In the absence of legislation requiring the use of seat belts,[22] the problem faced by the court in the instant case will appear with increasing frequency. In the light of the abundance of scientific studies

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(1907) (refusal to use safety shield on a power saw); Wertz v. Lincoln Liberty Life Ins. Co., 152 Neb. 451, 41 N.W.2d 740 (1950) (refusal of deceased to use safety belt while cleaning windows).

[15] *See, e.g.*, Atlantic C.R.R. v. Dixon, 189 F.2d 525 (5th Cir. 1951) (plaintiff's improper use of portable light cord); Crowley v. Elgin J. E. Ry., 1 Ill. App. 2d 481, 117 N.E.2d 843 (1954) (failure of plaintiffs to use facilities provided to aid in prevention of dermatitis); Kuchenmeister v. Los Angeles & S.L.R., 52 Utah 116, 172 P. 725 (1918) (plaintiff refused to follow doctor's safety instructions to protect his eye).

[16] *Compare* Kavanagh v. Butorac, 221 N.E.2d 824 (Ind. 1966), *and* Brown v. Kendrick, 192 So. 2d 49 (Fla. 1966), *with* Kirk v. United States, 161 F. Supp. 722 (D. Idaho 1958), *aff'd*, 270 F.2d 110 (9th Cir. 1959).

[17] Brown v. Kendrick, 192 So. 2d 49, 51 (Fla. 1966).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See generally* 14 DE PAUL L. REV. 152 (1964).

and investigative reports[23] demonstrating the safety value of seat belts, coupled with the constant admonition on radio and television to "Buckle up for Safety," courts may soon recognize that the value of seat belts is a matter of such common knowledge that to fail to use them is unreasonable. Once the courts have deemed failure to buckle-up as being negligence, they will be faced with the difficult problem of distinguishing between those injuries caused by the driver's negligence in causing the "first collision" (the accident) and the passenger's negligence in causing the "second collision" (inside the automobile). While this distinguishing between injuries as to causation may be extremely difficult, particularly in cases where injuries are extensive and the "first collision" very damaging, it is one that must be attempted.[24] For in failing to make this determination, assuming that failure to use seat belts may be negligence, courts will be imposing a liability on the defendant unjustified under either the doctrine of contributory or comparative negligence.[25] If juries could accept the proposition that the use of seat belts is effective in preventing injuries, and this effectiveness so well known that the failure to use them would be unreasonable, the courts, then, must accept the duty of facing the difficult legal and factual problems this acceptance engenders.

*Gerald William Alston*

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[23] *See generally Hearings on Automobile Seat Belts Before the Subcommittee on Traffic Safety of the House Committee on Interstate and Foreign Commerce,* 85 Cong. 1st Sess. (1957) (Hearings held on April 30, and August 5th through 8th); TRAFFIC SAFETY, May 1961, at 50. For an article which indicates that possibly safety equipment in automobiles is not the panacea some think it to be, *see Automobile Safety: Its Legal Implications,* 33 INS. COUNSEL J. 601 (1966).

[24] *See* Holtz v. Holder, 101 Ariz. 247, 418 P.2d 584 (1966), noted in this volume *infra,* p. 129, wherein the problem of separating injuries as to causation is discussed, with attention to the difficulty involved and the approaches taken by courts in meeting this problem.

[25] It is not within the scope of this note to discuss the pro and con arguments as to the value of comparative negligence. However it should be noted that circumstances such as those involved in the instant case offer support to the argument in favor of comparative negligence. This is due to the patent unfairness of the situation where the plaintiff's small amount of negligence in failing to buckle his seat belt will result in exculpation of the defendant, or, taking the approach that is taken in the instant case, the defendant is charged with the total injury to the plaintiff, part of which was contributed to by failure to have the seat belt fastened.

It is said that the result reached in most cases is the same, whether the particular jurisdiction has adopted comparative negligence or not, due to the belief that juries informally ignore and disregard the strictness of the rule as pronounced by the courts. To accept this argument is to justify an inadequacy in the law by a further inadquacy in the application of the law. For two excellent discussions of this problem *see* Body, *Comparative Negligence: The View of a Trial Lawyer,* 44 A.B.A.J. 346 (1958); Bress, *Comparative Negligence: Let Us Hearken to the Call of Progress,* 43 A.B.A.J. 127 (1957).

As more difficult problems of ascertaining damages and apportioning damages continue to arise, as in the instant case, and the *Holtz* case, more pressure will be brought to bear on the courts to adopt a form of comparative negligence. The movement toward comparative negligence is indicated by the statement made by Dean Prosser in 1953 when he estimated that there were as many as 40 comparative negligence statutes in use and a body of case law of approximately 1,200 cases. Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 467 (1953). For an

TORTS — IMPUTED CONTRIBUTORY NEGLIGENCE — CONTRIBUTORY NEGLIGENCE OF SERVANT WILL NOT BE IMPUTED TO MASTER TO BAR MASTER'S RECOVERY FROM NEGLIGENT THIRD PARTY. — *Weber v. Stokely-Van Camp, Inc.* (Minn. 1966).

Plaintiff's truck, driven by his servant, was involved in an accident with defendant's truck, driven by defendant's servant. Each servant was driving within the scope of his employment. Plaintiff, who was riding as a passenger in his truck at the time, suffered personal injuries and damage to his truck, for which he sued defendant, alleging negligence of defendant's servant. Defendant answered, *inter alia,* that plaintiff's servant was guilty of contributory negligence. The trial court instructed the jury that, as a matter of law, any contributory negligence of plaintiff's servant would be imputed to plaintiff. The jury returned a verdict for defendant. On appeal, *held,* reversed. In automobile negligence cases, the contributory negligence of a servant will not be imputed to his master so as to bar the master's recovery from a negligent third party. *Weber v. Stokely-Van Camp, Inc.,* 144 N.W.2d 540 (Minn. 1966).[1]

The doctrine of imputed contributory negligence seemingly originated with the 1894 English case of *Thorogood v. Bryan*[2] where negligence of an omnibus driver was held imputable to a passenger so as to bar the passenger's recovery from the negligent driver of another vehicle. The Court of Common Pleas reasoned that, since the passenger had chosen the particular driver, he was so far identified with the driver as to warrant his bearing the burden of the driver's negligence.[3] Similar reasoning led to early American decisions imputing contributory negligence among members of a joint enterprise,[4] from master to servant,[5]

excellent look at the advance of the movement toward comparative negligence in the rest of the world *see* Turk, *Comparative Negligence on the March,* 28 CHI.-KENT L. REV. 189 (1949); Cohen, *Negligence Law in Europe,* 1955 INS. L.J. 75 (1955); Pound, *Comparative Negligence,* 13 NACCA L.J. 195 (1954).

[1] *Noted in* 45 TEXAS L. REV. 364 (1966); 39 U. COLO. L. REV. 170 (1966).
[2] 8 C.B. 115, 137 Eng. Rep. 452 (C.P. 1849).
[3] *Id.* at 130-33, 137 Eng. Rep. at 458-59.
[4] Town of Knightstown v. Musgrove, 116 Ind. 121 (1888); Payne v. Chicago, R.I. & P. Ry., 39 Iowa 523 (1874); Beck v. East River Ferry Co., 29 N.Y. Super. 82 (1868).
[5] Smith v. New York Cent. & H.R.R., 4 App. Div. 493, 38 N.Y.S. 666, *supplemented,* 39 N.Y.S. 1119 (1896); Fero v. Buffalo & S.L.R.R., 22 N.Y. 209, 78 Am. Dec. 178 (1860) (rule recognized but not applied to these facts); Puterbaugh v. Reasor, 9 Ohio St. 484 (1859).

from bailee to bailor,[6] from spouse to spouse,[7] and from parent to child.[8] In the latter three relationships, the rule was patently unfair, for it barred an innocent person's recovery from one whose negligence had caused his injuries[9] because of a relationship which would not have occasioned vicarious liability against the innocent party under established agency rules were the parties to the action reversed. For instance, a bailor's action against a negligent third party was barred by the bailee's contributory negligence, although the same negligence would not render the bailor vicariously liable to a third person injured by the bailee.

This anomaly was gradually corrected as courts came to apply the so-called "both-ways" test:

> A plaintiff is barred from recovery by the negligent act or omission of a third person if, but only if, the relation between them is such that the plaintiff would be liable as defendant for the harm caused to others by such negligent conduct of the third person.[10]

This standard was based on what seemed the logical view that if the actor's negligence were to be imputed in one direction, so as to impose vicarious liability on the master or other person sought to be held liable, it should also be imputed in the other direction (*i.e.*, as contributory negligence) so as to bar recovery by such master or other person. In its inception, the rule operated to extend liability, since it greatly restricted a possible defense on the part of the defendant. Today, however, the rule's major function is its affirmative application, the creation of a valid defense whenever the "both-ways" standard can be met, most generally in master-servant and joint enterprise situations.

The imputation of the servant's contributory negligence to the master when the servant is acting within the scope of his employment

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[6] Illinois Cent. R.R. v. Sims, 77 Miss. 325, 27 So. 527 (1900); Forks Township v. King, 84 Pa. 230 (1877); Texas & Pac. Ry. v. Tankersley, 63 Tex. 57 (1885).

[7] Pennsylvania R.R. v. Goodenough, 55 N.J.L. 577, 28 A. 3 (Ct. Err. & App. 1893). Arizona still imputes negligence between spouses on the theory that, otherwise, the negligent spouse would benefit from his own wrong, for, under Arizona community property law, one spouse is normally entitled to share equally in the proceeds of the other's personal injury recovery. See note 21 *infra*.

[8] Cadman v. White, 296 Mass. 117, 5 N.E.2d 19 (1936); Kupchinsky v. Vacuum Oil Co., 263 N.Y. 128, 188 N.E. 278 (1933); Hartfield v. Roper, 21 Wend. 614 (N.Y. Sup. Ct. Jud. 1839).

[9] A passenger (exercising due care) has always had a remedy against his negligent driver (absent a guest statute), the driver's negligence not being imputed to his passenger in a suit *inter se*. Thorogood v. Bryan, 8 C.B. 115, 137 Eng. Rep. 452 (C.P. 1849). Likewise, in the bailee-bailor relationship, negligence was rarely imputed in a suit between those two parties. New York, L.E. & W.R.R. v. New Jersey Elec. Ry., 60 N.J.L. 338, 38 A. 828 (Sup. Ct. Jud. 1897). However, these remedies are worthless if the driver or bailee prove to be insolvent.

[10] RESTATEMENT OF TORTS § 485 (1934). Two leading cases in the development of the rule were Little v. Hackett, 116 U.S. 366 (1886), and Mills v. Armstrong, 13 App. Cas. 1 (H.L. 1888).

has been universally recognized.[11] The reasons usually assigned to justify such imputation are similar to the older justifications of vicarious liability — the master has a theoretical right to control his servant's actions,[12] and will be induced to exercise a higher degree of care in the hiring and supervision of his employees by the imposition of this added burden.[13]

While the "both-ways" rule seems to be applied without question in the master-servant situation, its reasoning has not been adopted in three analogous areas in recent years. In construing owner's consent statutes[14] and statutes imposing liability for a minor's negligence on the

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[11] Muhammad v. United States, 366 F.2d 298 (9th Cir. 1966) (applying Arizona law); Cox v. Maddux, 255 F. Supp. 517 (E.D. Ark. 1966); Truck Ins. Exch. v. Board of County Rd. Comm'rs, 244 F. Supp. 782 (W.D. Mich. 1965); City of Newark v. United States, 149 F. Supp. 917 (D.N.J. 1957), *aff'd*, 254 F.2d 93 (3d Cir. 1958); Johnson v. Battles, 255 Ala. 624, 52 So. 2d 702 (1951); Wilbanks v. Carter, 110 Ga. App. 644, 139 S.E.2d 435 (1964); Hightower v. Landrum, 109 Ga. App. 510, 136 S.E.2d 425 (1964) (dictum); Lingle v. Minneapolis & St. L. Ry., 251 Iowa 1183, 104 N.W.2d 467 (1960); Mammelli v. Dufrene, 169 So. 2d 242 (La. Ct. App. 1964); Ter Haar v. Steele, 330 Mich. 167, 47 N.W.2d 65 (1951); Sztaba v. Great N. Ry., 411 P.2d 379 (Mont. 1966); Bailey v. Jeffries-Eaves, Inc., 76 N.M. 278, 414 P.2d 503 (1966); Evans v. Zimmer, 31 Misc. 2d 661, 220 N.Y.S.2d 139 (Sup. Ct. Special Motion T. 1961); Forga v. West, 260 N.C. 182, 132 S.E.2d 357 (1963); 5 AM. JUR. *Automobiles* § 499 (1936); 8 AM. JUR. 2d *Automobiles* §§ 674-75 (1963); 65A C.J.S. *Negligence* §§ 161-62 (1966); 2 F. HARPER & F. JAMES, TORTS 1276 (1956); W. PROSSER, TORTS 501 (3d ed. 1964); RESTATEMENT (SECOND) OF AGENCY § 317 (1958); RESTATEMENT OF TORTS § 486 (1934). The RESTATEMENT (SECOND) OF TORTS § 486 (1965) states:

> A master is barred from recovery against a negligent defendant by the negligence of his servant acting within the scope of his employment.

[12] Lassock v. Bileski, 94 Pa. Super. 299 (1928); Gilmore, *Imputed Negligence* (pts. 1-2), 1 WIS. L. REV. 193, 257 (1921). A majority of the courts hold that the owner's presence in the automobile creates a presumption that the driver is his agent on a similar "right of control" theory. *E.g.*, Baker v. Maseeh, 20 Ariz. 201, 179 P. 53 (1919); Pinieri v. Rosenbaum, 20 App. Div. 2d 651, 246 N.Y.S.2d 237 (1964) (dictum); Ross v. Burgan, 163 Ohio St. 211, 126 N.E.2d 592 (1955); Rodgers v. Saxton, 305 Pa. 479, 158 A. 166 (1931). This would be a second ground for barring plaintiff's recovery in the instant case. However, the trend seems to be away from this majority position. See note 30 *infra*.

[13] Baber v. Akers Motor Lines, Inc., 215 F.2d 843 (D.C. Cir. 1954); National Trucking & Storage Co. v. Driscoll, 64 A.2d 304 (D.C. Mun. Ct. App. 1949); Virginia Ry. & Power Co. v. Gorsuch, 120 Va. 655, 91 S.E. 632 (1917).

[14] McMartin v. Saemisch, 254 Iowa 45, 116 N.W.2d 491 (1962); Stuart v. Pilgrim, 247 Iowa 709, 74 N.W.2d 212 (1956) (overruling Secured Finance Co. v. Chicago, R.I. & P. Ry., 207 Iowa 1105, 224 N.W. 88 (1929)); Villarubia v. Roy, 162 So. 2d 86 (La. Ct. App. 1964) (overruling Di Leo v. DuMontier, 195 So. 74 (La. Ct. App. 1940)); Universal Underwriters Ins. Co. v. Hoxie, 375 Mich. 102, 133 N.W.2d 167 (1965); Jacobsen v. Dailey, 228 Minn. 201, 36 N.W.2d 711 (1949); Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406 (1943); Mills v. Gabriel, 259 App. Div. 60, 18 N.Y.S.2d 78 (1940), *aff'd per curiam*, 284 N.Y. 755, 31 N.E.2d 512 (1940). *Contra*, Baber v. Akers Motor Lines, Inc., 215 F.2d 843 (D.C. Cir. 1954); National Trucking & Storage Co. v. Driscoll, 64 A.2d 304 (D.C. Mun. Ct. App. 1949); Davis Pontiac Co. v. Sirois, 82 R.I. 32, 105 A.2d 792 (1954); *cf.* Milgate v. Wraith, 19 Cal. 2d 297, 121 P.2d 10 (1942) (statute specifically requires imputation of contributory negligence as well as imposition of vicarious liability).

Owner's consent statutes vary widely from state to state, but, in general, they make the owner-bailor of an automobile liable for the negligence of his permitee-bailee, on the theory that a person who can afford to own a car will probably be

adult signer of his driver's license application,[15] as well as in applying the family-purpose doctrine,[16] a number of courts have refused to impute contributory negligence to defeat the claim of the innocent bailor or parent. They have recognized that the primary policy behind these statutes and rules is the creation of liability in a financially responsible person, and that when they are given a reverse application so as to afford a negligent party a defense, thus decreasing the total quantum of liability imposition, they are working against the policy which gave them birth.[17] However, to date, there has been little criticism of the application of the "both-ways" rule in true master-servant situations, even among critics of the general doctrine of imputed contributory negligence.[18]

Arizona has no case law directly on this point, probably because the general rule is so well settled. However, the Ninth Circuit, in an Arizona case, has imputed the contributory negligence of a servant to his master,[19] and there have been dicta to the same effect in two Arizona cases.[20] The Arizona court has consistently applied the doctrine of imputed contributory negligence between spouses[21] and in joint

able to compensate an accident victim. See, *e.g.*, CAL. VEHICLE CODE § 17150 (West 1959); MICH. COMP. LAWS ch. 257.401 (Mason's Supp. 1956); MINN. STAT. ch. 170.54 (1953).

[15] Westergren v. King, 48 Del. 158, 99 A.2d 356 (1953); York v. Day's, Inc., 153 Me. 441, 140 A.2d 730 (1958). *Contra*, McCants v. Chenault, 98 Ohio App. 529, 130 N.E.2d 382 (1954); Scheibe v. Lincoln, 223 Wis. 425, 271 N.W. 47 (1937); *cf.* Barnum v. Crayton, 186 So. 2d 452 (La. Ct. App. 1966) (under Louisiana doctrine of father's liability for negligent acts of minor residing with him).

[16] Levy v. Senofonte, 2 Conn. Cir. 650, 204 A.2d 420 (Cir. Ct. 1964); Bartek v. Glasers Provisions Co., 160 Neb. 794, 71 N.W.2d 466 (1955); Brower v. Stolz, 121 N.W.2d 624 (N.D. 1963); Michaelsohn v. Smith, 113 N.W.2d 571 (N.D. 1962). *Contra*, Ustjanauskas v. Guiliano, 26 Conn. Supp. 387, 225 A.2d 202 (Super. Ct. 1966); Russell v. Hamlett, 261 N.C. 603, 135 S.E.2d 547 (1964).

[17] Jacobsen v. Dailey, 228 Minn. 201, 36 N.W.2d 711 (1949); Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406 (1943); Bartek v. Glasers Provisions Co., 160 Neb. 794, 71 NW.2d 466 (1955).

[18] 2 F. HARPER & F. JAMES, TORTS § 23 (1956); W. PROSSER, TORTS 501 (3d ed. 1964); Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 YALE L.J. 831 (1932); Henniss, *Imputed Contributory Negligence*, 26 TENN. L. REV. 531 (1959); Keeton, *Imputed Contributory Negligence*, 13 TEXAS L. REV. 161 (1935); Weintraub, *The Joint Enterprise Doctrine in Automobile Law*, 16 CORNELL L.Q. 320 (1931). *Contra*, F. MECHEM, AGENCY § 477 (4th ed. 1952); Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 FORDHAM L. REV. 156 (1951).

[19] Muhammad v. United States, 366 F.2d 298 (9th Cir. 1966).

[20] Womack v. Preach, 64 Ariz. 61, 65, 165 P.2d 657, 659 (1946); Hunsaker v. Smith, 1 Ariz. App. 51, 53, 399 P.2d 185, 187 (1965).

[21] Under Arizona community property law, any recovery for injuries to one spouse is the equal property of both spouses. Contributory negligence of one spouse is, therefore, imputed to the other so as to preclude the guilty spouse from benefitting from his own wrongdoing. Muhammad v. United States, 366 F.2d 298 (9th Cir. 1966); Michie v. Calhoun, 85 Ariz. 270, 336 P.2d 370 (1959); Tinker v. Hobbs, 80 Ariz. 166, 294 P.2d 659 (1956); Womack v. Preach, 64 Ariz. 61, 165 P.2d 657 (1946); Pacific Constr. Co. v. Cochran, 29 Ariz. 554, 243 P. 405 (1926); Town of Flagstaff v. Gomez, 23 Ariz. 184, 202 P. 401 (1921). A claim for personal injuries sustained by a wife living separate from her husband is her separate property, City of Phoenix v. Dickson, 40 Ariz. 403, 12 P.2d 618 (1932), but where a divorced

enterprise situations.[22]

In the instant case, the Minnesota Supreme Court, although realizing that it might "stand alone,"[23] repudiated the "both-ways" rule for automobile negligence cases and refused to impute the servant's contributory negligence to the master. Knutson, C.J., reasoned as follows: In principle, tort liability is imposed only on the basis of fault. Certain exceptions to this principle exist, vicarious liability being imposed on innocent persons for the negligence of others with whom they stand in a particular relationship, *e.g.*, master and servant. Such exceptions have been justified on the persuasive policy ground of finding a financially responsible person to compensate accident victims — the "deep pocket" doctrine.[24] This public policy justification for making an innocent party bear the burden of a related person's negligence is absent where the existence of the relationship is used to *bar* a recovery by the innocent party against an actively negligent third party.

> There is no necessity for creating a solvent defendant in that situation, nor can any of the reasons given for holding a master vicariously liable in a suit by third persons be defended on any rational ground when applied to imputing negligence of a servant to a faultless master who seeks recovery from a third person for his own injury or damage.[25]

The doctrine of imputed contributory negligence is currently losing favor, as evidenced by the recent judicial construction of owner's consent statutes, and criticism of the doctrine in RESTATEMENT (SECOND) OF TORTS.[26] Finally, the master's right to control the driver, even when

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husband sued to recover for injuries received in an accident occurring before his divorce, his action was barred by the contributory negligence of his divorced wife. Tinker v. Hobbs, *supra*.

[22] West v. Soto, 85 Ariz. 255, 336 P.2d 153 (1959); Franco v. Vakares, 35 Ariz. 309, 277 P. 812 (1929) (drunken joyriders found to be engaged in joint enterprise).

[23] Weber v. Stokely-Van Camp, Inc., 144 N.W.2d 540, 545 (Minn. 1966). The Michigan Supreme Court has announced that the doctrine of imputed negligence is "abolished" in that state, particularly referring to actions by "employers, principals, members of a joint enterprise, or gratuitous passengers." Universal Underwriters Ins. Co. v. Hoxie, 375 Mich. 102, 133 N.W.2d 167, 170 (1965) (4-4 decision on this point). However, this dictum was not followed in a master-servant case in the United States District Court, Truck Ins. Exch. v. Board of County Rd. Comm'rs, 244 F. Supp. 782 (W.D. Mich. 1965). In Houlahan v. Brockmeier, 141 N.W.2d 545, 549, *supplemented*, 141 N.W.2d 924 (Iowa 1966), the Iowa Supreme Court stated that it had abandoned the "both-ways" test, but the statement is probably limited to application of the owner's consent statute.

[24] It must be recognized that other justifications remain — the master's "right of control," the argument from care, the benefit to the master, the master set the events in motion, etc. But the modern rationale is that of risk allocation, spreading the inevitable losses of a highly complex, mechanized society over a large number of persons, through the cost to consumers of a businessman's product or through insurance. *See* A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L.J. 584 (1929); Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916); Seavey, *Speculations as to "Respondeat Superior,"* HARVARD LEGAL ESSAYS (1934).

[25] Weber v. Stokely-Van Camp, Inc., 144 N.W.2d 540, 542 (Minn. 1966).

[26] Section 485 of RESTATEMENT OF TORTS (1934) (see quotation in text at note 10 *supra*) was changed in RESTATEMENT (SECOND) OF TORTS (1965) to read:

the master is physically present in the vehicle, is, in itself, an insufficient ground for making him responsible as a matter of law for the driver's negligence. Realistically, this "right of control" cannot safely be exercised in many instances.

> We can think of nothing more dangerous in these days of congested travel on high-speed highways than to permit a master riding as a passenger in a car driven by his servant constantly to interfere with the servant's driving, or his attempt to exercise a theoretic right of control.[27]

The opinion conceded that, of course, the master may be barred from recovery by his *own* negligence in failing to control the driver's actions where a real opportunity to do so existed.[28]

There is much sound and very practical reasoning in this opinion. There do not appear to be any sufficiently compelling reasons for maintaining this exception to the principle of liability based on fault. As the Minnesota court notes, the application of the "both-ways" rule does not provide a deeper pocket. Nor is it likely to contribute significantly to a higher degree of care on the part of employers in hiring and supervision, for the burden of imputed contributory negligence is relatively small (*i.e.*, applicable primarily in property damage claims) when compared with the employer's vicarious liability exposure to injured third persons[29] which remains unaffected by the Minnesota decision. The master's frequently unexercisable "right of control" does not justify barring his recovery from a negligent third party.[30] Dispensing with

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> Except as stated in §§ 486, 491, and 494, a plaintiff is not barred from recovery by the negligent act or omission of a third person.

However, present § 486 (quoted in note 11 *supra*) specifically *retains* the doctrine of imputed contributory negligence in master-servant situations.

[27] Weber v. Stokely-Van Camp, Inc., 144 N.W.2d 540, 545 (Minn. 1966).

[28] *Id.* at 543-44 (citing RESTATEMENT (SECOND) OF TORTS § 495 (1965)). It has been suggested that the existence in Minnesota of a judicially recognized right of contribution among joint tortfeasors may have been an unarticulated premise of the decision, on the theory that the doctrine of imputed contributory negligence has at times been employed to negate the possibility of the master, for purely personal reasons, suing and recovering from a third person rather than from his own servant. 39 U. COLO. L. REV. 170, 172 (1966). This, it would seem, should not be a distinguishing factor in Arizona, where no such right of contribution exists. United States v. Arizona, 214 F.2d 389 (9th Cir. 1954), *rehearing denied*, 216 F.2d 248 (9th Cir. 1954); Schade Transfer & Storage Co. v. Alabam Freight Lines, 75 Ariz. 201, 254 P.2d 800 (1953). The possible unfairness is tolerated in other situations (*e.g.*, action by a guest or bailor against a third party rather than his host or bailee) and should be remedied, if at all, by conferring such a right of contribution rather than by preserving the doctrine of imputed contributory negligence.

[29] 2 F. HARPER & F. JAMES, TORTS 1275 (1956); Friedenthal, *Imputed Contributory Negligence: The Anomaly in California Vehicle Code Section 17150*, 17 STAN. L. REV. 55 (1964); James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340 (1954).

[30] The "right to control" test, as applied in driver-passenger cases to determine the existence of an agency relationship for purposes of imputing contributory negligence, has been criticized in other recent cases. *See* Vallejo v. Montebello Sewer Co., 209 Cal. App. 2d 721, 26 Cal. Rptr, 447, 453 (1962); Gaspard v. LeMaire, 245 La. 239, 158 So. 2d 149 (1963); Sherman v. Korff, 353 Mich. 387, 91 N.W.2d 485 (1958); Davis v. Spindler, 156 Neb. 276, 56 N.W.2d 107 (1952); Clemens v.

imputed contributory negligence is not likely to cause any significant reduction in the extent to which losses sustained in accidents characterized by the relationships under discussion will ultimately be distributed over the public at large.[31]

The Minnesota court did not expressly mention that its ruling might enable the defendant corporation to maintain an action on a *respondeat superior* theory against the plaintiff employer for damages to its truck. However, this is not as anomalous as it seems.[32] Each employer was innocent of any personal wrongdoing, has suffered harm by the negligence of another, and should accordingly be compensated.[33] The optimum result would seem to be that liability insurance should bear the losses to both employers, thus spreading the total loss over the entire premium paying public.[34]

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O'Brien, 85 N.J. Super. 404, 204 A.2d 895 (App. Div. 1964) (rejecting the doctrine of joint enterprise); Jenks v. Veeder Contracting Co., 177 Misc. 240, 30 N.Y.S.2d 278 (Trial T. 1941), *rev'd on other grounds*, 264 App. Div. 979, 37 N.Y.S.2d 230 (1941); Jasper v. Freitag, 145 N.W.2d 879 (N.D. 1966) (following the instant case); Johnson v. Los Angeles-Seattle Motor Express, Inc., 222 Ore. 377, 352 P.2d 1091 (1960); Porter v. Wilson, 357 P.2d 309 (Wyo. 1960). *Contra*, Rocky Mountain Produce Trucking Co. v. Johnson, 369 P.2d 198 (Nev. 1962); *cf.* Girard Trust Corn Exch. Bank v. Philadelphia Transp. Co., 410 Pa. 530, 190 A.2d 293 (1963) (based on finding of actual agency as well as "right of control").

[31] The practical effect of the instant decision would seem to be the transferring of property losses from the employer's "collision" insurer to the other driver's "liability" insurer through the insurer's subrogation to its insured's claim. Where the other driver is insured, the whole loss will be spread over the insurance-buying public. Where the other driver is not insured (15% of the motoring public remains uninsured as of 1960, per W. PROSSER, TORTS 578 (3d ed. 1964)), the loss will probably be borne by the employer and his collision insurer, the employer's share being distributed among his customers through the pricing of his goods and services. Under the prevailing imputation rule, the whole loss is spread by this latter method — partially by insurance, the rest by the employer's enterprise. Under either the imputation or the "no imputation" rule, then, the ultimate burden of property losses is generally spread over a substantial segment of the community.

However, the personal injuries of the employer are not compensated in any way under the prevailing imputation rule, except to the extent that the employer has his own medical coverage. The "no imputation" rule adopted by the Minnesota court would remove this hardship, spreading personal injury losses through liability insurance, and would seem therefore to be the better policy.

[32] Universal Underwriters Ins. Co. v. Hoxie, 375 Mich. 102, 133 N.W.2d 167 (1965); Jacobsen v. Dailey, 228 Minn. 201, 36 N.W.2d 711 (1949); Friedenthal, *Imputed Contributory Negligence: The Anomaly in California Vehicle Code Section 17150*, 17 STAN. L. REV. 55 (1964); Note, 17 CORNELL L.Q. 158 (1931).

[33] Two special problems arise here. At the trial stage, should the court set off the verdict rendered in favor of one employer against that rendered in favor of the other, giving judgment for the difference only, or should two separate judgments be rendered? The decided cases seem to favor the latter approach. Jacobsen v. Dailey, 228 Minn. 201, 36 N.W.2d 711 (1949); Gelb v. McCabe, 220 N.Y.S.2d 738 (New Rochelle City Ct. 1961); Bandych v. Ross, 26 N.Y.S.2d 830 (Utica City Ct. 1941). May the insurer then set off the judgment in favor of its insured in partial satisfaction of its liability? Since the insurer is bound by its contract to meet the liability of its insured, it would seem that it should have no such right of set off, once the judgment against its insured has been rendered.

[34] It can be argued that the premium paying public would rather bear the burden of only the difference between the judgments rather than the aggregate. However, maximum risk distribution is achieved by having the insurers bear the burden of the whole of both judgments.

When an Arizona court is called upon to decide this question, it should seriously consider whether the accustomed "both-ways" rule serves any valid purpose today, or instead, whether, as the Minnesota court believed, it "is defensible only on the grounds of its antiquity."[35]

*John Morley Greacen*

TORTS — LIABILITY — INDEPENDENT TORTFEASORS JOINTLY AND SEVERALLY LIABLE FOR SEPARATE ACTS OF NEGLIGENCE WHERE HARM IS INDIVISIBLE. *Holtz v. Holder* (Ariz. 1966).

Plaintiff was involved in a collision between her vehicle and one negligently operated by the defendant. Plaintiff remained in her automobile after the accident and some five or ten minutes later it was struck again by a second defendant, also acting negligently, but independently of the first. As a result of the two collisions the plaintiff sustained personal injuries which were medically impossible to sever and assign to the successive impacts. The trial court instructed the jury that the plaintiff must carry the burden of proving the extent of injury caused by each tortfeasor. The jury, unable to segregate the damages based on the evidence presented, rendered a general verdict in favor of both defendants. On appeal, *held,* reversed. Two or more tortfeasors, not acting in concert nor concurring in cause so as to create a single indivisible force or condition, may nevertheless be held jointly and severally liable if their acts occur closely in time and space and the plaintiff suffers injuries which the trier of fact determines to be unapportionable between the several tortfeasors. *Holtz v. Holder,* 101 Ariz. 247, 418 P.2d 584 (1966).

The award of damages in negligence cases is generally based upon compensation for actual injuries or loss proximately caused by the defendant.[1] The plaintiff, asserting that his injuries have resulted from

[35] Weber v. Stokely-Van Camp, Inc., 144 N.W.2d 540, 545 (Minn. 1966). Several arguments can be made against the adoption of this rule as well. Where an individual does not carry liability insurance, or enough insurance, or is deemed uninsurable by the insurance companies, the "no imputation" rule will result in a lesser spreading of the loss. If the loss falls on the employer, he can always pass it on to his customers through the price of his goods and services, but the individual without insurance cannot spread it at all.

Also, should a negligent individual be involved in an accident with a negligent chauffeur or a negligent employee of a corporation, the chauffeur's master or the corporation could recover damages from the individual, but the individual would have to bear the full amount of his own losses. This can be interpreted as showing a special favoritism for the person rich enough to hire a chauffeur to drive his car for him and for the corporation, which, after all, can act only through its servants.

[1] *See, e.g.,* Steinman v. Penn. R.R., 54 F.2d 1052 (3d Cir.), *cert. denied,* 285 U.S. 552 (1932); O'Hara v. Frederickson Bldg. Corp., 166 Neb. 206, 88 N.W. 2d 643 (1958); Banks v. Shepard, 230 N.C. 86, 52 S.E.2d 215 (1949).

the defendant's negligence, must adduce competent evidence at the trial to prove those injuries.[2] This may be difficult where there are multiple tortfeasors since the trier of fact cannot speculate as to their nature and degree.[3] The injured party, however, may be aided in his evidentiary task by a basic principle of tort law imposing joint and several liability[4] on multiple tortfeasors in certain situations.[5] Under this rule, when concert of action,[6] breach of a common duty,[7] or concurrence of causation[8] exist, *each* tortfeasor is liable for *all* the injuries caused on the theory that the act of one is the act of all.[9] Neither the fact that the negligence of one might have contributed more to the injury than that of the others,[10] nor that one might have been more culpably negligent than the others,[11] alters the joint nature of their liability.[12]

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[2] Gewartowski v. Tomal, 125 Ind. App. 481, 123 N.E.2d 580 (1955); McElwain v. Capotosto, 332 Mass. 1, 122 N.E.2d 901 (1954); Uffner v. Campbell Soup Co., 207 Misc. 21, 138 N.Y.S.2d 728 (Munic. Ct. 1954).

[3] Louisville & N.R.R. v. Lankford, 304 Ky. 192, 200 S.W.2d 297 (1947); O'Brien v. Vandalia Bus Lines, Inc., 351 Mo. 500, 173 S.W.2d 76 (1943); Dietz v. Goodman, 256 Wis. 370, 41 N.W.2d 208 (1950).

[4] Evans v. City of American Falls, 52 Idaho 7, 11 P.2d 363 (1932); Humble Oil & Refining Co. v. Bell, 172 S.W.2d 800 (Tex. Civ. App. 1943).

[5] W. L. PROSSER, TORTS § 42 (3d ed. 1964); Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413 (1936).

[6] Bobich v. Dackow, 229 Ky. 830, 18 S.W.2d 280 (1929); Williams v. Sheldon, 10 Wend. 654 (N.Y. 1833); American Rio Grande Land & Irrigation Co. v. Barker, 268 S.W. 506 (Tex. Civ. App. 1924).

[7] Simmons v. Everson, 124 N.Y. 319, 26 N.E. 911 (1891); Walton, Witten & Graham v. Miller's Admr'x, 109 Va. 210, 63 S.E. 458 (1909); Johnson v. Chapman, 43 W. Va. 639, 28 S.E. 744 (1897).

[8] Allison v. Hobbs, 96 Me. 26, 51 A. 245 (1901). *Contra,* Livesay v. First Nat. Bank, 36 Colo. 526, 86 P. 102 (1906).

This is true whether or not either cause alone could have caused the entire injury. Tompkins v. Clay-Street Hill R.R., 66 Cal. 163, 4 P. 1165 (1884); Kinley v. Hines, 106 Conn. 82, 137 A. 9 (1927).

It is important to distinguish between "concurrent" causes and "successive" causes or mere conditions. In City of Okmulgee v. Hemphill, 183 Okla. 450, 453, 83 P.2d 189, 191 (1938), concurrent causes were defined as follows:

> Concurrent causes are causes acting contemporaneously and which together cause the injury, which injury would not have resulted in the absence of either . . . . in order for causes to be concurrent they must join with each other in some manner to produce the injury. If two distinct causes are successive and unrelated in operation they cannot be concurrent; one of them must be the proximate and the other the remote cause.

[9] Heydon's Case, 11 Co. Rep. 5, 77 Eng. Rep. 1150 (K.B. 1613).

[10] Hale v. City of Knoxville, 189 Tenn. 491, 226 S.W.2d 265 (1949).

[11] Myers v. Southern Pub. Util. Co., 208 N.C. 293, 180 S.E. 694 (1935).

[12] It should be noted that "joint," as used in this context, refers to its *substantive* application, as distinguished from the procedural aspects of "joint" defendants. While these two concepts were once coterminous, the separate and distinct nature of each in modern practice has been well stated in F. V. HARPER & F. JAMES, THE LAW OF TORTS § 10.1, at 697 (1956):

> [C]onfusion arose from an inability of some courts to conceive of the two as separate and distinct legal tools, each having its own function. The later view more properly reflects the overall goal of modern procedure: trial convenience. This is recognized by . . . the present day Federal Rules of Civil Procedure.

The adoption of the Federal Rules of Civil Procedure in Arizona has overruled Salt River Valley Water Users' Assoc. v. Cornum, 49 Ariz. 1, 63 P.2d 639 (1937), which had permitted joinder only when the tort was joint.

If the case falls within the above category, there is no requirement of proof dividing or apportioning damages since the requisite degree of "jointness" is already present, either in the nature of the defendants' relationship to each other or in the intrinsic character of concurrence of cause.[13]

Outside these situations the ordinary rule of tort law applies. If the acts of each defendant are separate, and the causes are separate, the liability of each must be separate also.[14] This is the strict, common law view and is still adhered to in a majority of jurisdictions.[15] The fact that it may be impossible for the plaintiff to segregate the damages which were inflicted by multiple tortfeasors not acting in concert or otherwise joined is immaterial.[16] These courts reason that a tortfeasor should be liable only for that particular injury proximately caused by his negligence,[17] and that the burden of proving the injury caused by each tortfeasor should remain with the plaintiff.[18] Such reasoning is based on the premise that "[i]t is the wrongful act, and not the injury, that creates liability."[19]

This approach has been criticized by textwriters on the ground that, despite the theoretical existence of separate and distinct injuries (and, hence, separate claims), such an unyielding rule stifles the compensatory function of tort law.[20]

The resulting hardship upon the plaintiff who finds it impossible to segregate damages has led to the procedural change in several jurisdictions of shifting the burden of proof to apportion damages to the several defendants when their independent conduct has resulted in injuries which the plaintiff is unable to apportion (assuming, of

[13] *See* Wold v. Grozalsky, 277 N.Y. 364, 14 N.E.2d 437 (1938) (common duty); Bradshaw v. Baylor Univ., 126 Tex. 99, 84 S.W.2d 703 (1935) (concurrent negligence); Michigan Millers Mut. Fire Ins. Co. v. Oregon-Washington R. & Nav. Co., 32 Wash. 2d 256, 201 P.2d 207 (1948) (concert of action).

[14] *See, e.g.*, Annot., 100 A.L.R.2d 16, 48 (1965). Mere coincidence in time does not make one defendant liable for the damages inflicted by the other, nor does similarity of design or conduct, without concert. Dickson v. Yates, 194 Iowa 910, 188 N.W. 948 (1922); *cf.* Millard v. Miller, 39 Colo. 103, 88 P. 845 (1907).

[15] *E.g.*, Symmes v. Prairie Pebble Phosphate Co., 66 Fla. 27, 63 So. 1 (1913); Stephens v. Schadler, 182 Ky. 833, 207 S.W. 704 (1919); Ader v. Blau, 241 N.Y. 7, 148 N.E. 771 (1925).

[16] *See* Hughes v. Great American Indem. Co., 236 F.2d 71 (5th Cir. 1956), *cert. denied*, 352 U.S. 989 (1957); Close v. Matson, 102 Ga. App. 663, 117 S.E.2d 251 (1960); Montgomery v. Polk Milk Co., 118 Ind. App. 433, 79 N.E.2d 108 (1948).

[17] *Id.*

[18] *See* Leishman v. Brady, 39 Del. 559, 3 A.2d 118 (1938); Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S.E. 265 (1920).

[19] Northern Finance Corp. v. Midwest Commercial Credit Co., 59 S.D. 282, 285, 239 N.W. 242, 243 (1931); *accord*, Caygill v. Ipsen, 27 Wis. 2d 578, 135 N.W.2d 284 (1965).

[20] Conant, *Recent Developments in Joint and Several Tort Liability*, 14 BAYLOR L. REV. 421 (1962); Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399 (1939); Wigmore, *Joint-Tortfeasors and Severance of Damages; Making the Innocent Party Suffer without Redress*, 17 ILL. L. REV. 458 (1923).

course, that the plaintiff has otherwise made out a prima facie case).[21] Other courts have relaxed the standard of proof required in an effort to reach the same result.[22]

Foremost in the recent trend to ameliorate the strict doctrine, however, is the "single injury" or "single indivisible injury" rule.[23] The Arizona court, in the instant case, has joined a number of other jurisdictions[24] in applying this liberal rule to situations where two or more persons are guilty of successive acts of negligence which, though independent, are closely related in time and space, and result in an indivisible injury to the plaintiff.[25] The gravamen of this rule lies in the singleness of the injury — one incapable of any *logical* division[26] — where it is impossible to say that each tortfeasor is responsible for a separate portion of the entire injury.[27]

The rationale for such an exception to the strict, common law view is its application to situations where it would seem more desirable, as a matter of policy, for the innocent plaintiff to recover his entire damage from several defendants, even though one may have to pay more than his share, than to leave the plaintiff without a remedy and absolve the defendants entirely.[28]

*Holtz v. Holder* meets the acid test: indivisibility of injury.[29] The Arizona court has aligned itself squarely with a majority of those jurisdictions following the "single injury" rule in adopting it without quali-

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[21] Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (in situations where it is *known* that only one of several defendants caused the injury, but not which one); *accord*, Benson v. Ross, 143 Mich. 452, 106 N.W. 1120 (1906); Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1926).

[22] Grzybowski v. Connecticut Co., 116 Conn. 292, 164 A. 632 (1933); Leinbach v. Pickwick Greyhound Lines, 135 Kan. 40, 10 P.2d 33 (1932). *Compare* Meier v. Holt, 347 Mich. 430, 80 N.W.2d 207 (1956), *with* Maddux v. Donaldson, 362 Mich. 425, 108 N.W.2d 33 (1961).

[23] Holtz v. Holder, 101 Ariz. 247, 418 P.2d 584 (1966).

[24] Cummings v. Kendall, 41 Cal. App. 2d 549, 107 P.2d 282 (1940); Rudd v. Grimm, 252 Iowa 1266, 110 N.W.2d 321 (1961); Gibson v. Bodley, 156 Kan. 338, 133 P.2d 112 (1943); Murphy v. Taxicabs of Louisville, Inc., 330 S.W.2d 395 (Ky. 1959); Maddux v. Donaldson, 362 Mich. 425, 108 N.W.2d 33 (1961); Matthews v. Mound City Cab Co., 205 S.W.2d 243 (Mo. Ct. App. 1947); Mason v. Reynolds, 135 Neb. 773, 284 N.W. 257 (1939); Riddle v. Artis, 243 N.C. 668, 91 S.E.2d 894 (1956); Hardware Mut. Cas. Co. v. Peroz, 110 Ohio App. 390, 169 N.E.2d 621 (1958); Richmond Coca-Cola Bottling Works, Inc. v. Andrews, 173 Va. 240, 3 S.E.2d 419 (1939).

[25] *Id.*

[26] Blanton v. Sisters of Charity, 82 Ohio App. 20, 79 N.E.2d 688 (1948); Bolick v. Gallagher, 268 Wis. 421, 67 N.W.2d 860 (1955). *But cf.*, Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127 (1934).

[27] Arnst v. Estes, 136 Me. 272, 8 A.2d 201 (1939); Nees v. Minneapolis St. Ry., 218 Minn. 532, 16 N.W.2d 758 (1944). *But see* McCulloch's Adm'r v. Abell's Adm'r, 272 Ky. 756, 115 S.W.2d 386 (1938); Deese v. Williams, 237 S.C. 560, 118 S.E.2d 330 (1961).

[28] Ruud v. Grimm, 252 Iowa 1266, 110 N.W.2d 321 (1961); Barber v. Wooten, 234 N.C. 107, 66 S.E.2d 690 (1951).

[29] See cases cited note 24 *supra*.

fication,[30] thereby modifying earlier rulings regarding joint and several liability.[31] Its prior decisions are also factually distinguishable from the instant case.[32]

Some courts have limited the application of the rule in successive collision cases to situations where the collisions, though obviously not concurrent, occurred within the space of a very short time.[33] In the instant case the collisions were separated by a lapse of from five to ten minutes. Another jurisdiction following the "single injury" rule denied recovery where the second collision occurred several hours later.[34] Thus juxtaposed, these cases suggest that, in order to impose joint and several liability in successive collision cases, there must be such a substantial relation between the successive collisions in time and space as to be considered "one event or occurrence in the eyes of the lay onlooker."[35] The utility of such a requirement seems doubtful where the time lapse is not of unreasonable length since the essence of the

[30] Some of these qualifications are, *e.g.*, Morgan v. Gore, 96 Colo. 508, 44 P.2d 918 (1935) (attempt by jury to apportion the damages among the several defendants held improper); Louisville Gas & Elec. Co. v. Nall, 178 Ky. 33, 198 S.W. 745 (1917) (the entire injury must have been the result of the act of only one of the tortfeasors); Floun v. Birger, 296 S.W. 203 (Mo. Ct. App. 1927) (verdict for plaintiff in a single sum against all defendants required). *See also* KY. REV. STAT. ch. 412.030 which provides for contribution among joint tortfeasors only when the wrong involves no moral terpitude.

Only two states have considered the situation where the separate acts which caused the injury are those of the victim himself and the negligent act of a single defendant. Both concluded that since the evidence did not show whether the victim's death was caused by his own act or the subsequent act of the defendant, a verdict for the plaintiff would be mere conjecture on the jury's part and therefore could not be sustained. Eckley v. Seese, 382 Pa. 425, 115 A.2d 227 (1955); Lane v. Hampton, 197 Va. 46, 87 S.E.2d 803 (1955). However, assuming there was no contributory negligence involved, the reasoning of the Arizona court would seem to apply equally in such a situation.

[31] White v. Arizona E.R.R., 26 Ariz. 590, 229 P. 101 (1924), held that where one defendant negligently maintained the vehicle in which plaintiff's intestate was killed while the other defendant's negligence consisted of failure to give adequate warning by blowing a train whistle approaching the crossing where the collision occured was not a situation to which joint and several liability could be applied. The court reasoned that there was no joint or concurrent negligence and that there could be no recovery absent a showing of a community of purpose or wrong. In Holtz v. Holder, 101 Ariz. 247, 251, 418 P.2d 584, 588 (1966), the court stated "[W]e are not overruling the White case in its holding that a joint tort, as defined in that case, results in joint and several liability. But we do modify it . . . ."

[32] Glen v. Chenowth, 71 Ariz. 271, 226 P.2d 165 (1951) (recovery denied against multiple assailants where no concert of action existed); DeGraff v. Smith, 62 Ariz. 261, 157 P.2d 342 (1945) (vicarious liability); Owl Drug Co. v. Crandall, 52 Ariz. 322, 80 P.2d 952 (1938) (plaintiff denied recovery after failing to show which of three falls, only one caused by the defendant, was the proximate cause of her injury); Salt River Valley Water Users' Assoc. v. Cornum, 49 Ariz. 1, 63 P.2d 639 (1937) (distinguishing active and passive negligence).

[33] *E.g.*, Garbe v. Halloran, 150 Ohio St. 476, 83 N.E.2d 217 (1948) (5 or 6 seconds); Krumvieda v. Hammond, 71 S.D. 544, 27 N.W.2d 583 (1947) (2 minutes); Derleder v. Piper, 239 Wis. 269, 1 N.W.2d 146 (1941) (6 or 7 seconds).

[34] Weisenmiller v. Nestor, 153 Neb. 153, 43 N.W.2d 568 (1950).

[35] Caygill v. Ipsen, 27 Wis. 2d 578, 583, 135 N.W.2d 284, 289 (1965); *accord*, Ruud v. Grimm, 252 Iowa 1266, 110 N.W.2d 321 (1961).

"single injury" rule, indivisibility of harm, must exist notwithstanding the time factor.[36]

Whether the court concerns itself with the time and space relationship, the plight of the plaintiff, the particular conduct of each defendant, or any other similar criteria in deciding whether to impose joint and several liability in a given situation, it seems that in the last analysis only one fundamental determination emerges as the decisive factor: Would it be *unfair* to make the plaintiff sustain the burden of allocating damages under all the circumstances? While admittedly this formula falls short of the finality and predictability of the common law rule, it is submitted that a remedy for a compensable loss seems ultimately more desirable than some inflexible guideline. Justice Cardozo once remarked: "A fruitful parent of injustice is the tyranny of concepts. They are tyrants rather than servants when treated as real existences and developed with merciless disregard of consequences to the limit of their logic."[37]

*Michael A. Beale*

TORTS — STANDARD OF CARE OF AN INFANT OPERATING A MOTOR VEHICLE — HELD TO ADULT STANDARD WITHOUT DISTINCTION BETWEEN PRIMARY AND CONTRIBUTORY NEGLIGENCE SITUATIONS. — *Daniels v. Evans.* (N.H. 1966).

In an action to recover damages for the death of a nineteen year old boy that resulted from an automobile-motorcycle accident, the trial court instructed the jury that the decedent must have exercised for his own protection that degree of care of an average child of like age, experience, and stage of mental development. The jury trial resulted in a verdict for the plaintiff. The defendent appealed objecting to this instruction. On appeal, *held,* reversed. A minor operating a motor vehicle must be judged by the same standard of care as an adult, whether the issue is primary or contributory negligence. *Daniels v. Evans,* 224 A.2d 63 (N.H. 1966).

Generally, in negligence actions, a minor is held to the relatively *"subjective"* standard of care that a reasonable person of like *age,* intelligence, and *experience* would exercise under like circumstances.[1]

At one time, this standard was widely accepted in situations in-

[36] See cases cited note 24 *supra.*
[37] B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 61 (1928).

[1] Bruno v. Grande, 31 Ariz. 206, 251 P. 550 (1926). *See generally* W.L. PROSSER, TORTS 157 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 283A (1965).

volving *a minor operating a motor vehicle,*[2] but today it is apparently the standard in only a few states.[3] The strong modern trend is to hold minors to the objective, adult (reasonable and prudent man) standard when engaging in this activity.[4] In justifying such a result, the courts usually stress one or more of five different factors: (1) A driver's license is intended to place adult responsibility on the minor.[5] (2) A standard of care statute provides the same standards for all drivers.[6] (3) Public policy demands that minors be held to an adult standard.[7] (4) Violation of a specific traffic regulation is negligence per se for everyone.[8] (5) An infant over the age of fourteen years is presumptively chargeable with the same degree of care as an adult.[9] California resolved an extended conflict in its earlier decisions in *Pritchard v. Veterans Cab Co.* where the court stated:

> The age of a minor who operates a motor vehicle will not excuse him from liability for driving it in a negligent manner, and he will be required to meet the standard established primarily for adults.[10]

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[2] *E.g.,* Shmatovich v. New Sonoma Creamery, 187 Cal. App. 2d 342, 9 Cal. Rptr. 630 (1960); Harvey v. Cole, 159 Kan. 239, 153 P.2d 916 (1944); Wolf v. Budzyn, 305 Ill. App. 603, 27 N.E.2d 571 (1940); Roques v. Butler County R.R., 264 S.W. 474 (Mo. App. 1924); Charbonneau v. MacRury, 84 N.H. 501, 153 A. 457 (1931); Hoke v. Atlantic Greyhound Corp., 226 N.C. 692, 40 S.E.2d 345 (1946).

[3] Nehrbass v. Home Indem. Co., 37 F. Supp. 123 (D.C. La. 1941) (contributory negligence); Overlock v. Ruedemann, 147 Conn. 649, 165 A.2d 335 (1960) (infant found negligent even though "subjective" standard applied); Bear v. Auguy, 164 Neb. 756, 83 N.W.2d 559 (1957) (contributory negligence); Rines v. Rines, 97 N.H. 55, 80 A.2d 497 (1951) (applying Maine law because accident occurred in Maine); Sheets v. Pendergrast, 106 N.W.2d 1 (N.D. 1960). *Compare* Chernotik v. Schrank, 76 S.D. 374, 79 N.W.2d 4 (1956), *with* Wittmeier v. Post, 78 S.D. 520, 105 N.W.2d 65 (1960).

[4] W.L. PROSSER, TORTS 159 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 283A, comment *c* (1965). *See generally* Annot., 97 A.L.R.2d 872 (1964).

[5] *E.g.,* Betzold v. Erickson, 35 Ill. App. 2d 203, 182 N.E.2d 342 (1962); Allen v. Ellis, 191 Kan. 311, 380 P.2d 408 (1963); Nielson v. Brown, 232 Ore. 426, 374 P.2d 896 (1962) (the court applied the adult test to gross negligence); Powell v. Hartford Accident & Indem. Co., 398 S.W.2d 727 (Tenn. 1966); Nelson v. Arrowhead Freight Lines, 99 Utah 129, 104 P.2d 225 (1940) (presumption of adult capacity).

[6] Harrelson v. Whitehead, 236 Ark. 325, 365 S.W.2d 868 (1963); Wilson v. Shumate, 296 S.W.2d 72 (Mo. 1956).

[7] *E.g.,* Wagner v. Shanks, 194 A.2d 701 (Del. 1963); Dawson v. Hoffman, 43 Ill. App. 2d 17, 192 N.E.2d 695 (1963); Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961); Carano v. Cardina, 115 Ohio App. 30, 184 N.E.2d 430, 20 Ohio Op. 2d 178 (1961).

[8] Karr v. McNeil, 92 Ohio App. 458, 110 N.E.2d 714 (1952); Tallent v. Talbert, 249 N.C. 149, 105 S.E.2d 426 (1958). *But see* 2 F. HARPER & F. JAMES, TORTS 1011 n.58 (1956).

[9] Sheetz v. Welch, 89 Ga. App. 749, 81 S.E.2d 319 (1954). *Compare* Renegar v. Cramer, 354 S.W.2d 663 (Tex. Civ. App. 1962) (adult standard applied to a 14 year old defendant driving an automobile), *with* City of Austin v. Hoffman, 379 S.W.2d 103 (Tex. Civ. App. 1964) (13 year old plaintiff on a motor scooter only required to meet "subjective" standard because such activity was not dangerous to other members of the public). These Texas cases are unique in drawing a distinction at a definite age and between the type of motor vehicle involved.

[10] 63 Cal. 2d 727, 408 P.2d 360, 363, 47 Cal. Rptr. 904, 907 (1965). For an excellent brief discussion of the California law on this subject prior to this case, see 2 IDAHO L. REV. 103, 107-09 (1965).

Some authorities have indicated that the adult standard is applicable when the minor is charged with primary negligence, but not when he is charged with contributory negligence.[11] The rationale for such a limitation can be explained by the following quotation from Harper & James' *Torts:*

> The shift in outlook towards accident liability that has taken place over the last century has led to an ever increasing expansion of the concept of negligence where that will lead to compensating an accident victim for his loss. It would be strange indeed if there had been a concomitant expansion of the negligence which would cut that compensation off. Every practical man knows this has not been the case. What has emerged has been a double standard which in all candor ought to be recognized.[12]

Notwithstanding the view of the authorities just cited, many courts have held that the adult standard applies when the minor is charged with contributory negligence in the operation of a motor vehicle, and have done so without discussing the possibility of applying different standards for contributory and primary negligence situations.[13]

In motor vehicle accidents in which the minor was operating a

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[11] Betzold v. Erickson, 35 Ill. App. 2d 203, 182 N.E.2d 342, 345 (1962), stated in dicta that the "subjective" standard is proper in contributory negligence situations although it held the minor defendant to the adult standard. However, the later Illinois case of Ryan v. C & D Motor Delivery Co., 38 Ill. App. 2d 18, 186 N.E.2d 156 (1962), held a 19 year old to the adult standard in a contributory negligence situation. Illinois has held that a minor operating a tractor on a farm is held only to the "subjective" standard. Mack v. Davis, 221 N.E.2d 121 (Ill. Ct. App. 1966).

Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961), involved a minor operating a motor boat who was charged with primary negligence. In discussing which standard of care should be required of the boy the court recognized that the great majority of cases applying the subjective test involved the issue of contributory negligence; and stated that this was proper and appropriate. The court then held that this minor defendant should be held to the adult standard. The court further stated that there may be a difference between the standard of care that is required of a child in protecting himself against hazards and the standard that may be applicable when his activities expose others to hazards. *Accord,* Nielson v. Brown, 232 Ore. 426, 374 P.2d 896, 905 (1962) (dictum).

Annot., 97 A.L.R.2d 867, 875 (1964), states:

> The reasoning in these cases is that the policy of protection for the minor was never intended to shield him from his affirmative wrong doing, but only to insure that he would not be denied recovery for his own injuries by reason of some indiscretion or impetuosuity attributable to his immaturity. This being the case, the courts conclude, the minor is entitled to consideration of his age where contributory negligence is charged, but is held to the adult standard where primary negligence is the issue.

2 F. HARPER & F. JAMES, TORTS 926-27 (1956); W.L. PROSSER, TORTS 159 (3d ed. 1964).

[12] 2 F. HARPER & F. JAMES, TORTS 1210 (1956).

[13] *E.g.,* Harrelson v. Whitehead, 236 Ark. 325, 365 S.W.2d 868 (1963); Pritchard v. Veterans Cab Co., 63 Cal. 2d 727, 408 P.2d 360, 47 Cal. Rptr. 904 (1965); Sheetz v. Welch, 89 Ga. App. 749, 81 S.E.2d 319 (1954); Garatoni v. Teegarden, 129 Ind. App. 500, 154 N.E.2d 379 (1958); Wilson v. Shumate, 296 S.W.2d 72 (Mo. 1956); Adams v. Lopez, 75 N.M. 503, 407 P.2d 50 (1965); Powell v. Hartford Accident & Indem. Co., 398 S.W.2d 727 (Tenn. 1966).

bicycle, the courts continue to hold the minor to a "subjective" standard when considering the issue of contributory negligence.[14]

The court in the instant case overrules[15] the prior New Hampshire case of *Charbonneau v. MacRury*[16] which has been continually cited[17] as a leading authority for the view that a minor is held to a "subjective" standard of care while operating a motor vehicle; therefore, the principal case may well sound the note that signals the final decline of the "subjective" rule. The instant case also specifically reasons that "there is no reason for making a distinction based on whether he is charged with primary negligence, contributory negligence, or a casual violation of a statute . . . ."[18] The significance here is that this case may be the first case[19] holding a minor operating a motor vehicle to an adult standard when contributory negligence is the issue which *also* specifically states that no distinction in the standard applied should be made whether the issue is primary or contributory negligence. Such a specific statement is certainly consistent with the cases[20] that hold a minor to the standard of an adult while operating a motor vehicle when his contributory negligence is the issue; such cases reject the possibility of applying different standards by implication. This case, thus, specifically *rejects* the position that the adult standard should apply only in primary negligence situations.

Although the possibility of applying a "double-standard"[21] has been suggested by several authorities,[22] the courts have not done so. This is true even though an excellent argument can be made for its application.

Since Arizona has no cases involving a minor operating a motor vehicle, it is open to argument as to which standard should be applied.[23] If the Arizona court did adopt the adult standard, it could be argued that it should apply only when primary negligence is the issue. The

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[14] *E.g.*, Conway v. Tamborini, 68 Ill. App. 2d 190, 215 N.E.2d 303 (1966); Crider v. Columbus Plastic Prod., Inc., 190 N.E.2d 63, 90 Ohio L. Abs. 605 (Ohio Ct. App. 1956) (minor not negligent per se when violating a statute regulating how a bicycle should be ridden); Thomas v. Harper, 53 Tenn. App. 549, 385 S.W.2d 130 (1964); Grant v. Mays, 204 Va. 41, 129 S.E.2d 10 (1963).

[15] Daniels v. Evans, 224 A.2d 63 (N.H. 1966) (by implication).

[16] 84 N.H. 501, 153 A. 457 (1931).

[17] *E.g.*, Harvey v. Cole, 159 Kan. 239, 153 P.2d 916 (1944); Nielson v. Brown, 232 Ore. 426, 374 P.2d 896 (1962); Chernotik v. Schank, 76 S.D. 374, 79 N.W.2d 4 (1951).

[18] Daniels v. Evans, 224 A.2d 63, 66 (N.H. 1966).

[19] *But see* Harrelson v. Whitehead, 236 Ark. 325, 365 S.W.2d 868, 869 (1963), which comes very close to so holding.

[20] Cases cited note 13 *supra*.

[21] *See generally* Note, *The Standard of Care for Children: A Possible Negligence-Contributory Negligence Double Standard*, 38 ORE. L. REV. 268 (1959).

[22] See note 11 *supra* and accompanying text.

[23] *Cf.*, Gilbert v. Quinet, 91 Ariz. 29, 369 P.2d 267 (1962) (A minor is held to the "more subjective" standard in Arizona in ordinary negligence situations).

court could accept this position based on reasoning that the higher standard in primary negligence situations promotes recoveries for innocent injured people; whereas, a higher standard in contributory negligence situations only tends to bar recoveries by holding the infant to a standard higher than he is generally recognized as being capable of attaining. It is clearly time for a court to directly face and discuss the merits of this position, and it is regrettable that the instant case failed to do so.

*Philip A. Edlund*

TORTS — WRONGFUL DEATH — SETTLEMENT WITH PARTY NOT ENTITLED TO BRING ACTION NOT A BAR TO RECOVERY BY PARTY ENTITLED TO BRING ACTION. *In re Estate of Milliman* (Ariz. 1966).

Respondent petitioned to set aside a probate court order approving an insurance company's settlement of a wrongful death claim on grounds, *inter alia*, that the party settling the claim was not decedent's legal widow. Respondent also contended that the insurer's adjuster had been informed of facts indicating that there might have been other beneficiaries entitled to the proceeds of the settlement. The Superior Court granted respondent's petition and the Court of Appeals affirmed. On appeal, *held*, affirmed.[1] Where an insurer's adjuster has knowledge of facts that indicate that there might be other beneficiaries of a wrongful death claim, the insurer is not protected against liability to the person actually entitled to bring the action by settlement with a person fraudulently asserting the claim.[2] *In re Estate of Milliman*, 101 Ariz. 54, 415 P.2d 877 (1966).

[1] The precise words used by the Supreme Court of Arizona are found at 101 Ariz. at 65, 415 P.2d at 888: "The decision of the Court of Appeals is vacated. Judgment affirmed." Presumably these words are intended to mean that the Supreme Court vacated the *opinion* of the Court of Appeals, while upholding the procedural result reached by the lower courts.

[2] In 1956, Willard Milliman deserted his wife Clarabelle in New York. In 1960, after an intervening marriage to and divorce from Maxine Roberts, Milliman married Lucy Horn. Lucy, already the mother of one son, bore Milliman a son. On March 2, 1961, Milliman was killed in an automobile accident.

Lucy's mother later testified that relatives of Milliman, attending his funeral, informed her and Lucy that there had been no divorce from Clarabelle, the mother of six of Milliman's children. Both Lucy and her mother later testified that they had informed insurer's adjuster that Milliman had another child; the adjuster denied knowledge of any other heirs.

Aided by insurer's counsel, Lucy was appointed administratrix of Milliman's estate. The probate court approved a settlement of the wrongful death claim against insurer and Lucy was appointed guardian of the $50,000.00 recovery. Subsequent to her discharge as administratrix in August, 1961, Lucy squandered $33,333.33 of the amount received.

In April, 1962, petitioner Ward, representing Clarabelle, appeared in order to request revocation of the letters of administration granted to Lucy on the grounds that she was not Milliman's legal widow and had failed to give notice to his heirs although she knew of their existence. Ward's petition to set aside the settlement with the insurer, which Lucy had procured, was granted.

Unknown at common law, an action for wrongful death was first created by statute in England in 1846.[3] Popularly known as Lord Campbell's Act, the statute provided that the personal representative of the deceased could maintain an action for damages against the party causing death; the recovery inured to the benefit of specified survivors of the deceased.[4] Every state has adopted, in some form, statutes creating the right to recover damages against a party causing a wrongful death.[5] Significant variations among such statutes exist in two areas: (a) the party or parties entitled to bring the action, and (b) the party or parties for whose benefit the action is brought. Some statutes require that the action be brought in the name of decedent's personal representative;[6] others allow designated survivors of decedent to maintain the action;[7] still others allow either the personal representative or named survivors to bring the action.[8] While many statutes provide that damages are recovered on behalf of certain specified survivors of decedent,[9] others regard the recovery as an asset of decedent's estate;[10] a third group of statutes contemplate recovery on behalf of the estate only if no specified survivors exist.[11]

Arizona's first wrongful death statute, as reflected in the 1887 code, provided that the action be brought by any or all of certain specified survivors of decedent for the benefit of the group.[12] An alteration of the wrongful death act in 1901 required that the action be brought in the name of decedent's personal representative for the benefit of decedent's estate.[13] With slight modification, the 1901 statute was incorporated in the codifications of 1913,[14] 1928,[15] and 1939.[16] In 1956, Arizona returned to the tenor of its original act by providing that either

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[3] Wrongful Death Act of 1846, 9 & 10 Vict., c. 93.

[4] *Id.* § II, at 291:

> . . . That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased . . .

[5] 2 F. HARPER & F. JAMES, TORTS 1284 (1956); W. PROSSER, TORTS 924, (3d 1964); Comment, 54 MICH. L. REV. 821-22 (1956).

[6] *E.g.*, CONN. GEN. STAT. ANN. § 52-555 (1958); ILL. ANN. STAT. ch. 70, § 2 (Supp. 1966); N.Y. DECED. EST. LAW § 130 (McKinney 1949).

[7] *E.g.*, KAN. STAT. ANN. ch. 60, § 1902 (1964); LA. STAT. ANN. art. 2315 (Supp. 1966); MO. ANN. STAT. § 537.080 (Supp. 1966).

[8] *E.g.*, ARIZ. REV. STAT. ANN. § 12-612 (1956); MISS. CODE § 1453 (Supp. 1964); WIS. STAT. ANN. § 331.04 (1963).

[9] *E.g.*, MICH. STAT. ANN. § 27A.2922 (1962); MINN. STAT. ANN. § 573.02 (Supp. 1966); PA. STAT. ANN. tit. 12, § 1602 (1953).

[10] *E.g.*, MASS. ANN. LAWS c. 229, § 1 (1955); N.J. STAT. ANN. § 2A:31-4 (Supp. 1966); WYO. STAT. § 1-1066 (1957).

[11] *E.g.*, ALAS. STAT. § 13.20.340 (1962); ARIZ. REV. STAT. ANN. § 12-612 (1956); S.C. CODE § 10-1954 (1962).

[12] ARIZ. REV. STAT. §§ 2148-49 (1887).

[13] *See* REV. STAT. ARIZ. CIV. CODE § 2765 (1901).

[14] ARIZ. CIV. CODE § 3373 (1913).

[15] ARIZ. REV. CODE § 945 (1928).

[16] ARIZ. CODE ANN. § 31-102 (1939).

the surviving spouse or the personal representative of decedent can maintain an action for the benefit of certain specified survivors; if no such survivors exist, recovery is on behalf of the estate.[17]

The beneficial interest in a wrongful death action is usually separated from the right to maintain it. In Arizona, the personal representative of decedent can maintain the action and recovery is made for the benefit of survivors named by the statute.[18] This separation of the ownership and beneficial interest in the action has led to complications in cases where settlements have been made or attempted. A number of cases have held that settlement of a wrongful death claim with a party not entitled to bring the action does not bar recovery by the person entitled to sue.[19] Even settlement with an individual in one capacity does not bar a later suit by the same person in another capacity.[20] Moreover, a settlement by a party entitled to sue is binding on another not entitled to sue,[21] even where fraud is alleged in procuring the settlement.[22] A settlement by one of a number of parties entitled to sue bars a later action by any or all of the others.[23]

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[17] Ch. 46, § 1, [1956] Ariz. Laws 2d Reg. Sess. 55. The substantive part of this act is codified in ARIZ. REV. STAT. ANN. § 12-612, which provides in part:

> A. An action for wrongful death shall be brought by and in the name of the surviving husband or wife or personal representative of the deceased person for and on behalf of the surviving husband or wife, children or parents, or if none of these survive, on behalf of the decedent's estate.

[18] It is possible that the personal representative is not constitutionally entitled to maintain a wrongful death action in Arizona despite the wording of the session law and the statute noted note 17 *supra*. ARIZ. CONST. art. 4, pt. 2, § 13 provides:

> Every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be embraced in the title.

The title of the session law, note 17 *supra* reads: "An Act relating to Death by Wrongful Act; Providing for *Recovery by Survivors* . . . ." (emphasis added). It is at least arguable that the word "Survivors" appearing in the title of the act does not include the personal representative of decedent. If this is true, so much of the act which authorizes an action by the personal representative would appear to be void under the constitutional provision noted *supra*. For a more complete discussion see 7 ARIZ. L. REV. 341 (1966).

[19] Yelton v. Evansville & I.R.R., 134 Ind. 414, 33 N.E. 629 (1893); Cummins v. Woody, 177 Tenn. 636, 152 S.W.2d 246 (1941); Louisville & N.R.R. v. Cantrell, 25 Tenn. App. 529, 160 S.W.2d 444 (1942). *Contra*, Edwards v. Sullivan, 200 Misc. 488, 102 N.Y.S.2d 951 (Sp. T. 1950).

[20] Morrow v. Drumwright, 202 Tenn. 307, 304 S.W.2d 313 (1957).

[21] Washington v. Louisville & N.R.R., 136 Ill. 49, 26 N.E. 653 (1891). Louisville & N.R.R. v. Turner, 290 Ky. 602, 162 S.W. 219 (1942), is highly similar on its facts to the instant case. The alleged widow of decedent had never been divorced from her first husband (decedent's son). Within twenty-four hours after decedent was killed, she was appointed administratrix of decedent's estate and settled the wrongful death claim for $200.00. The court held that her appointment was voidable and the settlement was valid because made prior to her discharge as administratrix of the estate.

[22] Odom v. Atlanta & W.P.R.R., 78 Ga. App. 477, 51 S.E.2d 466 (1949); *cf.* Hopkins v. Fidelity Ins. Co., 240 S.C. 230, 125 S.E.2d 466 (1962) (dicta that fraudulently procured settlement with beneficiary would not bar action by administrator).

[23] Fyfe v. Great N. Ry., 223 Minn. 339, 27 N.W. 147 (1947); Spencer v. Bradley, 351 S.W.2d 202 (Mo. 1961); *cf.* Eberle v. Sinclair Prairie Oil Co., 120 F.2d 746

In the instant case, the Arizona court was faced with the unique problem of deciding the lengths to which an insurer must go to ascertain whether or not the person asserting a claim is the individual legally entitled to it. In reaching its conclusion, the court reasoned that since recovery is on behalf of named survivors of decedent (not decedent's estate), probate court orders are not conclusive in establishing a particular individual's right to recover.[24] The thrust of the opinion seems to be that knowledge of some facts which indicate that there might be other parties entitled to the benefit of the wrongful death claim prevented the insurer from being insulated from liability by settlement of the claim with a fraudulent claiment.[25] There is an implication that the court also gave consideration to the fact that the insurer aided the fraudulent claimant in obtaining the probate court's approval of the settlement.[26]

However, some of the language used by the court implies that *even in the absence of constructive knowledge* of facts indicating that there are other beneficiaries entitled to share in the recovery, the insurer will still be held liable.[27] In the final analysis, the case is probably best regarded as limited to its peculiar facts; if so, the salient inference seems to be that the insurer was negligent in some respect. Yet similar fact situations are foreseeable in which it could be argued that the case would be applicable even in the absence of a contention that negligence existed. Suppose a case where the insurer settles a claim without any notice of other possible beneficiaries; or, more striking, suppose a case where a suit is instituted and taken to judgment against the insurer. Would the insurer still be liable if it were later

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(10th Cir. 1941) (settlement by administratrix with some of joint tortfeasors discharged liability of all others). *Contra,* Brown v. Moore, 247 F.2d 711 (3d Cir. 1957).

[24] 101 Ariz. at 60-61, 415 P.2d at 883-84. *Accord,* Pittsburgh, C.C. & St. L. Ry., v. Gipe, 160 Ind. 360, 65 N.E. 1034 (1903); Aho v. Republic Iron & Steel Co., 104 Minn. 322, 116 N.W. 590 (1908).

[25] The court held the insurer liable for the knowledge of its agent. The opinion states, at 101 Ariz. at 65, 415 P.2d at 888:

> While Mabry [the adjuster] testified that he did not recall being told of another heir, the court could have found that he was so informed. . . . Notice to the agent is notice to the principal.

[26] 101 Ariz. at 65, 415 P.2d at 888:

> The insurance company knew that it was dealing with Lucy in her individual capacity, as its attorneys had prepared all the papers which Lucy had signed and presented to the court, and in fact prepared the papers for all the proceedings. Undoubtedly this was done to save Lucy money, but in so doing the company assumed a greater responsibility in the case, and *regardless of whether Farmers* [the insurer] *had knowledge of another heir* it dealt with Lucy in her individual capacity, and did not protect itself in the proceedings and paid the money over to Lucy individually as the surviving wife of the decedent. (emphasis added).

[27] See note 26 *supra.*

discovered that the prevailing party was not legally entitled to assert the action?[28]

Short of legislative change too complicated for treatment here, the law controlling such fact situations must be left for determination on the facts of future cases as they arise. It is recognized that leaving the problems presented by the instant case for future ad hoc determination is not desirable from the standpoint of the insurer. At best, the case stands as a warning to the insurer to be extremely careful to exhaust all possibilities for protecting the rights of possible claimants of which the insurer has knowledge, or with due diligence might discover. It would be undesirable to extend the instant case beyond its peculiar facts, particularly in advance of full argument as to its applicability to the merits of other fact situations. Insurers must apparently rely on the hope that the Arizona courts will give the case a limited application in the future.

*Paul E. Wolf*

[28] In the instant case the court said at 101 Ariz. at 63, 415 P.2d at 886:

> [The statute] permits the surviving husband or wife to compromise the action without even bringing suit, but they would be actiing as a statutory trustee for the other beneficiaries, if any . . . The compromise would be valid only if made with the proper parties. . . . [I]f a third person were appointed administrator or executor and therefore qualified as personal representative he could bring the suit to make the compromise but he too would be acting as statutory trustee for the survivors, if any.

The court indicates that the person recovering the claim is only to be regarded as trustee for the beneficiaries in the event that he was in fact entitled to sue. Obviously this reasoning begs the very question presented by the case. It would seem that if Lucy Milliman had recovered a judgment against the insurer, which judgment was then satisfied, the insurer would not be discharged from liability on the claim.