

Notes

UNFAIR COMPETITION — ASSOCIATED PRESS DOCTRINE — UNAUTHORIZED RECEPTION AND USE OF MULTIPLEX CHANNEL FM TRANSMISSIONS INTENDED FOR SUBSCRIBERS CONSTITUTES UNFAIR COMPETITION. *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.* (C.D. Cal. 1967).

The plaintiff was licensed by the Federal Communications Commission to transmit commercial FM radio programs on its main channel and, at the same time, uninterrupted background music to paying subscribers on a separate subcarrier frequency or multiplex channel. While plaintiff's main channel programs could be received by any standard FM radio, reception of its multiplex channel required specially manufactured radio receivers. The defendant, without plaintiff's consent, purchased equipment capable of receiving plaintiff's multiplexed background music and made it available to those commercial establishments which, in exchange for this service, would allow defendant to place its cigarette vending machines on their premises.¹ Plaintiff brought this action to enjoin defendant's alleged violation of the Communications Act of 1935² and for damages for unfair competition. On motions for partial summary judgment on the question of liability, *held*, judgment for the plaintiff. Where plaintiff transmitted background music over a non-public FM multiplex channel for the exclusive benefit of paying subscribers, and where, without plaintiff's consent and in violation of statute, defendant appropriated these transmissions to its own commercial advantage, thereby diverting a substantial portion of plaintiff's trade; the plaintiff had a cause of action for unfair competition. *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35 (C.D. Cal. 1967).

The law of unfair competition has classically found a common denominator in the principle that one should not be allowed to deceive the buying public by "passing off" his goods as those of his competitor.³

¹ In conjunction with its background music service, the plaintiff had installed receiving and amplifying equipment for nearly eight hundred commercial and industrial subscribers, and had made other substantial expenditures for transmission equipment, maintenance, programming, and promotion. The defendant, incurring only minimal expenses, supplied over one hundred establishments with the background music transmitted by the plaintiff.

² 47 U.S.C. § 605 (1935) provides in part that radio transmissions not intended for general public reception may not be used for the benefit of those not entitled to receive them.

³ *Time, Inc. v. Viobim Corp.*, 128 F.2d 860 (7th Cir. 1942), *cert. denied*, 317 U.S. 673 (1942). See also *Stevens-Davis Co. v. Mather & Co.*, 230 Ill. App. 45 (1923); *Soft-Lite Lens Co. v. Ritholz*, 301 Ill. App. 100, 21 N.E.2d 835 (1939). For an extensive compilation of cases dealing with "passing off" generally, see 1 R. CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS, § 4.1, n.12 (2d ed. 1950). See generally 3 RESTATEMENT OF TORTS, §§ 711-56 (1938).

With the technological expansion which has taken place over the past century have come not only new products and services, but also entirely new modes of competition — both fair and unfair.⁴ Corresponding to these developments, a new class of cases has emerged, where the defendant no longer *misrepresents* his own product as that of his competitor, but instead *misappropriates* his competitor's product and sells it as his own.⁵ Thus, while the traditional case of unfair competition may be characterized in terms of fraud or "passing off," the kind of competitive wrong dealt with here, although containing elements of fraud, is more closely related to the tort of conversion.⁶

In *International News Service v. Associated Press*⁷ [hereinafter referred to as *INS*], the Supreme Court discussed the subtleties inherent in the misappropriation of trade values⁸ and synthesized an approach

⁴The "ticker-tape" cases provide early examples of the effect which the telegraph had on some areas of competition: *National Tel. News Co. v. Western Union Tel. Co.*, 119 F. 294 (7th Cir. 1902) (news distributed by telegraph); *Illinois Comm'n Co. v. Cleveland Tel. Co.*, 119 F. 301 (7th Cir. 1902) (market quotations distributed by telegraph); *Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236 (1905) (price quotations sent by telegraph). These cases and many subsequent cases, especially those following the doctrine of *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), could never have arisen prior to the many technical innovations realized in the areas of instantaneous communications, mass publication, and the related fields of service and entertainment. For example, consider the cases tabulated in note 15 *infra*.

⁵*International News Serv. v. Associated Press*, 248 U.S. 215, 242 (1918). For a brief summary of the facts in this case, see the Tabulation of Cases *infra*, note 15. The Supreme Court stated that the defendant, in copying the news gathered by the plaintiff and in "selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of [the plaintiff] is appropriating to itself the harvest of those who had sown." 248 U.S. at 239.

⁶*Cf.* 2 R. CALLMANN, *UNFAIR COMPETITION AND TRADE-MARKS*, § 60-61 (2d ed. 1950).

⁷248 U.S. 215 (1918).

⁸See generally Sells, *The Doctrine of Misappropriation in Unfair Competition*, 11 *VAND. L. REV.* 483 (1958). Clearly, one's *unprotected* trade values (products, ideas, trade secrets, good will, names, symbols, etc.) may be validly appropriated by a competitor after they have been marketed or otherwise unconditionally disclosed. In *Norwich Pharmacal Co. v. Sterling Drug, Inc.*, 271 F.2d 569 (2d Cir. 1959), *cert. denied*, 362 U.S. 919 (1960), the court refused relief where the plaintiff's product had been imitated by a competitor, and indicated that, absent protection by virtue of a trademark, copyright, patent, or secondary meaning, a plaintiff might have relief only if the defendant's conduct constituted one of three predatory practices: (1) "passing off," (2) actual deception, or (3) appropriation of that in which the plaintiff had a protectable property interest. Other instances in which the plaintiff's trade values have been held to be unprotected against appropriation by a competitor are: *Irizarry y Puente v. President & Fellows of Harvard College*, 248 F.2d 799 (1st Cir. 1957), *cert. denied*, 356 U.S. 947 (1959) (idea for tax service); *Addressograph-Multigraph Corp. v. American Expansion Bolt & Mfg. Co.*, 124 F.2d 706 (7th Cir. 1941), *cert. denied*, 316 U.S. 682 (1942) (plates for use in business machines); *G.W. Cole Co. v. American Cement & Oil Co.*, 130 F. 703 (7th Cir. 1904) (catalog); *Supreme Records v. Decca Records*, 90 F. Supp. 904 (S.D. Cal. 1950) (musical arrangements); *Chadwick v. Covell*, 151 Mass. 190, 23 N.E. 1068 (1890) (use of competitor's formula); *Parade Prods. v. Jaysid Mfg. & Distrib. Co.*, 196 Misc. 575, 98 N.Y.S.2d 183 (Sup. Ct. 1949) (advertising and marketing methods). But views on appropriation range from the very broad *INS* proposition that one should not reap where another has sown to the excessively narrow one that the federal policy found in art. I, § 8, cl. 8, of the United States Constitution and in the implementing federal statutes is to allow "free access to copy

to the problem which has come to be known as the *Associated Press* doctrine. Under this doctrine, "passing off" is no longer required;⁹ fraud and deceit are not indispensable elements;¹⁰ plaintiff's failure to obtain available copyright protection is immaterial;¹¹ and the parties need not be in actual¹² or direct¹³ competition. Because of its apparent generality, some jurisdictions, notably the Second Circuit,¹⁴ have limited the *Associ-*

whatever the federal patent and copyright laws leave in the public domain." *Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234, 237 (1964). See also the companion case of *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964). That the *Sears* and *Compco* view is untenable, see Leeds, *The Impact of Sears and Compco*, 55 TRADEMARK REP. 188 (1965).

⁹ *International News Serv. v. Associated Press*, 248 U.S. 215, 241 (1918). See also *Lone Ranger, Inc. v. Cox*, 124 F.2d 650, 653 (4th Cir. 1942).

¹⁰ *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 442, 194 A. 631, 640 (1937).

¹¹ *McCord v. Plotnick*, 108 Cal. App. 2d 393, 395, 239 P.2d 32, 34 (1951).

¹² *Dior v. Milton*, 9 Misc. 2d 425, 434, 155 N.Y.S.2d 443, 454 (Sup. Ct. 1956), *aff'd per curiam*, 2 App. Div. 2d 873, 156 N.Y.S.2d 996 (1956); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1951).

¹³ *Brooks Bros. v. Brooks Clothing, Ltd.*, 60 F. Supp. 442 (S.D. Cal. 1945), *aff'd*, 158 F.2d 798 (9th Cir. 1947).

¹⁴ The Second Circuit's reluctance to apply *INS* in variant situations has been demonstrated in the following cases: *G. Recordi & Co. v. Haendler*, 194 F.2d 914 (2d Cir. 1952) (typography of a book); *National Comics Publications v. Fawcett Publications*, 198 F.2d 927 (2d Cir. 1952) (comic strip characters); *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940) (use of record in violation of restrictive notice); *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929) (fabric designs).

ated Press doctrine strictly to the facts of that case, while many have extended it to analogous factual situations.¹⁵

¹⁵ A number of fact patterns to which *INS* has been applied are analyzed in terms of their mutually analogous elements in the following Tabulation of Cases. This structure provides a convenient vehicle for an investigation of the *Associated Press* doctrine and the degree to which some courts are willing to extend it. Periodic reference to this tabulation should make the often abstract concepts underlying this doctrine somewhat more palpable.

The tabulated cases are, respectively: *International News Serv. v. Associated Press*, 248 U.S. 215 (1918); *Dior v. Milton*, 9 Misc. 2d 425, 155 N.Y.S.2d 443 (Sup. Ct. 1956), *aff'd per curiam*, 2 App. Div. 878, 156 N.Y.S.2d 996 (1956); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 788, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1951); *Pittsburg Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Penn. 1938); *McCord Co. v. Plotnick*, 108 Cal. App. 2d 993, 239 P.2d 92 (1951); *Addison-Wesley Publishing Co. v. Brown*, 207 F. Supp. 678 (E.D.N.Y. 1962); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937); *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35 (C.D. Cal. 1967).

NAME OF CASE	(1) PLAINTIFF'S INCORPOREAL TRADE VALUE.	(2) HOW DISCLOSED TO INTENDED RECIPIENTS.
<i>INS Case.</i>	Compilation of news through world-wide facilities.	Posted news on bulletin board, published news in newspapers.
<i>Dior Case.</i>	Distinctive dress designs.	Conditional disclosure at pre-season showing.
<i>Metropolitan Opera Case.</i>	Operatic performances.	Live performance over radio, sold exclusive recording rights.
<i>Pittsburgh Athletic Case.</i>	Professional baseball games.	Exhibition of games to persons in stadium, sold exclusive broadcast rights.
<i>McCord Case.</i>	Compilation of credit information.	Published information for use by subscribers.
<i>Addison-Wesley Case.</i>	Unsolved problems in physics text book.	Sold text to students and teachers.
<i>Waring Case.</i>	Distinctive orchestral performances.	Sold recordings marked "Not licensed for radio broadcasting."
<i>KMLA Case.</i>	Programs of uninterrupted background music.	Transmitted to subscribers over a non-public radio channel.

An investigation of those cases which have applied INS reveals that the following considerations, in one form or another, have provided the basis upon which equitable relief has been granted.¹⁶

(1) In each case the essential commercial result of plaintiff's "enterprise, organization, skill, labor, and money"¹⁷ has been the creation of an incorporeal trade value. While in most cases this trade value has found manifestation in a physical product,¹⁸ it is the former and not the latter which the *Associated Press* doctrine seeks to protect.¹⁹ The

¹⁶ The columns of the tabulation in note 15 *supra*, correspond numerically to, and serve to illustrate, the material presented in the next five paragraphs of text.

¹⁷ *International News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918).

¹⁸ *E.g.*, printed news stories, as opposed to the compilation of news; actual dresses, as opposed to their designs; phonograph records, as opposed to an organization capable of producing unique sounds.

¹⁹ In *I. R. CALLMANN*, *supra* note 3 at § 2.3, n.3, the protection afforded incorporeal trade values, as opposed to their physical manifestations, was viewed as analogous to the protection granted in patent, copyright, and trademark cases:

The patent law does not protect the machine as such but the machine which is the manifestation of an inventive idea; the copyright law does not protect a series of letters on a sheet of paper, but the form of an artistic or literary work; the trade-mark law does not protect a word, a number of words, a design or a combination, but the symbol of a business activity.

(3) HOW APPROPRIATED BY DEFENDANT.	(4) HOW USED BY DEFEND- ANT.	(5) RESULTANT INJURY TO PLAINTIFF.
Copied news from bulletin board and newspaper.	Republished news in own newspaper.	Diversion of trade, devaluation of existing contracts.
Sketched designs at showing.	Reproduced designs, sold to other dressmakers.	Diversion of trade, loss of exclusiveness and uniqueness.
Recorded performance from radio.	Sold copies of recording.	Devaluation of exclusive recording rights.
Observed game from outside stadium.	Broadcast play - by - play description of game over radio.	Devaluation of exclusive broadcasting rights.
Copied credit information from paper.	Republished credit information in own paper.	Diversion of trade, devaluation of existing contracts.
Obtained copy of text and solved problems.	Published and sold solutions.	Devaluation of text as teaching and testing device.
Purchased recording.	Played recording on commercial radio program.	Devaluation of both live performances and the "equitable servitude" created by notice.
Received programs with special equipment.	Provided music service to own commercial advantage.	Diversion of trade, devaluation of existing contracts.

plaintiff has a property²⁰ or quasi-property²¹ interest in this incorporeal trade value;²² he has a right to the exclusive and unimpeded exploitation of its primary²³ commercial attributes.

(2) Because of the vulnerable nature of plaintiff's product,²⁴ it cannot be distributed to intended recipients through conventional means. Rather, methods must be employed which, under less exceptional conditions, would constitute an abandonment to the public domain of plaintiff's trade value and any appurtenant property rights.²⁵ The fact that the plaintiff can realize a profit only after this loosely controlled disclosure has been made negates any intent to abandon,²⁶ and demands a degree of equitable protection not otherwise afforded.²⁷

(3) The nature of plaintiff's product and the method by which it is distributed make appropriation by the defendant a relatively simple matter.²⁸

²⁰ In *International News Serv. v. Associated Press*, 248 U.S. 215, 236, 240 (1918), it was stated:

The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right [citing cases]; and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired

. . . [The defendants] cannot be heard to say that [plaintiff's] incorporeal trade value — news gathered from around the world] is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience.

²¹ *Id.* at 236.

²² Some writers treat the interest in question as a relational one between the nominal plaintiff and his existing or potential customers. For an excellent discussion of the penumbral area between property interests and relational interests, see Green, *Relational Interests*, 29 *ILL. L. REV.* 460, 460-64 (1934).

²³ The idea that the defendant should not be allowed to frustrate or defeat the plaintiff's primary purpose was presented in *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315 (D. Idaho 1961), and was discussed as a possible element of the *Associated Press* doctrine in Rahl, *The Right to "Appropriate" Trade Values*, 23 *OHIO L.J.* 56 (1962). In the *Intermountain* case the court held that the defendant's use of a community antenna system to receive plaintiff's commercial television programs in a distant area where they could not normally be received, and defendant's redistribution of these programs to subscribers, did not constitute unfair competition even though plaintiff had sold similar privileges to others serving the same fringe area. The court reasoned, in part, that the plaintiff's primary commercial end was the sale of advertising and that this end was in fact promoted by the defendant's activity. In a subsequent community antenna case, *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964), the Ninth Circuit, distinguishing the facts from those in *INS* and citing *Sears and Compco* (see note 8 *supra*) as determinative of what is within the public domain, reached a similar result.

²⁴ See Rahl, *The Right to "Appropriate" Trade Values*, 23 *OHIO L.J.* 56, 57-58.

²⁵ See cases cited note 8 *supra* which deny protection.

²⁶ See *International News Serv. v. Associated Press*, 248 U.S. 215, 240 (1918); *Dior v. Milton*, 9 Misc. 2d 425, 437, 155 N.Y.S.2d 443, 455 (Sup. Ct. 1956), *aff'd per curiam*, 2 App. Div. 873, 156 N.Y.S.2d 996 (1956).

²⁷ See Rahl, *supra* note 24 at 73.

²⁸ The factors in column (3) of the Tabulation of Cases in note 15 *supra*, illustrate this point.

(4) Upon appropriation and use of "the fruits of plaintiff's labor,"²⁹ the defendant is said to be reaping where he has not sown,³⁰ or taking that which equitably belongs to the plaintiff,³¹ or being unjustly enriched.³²

(5) The result of the defendant's conduct is to frustrate or defeat the plaintiff's primary commercial ends³³ through interference or diversion of profit at the point where plaintiff's profit is to be made.³⁴

At this writing, there appear to be no reported cases in Arizona to which the tenets of *INS* have been, or might have been, applied. The general tenor of the *Restatement*³⁵ and the fact that the courts of California have taken a favorable view of the *Associated Press* doctrine,³⁶ may be of some predictive value; but beyond this it is difficult to anticipate the reception to be given these principles in the Arizona courts.

As can be readily seen, the instant case³⁷ comes within the dictates of prior case law as defined in the numbered paragraphs above.³⁸ The case would seem to represent the ultimate degree, at least in a physical sense, to which one's product might be diffused into the public domain without an associated loss or abandonment of property interests: the plaintiff has actually immersed the surrounding community in a sea of radio waves,³⁹ yet the defendant is prohibited from reaching out with his antennae and appropriating these vibrations "for the purpose of

²⁹ *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315, 321, 325 (D. Idaho 1961).

³⁰ *International News Serv. v. Associated Press*, 248 U.S. 215, 238-40 (1918).

³¹ *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532 (1932) (dictum).

³² *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315, 323 (D. Idaho 1961). See also Callmann, *He Who Reaps Where Another Has Sown: Unjust Enrichment in the Law of Unfair Competition*, 55 HARV. L. REV. 595, 597-99 (1942).

³³ *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315, 323 (D. Idaho 1961). See note 23 *supra*.

³⁴ *International News Serv. v. Associated Press*, 248 U.S. 215, 239-40 (1918).

³⁵ The introductory note to 3 RESTATEMENT OF TORTS, §§ 711-56 (1938) at page 540 stated that "the tendency of the law, both legislative and common, has been in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade."

³⁶ In addition to the instant case and *McCord v. Plotnick*, 108 Cal. App. 2d 393, 239 P.2d 32 (1951) (see tabulation note 15 *supra*), cf. *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F. Supp. 594, 605 (S.D. Cal. 1956); *Haeger Potteries v. Gilner Potteries*, 123 F. Supp. 261, 271 (S.D. Cal. 1954); *Brooks Bros. v. Brooks Clothing, Ltd.*, 60 F. Supp. 442, 448 (S.D. Cal. 1945); *Associated Press v. Emmett*, 45 F. Supp. 907, 920 (S.D. Cal. 1942); *Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 353, 411 P.2d 921, 940 (1966); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 312, 95 P.2d 491, 496 (1939); *Chaplin v. Amador*, 95 Cal. App. 358, 363, 269 P. 544, 546 (1928).

³⁷ *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35 (C.D. Cal. 1967).

³⁸ See Tabulation of Cases in note 15 *supra*.

³⁹ Compare this with the relatively limited disclosures suggested by the other cases tabulated in note 15 *supra*: baseball game exhibited to paying observers in a stadium; physics text book sold to college students and professors; credit information published in paper sent to subscribers; etc.

merchandising [his own] products,"⁴⁰ since "[t]he nature of FM multiplex transmissions negates any intention that they be received by the public."⁴¹ The holding in this case is limited to "non-public" transmissions and would not extend to commercial radio or television broadcasts, where the intent of the sender is that his transmissions reach as large an audience as possible.⁴²

The many new methods of mass communications suggest situations in which the reasoning of *KMLA*, and the *Associated Press* doctrine might in the future find application.⁴³ In view of this it seems clear that, in a competitive society with an exponentially expanding technology, man's ability to compete unfairly is limited only by his imagination and his technical perspicacity. The *Associated Press* doctrine, as a by-product of this technology, fills the need for a flexible control of those emergent business practices which, in going beyond mere competition, tend to destroy the free enterprise system that has fostered them.⁴⁴ The instant case demonstrates the flexibility of this doctrine and illustrates the growing need for such remedies in a world where change is no longer a function of social value, but where social value is a function of change.

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TORTS — NEGLIGENCE — DRUG MANUFACTURER'S DUTY TO WARN PHYSICIAN OF IDIOSYNCRATIC REACTIONS. *Sterling Drug, Inc. v. Cornish* (8th Cir. 1966).

Plaintiff was made blind by use of a drug prescribed by her physician. The drug, manufactured by defendant, was not defective and was beneficial when administered to most patients for the treatment of arthritis. Plaintiff, however, belonged to a small percentage of persons in whom the drug produces a rare and serious impairment of vision.¹

⁴⁰ *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35, 44 (C.D. Cal. 1967).

⁴¹ *Id.*, at 42. The intent factor in this case is augmented by the statute involved. Communications Act of 1935, 47 U.S.C. § 605 (1935). See note 2 *supra*.

⁴² See *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35, 44 & n.3 (C.D. Cal. 1967) (dictum).

⁴³ The misappropriation of non-public transmissions between microwave or laser relay stations and the unauthorized use of another's communication satellite provide interesting examples.

⁴⁴ In *Remick Music Corp. v. American Tobacco Co.*, 57 F. Supp. 475, 478 (S.D.N.Y. 1944), it was stated that:

[Since] trade and commerce now make use of modern scientific developments, and have become possessed of instrumentalities of almost unlimited influence, the court must insist that fair dealing and ethical conduct be observed within the market place. To accomplish this, the blades of equitable remedies must be kept sharp, keen and flexible.

¹ The side effect is a condition known as chloroquine retinopathy, a degeneration or destruction of certain cells in the retina of the eye caused by the chloroquine chemical in the drug. The condition results in blindness in that part of the retina which is destroyed and is apparently irreversible. *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 83-84 (8th Cir. 1966).

The trial court instructed the jury that if the manufacturer knew or should have known that a group of persons would suffer rare side effects, it had a duty to warn the medical profession of the existence of this idiosyncratic reaction. The jury returned a verdict for the plaintiff. On appeal, *held*, affirmed. A prescription drug manufacturer has a duty to warn physicians of rare side effects which may be experienced by some persons when the manufacturer knows or should know of this unusual susceptibility.² *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82 (8th Cir. 1966).

There are some products, particularly new and experimental drugs, which in the present state of knowledge are incapable of being made completely safe for their intended use. Yet justification exists for marketing them in spite of the medically recognizable risks. The *Restatement (Second) of Torts* indicates that while the seller should not be absolutely liable for injuries caused by such a known but apparently reasonable risk, he should be liable for negligence if he fails to give the consumer proper warning of the risk entailed in the use of the product.³

Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known . . . the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.⁴

Most of the cases dealing with idiosyncratic and allergic reactions to manufactured products involve hair dyes,⁵ dyed items such as leather goods and furs,⁶ permanent wave products,⁷ and other cosmetic prepara-

² Plaintiff used the drug for approximately four years from November, 1958, to December, 1962. The first article to describe the condition appeared in a British medical journal in October, 1959, almost a year after appellee began taking the drug. Thereafter, several other articles were written and published in various medical journals. The early articles were cautious in attributing the condition to chloroquine treatment. In 1960 defendant made revisions in its "product card" in which it included the possibility of a side effect causing retinal damage. This was distributed by defendant's "detail men" to doctors. In January of 1963 appellant sent a letter to all doctors specifically calling their attention to the retinal side effects of Aralen. *Id.* at 84.

³ RESTATEMENT (SECOND) OF TORTS § 402A comment *k* at 353-54 (1965).

⁴ RESTATEMENT (SECOND) OF TORTS § 402A comment *j* at 353 (1965).

⁵ *Pinto v. Clairol, Inc.*, 324 F.2d 608 (6th Cir. 1963); *Braun v. Roux Distrib. Co.*, 312 S.W.2d 758 (Mo. 1958); *Esborg v. Bailey Drug Co.*, 61 Wash. 2d 347, 378 P.2d 298 (1963).

⁶ *Ray v. J. C. Penney Co.*, 274 F.2d 519 (10th Cir. 1959) (leather goods); *Gerkin v. Brown & Sehler Co.*, 177 Mich. 45, 148 N.W. 48 (1913) (fur).

⁷ *Bish v. Employers Liab. Assur. Corp.*, 236 F.2d 62 (5th Cir. 1956); *Merrill v. Beaute Vues Corp.*, 235 F.2d 893 (10th Cir. 1956); *Briggs v. National Indus. Inc.*, 92 Cal. App. 2d 542, 207 P.2d 119 (1949); *Bennett v. Pilot Prods. Co.*, 120 Utah 474, 235 P.2d 525 (1951).

tions.⁸ With a few notable exceptions,⁹ consumers suffering reactions have been denied recovery upon either negligence¹⁰ or warranty¹¹ theories. The reasons given for denying recovery have included: there was no foreseeable injury to an ordinary or normal person;¹² the manufacturer had no actual or implied knowledge of the possibility of harm;¹³ there was no duty to warn an unknown few, not an identifiable class, constituting a microscopic fraction of potential users;¹⁴ the cause of injury was the user's own peculiar systemic reaction rather than the product;¹⁵ a warning would have been ineffective to prevent injury;¹⁶ and, the manufacturer must guard against probabilities and not possibilities.¹⁷

There are, however, some cases permitting an idiosyncratic user to recover damages where the manufacturer fails to warn of dangers which are or should be known to him and the plaintiff is a member of a group of persons reacting to the product.¹⁸ A number of courts denying recov-

⁸ See, e.g., *Gober v. Revlon, Inc.*, 317 F.2d 47 (4th Cir. 1963) (nail polish); *Wright v. Carter Prods., Inc.*, 244 F.2d 53 (2d Cir. 1957) (deodorant); *Howard v. Avon Prods., Inc.*, 155 Colo. 444, 395 P.2d 1007 (1964) (cosmetic); *Crotty v. Shartenberg's, Inc.*, 147 Conn. 460, 162 A.2d 513 (1960) (cream hair remover); *Bonowski v. Revlon, Inc.*, 251 Iowa 141, 100 N.W.2d 5 (1959) (sun tan lotion); *Kaempfe v. Lehn & Fink Prods. Corp.*, 21 App. Div. 2d 197, 249 N.Y.S.2d 840 (1964) (deodorant); *Spiegel v. Saks 34th Street*, 43 Misc. 2d 1065, 252 N.Y.S.2d 852 (Sup. Ct. 1964) (skin cream).

⁹ *Gober v. Revlon, Inc.*, 317 F.2d 47 (4th Cir. 1963); *Wright v. Carter Prods., Inc.*, 244 F.2d 53 (2d Cir. 1957); *Crotty v. Shartenberg's, Inc.*, 147 Conn. 460, 162 A.2d 513 (1960); *Gerkin v. Brown & Sehler Co.*, 177 Mich. 45, 143 N.W. 48 (1918); *Braun v. Roux Distrib. Co.*, 312 S.W.2d 758 (Mo. 1958); *Esborg v. Bailey Drug Co.*, 61 Wash. 2d 347, 378 P.2d 298 (1963).

¹⁰ *Bonowski v. Revlon, Inc.*, 251 Iowa 141, 100 N.W.2d 5 (1959); *Kaempfe v. Lehn & Fink Prods. Corp.*, 21 App. Div. 2d 197, 249 N.Y.S.2d 840 (1964); *Bennett v. Pilot Prods. Co.*, 120 Utah 474, 235 P.2d 525 (1951).

¹¹ *Ray v. J. C. Penney Co.*, 274 F.2d 519 (10th Cir. 1959); *Zager v. F. W. Woolworth Co.*, 30 Cal. App. 2d 324, 86 P.2d 389 (1939); *Bonowski v. Revlon, Inc.*, 251 Iowa 141, 100 N.W.2d 5 (1959).

¹² See *Ray v. J. C. Penney Co.*, 274 F.2d 519 (10th Cir. 1959); *Kaempfe v. Lehn & Fink Prods. Corp.*, 21 App. Div. 2d 197, 249 N.Y.S.2d 840 (1964); *Walstrom Optical Co. v. Miller*, 59 S.W.2d 895 (Tex. Civ. App. 1933).

¹³ See *Bish v. Employers Liab. Assur. Corp.*, 236 F.2d 62 (5th Cir. 1956); *Howard v. Avon Prods., Inc.*, 155 Colo. 444, 395 P.2d 1007 (1964); *Gould v. Slater Woolen Co.*, 147 Mass. 315, 17 N.E. 531 (1883); *Bennett v. Pilot Prods. Co.*, 120 Utah 474, 235 P.2d 525 (1951). *But see* Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability*, 18 RUTGERS L. REV. 947, 1003 (1964).

¹⁴ See *Grau v. Proctor & Gamble Co.*, 324 F.2d 309 (5th Cir. 1963); *Merrill v. Beaute Vues Corp.*, 235 F.2d 893 (10th Cir. 1956).

¹⁵ See *Zager v. F. W. Woolworth Co.*, 30 Cal. App. 2d 324, 86 P.2d 389 (1939); *Hamilton v. Harris*, 204 S.W. 450 (Tex. Civ. App. 1918); *Bennett v. Pilot Prods. Co.*, 120 Utah 474, 235 P.2d 525 (1951). *But see* Comment, *Negligence—Liability of Manufacturer or Vendor to an Allergic Consumer*, 49 MICH. L. REV. 253, 254-56 (1950).

¹⁶ *Grau v. Proctor & Gamble Co.*, 324 F.2d 309 (5th Cir. 1963); *Merrill v. Beaute Vues Corp.*, 235 F.2d 893 (10th Cir. 1956).

¹⁷ *Ray v. J. C. Penney Co.*, 274 F.2d 519 (10th Cir. 1959); *Kaempfe v. Lehn & Fink Prods. Corp.*, 21 App. Div. 2d 197, 249 N.Y.S.2d 840 (1964).

¹⁸ *Gober v. Revlon, Inc.*, 317 F.2d 47 (4th Cir. 1963); *Wright v. Carter Prods., Inc.*, 244 F.2d 53 (2d Cir. 1957); *Braun v. Roux Distrib. Co.*, 312 S.W.2d 758 (Mo. 1958); *cf.* Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability*, 18 RUTGERS L. REV. 947, 1005 (1964). Rheingold states that in negligence

ery indicate in dicta that the issue might have been determined differently if the plaintiff's injury were not considered an isolated occurrence and if the manufacturer knew or had reason to know of the danger to the hypersensitive.¹⁹ An example of the reasoning of these courts is found in a New York decision:

If the danger of such an allergy is known or should be known to the maker, and if the consequences of the idiosyncrasy are serious enough, reasonable care may well require the taking of some precaution such as warning and some instructions for making tests.²⁰

The Second Circuit, remanding a case for consideration of defendant's duty to have warned potential users of a possible allergic reaction, stated:

[We] believe that duties to warn are not, in all cases, measured by solely quantitative standards. . .²¹

[I]t would seem that a manufacturer cannot be required to alter a formula that has proven safe for use by the overwhelming majority of its users, but the standard of care owed by that manufacturer to its ultimate consumers may include a duty to warn those few persons who it knows cannot apply its product without serious injury.²²

Arizona has had no decisions dealing with this precise problem, but the Supreme Court has set a very high standard of care for food and beverage manufacturers:

[I]n cases predicated upon negligence the duty owed to the consumer by the manufacturer of foods and beverages intended for human consumption, which we have heretofore stated to be commensurate with the danger and the possible and probable result of a lack of care, is the highest duty known to the law.²³

On many occasions the court has held that in the absence of prior statutory or case law, it will follow the *Restatement*,²⁴ which, as indicated above, would allow recovery where a seller fails to give warning of danger inherent in his product.

suits the weight of the products cases and commentators agree that there will be liability, regardless of the type of reaction, if there has been failure to warn. See generally Keeton, *Products Liability—Some Observations About Allocations of Risks*, 64 MICH. L. REV. 1329 (1966).

¹⁹ See *Grau v. Procter & Gamble Co.*, 324 F.2d 309 (5th Cir. 1963); *Howard v. Avon Prods., Inc.*, 155 Colo. 444, 395 P.2d 1007 (1964); *Kaempfe v. Lehn & Fink Prods. Corp.*, 21 App. Div. 2d 197, 249 N.Y.S.2d 840 (1964).

²⁰ *Kaempfe v. Lehn & Fink Prods. Corp.*, 21 App. Div. 2d 197, 200, 249 N.Y.S.2d 840, 844 (1964).

²¹ *Wright v. Carter Prods., Inc.*, 244 F.2d 53, 56 (2d Cir. 1957).

²² *Id.* at 58.

²³ *Eisenbeiss v. Payne*, 42 Ariz. 262, 270, 25 P.2d 162, 166 (1933) (decayed mouse in bottle of soda pop).

²⁴ E.g., *Rodriguez v. Terry*, 79 Ariz. 348, 290 P.2d 248 (1955); *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953); *Ingalls v. Neidlinger*, 70 Ariz. 40, 216 P.2d 387 (1950).

In the instant case the Eighth Circuit unequivocally joined those courts which have indicated by their holdings,²⁵ or dicta,²⁶ that a plaintiff may recover for an idiosyncratic reaction to a manufactured product if the reaction was not an isolated phenomenon wholly peculiar to the plaintiff and the manufacturer knew or should have known of the possibility of such a reaction but failed to give a warning. This case, seemingly applying Kansas law under Missouri conflict of laws principles, makes important additions to the law in three areas: the sufficiency of a warning, the number of persons likely to be adversely affected which will be necessary to impose a duty to warn, and the standards applicable to manufacturers of prescription drugs as distinguished from products sold over the counter without prescription. What constitutes a sufficient warning will vary with the facts and circumstances of each case. In the instant case the defendant changed its "product card" on the drug to include the possibility of a side effect involving retinal damage and distributed these product cards to physicians. However, the court held that a jury could have found that physicians do not regularly refer to these cards and quite possibly would not be aware of changes made in them.²⁷ Although appellant argued that the duty to warn did not extend to those few individuals who are injured due to their own unusual hypersensitivity to a product, the court found no error in the instruction to the jury that if appellant knew or should have known that a "group of persons" would suffer rare side effects appellant had a duty to warn the medical profession of the susceptibility of such a hypersensitive or idiosyncratic group.²⁸ The court thus did not follow the requirement postulated in some prior cases that the plaintiff must belong to a "substantial" or "appreciable" group of persons so affected.²⁹

In addition, the court distinguished the warning required for drugs sold by prescription from that required for drugs, cosmetics and other consumer items sold over the counter. The court reasoned that there

²⁵ *Gober v. Revlon, Inc.*, 317 F.2d 47 (4th Cir. 1963); *Wright v. Carter Prods., Inc.*, 244 F.2d 53 (2d Cir. 1957).

²⁶ *Love v. Wolf*, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (1964); *Howard v. Avon Prods., Inc.*, 155 Colo. 444, 395 P.2d 1007 (1964); *Kaempfe v. Lehn & Fink Prods. Corp.*, 21 App. Div. 2d 197, 249 N.Y.S.2d 840 (1964).

²⁷ *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 84 (8th Cir. 1966); *Yarrow v. Sterling Drug, Inc.*, 263 F. Supp. 159 (D.S.D. 1967) (cites and follows instant case).

²⁸ *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 84-85 (8th Cir. 1966). Evidence at the trial established that chloroquine retinopathy had been observed in a very small percentage of those to whom the drug Aralen (chloroquine phosphate) had been administered in the normally prescribed quantities.

²⁹ There is no accepted formula for arriving at a figure which constitutes a "substantial," "appreciable," or "significant," group of persons. See *Gober v. Revlon, Inc.*, 317 F.2d 47 (4th Cir. 1963) (some persons); *Wright v. Carter Prods., Inc.*, 244 F.2d 53 (2d Cir. 1957) (minuscule percentage); *Magee v. Wyeth Laboratories, Inc.*, 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (1963) (substantial portion of possible users); *Howard v. Avon Prods., Inc.*, 155 Colo. 444, 395 P.2d 1007 (1964) (members of identifiable class); *Zirpola v. Adams Hat Stores*, 122 N.J.L. 21, 4 A.2d 73 (1939) (4 or 5 per cent of possible users); *Kaempfe v. Lehn & Fink Prods. Corp.*, 21 App. Div. 2d 197, 249 N.Y.S.2d 840 (1964) (substantial number).

is a greater possibility of protecting a prescription drug purchaser than a user of a non-prescription item.

Moreover, in this case we are dealing with a prescription drug rather than a normal consumer item. In such a case the purchaser's doctor is a learned intermediary between the purchaser and the manufacturer. If the doctor is properly warned of the possibility of a side effect in some patients, and is advised of the symptoms normally accompanying the side effect, there is an excellent chance that injury to the patient can be avoided. This is particularly true if the injury takes place slowly, as is the case with the injury in question here.³⁰

The proliferation of prescription drugs and their users is bound to create more situations similar to that in the present case. The jury should be permitted to find for the injured plaintiff in these instances, since foreseeability is established when the testing or use of the product indicates (or should indicate) that injuries to some consumers may occur.³¹ Proximate causation is present despite the plaintiff's unusual reaction, since this is the reaction that should have been anticipated.

A jury also should be permitted to find that a pro forma warning inserted by a drug manufacturer in printed material distributed to physicians is not a sufficient warning of the possibility of an idiosyncratic drug reaction. Drug manufacturers are aware that physicians are often unable to read all the drug literature sent them by manufacturers. The patient is unable to protect himself; if his physician is not apprised of possible adverse reactions to drugs he is greatly handicapped in affording the protection needed.

Drug manufacturing is a competitive business run for profit. Drug companies, although exempted from strict or absolute liability in a case such as this, should be held to a strict duty to warn and a high standard of care in the issuance of each warning. This is in harmony with the trend towards greater protection for the consumer. Arizona, not restricted by prior case law in this field, should not erect a legal barrier to recovery in cases of idiosyncratic reactions to prescription drugs.

Eleanor Daru Schorr

CONSTITUTIONAL LAW — FAIR TRIAL AND FREE PRESS — FREEDOM OF THE PRESS TO REPORT OPEN COURT PROCEEDINGS. *Phoenix Newspapers, Inc. v. Superior Court* (Ariz. 1966).

Donald Chambers, charged with first degree murder, filed an application for writ of habeas corpus. Present at the hearing was a reporter

³⁰ *Sterling Drug, Inc., v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1966). *But cf. Keeton, Products Liability — Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV 855, 868 (1963).

³¹ 3 L. FRUMER AND M. FRIEDMAN, PRODUCTS LIABILITY §§ 28.10, 28.11, 28.12, at 22-23 (1966).

for Phoenix Newspapers, Inc. Upon defense counsel's request, the trial judge entered an order enjoining all persons from publishing what had transpired during the course of the hearing. Nevertheless, the newspaper published an article and, thereafter, was ordered by the trial judge to show cause why it should not be held in contempt. The newspaper obtained a peremptory writ prohibiting the contempt proceedings. In the subsequent written opinion, *held*, writ made permanent.¹ An order foreclosing the press from freely printing what occurs in open court violates the Arizona Constitution.² *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966).

Trial court judges are faced with the problem of reconciling an accused's constitutional right to a fair trial with the constitutional rights of free speech and press. The United States Supreme Court in *Sheppard v. Maxwell*³ found that Sam Sheppard had been denied due process of law because of prejudicial publicity. The Court held that the trial judge had failed in his duty to protect the accused from prejudicial publicity and in his duty to control disruptive influences in the courtroom.⁴ What measures a trial judge can take in meeting these duties are limited, however, by constitutional guarantees of free speech and press. The United States Supreme Court has yet to rule on a fact situation similar to the instant case.⁵ However, the Court has suggested that there is a presumption against the validity of any system of prior restraints⁶ and also has limited the power to punish out of court publications by contempt.⁷

What constitutes a "prior restraint" and to what extent "prior restraints" are constitutionally permissible is not clear.⁸ Restrictions which the Court has considered "prior restraints" are injunctions,⁹ permit

¹ *But cf.* *Walker v. Birmingham*, 87 S. Ct. 1824 (1967). The Supreme Court held that even though constitutional questions were raised by an injunction prohibiting a parade, convictions for contempt were not unconstitutional or void since petitioners had deliberately violated the injunction instead of testing its validity in court. While the *Walker* decision is not within the scope of this casenote, it does cast doubt on the ruling of the Arizona Supreme Court that the superior court was without "jurisdiction" to enforce a void order, where the court's act was "still incomplete." 101 Ariz. 257, 258, 418 P.2d 594, 595 (1966).

² ARIZ. CONST. art. 2, § 6. "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

³ 384 U.S. 833 (1966).

⁴ *Id.* at 363.

⁵ See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS (Tent. Draft, September, 1966) at 70 [hereinafter cited as ABA PROJECT].

⁶ *Freedman v. Maryland*, 380 U.S. 51, 57 (1965) (dictum).

⁷ *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

⁸ See Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533 (1951).

⁹ *Near v. Minnesota*, 283 U.S. 697 (1931).

requirements,¹⁰ license taxes,¹¹ and registration requirements.¹² In *Near v. Minnesota*,¹³ the Court struck down a state statute which gave courts the power to enjoin malicious publications, reasoning that the constitutional protection of free speech was meant principally, although not exclusively, to prevent previous restraints upon publication.¹⁴ The Court distinguished statutes which give a power of injunction from those which regulate speech by post-utterance punishment, such as libel laws.¹⁵ Whether this is a valid distinction for purposes of determining constitutionality in free speech cases has been seriously questioned by Professor Paul A. Freund,¹⁶ and by the Court itself.¹⁷ Nevertheless, the Court continues to adhere to the distinction.¹⁸

In *Near*, the Court did recognize that the right to be free of prior restraint was not absolute,¹⁹ but exceptions have been made in only a few instances.²⁰ In *Times Film Corp. v. Chicago*,²¹ the Court refused to hold unconstitutional, on the ground of absolute privilege from prior restraint, a city ordinance requiring submission of all motion pictures for examination by city officials prior to public exhibition. Justice Clark reasoned that the valid governmental interest in preventing obscene motion pictures outweighed the infringement on free speech, and his language could be interpreted either as requiring a "clear and present danger" to the interest involved,²² or as applying a "balancing test" similar to the one used by Justice Frankfurter in his concurring opinion in *Dennis v. United States*.²³ When dealing with cases concerning contempt convictions for out-of-court utterances which endanger the admin-

¹⁰ *Saia v. New York*, 334 U.S. 558 (1948); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

¹¹ *Follet v. Town of McCormick*, 321 U.S. 578 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

¹² *Thomas v. Collins*, 323 U.S. 516 (1945) (state statute requiring registration of labor organizers held unconstitutional when invoked to enjoin a speech in a public hall).

¹³ 283 U.S. 697 (1931).

¹⁴ *Id.* at 716.

¹⁵ *Id.* at 715; *accord*, *Kunz v. New York*, 340 U.S. 290 (1951); *see* *Garrison v. Louisiana*, 379 U.S. 64 (1964) (while the particular criminal libel statute involved was held unconstitutional, the Court did not invalidate all criminal libel statutes).

¹⁶ Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533 (1951); *accord*, Comment, *Prior Restraint—A Test of Invalidity in Free Speech Cases?*, 49 COLUM. L. REV. 1001, 1001 (1949).

¹⁷ *Kingsley v. Brown*, 354 U.S. 436 (1957) (dictum).

¹⁸ *Freedman v. Maryland*, 380 U.S. 51, 57 (1965) (dictum).

¹⁹ 283 U.S. 697 (1931).

²⁰ These exceptions have included: utterances creating a hindrance to the government's war effort, *see* *Shenck v. United States*, 249 U.S. 47, 52 (1919) (dictum); obscene publications, *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961); incitements to acts of violence, *see* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (dictum); overthrow by force of orderly government, *see* *Dennis v. United States*, 341 U.S. 494, 501 (1951) (dictum); and an illegal boycott, effectuated partially through spoken words, *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911).

²¹ 365 U.S. 43 (1961).

²² *See* *Shenck v. United States*, 249 U.S. 47 (1919).

²³ 341 U.S. 494, 517 (1951).

istration of justice, the Court still uses the "clear and present danger" test²⁴ formulated in *Bridges v. California*.²⁵ These cases provide some basis for applying the stricter "clear and present danger" test to determine whether a trial judge's order enjoining prejudicial publicity unconstitutionally restricts free speech.²⁶

State appellate courts considering cases similar to the instant case consistently have held judicial censorship of the press prior to publication to violate their state constitutions.²⁷ For example, in *Ex Parte McCormick*,²⁸ the Texas Court of Criminal Appeals, interpreting language similar to that of Arizona's constitution, held that a possibility of prejudice in a subsequent companion case did not give the trial judge power to prohibit the publication of evidence in the first case.²⁹

There have been few Arizona cases dealing with free speech problems.³⁰ In *Planned Parenthood Committee v. Maricopa County*,³¹ the court held that a statute which provides post-conduct punishment for advertising specific contraceptive devices or preparations did not impose a prior restraint in the form of a censorship or licensing require-

²⁴ *Wood v. Georgia*, 370 U.S. 375 (1962).

²⁵ 314 U.S. 252 (1941). Cases since *Bridges* have included: *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946).

²⁶ *Id.* at 262.

Freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. (emphasis added)

The last time the Supreme Court affirmed a conviction of contempt for out-of-court utterances was in *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918). The court held that comment on a pending case in a federal court was punishable by contempt if it had a "reasonable tendency" to obstruct the administration of justice. This test was discarded in *Nye v. United States*, 313 U.S. 33, 52 (1941).

²⁷ *Baltimore Radio Show v. State*, 193 Md. 300, 67 A.2d 497 (1949), cert. denied, 338 U.S. 912 (1950); *Wrather-Alvarez Broadcasting, Inc. v. Hewicker*, 147 Cal. App. 2d 509, 305 P.2d 236 (1957); *Daily v. Superior Court*, 112 Cal. 94, 44 P. 458 (1896); *Ex Parte Foster*, 44 Tex. Crim. 423, 71 S.W. 593 (1903).

²⁸ 129 Tex. Crim. 407, 88 S.W.2d 104 (1935). Since there was a danger of prejudice stemming from pre-trial publicity present in this case, the decision may be questionable in light of *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

²⁹ TEX. CONST. art. 1, § 8: "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of the privilege . . ."

³⁰ The United States District Court held that an Arizona statute imposing a privilege tax on publications was not an unconstitutional infringement of free speech, *Arizona Publishing Co. v. O'Neil*, 22 F. Supp. 117 (1938), aff'd, 304 U.S. 543 (1938); accord, *Giragi v. Moore*, 49 Ariz. 74, 64 P.2d 819 (1937), appeal dismissed, 301 U.S. 670 (1937). The Arizona Supreme Court has held that a statute which requires a loyalty oath of public officers and employees and prohibits membership in an organization having for its purpose the overthrow of government is not void for vagueness, *Elfbrandt v. Russell*, 97 Ariz. 140, 397 P.2d 944 (1965), rev'd, 384 U.S. 11 (1966); peaceful picketing for a lawful purpose cannot be enjoined without violating constitutional rights of free speech, *Baldwin v. Arizona Flame Restaurant*, 82 Ariz. 385, 313 P.2d 759 (1957); a court of equity cannot restrain members of a labor union from publishing on the subject of a labor dispute without violating Arizona Constitution art. 2, § 6, *Bisbee v. Cooks and Waiters' Local No. 380*, 19 Ariz. 379, 171 P. 121 (1918).

³¹ 92 Ariz. 231, 375 P.2d 719 (1962).

ment, and that the public interest involved, when weighed against the value of the prohibited speech, justified the limited restriction imposed.³² In *Van Dyke v. Superior Court*,³³ the Arizona court held that one who published a newspaper article tending to obstruct the administration of justice in a pending case may be punished by contempt. *Van Dyke's* authority is limited, however, by *Craig v. Harney*,³⁴ where the United States Supreme Court held contempt convictions for out of court utterances concerning state civil proceedings invalid because there was no showing of "clear and present danger" to the administration of justice. Further, *Van Dyke* is not directly in point with the instant case since there was no restraining order prior to publication.

In the instant case, the Arizona Supreme Court did not reach arguments based on the first and fourteenth amendments to the United States Constitution. The court found the Arizona Constitution controlling:

The words of the Arizona Constitution are too plain for equivocation. The right of every person to freely speak, write and publish may not be limited but such a person may be held accountable for an abuse of that right. There can be no censor appointed to whom the press must apply for prior permission to publish³⁵

The court also found that the trial judge's order violated the right of the public to be informed.

Courts are public institutions. The manner in which justice is administered does not have any private aspects. To permit a hearing held in open court to be kept secret, the order of secrecy being based entirely on defendant's request, would take from the public its right to be informed of a proceeding to which it is an interested party.³⁶

The court's absolute language seems to preclude the use of injunctions to suppress prejudicial publicity regardless of the circumstances. Vice Chief Justice Bernstein, in a special concurrence, took a different approach, recognizing, under the first amendment to the United States Constitution, the theoretical validity of prior restraints where prejudicial publicity presents a "clear and present danger" to the administration of justice.³⁷ However, since he felt there were no circumstances present which could bring the case within the "clear and present danger" exception, he agreed with the majority's conclusion.³⁸ The Vice Chief Justice

³² *But cf.* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³³ 24 Ariz. 508, 211 P. 576 (1922).

³⁴ 331 U.S. 367 (1947).

³⁵ *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 259, 418 P.2d 594, 596 (1966).

³⁶ *Id.* at 259, 418 P.2d at 596.

³⁷ *Id.* at 263, 418 P.2d at 600.

³⁸ *Id.* at 264, 418 P.2d at 601.

went beyond the majority, indicating his approval of proposed restrictions on the release of information by lawyers and law enforcement officers, notwithstanding their collateral effect of reducing the amount of information made available to newspapers.³⁹

Since there was little possibility of prejudicial publicity, the decision in this case was undoubtedly correct. The decision warns trial judges of the problems involved in using injunctions against the news media, and rightly so. Injunctive relief is commonly used in England,⁴⁰ but could be adopted in this country only by ignoring our basically different free press tradition.⁴¹ It is unfortunate, however, that the majority did not take this opportunity to delineate acceptable measures which can be taken to protect an accused.

Among possible solutions to the fair trial—free press problem is reliance on the right of appeal afforded allegedly prejudiced defendants. However, as the United States Supreme Court noted in *Sheppard*, “reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.”⁴² Procedural remedies such as curative instructions, voir dire, and change of venue are deemed by some authorities to be sufficient.⁴³ However, their effectiveness has been questioned by others.⁴⁴ Self-imposed guidelines have been suggested by the news media⁴⁵ and, if adhered to, would substantially alleviate the problem. Statutory restriction of the news media, preventing the dissemination of information prejudicial to an accused’s right to a fair trial is also a possible solution. However, assuming problems of vagueness could be solved, such a statute would still have to overcome general free speech objections⁴⁶ based on the impairment of the

³⁹ *Id.* at 260, 418 P.2d at 597.

⁴⁰ Gillmor, *Free Press and Fair Trial in English Law*, 22 WASH. & LEE L. REV. 17, 20 (1965):

Once a person is arrested, newspapers, on pain of a contempt citation, carefully refrain from publishing pretrial comment.

For a discussion of the English system see generally Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885 (1935).

⁴¹ *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 260-64, 418 P.2d 594, 597-601 (1966) (special concurrence). In *Bridges v. California*, 314 U.S. 252, 263-64 (1941), Mr. Justice Black wrote:

[T]he argument runs, the power of judges to punish by contempt out-of-court publication tending to obstruct the orderly and fair administration of justice in a pending case was deeply rooted in English common law at the time the Constitution was adopted . . . However, one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.

⁴² 384 U.S. 333, 363 (1966) (dictum).

⁴³ *United States v. Leviton*, 193 F.2d 848, 857 (1951) (dictum); *Ex Parte McCormick*, 129 Tex. Crim. 407, 408, 88 S.W.2d 104, 105 (1935) (dictum); see *State v. Hilliard*, 89 Ariz. 129, 359 P.2d 66 (1961).

⁴⁴ ABA PROJECT at 75; Comment, *Due Process for Whom, Newspaper or Defendant*, 4 STAN. L. REV. 101, 102-05 (1951).

⁴⁵ REPORT OF THE BAR — PRESS RELATIONS, CLEVELAND BAR ASSOCIATION (1966).

⁴⁶ *Opinion of the Justices*, 349 Mass. 786, 208 N.E.2d 240 (1965). *But see Bridges v. California*, 314 U.S. 252, 260 (1941) (dictum); ABA PROJECT at 70.

newspapers' right to speak and the public's right to know.⁴⁷ The best solution to the dilemma facing trial court judges is to restrict the release of information by lawyers and law enforcement officers⁴⁸ as proposed by bar associations,⁴⁹ suggested by the Supreme Court in the *Sheppard* case,⁵⁰ praised by Vice Chief Justice Bernstein in the instant case,⁵¹ and imposed by Superior Court Judge Royston in the recent Schmid murder trial.⁵² Objections based on the public's right to know have been refuted by a group of eminent jurists, headed by Judge Medina, who conclude:

[T]here is . . . no overriding policy consideration that favors the disclosure of facts at a time that will hamper investigation or make it more difficult either to acquit the innocent or to convict the guilty. It must be remembered that "public trial" is in essence an institutional safeguard designed to insure the achievement of the system's ultimate objective: a fair trial.⁵³

If appellate courts recognize that the right of the public to know cannot be absolute, and accept these restrictions,⁵⁴ the possibility of prejudice resulting from pre-trial publicity would be substantially reduced, and hopefully eliminated*

Fredrick Downey Palmer

⁴⁷ For a discussion of benefits derived from the reporting of criminal matters see ABA PROJECT at 47-51.

⁴⁸ These restrictions could be statutory, in the form of court rules as proposed by the ABA PROJECT, or be enforced on a case-by-case basis. (The case-by-case approach would be the least effective since there would be no restriction prior to the issuance of an order.)

⁴⁹ THE SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE, OF THE BAR, OF THE CITY OF NEW YORK, FINAL REPORT WITH RECOMMENDATIONS, FREEDOM OF THE PRESS AND FAIR TRIAL (1967) at 14-35 [hereinafter cited as MEDINA REPORT]; ABA PROJECT at 2-14.

⁵⁰ 384 U.S. 333, 363 (1966) (dictum).

⁵¹ *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 260, 418 P.2d 594, 597 (1966) (special concurrence).

⁵² *State v. Schmid*, No. A 15054, Pima County Superior Court (1966) (Prosecution's Opposition To Motion For Continuance at 9, Index 8).

⁵³ MEDINA REPORT at 12; see ABA PROJECT at 78.

⁵⁴ The same argument used in support of the proposed restrictions could be applied to support a statute aimed at the news media. However, a statute aimed at the news media would set a dangerous precedent, while on the other hand, courts have traditionally possessed the power to control officers of the court. In light of the *Sheppard* case it can be said a trial judge violates due process if he does not control court officers in criminal cases. It seems likely, therefore, that appellate courts would be more receptive to the proposed solution than to direct statutory restriction of the news media. MEDINA REPORT at 50; ABA PROJECT at 68-79.

* Subsequent to the completion of this note, but prior to its publication, the Arizona Supreme Court revised Rule 27 of the Rules of Criminal Procedure dealing with preliminary hearings, by deleting from the rule the following clause:

The magistrate shall also, upon the request of the defendant, exclude from the examination every person except attorneys in the case, and officers of the court.

The text of the new rule now reads:

During the examination of any witness, or when the defendant is making a statement or testifying, the magistrate may and on the request of the defendant shall exclude all other witnesses. He may also cause the witnesses to be kept separate and prevented from communicating with each other

CONSTITUTIONAL LAW — WATER LAW — UNDERGROUND WATER AS SUBJECT OF COMMERCE — PROHIBITION OF REMOVAL OF UNDERGROUND WATER FOR INTERSTATE TRANSPORTATION VIOLATES COMMERCE CLAUSE. *City of Altus v. Carr* (W.D. Tex. 1966).

Plaintiff, an Oklahoma municipality, leased water-producing land in Texas with the intent of mining¹ and transporting water to Oklahoma for municipal use. The Texas legislature subsequently enacted a statute providing that underground water could not be withdrawn from a well in Texas for the purpose of transportation out of the state, except by legislative authorization.² Plaintiff sought declaratory judgment that the statute was unconstitutional, and a permanent injunction restraining its enforcement. Upon trial before a three-judge district court, *held*, the statute had no real relation to water conservation and was in purpose and result an unreasonable burden upon, and interference with, interstate commerce, and thus violative of the principles inherent in the Commerce Clause of the Federal Constitution. *City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd mem.*, 385 U.S. 35 (1966).

The Commerce Clause of the Federal Constitution has been interpreted to limit state regulations affecting interstate commerce in many areas, including interstate train traffic,³ milk distribution,⁴ highway safety devices,⁵ and mail order companies.⁶ It is well settled that a state's

until all are examined. *Order Amending Rule 27 of The Rules of Criminal Procedure*, Jan. 28, 1968.

In the noted case the Court held that an order foreclosing the press from freely printing what occurs in open court violates the Arizona Constitution. If the revision of Rule 27 means that the press can never be excluded from preliminary hearings then facts developed during a hearing could be printed by the press with impunity. This would render ineffective any restrictions placed on judicial officers concerning the pre-trial release of information, as proposed in this note.

To resolve this problem the Court will have to answer certain questions. First, was the basis of this ruling constitutional or was it simply an exercise of the Court's discretion? If the latter, do Superior Court Judges and magistrates still have discretionary power to exclude the press from preliminary hearings? If not, then in effect the public's "right to know" of the proceedings in preliminary hearings becomes absolute. How sound is this historically? Is the right to a public trial a right of the public or is it primarily that of the defendant? Finally, what effect does the *Sheppard* case and *Estes v. Texas*, 381 U.S. 532 (1965), have on the public's right to know?

If this ruling were held to preclude discretionary exclusion by a magistrate, how far would the rationale extend? What of grand jury proceedings, motions to suppress evidence, juvenile proceedings, or even bargaining sessions between defense counsel and the prosecuting attorney? The problems presented by this ruling will be explored in a later issue.

¹ Mining denotes a rate of withdrawal which exceeds the rate of recharge. Clark & Martz, *Classes of Water and Character of Water Rights and Uses*, in 1 WATERS AND WATER RIGHTS § 52.2 (C) (R. Clark ed. 1967).

² TEX. REV. CIV. STAT. ANN. art. 7477b (Supp. 1965).

³ *Southern Pac. Co. v. Ariz.*, 325 U.S. 761 (1945).

⁴ *H. P. Hood & Sons v. Dumond*, 336 U.S. 525 (1949).

⁵ *Bibb v. Navajo Freight Lines Inc.*, 359 U.S. 520 (1959).

⁶ *National Bellas Hess, Inc. v. Illinois Dept. of Revenue*, 386 U.S. 386 (1967) (The court also found that the state had insufficient contacts with the transaction to satisfy due process requirements.).

power to forbid or restrict the exportation of its natural resources is similarly limited.⁷ The state, acting within its police power to protect the public health and welfare, may control its natural resources by enacting local conservation laws,⁸ even where such laws operate incidentally to burden interstate commerce.⁹ However, where an examination of the competing local and national demands involved indicates that the local interest is outweighed by the increased burden on interstate commerce, the statute will be struck down as violative of the Commerce Clause.¹⁰ Another method of control over natural resources exists where the state has a proprietary interest in them.¹¹ The state as proprietor may place conditions upon the acquisition of the resource by the public, including prohibition of the exportation of the resource.¹²

In some jurisdictions underground water is the subject of private rights,¹³ but its use is controlled by the state through the exercise of the police power.¹⁴ In other jurisdictions, underground water is owned by the public,¹⁵ and the state as sovereign or proprietor places limits upon the

⁷ The decisions are based on the ground that the attempted state restriction is an unreasonable interference with interstate commerce, thus violating the Commerce Clause. The most frequently cited cases are *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) and *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). See generally Annot., 32 A.L.R. 331, 332 (1924).

⁸ *Cities Services Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950) (natural gas); *Toomer v. Witsell*, 334 U.S. 385 (1948) (shrimp); *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) (waters of a river); *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 P.2d 972 (1935) (surface and underground water); *State v. Dexter*, 32 Wash. 2d 551, 202 P.2d 906 (1949) (forests).

⁹ See, e.g., *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908).

¹⁰ *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 770-71 (1945). See *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346 (1939). For a good discussion of the doctrine, history, and theories inherent in the determination of whether a state statute violates the Commerce Clause, see generally Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940); Dowling, *Interstate Commerce and State Power Revisited*, 47 COLUM. L. REV. 547 (1947).

¹¹ E.g., *Rupert v. United States*, 104 Ct. Cust. App. 255, 181 F. 87 (1910) (quail); *Organ v. State*, 56 Ark. 267, 19 S.W. 840 (1892) (fish). See generally Hardman, *The Right of a State to Restrain the Exportation of its Natural Resources*, 26 W. VA. L.Q. 1 (1919); 35 L.R.A. (n.s.) 1193, 1194 (1912) (where a state owns natural resources its powers of control may be predicated upon its proprietorship of such resources and not upon its police powers over privately owned property).

¹² See *Geer v. Connecticut*, 161 U.S. 519 (1896) (state through its proprietorship in game birds could forbid their exportation); *Santa Cruz Oil Corp. v. Milnor*, 55 Cal. App. 2d 56, 130 P.2d 256 (1942) (state as proprietor of fish could place a condition on their taking, thus forbidding export); *McCarter v. Hudson County Water Co.*, 70 N.J. Eq. 695, 65 A. 489, 491-92 (1906), *aff'd on other grounds*, 209 U.S. 349 (1908) (state as trustee of a river could forbid exportation of its waters).

¹³ These states follow the doctrine that the overlying land owner has property rights in underground water. See, e.g., *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953); *Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955); *Houston & T.C. Ry. v. East*, 98 Tex. 146, 81 S.W. 279 (1904). See generally Clark & Martz, *Classes of Water and Character of Water Rights and Uses*, in 1 *WATERS AND WATER RIGHTS* § 52.2 (B) (R. Clark ed. 1967).

¹⁴ E.g., *Southwest Eng'r Co. v. Ernst*, 79 Ariz. 403, 291 P.2d 764 (1955). See generally Clark & Martz, *Classes of Water and Character of Water Rights and Uses*, in 1 *WATERS AND WATER RIGHTS* § 53.5 (E) (R. Clark ed. 1967).

¹⁵ Many states have a statutory dedication of all waters to the public. E.g., KAN. GEN. STAT. ANN. § 82a-702 (1963); NEV. REV. STAT. § 534.020 (1961); ORE. REV. STAT. § 537.110 (1965); UTAH CODE ANN. § 73-1-1 (1953). See generally Stone,

rights that a private citizen may acquire in underground water,¹⁶ including prohibition of interstate transportation.¹⁷ The United States Supreme Court, considering state regulation of the shrimp fishing industry,¹⁸ and Professor Trelease, an authority in water law,¹⁹ have concluded that control based upon state proprietorship is simply a legal fiction not distinguishable in result from the police power.

Prior to the instant case, the decisions dealing with the transportation of underground water²⁰ have not raised Commerce Clause issues. However, the Commerce Clause frequently has been invoked to hold unconstitutional statutes restricting interstate transportation of natural gas.²¹

In Arizona, *surface* waters are within the public domain,²² and may be exported only with administrative approval.²³ In contrast, *underground* water is governed by private rights subject to a limit of reasonable use.²⁴ Water conservation statutes regulate the withdrawal of underground water,²⁵ but no statute forbids its interstate transportation. A landowner may transport underground water developed on his premises to other premises providing no existing rights are injured.²⁶

Public Rights In Water Uses And Private Rights In Land Adjacent to Water, in 1 *WATERS AND WATER RIGHTS* § 39.3 (R. Clark ed. 1967) (public use of water now a part of the constitution or statutes of every western state — list by states); Hutchins, *Protection in Means of Diversion of Ground-Water Supplies*, 29 *CALIF. L. REV.* 1 (1940); Trelease, *Government Ownership and Trusteeship of Water*, 45 *CALIF. L. REV.* 638 (1957).

¹⁶ See *Williams v. Wichita*, 190 Kan. 317, 374 P.2d 578 (1962); *Knight v. Grimes*, 80 S.D. 517, 127 N.W.2d 708 (1964). But see *Hardman, The Right of a State to Restrain the Exportation of Its Natural Resources*, 26 *W. VA. L.Q.* 1, 11-12 (1919).

¹⁷ E.g., *COLO. REV. STAT. ANN.* § 148-1-1 (1963); *NEV. REV. STAT.* § 533.520 (1961); *ORE. REV. STAT.* § 537.810 (1965). See generally *W. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST* 403 (1942).

¹⁸ *Toomer v. Witsell*, 334 U.S. 385, 402 (1948) (dictum).

¹⁹ Trelease, *Government Ownership and Trusteeship of Water*, 45 *CALIF. L. REV.* 638 (1957). See also 1 *G. WILLIAMS & C. MEYERS, OIL AND GAS LAW* § 204.3 (1964).

²⁰ E.g., *Fourzan v. Curtis*, 43 *Ariz.* 140, 29 P.2d 722 (1934) (owner may convey underground water off premises provided no rights of other users are thereby injured); *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 *Cal.* 2d 489, 45 P.2d 972 (1935) (owner has right to convey water to distant lands for beneficial use if prior rights are not harmed); *Canada v. City of Shawnee*, 179 *Okla.* 53, 64 P.2d 694 (1936) (owner may not destroy neighbor's water supply by extracting water for distant sale); *Corpus Christi v. City of Pleasanton*, 154 *Tex.* 289, 276 S.W.2d 798 (1955) (owner may use artesian waters off premises). See generally *Annot.*, 55 *A.L.R.* 1385, 1404 (1928).

²¹ E.g., *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (statute required preference to local consumers in sale of gas); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (statute gave exclusive right of eminent domain and use of high-ways to domestic corporations engaged in the intrastate transportation of natural gas); *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 155 *Ind.* 545, 58 *N.E.* 706 (1900) (statute prohibited interstate transportation of natural gas); *State ex rel. Corwin v. Indiana & Ohio Oil Gas & Min. Co.*, 120 *Ind.* 575, 22 *N.E.* 778 (1889) (statute prohibited interstate transportation of natural gas). See generally 1 *A. W. SUMMERS, THE LAW OF OIL AND GAS* § 106 (1954).

²² *ARIZ. REV. STAT. ANN.* § 45-101 (1956).

²³ *ARIZ. REV. STAT. ANN.* § 45-153B (1956).

²⁴ *State ex rel. Morrison v. Anway*, 87 *Ariz.* 206, 349 P.2d 774 (1960); *Bristor v. Cheatham*, 75 *Ariz.* 227, 255 P.2d 173 (1953).

²⁵ *ARIZ. REV. STAT. ANN.* §§ 45-301 to 45-324 (1956).

²⁶ *Fourzan v. Curtis*, 43 *Ariz.* 140, 29 P.2d 722 (1934).

The court in *Altus* nowhere drew comparisons between gas and water, but by relying on natural gas cases,²⁷ it presumably adopted the theory that water is analogous to natural gas,²⁸ and is thus subject to the same Commerce Clause considerations applied to natural gas. No attention was directed to the physical and economic factors which may distinguish water as a special commodity.²⁹ The court apparently thought³⁰ that underground water should be included in the warning expressed in *West v. Kansas Natural Gas Co.*:

If the states have such power [to prohibit interstate shipment of natural gas], a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals.³¹

Defendant attempted to distinguish the natural gas cases, in each of which the gas was reduced to possession,³² from the instant case where the water was uncaptured,³³ reasoning that uncaptured underground water could not be the subject of absolute ownership and thus not a subject of commerce to which the Commerce Clause could apply.³⁴ The court, however, reasoned that:

Whether a statute by its phraseology prohibits the interstate transportation of an article of commerce after it has become the personal property of someone . . . or prohibits the withdrawal of such substance where the intent is to transport such in interstate commerce, the result upon interstate commerce is the same.³⁵

²⁷ The court relied upon *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), and *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

²⁸ See *Sycamore Coal Co. v. Stanley*, 292 Ky. 168, 166 S.W.2d 293 (1942); *McCarter v. Hudson County Water Co.*, 70 N.J. Eq. 695, 65 A. 489, 491-92 (1906), *aff'd on other grounds*, 209 U.S. 349 (1908). But see *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 155 Ind. 461, 57 N.E. 912 (1900). See generally 1 W. SUMMERS, *THE LAW OF OIL AND GAS* § 62 (1954); 1 G. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* §§ 203-204.3 (1964).

Among the similarities between natural gas and underground water are the following: (1) both are contained within porous, bounded, underground, rock formations, (2) both are subject to extraction by drilling, (3) both may be transported in pipes, (4) both are subjects of capture by overlying landowners, and (5) both are frequently subject to state conservation statutes.

²⁹ See generally Clark, *Plan and Scope of the Work*, in 1 WATERS AND WATER RIGHTS § 2.5 (R. Clark ed. 1967).

³⁰ The court's reasoning may be drawn from authority it cites. For example, *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923) (cited in *Altus*, 255 F. Supp. at 837, 839), expressed the concern that, "[W]hat may be done with one natural product may be done with another."

³¹ 221 U.S. 229, 255 (1911); cf. *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 538 (1949).

³² E.g., *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

³³ *City of Altus v. Carr*, 255 F. Supp. 828, 838 (W.D. Tex. 1966).

³⁴ Cf. *Turner v. Maryland*, 107 U.S. 38 (1882).

³⁵ 255 F. Supp. at 840.

The court rejected the contention that the Texas statute³⁶ was an allowable exercise of the police power, because:

[The statute] does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of her sister states In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the state, no matter how distant³⁷

Altus did not raise the question of what criteria must be met by a water conservation statute if it is to be recognized as a legitimate exercise of the police power for the public welfare. However, the inference may be drawn from the decision that conservation statutes are valid exercises of the police power only if they operate to restrict the depletion of the water supply within hydrological regions³⁸ rather than simply to contain water within state boundaries.³⁹

The Supreme Court, in affirming *Altus* in a memorandum decision without opinion,⁴⁰ left in doubt whether *Altus* has overruled *Hudson County Water Co. v. McCarter*.⁴¹ In *Hudson*, the Supreme Court, speaking through Justice Holmes, rejected an argument that the Commerce Clause forbade a statute restricting exportation of surface waters and held that such a restriction was a valid exercise of New Jersey's police power.⁴² *Altus* might be distinguished on the basis that it dealt with private rights in underground water, while *Hudson* dealt with public

³⁶ TEX. REV. CIV. STAT. ANN. art. 7477b (Supp. 1965). N.M. STAT. ANN. § 75-11-20 (1953) is substantially the same as the Texas statute held unconstitutional in the instant case.

³⁷ 255 F. Supp. at 839-40.

³⁸ The rationale for limited area conservation is that conservation should begin at the source of supply. Measures directed at a single water basin can protect the water bearing formations (aquifers) by controlling withdrawals and maximizing recharge of the aquifer. Some states base their control of underground water on the designation of hydrological areas. E.g., ARIZ. REV. STAT. ANN. § 45-308 (1956). For a scientific discussion of ground water, see generally, R. KAZMANN, MODERN HYDROLOGY 129-210 (1965).

³⁹ See generally Corker, *Water Rights In Interstate Streams*, in 2 WATERS AND WATER RIGHTS § 130 (R. Clark ed. 1967).

⁴⁰ *City of Altus v. Carr*, 385 U.S. 35 (1966).

⁴¹ 209 U.S. 349 (1908). For a general discussion of the *Altus* decision with special attention directed to its uncertain precedential value, see Corker, *Water Rights In Interstate Streams*, in 2 WATERS AND WATER RIGHTS § 132 (R. Clark ed. 1967).

⁴² For a discussion of *Hudson*, see Corker, *Water Rights In Interstate Streams*, in 2 WATERS AND WATER RIGHTS § 131.6 (R. Clark ed. 1967). An aspect of interest in considering the current value of *Hudson* is that the Supreme Court in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), over the dissent of Justice Holmes, distinguished, and did not follow *Hudson*. *Hudson*, unlike *Altus*, dealt primarily with due process of law rather than Commerce Clause considerations.

rights in river water. On the other hand, the distinction might be rejected as a "legal fiction."⁴³

Although decided in a jurisdiction where underground water is privately "owned,"⁴⁴ *Altus* would seem equally applicable in public ownership jurisdictions,⁴⁵ on the basis that the classification of rights to underground water under state law should not be determinative of the application of the Federal Constitution. Although it is yet unclear whether *Altus* is limited to underground water in private rights jurisdictions or is broader in scope, this case represents a substantial step toward the view that a state may not "conserve" its waters by the simplistic device of prohibiting their transportation across state lines.

Water may be a special commodity because it is the subject of unique problems.⁴⁶ However, conceptually there is little justification for treating water as immune from the protection of the Commerce Clause. Past application of the Commerce Clause to natural gas and the present need to develop water resources without reference to state lines,⁴⁷ amply justify the extension by *Altus* of Commerce Clause protection to underground water.

James A. Glasgow

TORTS — ATTRACTIVE NUISANCE — DOCTRINE EXTENDED TO PRIVATE SWIMMING POOLS. *Giacona v. Tapley* (Ariz. Ct. App. 1967).

The plaintiff left his five year old son unattended, sitting on the back steps of a home diagonally across the alley from the defendant's home. Five to ten minutes later, after the boy gained entry to the defendant's yard either through an unlocked gate or by climbing over their forty-five inch wire fence at a point where it was pushed down, he was discovered drowned in the defendant's swimming pool. The trial court awarded judgment to the plaintiff under the attractive nuisance doctrine after excluding from the consideration of the jury a city ordinance requiring swimming pool owners to erect and maintain a

⁴³ The separation in law of surface waters and underground waters is without scientific basis. Clark, *Plan and Scope of Work*, in 1 WATERS AND WATER RIGHTS § 3.1 (R. Clark ed. 1967).

⁴⁴ Arizona and Texas follow the doctrine of private ownership subject to reasonable use. *Bristow v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953); *Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955).

⁴⁵ See generally Stone, *Public Rights In Water Uses and Private Rights In Land Adjacent To Water*, in 1 WATERS AND WATER RIGHTS § 39.3 (R. Clark ed. 1967) (list by states).

⁴⁶ See generally Hutchins, *Background and Modern Developments In State Water-Rights Law*, in 1 WATERS AND WATER RIGHTS § 28.1 (R. Clark ed. 1967); R. KAZMANN, *MODERN HYDROLOGY* 200, 249-74 (1965).

⁴⁷ See generally Corker, *Water Rights In Interstate Streams*, in 2 WATERS AND WATER RIGHTS § 130.1 (R. Clark ed. 1967).

fence around their pools.¹ On appeal, *held*, affirmed. The owner of an inadequately fenced private residential swimming pool may be liable for the drowning of a trespassing child under the attractive nuisance doctrine.² *Giacona v. Tapley*, 5 Ariz. App. 494, 428 P.2d 439 (1967).

As a general rule an occupier of land owes no duty to a trespasser except to refrain from willfully or wantonly injuring him.³ The rule has been modified, however, by the attractive nuisance doctrine. This modification was articulated for the first time in this country in *Sioux City & Pacific R.R. v. Stout*, the "turntable case."⁴ The doctrine, as it has been developed, provides that if a person maintains upon his property some uncommon object or condition dangerous in nature, he is under a duty to exercise reasonable care to protect children too young to appreciate the danger if he might reasonably expect that they will be lured to the property or attracted to the danger.⁵

The basic attractive nuisance theory is accepted today in all but

¹ PHOENIX, ARIZ., CODE § 506 (a) (1962), states:

All swimming pools shall be enclosed by a solid wall or fence or chain link fence not less than five (5) feet nor more than six (6) feet in height so as to prevent uninvited access.

Rather than considering the effect of violation of the ordinance the Court of Appeals seems to have used this opportunity to extend the attractive nuisance doctrine to water hazards.

² The court expressly adopts the RESTATEMENT (SECOND) OF TORTS § 339 (1963). This section provides:

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

This section has been said by Dean Prosser to be the most effective single section of the *Restatement of Torts*. W. Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 435 (1959).

³ *E.g.*, *Buckeye Irr. Co. v. Askren*, 45 Ariz. 566, 46 P.2d 1068 (1935); *Salladay v. Old Dominion Copper Co.*, 12 Ariz. 124, 100 P. 441 (1909); *Hall v. Southern Cal. Edison Co.*, 137 Cal. App. 449, 30 P.2d 1013 (1934); *Beauchamp v. New York City Housing Authority*, 12 N.Y.2d 400, 190 N.E.2d 412, 240 N.Y.S.2d 15 (1963); see RESTATEMENT (SECOND) OF TORTS § 333 (1963); W. PROSSER, *LAW OF TORTS* 365 (3d ed. 1964). The rule is qualified however, when there are frequent trespassers known to the owner or when the owner discovers the trespasser. *Id.* at 368-69.

⁴ 84 U.S. (17 Wall) 657 (1874).

⁵ *E.g.*, *St. Louis I.M. & S. Ry. v. Jackson*, 96 Ark. 469, 132 S.W. 206 (1910); *Polk v. Laurel Hill Cemetery Ass'n*, 37 Cal. App. 624, 174 P. 414 (1918); *Follett v. Illinois Cent. R.R.*, 288 Ill. 506, 123 N.E. 592 (1919); see Annot., 36 A.L.R. 34, 53 (1925).

six or seven jurisdictions.⁶ The dissenting jurisdictions refuse to burden a property owner with a higher standard of care toward a trespassing child than toward an adult, with at least one state indicating that the doctrine unreasonably tends to curtail the proper use of property.⁷ Those jurisdictions applying the doctrine are split into two general schools of thought; one has developed from the "turntable case," the other is formulated in the *Restatement*. Courts following the "turntable case" have tended to limit the application of the doctrine,⁸ applying it only to highly dangerous conditions that are novel or unusual.⁹ Accordingly, courts following the "turntable" theory have generally refused, as a matter of law, to apply the doctrine to water hazards,¹⁰ except where there was an unusual or hidden peril not normally incident to a body of water.¹¹ The reasons given by the courts for refusing to apply the doctrine to water cases have been numerous,¹² the most frequent being that bodies of water are so common that their perils are obvious even to the youngest child.¹³

⁶ The attractive nuisance doctrine is rejected in the following jurisdictions: *Maine*, *Lewis v. Mains*, 150 Me. 75, 104 A.2d 432 (1954); *Maryland*, *Conrad v. City of Takoma Park*, 208 Md. 363, 118 A.2d 497 (1955); *Massachusetts*, *Fallardeal v. Malden & Melrose Gas Light Co.*, 275 Mass. 196, 175 N.E. 471 (1931); *Ohio*, *Ware v. Cincinnati*, 93 Ohio App. 431, 111 N.E.2d 401 (1952); *Rhode Island*, *Houle v. Carr-Consol. Biscuit Co.*, 125 A.2d 143 (R.I. 1956); *Vermont*, *Trudo v. Lazarus*, 116 Vt. 221, 73 A.2d 306 (1950); and perhaps *New York*, *Carbone v. Mackchil Realty Corp.*, 296 N.Y. 154, 71 N.E.2d 447 (1947). *Virginia* and *West Virginia* purport to reject the doctrine but follow a "Dangerous Instrumentalities" rule which allows recovery in most cases where it would be allowed by other states. See *Tresspassing Children*, *supra* note 2, at 433; *W. Prosser*, *supra* note 3, at 373.

⁷ *Cogwell v. Warren Bros. Road Co.*, 229 A.2d 215 (Me. 1967); *Lewis v. Mains*, 150 Me. 75, 104 A.2d 432 (1954).

⁸ *E.g.*, *Salt River Valley Water Users' Ass'n. v. Compton*, 40 Ariz. 282, 11 P.2d 839 (1932); *Salladay v. Old Dominion Copper Co.*, 12 Ariz. 124, 100 P. 441 (1909); *Denver Tramway Corp. v. Callahan*, 112 Colo. 460, 150 P.2d 798 (1944).

⁹ *E.g.*, *Esquibel v. Denver*, 112 Colo. 546, 151 P.2d 757 (1944); *Brown v. Salt Lake City*, 33 Utah 222, 93 P. 570 (1908); *Clark v. City of Bremerton*, 1 Wash. 2d 689, 97 P.2d 112 (1939).

¹⁰ *Fickling v. City Council of Augusta*, 110 Ga. App. 330, 138 S.E.2d 437 (1964); *Adams v. Brookwood Country Club*, 16 Ill. App. 2d 163, 148 N.E.2d 39 (1958); *McGill v. City of Laurel*, 252 Miss. 740, 173 So. 2d 892 (1965). See also Annot., 8 A.L.R.2d 1254, 1258 (1949).

¹¹ *E.g.*, *Marble v. Parham*, 3 Ariz. App. 585, 416 P.2d 1006 (1966) (raft on a pond of water); *Smith v. Evans*, 178 Kan. 259, 184 P.2d 1065 (1955) (diving board); *Slaughter v. Gravity Drainage Dist.*, 145 So. 2d 50 (La. 1962) (steep banks held to be insufficient hidden danger to impose liability). See also Annot., 8 A.L.R.2d 1254, 1278 (1949).

¹² Among the most frequently given have been the absence of unusual features, *Wood v. Consumers Co.*, 334 Ill. App. 530, 79 N.E.2d 826 (1948); *Plotzki v. Standard Oil Co.*, 124 Ind. 518, 92 N.E.2d 632 (1950); the impracticability of guarding the condition, *Villani v. Wilmington Housing Authority*, 106 A.2d 211 (Del. 1954); *Fitch v. Selwyn Village*, 234 N.C. 632, 68 S.E.2d 255 (1951); and the absence of any hidden peril, *Avina v. United States*, 115 F. Supp. 579 (D. Tex. 1953); *Lockridge v. Standard Oil Co.*, 124 Ind. App. 257, 114 N.E.2d 807 (1953). See generally *Carmichael v. Little Rock Housing Authority*, 227 Ark. 470, 299 S.W.2d 198 (1957); *Hanners v. City of Ashland*, 331 S.W.2d 729 (Ky. 1959). See also Annot., 8 A.L.R.2d 1254, 1270 (1949).

¹³ *Salladay v. Old Dominion Copper Co.*, 12 Ariz. 124, 100 P. 441 (1909); *Hanners v. City of Ashland*, 331 S.W.2d 729 (Ky. 1959); *Mellas v. Lowdermilk*, 58 N.M. 363, 271 P.2d 399 (1954).

The *Restatement* emphasizes the need to weigh and compare the reasonableness of the condition, the age and understanding of the child, and the cost and burden of eliminating the risk. The adoption of the *Restatement* provisions has caused courts to replace the strict "dangerous and unusual" instrumentality requirement¹⁴ with a negligence-oriented approach.¹⁵ This change recognizes that the ability to appreciate danger varies with the age and mental capacity of the child, and that the important factor is not whether conditions are common in character but whether children could reasonably be expected to understand their dangers.¹⁶ In the decisions which have followed the *Restatement* there has been a trend away from the view that, as a matter of law, artificial water hazards do not constitute attractive nuisances.¹⁷ Water hazards found to come within the doctrine have included a swimming pool,¹⁸ a pit filled with water,¹⁹ a log pond,²⁰ and a cattle dipping vat,²¹ none of which contained any hidden or unusual danger not normally incident to a body of water.

Arizona first recognized the attractive nuisance doctrine in the leading case of *Salladay v. Old Dominion Copper Co.*²² which involved the death of a three year old child in an open water flume. The court denied relief, holding that *as a matter of law* the doctrine did not apply where both the condition and the attendant danger were obvious and were such that the child's parents should have protected him from them. The court later affirmed this reasoning in *Salt River Valley Water Users' Ass'n. v. Compton.*²³ In the only other Arizona case involving a water attraction, the Court of Appeals held that a raft floating on a pond could be an attractive nuisance, criticizing the *Salladay* case:

We are impressed with the humanitarian trend in favor of the child which lessens the impact of the following statement contained in *Salladay* wherein the court observed that it was inclined to hold that the classic turntable decision of the United

¹⁴ *E.g.*, *Esquibel v. Denver*, 112 Colo. 546, 151 P.2d 757 (1944); *Brown v. Salt Lake City*, 33 Utah 222, 93 P. 570 (1908); *Clark v. City of Bremerton*, 1 Wash. 2d 689, 97 P.2d 112 (1939).

¹⁵ 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1451 (4th ed. 1956); *Trespassing Children*, *supra* note 2, at 466.

¹⁶ *Garcia v. Soogian*, 52 Cal. 2d 110, 338 P.2d 433 (1959); *Trespassing Children*, *supra* note 2, at 461; *RESTATEMENT (SECOND) OF TORTS*, *supra* note 2.

¹⁷ *King v. Lennen*, 53 Cal. 2d 340, 348 P.2d 98 (1959); *Davies v. Land O'Lakes Racing Ass'n.*, 244 Minn. 248, 69 N.W.2d 642 (1955). *See also* 48 IOWA L. REV. 939, 947 (1963). *But see* *Reynolds v. Willson*, 51 Cal. 2d 94, 331 P.2d 48 (1958); *Morris v. City of Britton*, 66 S.D. 121, 279 N.W. 531 (1938).

¹⁸ *King v. Lennen*, 53 Cal. 2d 340, 348 P.2d 98 (1959).

¹⁹ *Banker v. McLaughlin*, 146 Tex. 434, 208 S.W.2d 843 (1948); *Robertson v. Centennial Properties of Austin, Inc.*, 392 S.W.2d 577 (Tex. Civ. App. 1965).

²⁰ *Pocholec v. Giustina*, 224 Ore. 245, 355 P.2d 1104 (1960) (liability denied on other grounds).

²¹ *Eaton v. R. B. George Investment, Inc.*, 152 Tex. 523, 260 S.W.2d 587 (1953).

²² 12 Ariz. 124, 100 P. 441 (1909).

²³ 39 Ariz. 491, 8 P.2d 249 (1932).

States Supreme Court, “. . . does not reach cases where the danger is not only obvious, but where the object itself from which the danger arises is of such a character that, as has been said, ‘from the reason of the thing and the customs of the community the defendant was entitled to assume that the plaintiff’s natural guardians would protect him from any dangers attached thereto as they easily could and ought to have done.’”²⁴

In Arizona attractive nuisance cases not involving water hazards²⁵ the court has quoted and followed the *Restatement*, beginning with the 1935 case of *Buckeye Irrigation Co. v. Askren*.²⁶ However, all of these cases involved what could be considered inherently dangerous articles, which fit as well under the reasoning of the older cases as they do under the *Restatement*.²⁷

The principal significance of the instant case is that liability in cases involving a water hazard is now a question of fact whereas in *Salladay* it was denied as a matter of law.²⁸ The adoption of the *Restatement* in this case leaves liability to be determined by balancing the social utility of the condition and the practicability of taking adequate precautions with the likelihood that children will trespass and the risk of death or serious bodily harm to them if they do.²⁹ The court, by noting in its holding that the burden of properly fencing the pool would have been slight, suggests that the possessor of a pool in a residential neighborhood is now under a duty to adequately fence or otherwise guard the pool so that children too young to recognize the danger will be prevented from gaining entrance into the pool area.³⁰

While clearly stating the responsibility of swimming pool owners, the court expressly refused to comment on the effect of this decision on the operation of the extensive canal and ditch systems within the state.³¹

²⁴ *Marble v. Parham*, 3 Ariz. App. 585, 587, 416 P.2d 1006, 1008 (1966).

²⁵ *MacNeil v. Perkins*, 84 Ariz. 74, 324 P.2d 211 (1958) (dynamite caps); *Downs v. Sulphur Springs*, 80 Ariz. 286, 297 P.2d 339 (1956) (electric current).

²⁶ 45 Ariz. 566, 46 P.2d 1068 (1935).

²⁷ *MacNeil v. Perkins*, 84 Ariz. 74, 324 P.2d 211 (1958); *Downs v. Sulphur Springs*, 80 Ariz. 286, 297 P.2d 339 (1956). See also 2 ARIZ. L. REV. 296 (1960). *MacNeil* and *Downs*, although quoting the *Restatement* and citing it as an authority, state that the doctrine is an exception made in cases involving inherently dangerous artificial conditions, indicating a misunderstanding of the implications of the section. See *King v. Lennen*, 53 Cal. 2d 340, 348 P.2d 98 (1959).

²⁸ *Giacona v. Tapley*, 428 P.2d 439 (Ariz. Ct. App. 1967).

²⁹ See *Trespassing Children*, *supra* note 2, at 466-69; RESTATEMENT (SECOND) OF TORTS, *supra* note 2.

³⁰ In holding the defendant liable, the court reasoned:

Here, we are not faced with the same question [as in earlier Arizona cases involving industry]. We are concerned with an inadequately fenced backyard swimming pool, the proper fencing of which would have imposed a slight burden upon the possessor. 428 P.2d at 442.

³¹ The court stated:

In the earlier Arizona cases, the court was dealing with industries and businesses which were vital to the economic growth and development of the state.

These systems in the past have been responsible for drownings of small children.³² Protection of the system at large would be prohibitively expensive. However, it is doubtful that the courts will now dismiss, as a matter of law, cases involving canals and irrigation ditches, as was done in *Salladay*. Each case will have to stand on its own merits, as tested by the requirements of the *Restatement*. The end result may be to hold owners of these systems liable for failure to fence or otherwise protect particular parts of these canals and ditches if it can be shown that this could have been done at a reasonable cost, and that by doing so the risk to young children would have been substantially lessened.

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. . . Here we are not faced with the same question. . . . For this reason, we will not speculate as to the outcome under a different set of facts. 428 P.2d at 442.

The extensive canal and ditch system is graphically set forth in D. MANN, *THE POLITICS OF WATER IN ARIZONA* at xv and 139 (1963).

³² It was not possible to determine the number of drownings attributable to canals and ditches as opposed to other bodies of water. There were 522 drownings in Arizona during the years 1961-65. In 1965 the drownings were spread throughout various age groups as follows:

<i>Age</i>	<i>Drownings</i>	<i>Percentage of Total</i>
1 to 4	18	25.3
5 to 14	19	26.7
15 to 24	13	18.3
25 to 44	7	9.9
45 to 64	7	9.9
65 and over	7	9.9
Total	<u>71</u>	<u>100.0</u>

G. SPENDLOVE, *ANNUAL REPORT OF VITAL STATISTICS* (1967). Of special significance is the large percentage of the total drownings that fall within the two lower age groups. These age groups are most likely to come within the age and intelligence requirements of the attractive nuisance doctrine.