Notes

CONTRACTS — ILLEGALITY — PROMISOR'S ASSUMPTION OF RISK OF FUTURE CHANGES IN CONDITIONS INCLUDES CHANGES IN LAW — *Kintner v. Wolfe* (Ariz. 1967).

Plaintiff leased liquor license to lessee. Defendant, owner of the building in which the license was to be used, guaranteed the lessee's payment of the license rental to the plaintiff for a period of ten years regardless of future changes in conditions. Five years later a statute was enacted making the leasing of liquor licenses illegal.[1] Because the plaintiff could no longer perform, due to the enactment of the statute, the defendant asserted that he also should be excused from further performance. Defendant appealed from an adverse trial court judgment of $30,000.00, to the Arizona Court of Appeals, which reduced the amount to $8,500.00.[2] On review, *held,* judgment of the trial court affirmed. Any provision in a contract providing that one party must perform regardless of future change in conditions will be interpreted to include future change in law. *Kintner v. Wolfe,* 102 Ariz. 164, 426 P.2d 798 (1967).

The doctrine of assumption of the risk is not one peculiar to the law of torts, but may also be applied in the law of contracts. It is generally settled that there are three classes of cases in which a promisor will be excused from performance due to supervening impossibility, provided that the risk of the event causing the impossibility has not been assumed.[3] The first class arises where the act to be performed is of such a nature that it can be performed only by the person seeking to be excused. In such cases the death or incapaciting illness of the promi sor generally excuses performance.[4] Second, it is recognized that performance is excused where there is a fortuitous change in or destruction of a specific thing, condition, or means of performance essential to per-

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[1] ARIZ. REV. STAT. ANN. § 4-203 E (Supp. 1966).

> No spirituous liquor license shall be assigned, transferred or sold, except as provided for in this title. No spirituous liquor license shall be leased or subleased, except that for the purpose of preserving rights and duties that have already matured, any licensee who has leased a spirituous liquor license under a lease in effect on the effective date of this subsection shall, after examination of such lease by the superintendent, be permitted to continue the lease according to its terms, and the license shall revert to the lessor upon expiration of the lease, or upon any termination of the lease, or by December 31, 1963, whichever shall be sooner.

[2] Kintner v. Wolfe, 4 Ariz. App. 212, 419 P.2d 116 (1966).

[3] *See generally* 6 A. CORBIN, CONTRACTS §§ 1334, 1337, 1343 (1962); L. SIMPSON, CONTRACTS § 174 (2d ed. 1965); 6 S. WILLISTON, CONTRACTS § 1935 (rev. ed. 1938).

[4] Slenderella Sys., Inc. v. Greber, 163 A.2d 462 (D.C. Mun. Ct. App. 1960); Jones v. Joy Mfg. Co., 381 S.W.2d 860 (Mo. 1964); Rodgers v. Southern Newspapers, Inc., 214 Tenn. 335, 379 S.W.2d 797 (1964); Salter v. Jones, 348 S.W.2d 381 (Tex. Civ. App. 1961). *See generally* 6 S. WILLISTON, CONTRACTS § 1940 (rev. ed. 1938).

formance under the contract, such as the destruction by an unprecedented storm of a specific crop contracted for which was to be grown on specific land.[5] Third, it is equally well settled that a promisor is excused from his failure to render performance where his performance is prevented by a supervening change in the law.[6] In the absence of assumption of the risk of the supervening change in law, the agreement is terminated at the time the change in law takes effect and neither party may bring an action to recover on the contract.[7] It is often stated that there is an implied condition in all contracts that no law will be enacted rendering the promised performance unlawful, and that if such law is enacted the duty of performance is thereby discharged.[8] The reasoning adopted in excusing performance is that it would be an injustice to require one party to bear the entire loss of nonperformance when the law itself had prohibited the performance.[9]

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[5] Glidden Co. v. Hellenic Lines, Ltd., 275 F.2d 253 (2d Cir. 1960); Anderson v. Bradley, 23 Conn. Supp. 87, 177 A.2d 227 (Super. Ct. 1961); Hipskind Heating & Plumbing Co. v. General Indus. Inc., 204 N.E.2d 339 (Ind. 1965); Cotner College v. Hester's Estate, 155 Neb. 279, 51 N.W.2d 612 (1952); Mitler v. Friedeberg, 32 Misc. 2d 78, 222 N.Y.S.2d 480 (Sup. Ct. T.T. 1961); Blount-Midyette & Co. v. Aeroglide Corp., 254 N.C. 484, 119 S.E.2d 225 (1961); Unke v. Thorpe, 75 S.D. 65, 59 N.W.2d 419 (1953); Housing Authority v. East Tenn. Light & Power Co., 183 Va. 64, 31 S.E.2d 273 (1944). *See generally* 6 S. WILLISTON, CONTRACTS, §§ 1946, 1948 (rev. ed. 1938).

[6] Omnia Com. Co. v. United States, 261 U.S. 502 (1923); Columbus R. Power & Light Co. v. Columbus, 249 U.S. 399 (1919); Louisville & N.R. Co. v. Mottley, 219 U.S. 467 (1911); United States v. Texas Const. Co., 224 F.2d 289 (5th Cir. 1955); United States v. Dietrich, 126 F. 671 (C.C. Neb. 1904); Stamey v. State Highway Comm'n, 76 F. Supp. 946 (D. Kan. 1948); Frazier v. Collins, 300 Ky. 18, 187 S.W.2d 816 (1945); Wischhusen v. American Medicinal Spirits Co., 163 Md. 565, 163 A. 685 (1933); Marshall v. Smith, 17 Ohio Op. 2d 173, 174 N.E.2d 558 (C.P. 1960). *See generally* 6 A. CORBIN, CONTRACTS § 1343 (1962); L. SIMPSON, CONTRACTS § 178 (2d ed. 1965); 6 S. WILLISTON, CONTRACTS § 1759 (rev. ed. 1938). *See also* RESTATEMENT OF CONTRACTS § 458 (1932):

> SUPERVENING PROHIBITION OR PREVENTION BY LAW.
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> A contractual duty or a duty to make compensation is discharged in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited:
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> (a) by the Constitution or a statute of the United States, or of any one of the United States whose law determines the validity and effect of the contract, or by a municipal regulation enacted with constitutional or statutory authority of such a State, or
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> (b) by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States or of any one of the United States.

[7] *See* Texas Co. v. Hogarth Shipping Co., 256 U.S. 619 (1921); Stamey v. State Highway Comm'n, 76 F. Supp. 946 (D. Kan. 1948); Marshall v. Smith, 17 Ohio Op. 2d 173, 174 N.E.2d 558 (C.P. 1960); Paddock v. Mason, 187 Va. 809, 48 S.E.2d 199 (1948). *See generally* 6 S. WILLISTON, CONTRACTS § 1972 (rev. ed. 1938). *See also* Annot., 84 A.L.R.2d 12, 44 (1962).

[8] Texas Co. v. Hogarth Shipping Co., 256 U.S. 619 (1921); Baird v. Wendt Enterprises, Inc., 248 Cal. App. 2d 66, 56 Cal. Rptr. 118 (1967); Leonard v. Autocar Sales & Serv. Co., 392 Ill. 182, 64 N.E.2d 477 (1945); Burkus v. Henshall, 386 Pa. 478, 126 A.2d 722 (1956); Paddock v. Mason, 187 Va. 809, 48 S.E. 2d 199 (1948).

[9] L.N. Jackson Co. v. Royal Norwegian Gov't, 177 F.2d 694 (2d Cir. 1949); Kuhl v. School Dist., 155 Neb. 357, 51 N.W.2d 746 (1952); Village of Minnesota v. Fairbanks, Morse & Co., 226 Minn. 1, 31 N.W.2d 920 (1948); Wagner v. Alex-

It is fundamental that where one party to a contract is excused from performance because of impossibility, the other party should also be excused through operation of the doctrine of failure of consideration.[10] Stated differently, when one party's performance has been excused, the other party should not be required to give something for nothing. This doctrine is related in principle to that of frustration of purpose.[11] Frustration arises in the case where the promisor's performance is excused, not because it is impossible to perform, but because an event has occurred which has caused a complete failure of the object for entering into the contract, or a total destruction in the value of the promised counter-performance.[12]

However, for either party's duty of performance to be excused under the doctrine of impossibility, or for a party to be excused under the similar doctrine of frustration of purpose, it is essential that the party seeking to be excused did not, by any express or implied provision in the contract, assume the risk of the supervening event.[13] If an inten-

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ander's Dept. Store, 87 N.Y.S.2d 253 (Sup. Ct. 1949); Flaster v. Seaboard Gage Corp., 61 N.Y.S.2d 152 (Sup. Ct. T.T. 1946). *See generally* 6 S. WILLISTON, CONTRACTS § 1938 (rev. ed. 1938). *See also* Annot., 84 A.L.R.2d 12, 44 (1962).

[10] Texas Co. v. Hogarth Shipping Co., 256 U.S. 619 (1921); Stamey v. State Highway Comm'n, 76 F. Supp. 946 (D. Kan. 1948); American Merc. Exch. v. Blunt, 102 Me. 128, 66 A. 212 (1906); Brauer v. Hyman, 98 N.J.L. 743, 121 A. 667 (Ct. Err. & App. 1923); Marshall v. Smith, 17 Ohio Op. 2d 173, 174 N.E.2d 558 (C.P. 1960); Paddock v. Mason, 187 Va. 809, 48 S.E.2d 199 (1948). *See generally* 6 A. CORBIN, CONTRACTS §§ 1348, 1363 (1962); 6 S. WILLISTON, CONTRACTS § 1972 (rev. ed. 1938).

[11] *See* West Los Angeles Institute for Cancer Research v. Mayer, 366 F.2d 220 (9th Cir. 1966); Leonard v. Autocar Sales & Serv. Co., 392 Ill. 182, 64 N.E.2d 477 (1945); Warshawsky v. American Auto. Prods. Co., 12 Ill. App. 2d 178, 138 N.E.2d 816 (1956); Wood v. Bartolino, 48 N.M. 175, 146 P.2d 883 (1944). *See generally* 6 S. WILLISTON, CONTRACTS § 1954 (rev. ed. 1938).

[12] West Los Angeles Institute for Cancer Research v. Mayer, 366 F.2d 220 (9th Cir. 1966); L.N. Jackson & Co. v. Royal Norwegian Gov't, 177 F.2d 694 (2d Cir. 1949); Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944); Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc., 174 So. 2d 614 (Fla. Ct. App. 1965); Perry v. Champlain Oil Co., 101 N.H. 97, 134 A.2d 65 (1957); Dorsey v. Oregon Motor Stages, 183 Ore. 494, 194 P.2d 967 (1948).

[13] A very good discussion of this proposition is found in Annot., 144 A.L.R. 1298, 1320 (1943). Part of this discussion is as follows:

> The correctness of this proposition is manifest where after the formation of a valid contract an event occurs which renders impossible further performance by a party who at this time has already received the consideration agreed upon, partly or in whole, but has assumed the risk of supervening impossibility. For, if this party has assumed such risk, his further performance is not excused and he is liable in damages as for breach of contract. . . . The same is true where the party who, at the time the event constituting supervening impossibility occurs, has already performed, partly or in whole, has assumed the risk of such supervening impossibility. For, notwithstanding the fact that the other party is excused from further performance by reason of such impossibility, the party who has performed remains liable for his obligations under the contract, since the theory that such party has assumed the risk of supervening impossibility admits of no distinction . . . between past performance made by one of the parties at the time the event constituting supervening impossibility occurs, and performance which afterwards becomes due under the terms of the contract.

tion to assume such a risk is expressed by either party to the contract, the law will give effect to such intention, and the supervening event will not be allowed to excuse performance.[14]

In the instant case, one of first impression in Arizona, there is no doubt that the plaintiff's duty of performance was discharged by the supervening illegality.[15] The defendant's duty, however, was not. In construing the contract, the court held that because of the clause, "without respect to future changes in conditions,"[16] the defendant had assumed the risk of *any* intervening circumstances which might have excused his performance, including frustration of purpose or failure of consideration,[17] and had thereby taken on an unconditional obligation to perform.[18] The dissent, however, agreed with the contention of the defendant that the clause was inserted to cover changes in economic conditions frustrating the purpose of the contract, but not changes in the law.[19]

The decision of the majority may be harsh. In the interpretation of the words of a written agreement, the intention of the parties is paramount.[20] The difficulty often lies in determining that intention. When such difficulty is encountered, it would seem proper in most cases to thrust upon a person claiming frustration of purpose, or failure of con-

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[14] *See* Texas Co. v. Hogarth Shipping Co., 256 U.S. 619 (1921); Albertville v. United States Fidelity & Guar. Co., 272 F.2d 594 (5th Cir. 1959); Warshawsky v. American Auto. Prods. Co., 12 Ill. App. 2d 178, 138 N.E.2d 816 (1956); Montauk Corp. v. Seeds, 215 Md. 491, 138 A.2d 907 (1958); State v. Dashiell, 195 Md. 677, 75 A.2d 348 (1950); Paddock v. Mason, 187 Va. 809, 48 S.E.2d 199 (1948). *See generally* 6 A. CORBIN, CONTRACTS § 1354 (1962); 6 S. WILLISTON, CONTRACTS §§ 1972, 1972 A (rev. ed. 1938).

[15] ARIZ. REV. STAT. ANN. § 4-203 E (Supp. 1966).

[16] Kintner v. Wolfe, 102 Ariz. 164, 166, 426 P.2d 798, 800 (1967).

[17] In the instant case the plaintiff's duty of performance was discharged due to the passage of A.R.S. § 4-203 E making the leasing of liquor licenses illegal. In the absence of assumption of the risk of the change in law, the defendant's duty of performance also would have been discharged on either of the following two theories:

(1) *Frustration of Purpose* — The purpose for which the defendant guaranteed payment of the license rental to the plaintiff was to assure that there would be a duly licensed liquor business run by the lessee in his building. In this way the defendant would be assured of the payment of the building rent by the lessee of the liquor license. When the passage of A.R.S. § 4-203 E made it impossible for the plaintiff to continue leasing the liquor license to the lessee, the defendant's purpose in guaranteeing payment of the license rental was frustrated.

(2) *Failure of Consideration* — The defendant guaranteed payment of the license rental to the plaintiff in exchange for the plaintiff's leasing the liquor license to the lessee. Since the plaintiff was no longer able to perform because of the change in law, the consideration for the defendant's promise failed. The defendant could not then be compelled to give something for nothing.

[18] Kintner v. Wolfe, 102 Ariz. 164, 169, 426 P.2d 798, 803 (1967).

[19] 102 Ariz. at 170, 426 P.2d at 804.

[20] Rental Dev. Corp. of America v. Rubenstein Const. Co., 96 Ariz. 133, 393 P.2d 144 (1964); Ashton v. Ashton, 89 Ariz. 148, 359 P.2d 400 (1961); Employer's Liab. Assur. Corp. v. Lunt, 82 Ariz. 320, 313 P.2d 393 (1957); General Accident Fire & Life Assur. Corp. v. Traders Furniture Co., 1 Ariz. App. 203, 401 P.2d 157 (1965). *See generally* 4 S. WILLISTON, CONTRACTS § 601 (3rd ed. 1961).

sideration, the burden of proving it.[21] In order to sustain this burden, it should be incumbent upon one seeking to be excused from his contractual obligation, who has used language in the contract indicating that he has assumed the risk of some fortuitous events, to prove that he did not assume the specific risk involved.

However, the law abhors a forfeiture. Since the plaintiff's performance has been absolutely excused due to impossibility, to hold that the defendant is obligated to perform, even though his consideration has failed, is to work a forfeiture. In order to avoid this, perhaps it would be proper to shift to the plaintiff the burden of proving that the clause was intended to cover changes in the law.

Nevertheless, the clause "without respect to future changes in conditions," is sufficiently broad to include changes in the law. The lesson to be learned from this case is that if the defendant had wished to limit the risk he was assuming so as not to include changes in the law, he should have used language indicating the assumption of a narrower risk.

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DOMESTIC RELATIONS — ANNULMENT FOR FRAUD — FALSE REPRESENTATION OF PREGNANCY HELD GROUND FOR ANNULMENT. *Parks v. Parks* (Ky. 1967).

Plaintiff and defendant had sexual intercourse on numerous occasions over a period of almost a year. Then defendant, to induce the plaintiff to marry her, represented to him that she was pregnant, knowing that she was not. Relying upon the representation, plaintiff married defendant, but one week after the marriage discovered the deception. He thereupon sought an annulment of the marriage, but was unsuccessful in the lower court. On appeal, *held,* reversed. A false representation of pregnancy, knowingly made to induce marriage, entitles the husband to an annulment for fraud. *Parks v. Parks,* 418 S.W.2d 726 (Ky. 1967).

Almost universally, in order for a misrepresentation to be grounds for the defrauded party to obtain an annulment, the misrepresentation must not only induce the consent to marry, but must also go to the "essentials" of the marriage relation.[1] It is said that, unlike an ordinary

[21] *See* Gold v. Salem Lutheran Home Ass'n, 53 Cal. 2d 289, 347 P.2d 687 (1959); Hensler v. Los Angeles, 124 Cal. App. 2d 71, 268 P.2d 12 (1954); Paddock v. Mason, 187 Va. 809, 48 S.E.2d 199 (1948). *See generally* 6 A. CORBIN, CONTRACTS § 1329 (1962); 6 S. WILLISTON, CONTRACTS § 1937 (rev. ed. 1938). *See also* Annot., 84 A.L.R.2d 12, 25 (1962).

[1] *E.g.,* Reynolds v. Reynolds, 85 Mass. (3 Allen) 605 (1862) (leading case); Hyslop v. Hyslop, 241 Ala. 223, 2 So. 2d 443 (1941); Mayer v. Mayer, 207 Cal. 685, 279 P. 783 (1929); Morris v. Morris, 40 Del. 480, 13 A.2d 603 (1940);

contract, the marriage contract involves the state as a party, and the state has a definite interest in upholding the sanctity and stability of the marital status.[2]

The courts differ, however, concerning what a fraud going to the "essentials" entails. Many refrain from defining such a fraud, while others offer a definition so vague that whether a particular fraud will fall within it is nearly impossible to foretell.[3] A case by case approach is the norm. An annulment will probably be decreed if the court feels that continued cohabitation would be "intolerable."[4]

The "essentials" question has frequently been raised in cases of "unchastity." It is clear that premarital intercourse with one other than the future spouse will not suffice alone. It generally is of little significance whether the unchaste spouse merely concealed her conduct,[5] represented herself to be "chaste,"[6] was a prostitute,[7] or concealed

Arndt v. Arndt, 336 Ill. App. 65, 82 N.E.2d 908 (1948); Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952).

In New York, the misrepresentation does not have to go to the "essence" of the marriage relation. Instead, it must relate to a matter "vital" to the relation. The meaning of "vital" cannot be accurately stated, but it is clear that the requirements for obtaining an annulment in New York are much less stringent than in other jurisdictions. Di Lorenzo v. Di Lorenzo, 174 N.Y. 467, 67 N.E. 63, 95 Am. St. R. 609 (1903) (leading case); Garfinkel v. Garfinkel, 9 App. Div. 2d 98, 191 N.Y.S.2d 574 (1959) (per curiam); Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 303 N.Y. 506, 104 N.E.2d 877 (1952); Shonfeld v. Shonfeld, 260 N.Y. 477, 184 N.E. 60 (1933).

[2] Carris v. Carris, 24 N.J. Eq. 516 (Ct. Err. & App. 1873); Wells v. Talham, 180 Wis. 654, 194 N.W. 36 (1923). The precise nature of the state's interest is infrequently stated. Presumably, if marriages were freely dissoluble, degeneracy would result, and the welfare of children would be adversely affected.

[3] *E.g.*, Brown v. Scott, 140 Md. 258, 177 A. 114 (1922) (fraud must affect the health or well-being of the parties or any offspring); Robertson v. Roth, 163 Minn. 501, 204 N.W. 329 (1925) (fraud must impose unexpected burdens that tend to destroy domestic tranquility and promote humiliation, making the continuance of the relation intolerable to society and detrimental to the marriage relation); Fortin v. Fortin, 106 N.H. 208, 208 A.2d 447 (1965) (fraud must make impossible the performance of the marital duties or render the continuance of the marriage relation dangerous to health or life).

[4] Kingsley, *Fraud as a Ground for Annulment of Marriage*, 18 S. CAL. L. REV. 213 (1944-45); Note, 19 KY. L.J. 295 (1930-31).

[5] *E.g.*, Osborne v. Osborne, 134 A.2d 438 (D.C. Mun. Ct. App. 1957) (applying Maryland law); Wesley v. Wesley, 181 Ky. 135, 204 S.W. 165 (1918); Richardson v. Richardson, 246 Mass. 353, 140 N.E. 73 (1923) (dictum); Travis v. Travis, 183 Pa. Super. 273, 130 A.2d 724 (1957); Varney v. Varney, 52 Wis. 120, 8 N.W. 739 (1881). *But see* Browning v. Browning, 89 Kan. 98, 130 P. 852 (1913) (ordinarily will adhere to majority rule, but unusual circumstances warrant an annulment).

[6] *E.g.*, Sutton v. Sutton, 12 Cal. App. 2d 355, 55 P.2d 261 (1936); Hull v. Hull, 191 Ill. App. 307 (1915); Donnelly v. Strong, 175 Mass. 157, 55 N.E. 892 (1900); Leavitt v. Leavitt, 13 Mich. 452 (1865). *Contra*, Domschke v. Domschke, 138 App. Div. 454, 122 N.Y.S. 892 (1910). The plaintiff in *Domschke* was led to believe that the woman had never engaged in illicit intercourse and that her child was the product of a prior marriage. In fact, the woman had been the mistress of another for eight years. The decision is probably explainable, however, more by the New York rule of fraud than by the unusual facts of the case.

One may wonder how unchastity can be an issue when the man knew that the woman had borne a child. The courts, however, uniformly use the word "unchastity" to mean illicit intercourse.

[7] DuPont v. DuPont, 8 Terry 231, 90 A.2d 468 (Del. 1952). *But see* Entsminger

an illegitimate child.[8] There is no "warranty" of chastity.[9] Otherwise, one would always have his or her marriage subject to annulment if the spouse should happen to discover the premarital incontinence.[10]

When the fraud goes beyond mere unchastity and involves actual or asserted pregnancy, it assumes increased importance. Fraud involving *actual* pregnancy is of two types: concealment at the time of marriage, and misrepresentation to the spouse-to-be that he is the father of the child. Fraud involving *asserted* pregnancy occurs when the female represents that she is pregnant, knowing that she is not, to induce the male to marry — the type of fraud in issue in the principal case. An understanding of the general subject can best be gained by analyzing the treatment accorded by the courts to each of these three types of fraud.[11]

Almost universally, concealed pregnancy at the time of marriage is a fraud going to the "essentials" of the marriage,[12] although there

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v. Entsminger, 99 Kan. 362, 161 P. 607 (1916). As in *Browning v. Browning*, 89 Kan. 98, 130 P. 852 (1913), the court in *Entsminger* permitted an annulment upon the showing of unusual circumstances. The plaintiff was weakened by age and by physical and mental disabilities. The woman represented she was virtuous, when in fact, she had been conducting a house of prostitution for many years.

[8] *E.g.*, Foy v. Foy, 57 Cal. App. 2d 334, 134 P.2d 29 (1943); Wesley v. Wesley, 181 Ky. 135, 204 S.W. 165 (1918); Travis v. Travis, 183 Pa. Super. 273, 130 A.2d 724 (1957). *Contra*, Domschke v. Domschke, 138 App. Div. 454, 122 N.Y.S. 892 (1910).

[9] Reynolds v. Reynolds, 85 Mass. (3 Allen) 605 (1862); Travis v. Travis, 183 Pa. Super. 273, 130 A.2d 724 (1957). Chastity can be made an *express condition* of the marriage, and if the condition is not met an annulment will be granted. Gatto v. Gatto, 79 N.H. 177, 106 A. 493 (1919); Travis v. Travis, 183 Pa. Super. 273, 130 A.2d 724 (1957) (dictum). The man in *Gatto* informed the woman he would not under any circumstances marry her unless she was chaste. The woman assured him she was, although for years she had had an incestuous relationship with her father.

[10] Reynolds v. Reynolds, 85 Mass. (3 Allen) 605 (1862).

[11] It should be observed that in some jurisdictions, fraud is a statutory ground for divorce. For instance, in Georgia, fraud in general is a ground for divorce and the specific fraud of concealment of pregnancy is also expressly mentioned as a ground. GA. CODE ANN. § 30-102(4), (5) (1933). Whenever a fraud that is specifically mentioned in the statute as a ground for divorce is used as a basis for the action, the court is absolved of the burden of deciding an "essentials" question. It is otherwise when fraud in general is a ground. In a few cases cited in this note, a divorce, rather than annulment, was the relief sought. However, the basic inquiry in the divorce cases was the same as in the annulment cases: did the fraud go to the "essentials" of the marriage? Hence, the divorce cases usually will not be distinguished.

[12] *E.g.*, Lenoir v. Lenoir, 24 App. D.C. 160 (1904) (annulment denied, however, because the husband's testimony was uncorroborated); Baker v. Baker, 13 Cal. 88 (1859); Frith v. Frith, 18 Ga. 273, 63 Am. Dec. 289 (1855) (dictum); May v. May, 71 Kan. 317, 80 P. 567 (1905) (divorce denied for lack of corroboration); Donavan v. Donavan, 91 Mass. (9 Allen) 140 (1864); Harrison v. Harrison, 94 Mich. 559, 54 N.W. 275 (1893); Fontana v. Fontana, 77 Misc. 28, 135 N.Y.S. 220 (Sup. Ct. 1912); Morris v. Morris, Wright 630 (Ohio 1834); Johnson v. Johnson, 152 S.W. 661 (Tex. Civ. App. 1912). *See also* Hardesty v. Hardesty, 193 Cal. 330, 223 P. 951 (1924), where the court decreed an annulment for fraud even though the woman was not aware of her pregnancy at the time of marriage. There is some justification for the result because the husband is burdened with a child he knows is not his, but the decision is objectionable because there obviously wasn't any

is old authority to the effect that a marriage will not be annulled if the husband had premarital intercourse with his spouse.[13] Those courts annulling the marriage do so for two reasons. First, the wife is incapable of immediately performing an important part of the marriage contract — that of bearing the husband's child. Second, unless the marriage is annulled, the husband will be left in the dilemma of either supporting another's child, or disgracing his wife, with whom he still must live, by announcing to the world the child is not his.[14] When an annulment has been refused, the courts have reasoned that the husband's participation in the illicit intercourse precluded equitable relief because he was not an innocent party,[15] and because, knowing his wife was unchaste, he thereby had notice that his wife's pregnancy by a "stranger" was at least a possibility.[16]

When the second type of fraud involving actual pregnancy is in issue, that of misrepresentation of paternity, most courts have been sympathetic to the husband's cause and have granted an annulment.[17]

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fraud. It seems irrational to penalize the wife for non-disclosure when she knew of nothing to disclose.

In the landmark case of *Reynolds v. Reynolds*, 85 Mass. (3 Allen) 605, 610-11 (1862), the court aptly described the manner in which fraudulent concealment of pregnancy goes to the "essentials" of the marriage:

> An enforced union under such circumstances would not tend to promote morality or give dignity or sanctity to the institution of marriage. On the contrary, it would tend to bring it into contempt, by compelling parties to continue in the relation of husband and wife after the basis of confidence and harmony has been taken away by the destruction of mutual respect and affection.

[13] Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98 (1867); Seilheimer v. Seilheimer, 40 N.J. Eq. 412, 2 A. 376 (Ch. 1885); Westfall v. Westfall, 100 Ore. 224, 197 P. 271 (1921).

[14] Reynolds v. Reynolds, 85 Mass. (3 Allen) 605 (1862); Sinclair v. Sinclair, 57 N.J. Eq. 222, 40 A. 679 (Ch. 1898); Carris v. Carris, 24 N.J. Eq. 516 (Ct. Err. & App. 1873). *See also* MADDEN, DOMESTIC RELATIONS §§ 6-10 (1931); Kinglsey, *Fraud as a Ground for Annulment of Marriage*, 18 S. CAL. L. REV. 213 (1944-45); 19 KY. L.J. 295 (1930-31). The first reason advanced may be criticized as being insubstantial because the incapacity is only temporary, but the second has definite merit.

[15] Seilheimer v. Seilheimer, 40 N.J. Eq. 412, 2 A. 376 (Ch. 1885). The court is applying the equitable doctrine of "clean hands." When "unclean hands" preclude relief, the court is actually holding that the fraud goes to the "essentials," but the marriage cannot be annulled because of the bad conduct. *See* Brown, *Duress and Fraud as Grounds for the Annulment of Marriage*, 10 IND. L. REV. 473, 482-83 (1934-35).

[16] Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98 (1867).

[17] *E.g.*, Shatford v. Shatford, 214 Ark. 612, 217 S.W.2d 917 (1949); Lyman v. Lyman, 90 Conn. 399, 97 A. 312 (1916); Arndt v. Arndt, 336 Ill. App. 65, 82 N.E.2d 908 (1948); Mitchell v. Mitchell, 136 Me. 406, 11 A.2d 898 (1940); Yager v. Yager, 313 Mich. 300, 21 N.W.2d 138 (1946); Ritayik v. Ritayik, 202 Mo. App. 74, 213 S.W. 883 (1919); Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952); Winner v. Winner, 171 Wis. 413, 177 N.W. 680 (1920). *See also* Cuneo v. Cuneo, 198 Misc. 240, 96 N.Y.S.2d 899 (Sup. Ct. 1950); and Barden v. Barden, 14 N.C. (3 Dev.) 580 (1832). In *Barden*, the woman (a Caucasian) gave birth to a child and induced the man to marry her by falsely alleging that he was the father. After the marriage, the husband (also a Caucasian) discovered the child had Negroid features, and deduced that it wasn't his. The court granted him an annulment, observing that the young child was so light in color that a reasonable

The rationale of the decisions is the same as the fraudulent concealment cases,[18] although many courts add for good measure that denial of relief would unjustly penalize the husband for his laudable act of marrying the woman.[19] When an annulment is denied, his premarital intercourse with the woman,[20] which warned him that the woman was prone to engage in such conduct, and which should have caused him to take reasonable measures to ascertain the truth or falsity of the representation, is often given as a reason.[21] Other courts have premised their decisions on the "unclean hands" of the plaintiff.[22] In answer to the arguments of the minority, the courts favorable to an annulment have asserted that the doctrine of "clean hands" is not applicable, because it applies only when the plaintiff's bad conduct arises out of the transaction complained of. Here the transaction complained of is the intercourse with the stranger and the subsequent fraudulent misrepresentation, not the illicit intercourse between the plaintiff and the

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man would have been misled. Similarly, in *Cuneo*, the court granted an annulment when the woman gave birth to a child and induced marriage by a false allegation of paternity.

[18] *E.g.*, Wallace v. Wallace, 137 Iowa 37, 114 N.W. 527 (1908); Sissung v. Sissung, 65 Mich. 188, 31 N.W. 770 (1887); Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952); Winner v. Winner, 171 Wis. 413, 177 N.W. 680 (1920).

[19] *E.g.*, Lyman v. Lyman, 90 Conn. 399, 97 A. 312 (1916); Morris v. Morris, 40 Del. 480, 13 A.2d 603 (1940); Wallace v. Wallace, 137 Iowa 37, 114 N.W. 527 (1908); Gard v. Gard, 204 Mich. 255, 169 N.W. 908 (1918); Winner v. Winner, 171 Wis. 413, 177 N.W. 680 (1920). The court in *Lyman* concludes:

> Certainly neither society nor the state representing it can have any interest favorable to the successful perpetration of a fraud or to the perpetration of the normal consequences of one like this which do not end with the marriage tie, but involve matters of presumptive paternity, the obligations which go with paternity, and the right of succession to property. 90 Conn. at 411, 97 A. at 316.

[20] Premarital intercourse seems to be an obvious prerequisite to the husband's claim of fraud. If there was no premarital intercourse, he would have some difficulty convincing the court that he was led to believe that he was the father. At least one plaintiff, however, has alleged that intercourse wasn't necessary. *See* Nice v. Nice, 71 Pa. D. & C. 167 (Montgomery Co. C.P. 1950), discussed in note 40 *infra*.

[21] Franke v. Franke, 3 Cal. Unrep. 656, 31 P. 571 (1892); Safford v. Safford, 224 Mass. 392, 113 N.E. 181 (1916); Foss v. Foss, 94 Mass. (12 Allen) 26 (1866). The *Franke* court actually went beyond a "reasonable diligence" test by holding that knowledge by the man of the woman's unchastity *fully* deprived him of the right to claim he was deceived. In other words, even if the man did take some measures to ascertain the truth, such as subjecting the woman to a medical examination, or asking her neighbors to divulge what they knew, he still could not allege a deception. Massachusetts apparently toughened its requirements in *Arno v. Arno*, 265 Mass. 282, 163 N.E. 861 (1928), where the man did make a careful examination to get at the truth, but was denied an annulment, because the court then decided that the "clean hands" doctrine was applicable.

[22] Boisclair v. Boisclair, 313 Mass. 442, 47 N.E.2d 921 (1943); States v. States, 37 N.J. Eq. 195 (Ch. 1883). *But see* B. v. S., 36 U.S.L.W. 2580 (N.J. Super Ct. March 26, 1968). The New Jersey court held that the "clean hands" doctrine was an anachronism and that a Caucasian boy, who married relying on the representation that he was the cause of the girl's pregnancy, was entitled to an annulment upon discovering that the girl was actually pregnant by a Negro. The court indicates that it is ready to completely abandon the "clean hands" doctrine in the whole area of fraud involving pregnancy.

defendant.[23] Furthermore, it is said that the male has no reason not to believe the representation;[24] that inquiry by him would be of little, if any, avail;[25] and that it would greatly humiliate and besmirch the reputation of the woman he intends to marry.[26]

When *asserted,* not actual, pregnancy is the primary element of the fraud, the courts have done an about-face and held that the fraud does *not* go to the "essentials" of the marriage.[27] It is readily apparent that the husband is not faced with the same dilemma of either supporting a stranger's child or of divulging the child's illegitimacy to the world. Nor is the wife incapable of performing her marital obligations.[28] At least one court has concluded that the absence of these circumstances alone is sufficient reason for denying an annulment.[29] Another court has reasoned that the man is placed on guard by his knowledge of the woman's incontinence, and cannot be considered deceived by her misrepresentations.[30] Still others have invoked the old stand-by of "unclean hands."[31] Occasionally, a court has not found it necessary to proffer any explanation of its decision.[32]

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[23] Lyman v. Lyman, 90 Conn. 399, 97 A. 312 (1916); Morris v. Morris, 40 Del. 480, 13 A.2d 603 (1940); Arndt v. Arndt, 336 Ill. App. 65, 82 N.E.2d 908 (1948); Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952); Winner v. Winner, 171 Wis. 413, 177 N.W. 680 (1920).

[24] Morris v. Morris, 40 Del. 480, 13 A.2d 603 (1940); Arndt v. Arndt, 336 Ill. App. 65, 82 N.E.2d 908 (1948); Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952); Winner v. Winner, 171 Wis. 413, 177 N.W. 680 (1920).

[25] Lyman v. Lyman, 90 Conn. 399, 97 A. 312 (1916); Morris v. Morris, 40 Del. 480, 13 A.2d 603 (1940); Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952).

[26] Jackson v. Ruby, 120 Me. 391, 115 A. 90 (1921); Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952); Winner v. Winner, 171 Wis. 413, 177 N.W. 680 (1920).

[27] Mobley v. Mobley, 245 Ala. 90, 16 So. 2d 5 (1943); Mason v. Mason, 164 Ark. 59, 261 S.W. 40 (1924); Gondouin v. Gondouin, 14 Cal. App. 285, 111 P. 756 (1910); Brandt v. Brandt, 123 Fla. 680, 167 So. 524 (1936); Diamond v. Diamond, 101 N.H. 338, 143 A.2d 109 (1958); Fairchild v. Fairchild, 43 N.J. Eq. 473, 11 A. 426 (Ch. 1887); Bryant v. Bryant, 171 N.C. 746, 88 S.E. 147 (1916); Todd v. Todd, 149 Pa. 60, 24 A. 128 (1892); Herr v. Herr, 109 Pa. Super. 42, 165 A. 547 (1933); Young v. Young, 127 S.W. 898 (Tex. Civ. App. 1910). *See also* Rhoades v. Rhoades, 10 N.J. Super 432, 77 A.2d 273 (Super Ct. 1950), where the woman represented to the man that she had borne a child by him, when in fact she had not given birth to a child. The parties cohabited for a year after the marriage and the court denied an annulment.

[28] Kingsley, *Fraud as a Ground for Annulment of Marriage,* 18 S. CAL. L. REV. 213 (1944-45).

[29] Mobley v. Mobley, 245 Ala. 90, 16 So. 2d 5 (1943).

[30] Young v. Young, 127 S.W. 898 (Tex. Civ. App. 1910).

[31] Brandt v. Brandt, 123 Fla. 680, 167 So. 524 (1936); Fairchild v. Fairchild, 43 N.J. Eq. 473, 11 A. 426 (Ch. 1887). *See also* Tyminski v. Tyminski, 8 Ohio Misc. 202, 221 N.E.2d 486 (Lucas Co. C.P. 1966), where the equitable doctrine of "unclean hands" precluded an annulment, but the court allowed the plaintiff a divorce.

[32] Diamond v. Diamond, 101 N.H. 338, 143 A.2d 109 (1958); Herr v. Herr, 109 Pa. Super. 42, 165 A. 547 (1933). In *Diamond,* the court states that false representations of pregnancy are not grounds for annulment. It then observes that this is "especially" true when the parties had premarital intercourse. It may be posited that if the parties *don't* have premarital intercourse there can be no fraud; one can

Prior to the decision in the instant case,[33] only two jurisdictions had granted an annulment to the husband when a non-pregnant woman falsely represented she was pregnant by him.[34] In *Masters v. Masters*,[35] the Wisconsin Supreme Court, without much discussion, concluded that the fraud did go to the "essentials" of the marriage, and that the doctrine of *pari delicto*[36] should not apply. Application of *pari delicto*, the court reasoned, would be punishment vastly out of proportion to the offense committed,[37] and would unjustly punish the husband for his efforts to right a supposed wrong. The court observed that the only justification for applying the doctrine would be that denial of annulments might deter unmarried persons from indulging in sexual intercourse, and countered that if the possibility of pregnancy or the fear of a criminal prosecution were not strong enough deterrents, it was doubtful whether denial of an annulment would be any stronger.

It is worthy of emphasis that the term "fraud," by definition, requires that there be justifiable reliance. As mentioned above, most courts do not require the man to inquire into the truth or falsity of the woman's representations,[38] but none absolve him from the duty of acting as a reasonable man. Thus, there was no justifiable reliance when the woman, three or four days after having sexual intercourse with the man for the first time, represented that she was pregnant as a result of that intercourse.[39] The decisions, however, reflect a propensity to give the term "justifiable reliance" a liberal construction.[40]

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hardly rely on the representation that he is the father of a woman's child when he has never had intercourse with her.

[33] Parks v. Parks, 418 S.W.2d 726 (Ky. 1967).

[34] Garfinkel v. Garfinkel, 9 App. Div. 2d 98, 191 N.Y.S.2d 574 (Sup. Ct. 1959) (per curiam); Masters v. Masters, 13 Wis. 2d 332, 108 N.W.2d 674 (1961). See also the leading New York case, *Di Lorenzo v. Di Lorenzo*, 174 N.Y. 467, 67 N.E. 63, 95 Am. St. R. 609 (1903), where the woman represented to her spouse-to-be that she had given birth to his child. In truth, she had not given birth to any child, but had procured one for the purpose of fraudulently inducing the man to marry her. The court, in granting the annulment, for the first time indicated that in New York the fraud need not go to the "essentials."

[35] 13 Wis. 2d 332, 108 N.W. 674 (1961).

[36] Essentially the "clean hands" doctrine.

[37] Illicit intercourse was a misdemeanor; marriage a life sentence.

[38] There is, of course, no duty of inquiry where the woman conceals her pregnancy.

[39] Levy v. Levy, 309 Mass. 230, 34 N.E.2d 650 (1941).

[40] *E.g.*, see *Caton v. Caton*, 17 D.C. (6 Mackey) 309 (1888), where the wife had a third person's child three or four days after the marriage. The court granted a divorce to the husband. See also *Morris v. Morris*, Wright 630 (Ohio 1834), where the wife "concealed" her pregnancy and twenty-three days after the marriage gave birth to another's child. The husband had been "little accustomed to female society" and the marriage had taken place at dusk, without lights, in the presence of three other persons and the clergyman. And, in the words of the court, "[t]he husband and wife lived together without his suspicions being awakened, until the wife was taken in labor pains, and presented her wondering spouse a full grown child before the expiration of the honeymoon." *Id.* at 630. Nevertheless, the husband was given a divorce for fraud. For an interesting factual situation, see *Nice v. Nice*, 71 Pa. D. & C. 167 (Montgomery Co. C.P. 1950). There, defendant's child came ten days after the marriage. The parties never had premarital intercourse, but the defendant had convinced the man that he was the father as the

In Arizona, there is no case law pertaining to the frauds under discussion.[41] When cases do arise, the supreme court may be faced with the task of making some difficult decisions.

For example, A.R.S. § 25-312(8) (1956) provides:

> A *divorce* from the bonds of matrimony may be granted:
>
> In favor of the husband when the wife at the time of the marriage was pregnant by a man other than the husband and without the husband's knowledge at the time of marriage. (emphasis supplied).

The statute raises two important and interrelated questions. First, which of the frauds fall within the statute? Second, assuming a fraud does fall within the statute, and therefore is a ground for divorce, can that same fraud be the basis for an equitable action of annulment? The answers to these questions can significantly affect the litigants, because, in Arizona, as in most jurisdictions, no alimony is awarded on annulment.[42]

A concealed pregnancy obviously would fall within the statute. A false representation of pregnancy by a non-pregnant woman — the type of fraud found in the principal case — obviously would not. The question arises, then, whether a misrepresentation of paternity by a woman actually pregnant would be covered by the statute. In *Peacon v. Peacon*[43] the Supreme Court of Georgia, construing a statute which provided for a divorce if "[t]he pregnancy of the wife at the time of the marriage was unknown to the husband,"[44] held that the husband's knowledge of the pregnancy precluded relief. But what might be implied in that statute — that the pregnancy be caused by a stranger — is expressly stated in the Arizona statute. Furthermore,

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result of a "petting party." Unfortunately, the court didn't reach the reliance issue, but denied an annulment on the basis of *pari delicto*. It would have been of interest to know whether modern man justifiably could be unaware of the fact that there can be "no impregnation without penetration."

[41] The Arizona Supreme Court has stated, however, that a fraud warranting an annulment must go to the "essence" of the marriage contract. Hallford v. Industrial Comm'n, 63 Ariz. 40, 159 P.2d 305 (1945).

[42] Alimony can be awarded only if authorized by statute. *E.g.*, Stapleberg v. Stapleberg, 77 Conn. 31, 58 A. 233 (1904); Whitebird v. Luckey, 180 Okla. 1, 67 P.2d 775 (1937); Stewart v. Vandervort, 34 W. Va. 524, 12 S.E. 736 (1890). *Contra*, Strode v. Strode, 66 Ky. (3 Bush) 227, 96 Am. Dec. 211 (1867). Arizona has no statute awarding alimony on annulment. For cases denying alimony, in the absence of a statute, see, *e.g.*, Peacock v. Peacock, 264 Ala. 232, 87 So. 2d 626 (1956); Middlecoff v. Middlecoff, 171 Cal. App. 2d 286, 340 P.2d 331 (1959); Werner v. Werner, 59 Kan. 399, 53 P. 127 (1898); State v. Ponthieaux, 232 La. 121, 94 So. 2d 3 (1957); Yake v. Yake, 170 Md. 75, 183 A. 555 (1936). The reason given for denying alimony is that the duty of support arises out of a valid marriage, and since an annulled marriage is void *ab initio, a fortiori* there is no duty of support. Cases allowing alimony pursuant to statute include Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E.2d 290 (1954); Jones v. Jones, 48 Wash. 2d 862, 296 P.2d 1010 (1956).

[43] 197 Ga. 748, 30 S.E.2d 640 (1944).

[44] GA. CODE ANN. § 30-102(5) (1933).

the Arizona phrase "without the husband's knowledge" appears to modify not only the word "pregnant," but also the words "by a man other than the husband." The difference in phraseology between the statutes seems decisive. Under the Arizona statute, therefore, a pregnant woman's misrepresentation of paternity would probably be a ground for divorce, because the husband, while knowing of the pregnancy, would not know that it was caused by another.[45]

Courts are split on the question of whether or not a fraud falling within a divorce statute can also be the basis for an annulment,[46] but in Arizona an affirmative answer appears likely. The Arizona Supreme Court, in *Southern Pacific Co. v. Industrial Commission*,[47] held that since impotency was a statutory ground for divorce,[48] it could not be a ground for annulment. It further stated, however, that all other forms of voidable marriage[49] were subject to annulment. By excluding impotency as a ground for annulment, the court effectuated the clear intent of the legislature, because the legislature had changed impotency from a statutory ground for annulment to a ground for divorce only.[50] Fraud involving *actual* pregnancy,[51] however, has never been a statutory ground for annulment, and was already a statutory ground for divorce when the decision in *Southern Pacific* was rendered.[52] When these two facts are coupled with the dictum that all other voidable marriages are annullable, equitable relief appears permissible.

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[45] It might be argued that the same result can be reached under the Arizona statute as was reached under the Georgia statute. The argument would run that the phrase "by a man other than the husband" — implied in the Georgia statute — was inserted in the Arizona statute *only* to make it clear that a husband cannot have a divorce if he caused the pregnancy, and that the phrase "without the husband's knowledge" was *intended* to modify *only* the word "pregnant." This argument, however, would mean disregarding the plain meaning of the words of the statute. It would also result in different treatment of the frauds involving misrepresentation of paternity and concealed pregnancy, which seems illogical, because, as noted in the text, the same reasons support granting an annulment when either of the frauds is in issue.

[46] In Georgia, an equitable action may not be maintained for a cause recognized by statute as a ground for divorce. Burke v. Grubbs, 199 Ga. 706, 35 S.E.2d 268 (1945); Mackey v. Mackey, 198 Ga. 707, 32 S.E.2d 764 (1945). The Virginia court has held to the contrary. Pretlow v. Pretlow, 177 Va. 524, 14 S.E.2d 381 (1941).

[47] 54 Ariz. 1, 91 P.2d 700 (1939).

[48] ARIZ. REV. CODE § 2179 (1928), which is now ARIZ. REV. STAT. ANN. § 25-312(10) (1956).

[49] A "voidable" marriage, as opposed to a "void" marriage, is one which is valid until made invalid *ab initio* by judicial decree. A "void" marriage is one which was never valid, and does not require a decree to be a nullity. Marriages induced by fraud or duress are usually voidable, as are marriages where one party is insane, impotent, or under age at the time of marriage.

[50] *Compare* REV. STAT. OF ARIZ. paragraph 2110 (1887), (impotency was a ground for annulment), *with* REV. STAT. OF ARIZ. paragraph 3112 (1901) (it was omitted as such ground). *See also* REV. STAT. OF ARIZ. paragraph 3113 (1901) (impotency was made a ground for divorce).

[51] As mentioned in the text, the fraud involving asserted pregnancy, which was before the court in the principal case, does not fall within ARIZ. REV. STAT. ANN. § 25-312(8) (1956). Therefore this discussion is inapplicable to the instant case.

[52] ARIZ. REV. CODE § 2179 (1928).

The principal case[53] is in accord with the modern trend of ending a marriage when a harmonious relationship is no longer possible. But, as we have seen, it is in direct conflict with the large number of cases which deny an annulment.[54] Regrettably, the court, as did the court in *Masters,* evades explaining why the fraud goes to the "essentials" of the marriage. Merely assuming that it does, the court rebuts the proposition that *pari delicto* should apply. Citing *Masters,* it reasons that, by forever precluding equitable relief to one who had had premarital intercourse, punishment would be inflicted far out of proportion to the offense committed.[55] A concurring opinion concludes that if the claim of pregnancy had been made in good faith, it would not have been fraudulent, and the marriage could not be annulled.[56]

The decision of the court is a just one. If a fraud must make cohabitation intolerable to go to the "essentials," such a fraud is evident here. The mutual confidence and respect necessary for a successful marriage have been utterly destroyed. Surely the state lacks any justification for upholding such a marriage.[57] Denial of an annulment precludes any relief for the husband,[58] leaving him stranded on an isle of unhappiness, while rewarding the woman for perpetrating a gross fraud. The Arizona courts would do well to adopt the holding of the instant case and grant the defrauded husband an annulment.

Dennis Joseph Skarecky

DOMESTIC RELATIONS — PARENTAL IMMUNITY — UNEMANCIPATED MINOR MAY NOT MAINTAIN NEGLIGENCE ACTION AGAINST PARENT. *Purcell v. Frazer* (Ariz. Ct. App. 1967).

Plaintiffs, unemancipated minors, were passengers in an automobile driven by their father when an accident occurred, injuring the children. Suit was brought on behalf of the children, alleging that the father was negligent. In opposition to defendant's motion to dismiss, treated as a motion for summary judgment, plaintiff submitted the father's affidavit that he was protected by liability insurance, and that he was

[53] Park v. Parks, 418 S.W.2d 726 (Ky. 1967).
[54] The dissenting opinion hastens to point this out. *Id.* at 728.
[55] *Id.* at 727. See also note 37 *supra.*
[56] *Id.* at 728.
[57] In passing it might also be said that the state's interest in upholding a marriage where the husband married solely to avoid an arrest or imprisonment for seduction or bastardy also seems nil. Nevertheless, such marriages universally have been upheld. *E.g.,* Jacobs v. Jacobs, 146 Ark. 45, 225 S.W. 22 (1920); Lloyd v. Lloyd, 132 Fla. 673, 182 So. 237 (1938); Smith v. Saum, 324 Ill. App. 299, 58 N.E.2d 248 (1944); Pray v. Pray, 128 La. 1037, 55 So. 666 (1911); Wimbrough v. Wimbrough, 125 Md. 619, 94 A. 168 (1915); Figueroa v. Figueroa, 110 N.Y.S.2d 550 (Sup. Ct. 1952); State v. English, 101 S.C. 304, 85 S.E. 721 (1915); Harrison v. Harrison, 110 Vt. 254, 4 A.2d 348 (1939); Thorne v. Farrar, 57 Wash. 441, 107 P. 347 (1910).
[58] To the writer's knowledge, asserted pregnancy is not a ground for divorce in any jurisdiction.

"amicable" to having judgment entered against him in the event of a finding that he was negligent. The trial court entered judgment for the father. On appeal, *held,* affirmed. A parent is immune from liability for the negligent injury of his unemancipated minor children riding as passengers in an automobile operated by him. *Purcell v. Frazer,* 435 P.2d 736 (Ariz. Ct. App. 1967).

There is a split of authority today as to whether an unemancipated minor child may maintain an action against his parent for personal injuries arising out of the parent's negligence.[1] Thirty-seven jurisdictions hold that such an action cannot be maintained, at least where the parent's negligent act was committed in the course of the family relation.[2] The two principal reasons given for denying the cause of action are to preserve domestic tranquility and to maintain parental discipline and control over the child.[3] These reasons were given in 1891 by the

[1] Courts are not in agreement as to whether the parental immunity doctrine was applied at common law. *Compare* Roller v. Roller, 37 Wash. 242, 245, 79 P. 788, 789 (1905) ("At common law it is well established that a minor child cannot sue a parent for a tort.") *with* Dunlap v. Dunlap, 84 N.H. 352, 354, 150 A. 905, 906 (1930) ("There never has been a common law rule that a child could not sue its parent.").

[2] Purcell v. Frazer, 435 P.2d 736 (Ariz. Ct. App. 1967); Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Perkins v. Robertson, 140 Cal. App. 2d 870, 295 P.2d 972 (1956); Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); Traczyk v. Connecticut Co., 24 Conn. Supp. 382, 190 A.2d 922 (Super. Ct. 1963); Strahorn v. Sears, Roebuck & Co., 50 Del. 50, 123 A.2d 107 (1956); Rickard v. Rickard, 203 So. 2d 7 (Fla. App. 1967); Union Bank & Trust Co. v. First Nat'l Bank & Trust Co., 362 F.2d 311 (5th Cir. 1966) (applying Georgia law); Scruggs v. Meredith, 135 F. Supp. 376 (D. Hawaii 1955); Mroczynski v. McGrath, 34 Ill. 2d 451, 216 N.E.2d 137 (1966); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Barlow v. Iblings, 156 N.W.2d 105 (Iowa 1968); Harlan Nat'l Bank v. Gross, 346 S.W.2d 482 (Ky. 1961); Downs v. Poulin, 216 A.2d 29 (Me. 1966); Yost v. Yost, 172 Md. 128, 190 A. 753 (1937); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); Rodebaugh v. Grand Trunk W.R.R., 4 Mich. App. 559, 145 N.W.2d 401 (1966); Durham v. Durham, 227 Miss. 76, 85 So. 2d 807 (1956); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959); Strong v. Strong, 70 Nev. 290, 267 P.2d 240 (1954); Franco v. Davis, 239 A.2d 1 (N.J. 1968); Fitzgerald v. Valdez, 77 N.M. 769, 427 P.2d 655 (1967); Badigian v. Badigian, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961); Watson v. Nichols, 270 N.C. 733, 155 S.E.2d 154 (1967); Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966); Hale v. Hale, 426 P.2d 681 (Okla. 1967); Chaffin v. Chaffin, 239 Ore. 374, 397 P.2d 771 (1964); Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957); Castellucci v. Castellucci, 96 R.I. 34, 188 A.2d 467 (1963); Gunn v. Rollings, 157 S.E.2d 590 (S.C. 1967); Smith v. Henson, 214 Tenn. 541, 381 S.W.2d 892 (1964); Aboussie v. Aboussie, 270 S.W.2d 636 (Tex. Civ. App. 1954); Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966); Groves v. Groves, 158 S.E.2d 710 (W. Va. 1968); Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954).

[3] McCurdy, *Torts Between Parent And Child,* 5 VILL. L. REV. 521, 546 (1960). Professor McCurdy writes, at 529, that there are at least seven reasons offered in justification of the parental immunity doctrine:

> [T]he position of the family as a quasi-governing unit; the husband-wife cases denying an action despite a married women's statute; danger of fraud (stale claims asserted after majority); possibility of succession (inheritance of amount recovered in damages); family exchequer (financial detriment to other children); disturbance of domestic tranquility (although a reason sometimes suggested of the danger of possible domestic

Mississippi Supreme Court in *Hewlett v. George*,[4] which held, without citing authority, that a minor child who was married but separated from her husband and had been living with her mother could not maintain an action for malicious false imprisonment against the estate of her deceased mother.[5] It was the court's opinion that:

> The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand.[6]

From *Hewlett*, American courts originally adopted a broad rule refusing to allow actions between parent and child for personal torts,[7] whether inflicted intentionally or unintentionally.[8] The existence of liability insurance in such cases is considered by these courts to be immaterial, since liability insurance only indemnifies for loss imposed by law, and no loss is imposed upon the parent in an action brought by his child.[9] Moreover, "the danger of collusion between the injured person and the insured, always present in liability insurance cases, is . . . considerably increased by the family relation."[10]

In nearly all the cases where the question has arisen, an exception

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collusion where there is liability insurance is antithetical); and interference with parental discipline and control.
However, since recent decisions supporting the doctrine tend to rely solely on the two reasons stated in the text, discussion will be limited thereto.

[4] 68 Miss. 703, 9 So. 885 (1891).

[5] As to whether an action may be maintained by an unemancipated minor child against his deceased parent's estate, *compare* Gunn v. Rollings, 157 S.E.2d 590 (S.C. 1967) (No) *with* Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960) (Yes). It is difficult to understand why a child should be precluded from recovery in such a situation, since domestic tranquility and parental control could no longer be jeopardized. *See also* 8 ARIZ. L. REV. 186 (1966).

[6] 68 Miss. 703 at 711, 9 So. 885 at 887.

[7] Courts uniformly permit a child to maintain an action against his parent for a tort against property, though the reasons underlying the parental immunity doctrine as to personal torts would seem to apply with equal force. *See* W. PROSSER, LAW OF TORTS § 116, at 887 (3d ed. 1964).

[8] Today the courts have made a substantial change in the "broad rule" stated above, and allow recovery when personal injuries are intentionally inflicted. *E.g.*, Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Brown v. Selby, 206 Tenn. 71, 332 S.W.2d 166 (1960) (dictum); Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942) (dictum).

Some courts have extended this exception to include wanton or reckless misconduct. *E.g.*, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Aboussie v. Aboussie, 270 S.W.2d 636 (Tex. Civ. App. 1954) (dictum).

However, most courts following the parental immunity doctrine refuse to allow actions based on gross negligence. Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966). *Contra*, Rodebaugh v. Grand Trunk W.R.R., 4 Mich. App. 559, 145 N.W.2d 401 (1966) (an unemancipated minor may sue his parent for personal injuries resulting from gross negligence in activities that do not involve an exercise of parental care, discipline, and control.)

[9] Purcell v. Frazer, 435 P.2d 736, 740 (Ariz. Ct. App. 1967); Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468, 470 (1938).

[10] W. PROSSER, LAW OF TORTS § 116, at 889 (3d ed. 1964). *But see* Judge Fuld's dissent in Badigian v. Badigian, 9 N.Y.2d 472, 480, 174 N.E.2d 718, 723, 215 N.Y.S.2d 35, 42 (1961), a portion of which is quoted *infra*, p. 496.

to the parental immunity doctrine has been made as to those standing in place of the natural parent, such as an adoptive parent.[11] Three recent cases have held otherwise,[12] reaching a result more consistent with the reasons behind the rule.

Numerous other exceptions have developed, all of which may be said to be outside the course of the family relation. For example, the parent (or his estate) is not immune from suit where he is engaged in business, as opposed to personal, activities and injures his child;[13] or where the relationship has been terminated by emancipation of the child[14] or by death of either the parent or the child.[15]

Five jurisdictions have rejected the parental immunity doctrine and hold that a child may sue his parents in tort for personal injuries, even where such injuries arise out of ordinary negligence.[16] The rejection rests partly upon the ground that the reasons for the immunity no longer exist, partly in recognition that the exceptions have swallowed the rule, and partly upon the effect of liability insurance.[17] It is the existence of insurance which is most important, and its effect upon parental immunity is the center of controversy among the courts. Those courts which have abrogated parental immunity take the posi-

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[11] *E.g.*, Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939); Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903).

[12] Perkins v. Robertson, 140 Cal. App. 2d 536, 295 P.2d 972 (1956); Franco v. Davis, 239 A.2d 1 (N.J. 1968); Miller v. Davis, 49 Misc. 2d 764, 268 N.Y.S.2d 490 (Sup. Ct. 1966).

[13] *E.g.*, Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

[14] *E.g.*, Wood v. Wood, 135 Conn. 280, 63 A.2d 586 (1948); Bulloch v. Bulloch, 45 Ga. App. 1, 163 S.E. 708 (1932); Glover v. Glover, 44 Tenn. App. 712, 319 S.W.2d 238 (1958).

[15] *E.g.*, Davis v. Smith, 253 F.2d 286 (3d Cir. 1958) (applying Pennsylvania law); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965).

[16] Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966) (overruling Levesque v. Levesque, 99 N.H. 147, 106 A.2d 563 (1954)); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963) (qualified abrogation).

[17] In *Hebel v. Hebel*, 435 P.2d 8, 15 (Alas. 1967), the court stated:

> Analysis of [the reasons given in justification of the parental immunity doctrine] has convinced us that neither individually nor collectively do the arguments in support of the immunity rule outweigh the necessity of according the minor child a remedy for wrongful negligent injury to his person. And it is this factor of a negligent wrong that we believe to be of paramount significance. It appears . . . illogical to sanction property action between unemancipated minors and their children [*sic*]; to allow an action if the child happens to be emancipated; to permit an action if the parent inflicts intentional harm upon the child; or if that harm is inflicted through negligence characterized as gross or wanton; to permit an action should the child happen to be injured in the course of the parent's business or vocation; to permit an action if the parent is deceased; but, on the other hand, to deny the unemancipated child redress for his personal injuries when caused by the negligence of a living parent.

tion that "to persist in adherence to family-harmony and parental-discipline-and-control arguments when there is . . . liability insurance involved is . . . unrealistic."[18] The argument is that family harmony is not endangered where there is liability insurance coverage, since it is the insurer who is the defendant, in substance if not in form.[19] However, the courts in these five jurisdictions have not limited the rejection of parental immunity to situations where liability insurance is present.[20] Perhaps this is because "the insurance covers legal liability, does not create it,"[21] and that "the existence of insurance should not impose a duty upon a parent where none existed before."[22] However, these courts deem "the wide prevalence of liability insurance in personal injury actions a proper element to be considered in making the policy decision of whether to abrogate parental immunity in negligence actions."[23]

The instant case[24] presented a question of first impression in Arizona. While not bound by precedent,[25] the court of appeals unanimously affirmed the trial court's judgment and adopted the rule that, liability insurance notwithstanding, parents are immune from liability for their negligent acts towards their unemancipated minor children when the tort is committed in the course of the family relationship. The court reasoned that the liability insurance contract could not cover a liability which was not imposed by law on the insured,[26] and that, in the absence of liability insurance, negligence actions between a child and his parent might lead to destruction of domestic harmony.[27]

> The court recognized that the tort was related to a common activity in the typical American family. Children are often "ferried" about by their parents. . . . [S]uch a function is conducive to the well-being of both the children and the

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[18] *Id.* at 15.

[19] *See generally* W. PROSSER, LAW OF TORTS § 116, at 888-90 (3d ed. 1964).

[20] *But cf.* Purcell v. Frazer, 435 P.2d 736, 739 (Ariz. Ct. App. 1967):

> If a person does not realize that a civil action, brought when there is no insurance coverage by a child against a parent for a mistake made in attempting to carry out ordinary family activities, is disruptive of family unity, then we can only suggest that that person knows little about family living.

[21] McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521, 545 (1960).

[22] Hebel v. Hebel, 435 P.2d 8, 12 (Alas. 1967).

[23] Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193, 197 (1963). *Accord*, Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967).

[24] Purcell v. Frazer, 435 P.2d 736 (Ariz. Ct. App. 1967).

[25] The court relied on decisions in five other states to rule "in favor of an immunity sufficiently broad to cover the instant fact situation." 435 P.2d 736, 738 (1967).

[26] 435 P.2d 736, 740 (1967).

[27] *Id.* at 739.

> parent and is intimately connected with the welfare of a family.[28]

Thus, the father was acting in the course of the family relationship; if he was negligent, nevertheless he is immune from suit — the immunity being applied in the interest of "domestic harmony."

The court stated that "this most fundamental policy decision should not be made simply on a nose count of the number of cases holding one way or the other."[29] While the parental immunity doctrine may have been founded on valid reasons at its inception in 1891 in *Hewlett v. George*,[30] modern developments have removed these reasons and the "nose count" should not control. Most of the cases have involved personal injuries sustained by the plaintiff-child while riding as a passenger in an automobile negligently driven by the parent.[31] The prevalence of liability insurance cannot be ignored. In this connection, it is significant that the *Uniform Motor Vehicle Safety Responsibility Act* has been adopted in Arizona.[32] The *Uniform Act* provides an inducement to drivers to purchase liability insurance;[33] in most cases, the parents will be insured.[34]

The two primary reasons for denying a cause of action in tort between an unemancipated minor child and his parent, that is, preservation of domestic tranquility and maintaining parental discipline and control, are inapplicable when the action is, in effect, against the insurance company.[35] There is, of course, always the possibility that the parent will not be insured; but "there is no great need to be tender of defendants who do not have [insurance], since decisions imposing liability may be expected to lead to its purchase."[36]

Perhaps the strongest objection to the abrogation of parental immunity under *today's* circumstances is that the possibility of collusion in insurance cases would be heightened by the family relationship. However, in the words of Judge Fuld:

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[28] *Id.*

[29] 435 P.2d 736, 738 (1967). *Accord,* Hebel v. Hebel, 435 P.2d 8, 9 (Alas. 1967).

[30] 68 Miss. 703, 9 So. 885 (1891).

[31] McCurdy, *Torts Between Parent and Child,* 5 VILL. L. REV. 521, 545 (1960).

[32] ARIZ. REV. STAT. ANN. §§ 28-1101 through 28-1225 (1956).

[33] *See* Comment, *Automobile Liability Insurers In Arizona — Are They Absolutely Liable?* 5 ARIZ. L. REV. 248, 249 (1964):

> Although the Act does not require liability insurance before an accident, carrying such insurance is probably the best way to satisfy the security requirement following an accident. The law thus induces drivers to carry liability insurance.

[34] Those courts which reject parental immunity have recognized that "generally," (Briere v. Briere, 107 N.H. 432, 224 A.2d 588, 591 (1966)) or "in most instances," (Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66, 75 (1966)) or "in a great majority of actions," (Goller v. White, 20 Wis. 2d 402, 412, 122 N.W.2d 193, 197 (1963)) the parent's losses will be protected by liability insurance.

[35] McCurdy, *Torts Between Parent and Child,* 5 VILL. L. REV. 521, 546 (1960).

[36] W. PROSSER, LAW OF TORTS § 116, at 889 (3d ed. 1964).

> One may not, of course, deny the hazard, but such a danger, being present in all liability insurance cases, furnishes reason not for denial of a cause of action, but for added caution on the part of court and jury in examining and assessing the facts.[37]

In view of the foregoing, it is difficult to understand why the parental immunity doctrine is perpetuated. The large number of exceptions which have nibbled away at its applicability indicate judicial dissatisfaction with it. The ever-increasing presence of liability insurance in such cases has dissolved the reasons behind parental immunity, and the maxim *cessante ratione legis, cessat et ipsa lex* has become applicable. Refusing to recognize a cause of action between parent and child may have preserved domestic transquility in 1891, but under modern circumstances such a refusal can only promote domestic agitation. Leaving a child uncompensated for his injuries while fostering the parent's security in his knowledge that he will not be held liable for his negligence hardly will lead to family harmony. In fact, the parent must now bear the financial hardship brought upon the family by medical expenses and costs of other special care, perhaps causing a severe financial strain on the family. If it can be presumed that a person buying liability insurance has as an auxiliary purpose the protection of others whom he may injure, this purpose would be most applicable to the protection of a member of his own family.

If the doctrine were abrogated, there would be an even greater incentive to purchase liability insurance. This, of course, would result in providing a greater probability that one who has been injured — whether or not a member of the family of the party at fault — will have a source of compensation for his injuries, and will not be forced to go unaided. In other words, abrogation of parental immunity would foster the purposes of the *Uniform Motor Vehicle Safety Responsibility Act*. Liability would be imposed by law upon the parent, and the child would then look to his parent's insurer for compensation. It seems reasonable that this would tend to preserve the harmony of the home by compensating the child for his injuries while removing the danger of heavy financial burdens upon the family. Finally, abrogation of the parental immunity doctrine would give effect to a fundamental concept in our tort system, based upon fault — that an injured party should be compensated for his injuries by the wrongdoer.

Harry S. Bachstein, Jr.

[37] Badigian v. Badigian, 9 N.Y.2d 472, 480, 174 N.E.2d 718, 723, 215 N.Y.S.2d 35, 42 (1961) (dissenting opinion).

INSURANCE — ACCIDENTAL DEATH — THERE IS NO DISTINCTION BETWEEN ACCIDENTAL MEANS AND ACCIDENTAL RESULT IN ARIZONA. *Knight v. Metropolitan Life Insurance Co.* (Ariz. 1968).

Plaintiff's son, insured by defendant, was an experienced high diver. While on an outing, he voluntarily, intentionally, and without suicidal intent, dived 139 feet from a dam into a lake below and was fatally injured. The insurance policy issued by defendant provided against injury sustained solely through *accidental means.* Plaintiff filed suit for the death benefit urging that death was accidental since the result of the insured's act was unintended. The trial court, sitting without a jury, concluded that the death was not accidental and awarded judgment for the defendant. The Arizona Court of Appeals affirmed. On appeal to the supreme court, *held,* reversed, court of appeals decision vacated. The term "accidental means" as used in insurance policies should not be construed in a technical sense but should be given its ordinary and popular meaning according to common speech and usage and the understanding of the average man. *Knight v. Metropolitan Life Insurance Co.*, 437 P.2d 416 (Ariz. 1968).

There is a split of authority as to the construction of the term "accidental means" in accident insurance policies insuring against loss sustained "solely through accidental means." Twenty-three jurisdictions distinguish "accidental means" and "accidental results."[1] Twenty-one

[1] Landress v. Phoenix Mut. Life Ins. Co., 291 U.S. 491 (1934); Smith v. Continental Cas. Co., 203 A.2d 168 (D.C. Ct. App. 1964) (the distinction is made in all cases except sunstroke); Acacia Mutual Life Ins. Co. v. Galleher, 144 A.2d 550 (D.C. Mun. Ct. App. 1958); Bullard v. Emergency Aid Ins. Co., 39 Ala. App. 92, 103 So. 2d 44 (1957), *cert. denied* 267 Ala. 694, 103 So. 2d 50 (1957); Rooney v. Mutual Benefit Health & Accident Ass'n, 74 Cal. App. 2d 885, 170 P.2d 72 (1946) (It has been suggested that California claims to make the distinction, but in practice rejects it. *See* Comment, *The Judicial Approach To "Accidental Means" Policies In California,* 13 HASTINGS L.J. 255 (1961)); Prudential Ins. Co. v. Gutowski, 49 Del. 233, 113 A.2d 579 (1955); Life Ins. Co. v. Williams, 109 Ga. App. 264, 135 S.E.2d 925 (1964); New York Life Ins. Co. v. Bruner, 129 Ind. App. 271, 153 N.E.2d 616 (1958); Donohue v. Washington Nat'l Ins. Co., 259 Ky. 611, 82 S.W.2d 780 (1935); Home Beneficial Life Ins. Co. v. Partain, 205 Md. 60, 106 A.2d 79 (1954); Reeves v. John Hancock Mut. Life Ins. Co., 333 Mass. 314, 130 N.E.2d 541 (1955); Wells v. Prudential Ins. Co., 3 Mich. App. 220, 142 N.W.2d 57 (1966); Kluge v. Benefit Ass'n of Ry. Employees, 149 N.W.2d 681 (Minn. 1967); State Farm Mut. Auto. Ins. Co. v. Underwood, 377 S.W.2d 459 (Mo. 1964); McGinley v. John Hancock Mut. Life Ins. Co., 88 N.H. 108, 184 A. 593 (1936); Linden Motor Freight Co. v. Travelers Ins. Co., 40 N.J. 511, 193 A.2d 217 (1963); Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 150 S.E.2d 40 (1966); Baker v. All States Life Ins. Co., 58 Ohio L. Abs. 350, 46 Ohio Op. 308, 96 N.E.2d 787 (Ohio App. 1950); Finley v. Prudential Life & Cas. Ins. Co., 236 Ore. 235, 388 P.2d 21 (1963); Kimball v. Massachusetts Accident Co., 44 R.I. 264, 117 A. 228 (1922); Rollins v. Life & Cas. Ins. Co., 190 Tenn. 89, 228 S.W.2d 70 (1950); International Travelers Ass'n v. Francis, 119 Tex. 1, 23 S.W.2d 282 (1930); Dorsey v. Prudential Ins. Co., 124 W. Va. 100, 19 S.E.2d 152 (1942); Evans v. Metropolitan Life Ins. Co., 26 Wash. 2d 594, 174 P.2d 961 (1946).

jurisdictions make no such distinction.[2] The two views are denoted respectively, the "strict" and "liberal" approaches.[3]

Under the strict approach, the difference between accidental means and accidental results is analogous to that between cause and effect.[4] When nothing unforeseen and unintended occurs in the performance of the injurious act, and the only unanticipated factor is the result — that is, the death or injury — then the consequences are "accidental results." Such consequences are *not* caused by accidental means, since the act was performed as intended. Only when an unusual, unforeseen and unintended mishap occurs in the very performance of the act itself are the results considered the product of accidental means.[5] The jurisdictions which recognize this distinction restrict recovery to a situation where the result arises from acts unintentionally done.[6] The rationale underlying this strict interpretation is that

> to make no distinction between accidental result and accidental means [is] to violate the terms of a contract of insurance and . . . the courts [have] no authority to make a contract for the parties other than as they . . . actually made.[7]

The trend is to make no distinction.[8] Courts applying the liberal

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[2] Knight v. Metropolitan Life Ins. Co., 437 P.2d 416 (Ariz. 1968); Union Life Ins. Co. v. Epperson, 221 Ark. 522, 254 S.W.2d 311 (1953); Equitable Life Assur. Soc'y v. Hemenover, 100 Colo. 231, 67 P.2d 80 (1937); King v. Travelers Ins. Co., 123 Conn. 1, 192 A. 311 (1937); Gulf Life Ins. Co. v. Nash, 97 So. 2d 4 (Fla. 1957); O'Neil v. New York Life Ins. Co., 65 Idaho 722, 152 P.2d 707 (1944); Henry v. Metropolitan Life Ins. Co., 70 Ill. App. 2d 132, 217 N.E.2d 482 (1966); Akins v. Illinois Bankers Life Assur. Co., 166 Kan. 648, 203 P.2d 180 (1949); Schonberg v. New York Life Ins. Co., 235 La. 461, 104 So. 2d 171 (1958); Byrd v. Reserve Life Ins. Co., 217 Miss. 761, 65 So. 2d 249 (1953); Terry v. National Farmers Union Life Ins. Co., 138 Mont. 333, 356 P.2d 975 (1960); Murphy v. Travelers Ins. Co., 141 Neb. 41, 2 N.W.2d 576 (1942); Scott v. New Empire Ins. Co., 75 N.M. 81, 400 P.2d 953 (1965); Morgan v. Indemnity Ins. Co. of North America, 302 N.Y. 435, 99 N.E.2d 228 (1951); Jacobson v. Mutual Benefit Health & Accident Ass'n, 69 N.D. 632, 289 N.W. 591 (1940); New York Life Ins. Co. v. Wise, 207 Okla. 622, 251 P.2d 1058 (1952); Beckham v. Travelers Ins. Co., 424 Pa. 107, 225 A.2d 532 (1967) (a landmark case in which Pennsylvania decided to abandon the distinction); Goethe v. New York Life Ins. Co., 183 S.C. 199, 190 S.E. 451 (1937); Handley v. Mutual Life Ins. Co., 106 Utah 184, 147 P.2d 319 (1944); Griswold v. Metropolitan Life Ins. Co., 107 Vt. 367, 180 A. 649 (1935); O'Connell v. New York Life Ins. Co., 220 Wis. 61, 264 N.W. 253 (1936).

[3] Henry v. Metropolitan Life Ins. Co., 70 Ill. App. 2d 132, 217 N.E.2d 482, 484 (1966) (liberal "attitude") (dictum); Note, *"Accident" and "Accidental Means" In Indiana*, 36 IND. L.J. 376, 377 (1961) ("classical" and "liberal").

[4] Note, *"Accident" and "Accidental Means" In Indiana*, 36 IND. L.J. 376 (1961).

[5] Kluge v. Benefit Ass'n of Ry. Employees, 149 N.W.2d 681 (Minn. 1967); *see* W. VANCE, INSURANCE § 181, at 947 (3d ed. 1951).

[6] *See generally* G. COUCH, INSURANCE 2d § 41:28 (1962); 2 G. RICHARDS, INSURANCE § 215 (1952); *see* Comment, *"Accidental Means" — A Serbonian Bog In Tennessee*, 24 TENN. L. REV. 574 (1956).

[7] Van Schaick, *Accidental Means In New York — A Rational Approach*, 32 CORNELL L.Q. 378, 382 (1947).

[8] Knight v. Metropolitan Ins. Co., 437 P.2d 416 (Ariz. 1968); Haynes v. American Cas. Co., 228 Md. 394, 179 A.2d 900 (1962). While Maryland admits that a growing number of courts refuse to make the distinction, that jurisdiction has applied it in the past. *Haynes* makes that state's current position somewhat uncertain by recognizing the trend.

construction allow recovery for unintended results of the insured's voluntary act, even though nothing unforeseen or unintended has occurred in the performance of the act. Thus, unexpected *consequences* provide the accidental element, notwithstanding the fact that the policy provides only against injury arising from accidental means. These courts base their decisions upon generally accepted rules of construction — that an insurance policy should be interpreted most strongly against the insurer,[9] that doubt should be resolved in favor of the insured whenever there is an ambiguity,[10] and that in defining the terms of the policy the courts should adopt that definition naturally accepted by the average layman rather than a technical one.[11]

Arizona adopted the liberal view in *California State Life Insurance Company v. Fuqua*[12] by ignoring any distinction between "means" and "result." In *Fuqua*, as in the instant case, the policy provided against bodily injury effected solely through "accidental means." In dealing with that phrase, the court prescribed a test to be followed in order to determine if a *result* is accidental:

> [I]f the *result* is one which in the ordinary course of affairs would not be anticipated by a reasonable person to flow from his own acts, it is accidental. The test is, what *effect* should the insured, as a reasonable man, expect from his own actions under the circumstances.[13] (emphasis added).

In *Malanga v. Royal Indemnity Company*,[14] the insured voluntarily consumed quantities of alcohol and barbiturates. Neither, if taken alone, could have been fatal, but the synergistic reaction of the two produced death. Reaffirming the reasonable man test of *Fuqua*, the court concluded that the insured's death was accidental within the meaning of the policy, since he did not know, nor have reason to know, that overingestion of alcohol and barbiturates would result in death.[15]

Arizona departed from the application of the *Fuqua* test in the instant case.[16] Rather than merely ignore the technical difference be-

[9] Struble v. Occidental Life Ins. Co., 265 Minn. 26, 120 N.W.2d 609, 616 (1963); Aetna Life Ins. Co. v. Evins, 199 So. 2d 238, 241 (Miss. 1967).

[10] *E.g.*, Dove v. Arkansas Nat'l Life Ins. Co., 238 Ark. 1033, 386 S.W.2d 495, 496 (1965) (dictum); Fowler v. First Nat'l Life Ins. Co., 71 N.M. 364, 378 P.2d 605, 607 (1963); Dakota Block Co. v. Western Cas. & Sur. Co., 81 S.D. 213, 132 N.W.2d 826, 830 (1965).

[11] *E.g.*, Aeroline Flight Serv., Inc. v. Insurance Co. of North America, 257 Iowa 409, 133 N.W.2d 80, 85 (1965); Couey v. National Benefit Life Ins. Co., 77 N.M. 512, 424 P.2d 793, 796 (1967); Thompson v. Ezzel, 61 Wash. 2d 685, 379 P.2d 983, 985 (1963).

[12] 40 Ariz. 148, 10 P.2d 958 (1932).

[13] *Id.* at 155, 10 P.2d at 960.

[14] 101 Ariz. 588, 422 P.2d 704 (1967).

[15] In *Malanga*, the policy provided against loss resulting directly from "accidental bodily injuries." Thus, the reasonable man test of *Fuqua* was not confined solely to those policies insuring against injuries from "accidental means."

[16] Knight v. Metropolitan Life Ins. Co., 437 P.2d 416 (Ariz. 1968). The court noted, however, that even if the reasonable man test of *Fuqua* were applied to the facts of the instant case, the outcome would be the same.

tween "means" and "result," as the court of appeals had done, a unanimous court chose this case

> as a vehicle to re-examine the meaning of "accidental," "accidental means," "accidental results," and similar terms used in health and accident policies and life policies providing double indemnity for "death by accidental means."[17]

The insured was an excellent swimmer and experienced diver who had jumped off the same dam five years prior to his death. He was extremely confident of his swimming and diving abilities, and sought to prove those abilities to others by executing successively higher dives over a period of years. The trial court applied the *Fuqua* test and concluded that a reasonable man under the same circumstances would have anticipated that death or serious bodily injury would result from this act, and, therefore, that the death was not "accidental." The court of appeals held that the reasonable man test was properly applied by the trial court and added:

> [W]e do not believe the absence of any evidence that the deceased subjectively intended to injure himself necessarily requires the trier of fact to find that the death was "accidental."[18]

The supreme court reversed, stating:

> That a reasonable man might consider [the insured's] voluntary stunt foolhardy does not of itself make the result any less accidental. [The insured] thought he could successfully perform the feat . . . .[19]

By applying the "cardinal rule of contract construction"[20] that the intention of the parties governs, the court concluded that an accident is an accident whether it be in the "means" or "result," if it would ordinarily be "talked about" as an accident.[21]

The instant case indicates that Arizona courts will continue to ignore what has been termed the "illogical distinction"[22] between accidental means and accidental results. The distinction has led to diametrically opposed decisions in the "strict" and "liberal" jurisdictions,[23]

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[17] 437 P.2d 416, 419 (Ariz. 1968).
[18] 428 P.2d 137, 140 (Ariz. Ct. App. 1967).
[19] 437 P.2d 416, 421 (Ariz. 1968).
[20] *Id.* at 420.
[21] 437 P.2d 416, 420 (Ariz. 1968).
[22] Murphy v. Travelers Ins. Co., 141 Neb. 41, 2 N.W.2d 576 (1942). *See also,* Note, *"Accident" and "Accidental Means" In Indiana,* 36 IND. L.J. 376 (1961). Mr. Justice Cardozo had a particular dislike for confusingly fine distinctions in the interpretation of insurance policies. In his dissent in *Landress v. Phoenix Mutual Life Insurance Co.,* 291 U.S. 491, 499 (1934), he stated:

> The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog.

[23] *Compare* Aubuchon v. Metropolitan Life Ins. Co., 142 F.2d 20 (8th Cir. 1944) (applying Missouri Law) *with* Mansbacher v. Prudential Ins. Co., 273 N.Y. 140, 7 N.E.2d 18 (1937). In both cases, the insured died from a voluntary overdose of veronal. The beneficiary was precluded from recovery in the former case on the ground that there was nothing unforeseen in the means. Had the insured miscalculated the *dosage* rather than the *effect* of the dosage, recovery

and is so exceedingly difficult to apply that widely divergent decisions have arisen even among the "strict" jurisdictions.[24] No undue burden is cast upon insurance companies by disregarding technical distinctions in insurance policies.[25]

Abandonment of the reasonable man test of *Fuqua* and *Malanga* is likely to have far-reaching consequences. In the construction of accident insurance policies, Arizona courts will find that unintended injuries are accidental and are caused by accidental means when such injuries are produced by any act of the insured, however daring, reckless, or foolhardy such act might appear to a reasonable man. The court justifies such a construction by the rule that the intention of the parties governs, and that when the insured pays his premium, he does not anticipate that a court will measure his acts against those of a mythical "reasonable man" to determine the validity of an insurance claim which may arise out of his acts. Thus, the court implicitly recognizes that when a person obtains accident insurance, he is, in effect, intentionally insuring against his own momentary carelessness.

In the instant case, the court put insurance companies on notice that, since the companies draft the policies they sell, they must unambiguously exclude reckless and foolhardy acts.[26] How such an exclusion should be stated was not suggested by the court, but two alternatives are apparent: a provision specifically setting out the various acts which the company considers reckless, daring, or foolhardy (such as stunt flying), or a simple recital that the insurer does not undertake to provide against loss occasioned by acts of the insured which are "reckless, daring, or foolhardy." A third alternative, which does not involve exclusionary clauses, would be for the company to raise rates on its accident policies so as to "spread the risk," while at the same time attempting to compete with other companies.

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would have been allowed. In the latter case the beneficiary recovered because the result was accidental.

[24] Courts following the strict view occasionally have gone out of their way to find something unforeseen in the means in order to allow recovery. *Compare* Northam v. Metropolitan Life Ins. Co., 231 Ala. 105, 163 So. 635 (1935) *with* James v. State Life Ins. Co., 83 Ind. App. 344, 147 N.E. 533 (1925). In *Northam*, where the insured's puncturing a pimple on his face with an unsterilized needle resulted in a fatal infection, recovery was denied on the ground that the means employed were not accidental. In *James*, where the insured died as a result of an infection stemming from his barber's use of an unsterilized blackhead eradicator, the beneficiary recovered. The court explained that there was something unforeseen in the means, that is, that the insured consented to the use of a blackhead eradicator, but not an infected one.

[25] *See* Mansbacher v. Prudential Ins. Co., 273 N.Y. 140, 7 N.E.2d 18, 20 (1937):

> [I]nsurance policies upon which the public rely for security . . . should be plainly written, in understandable English, free from fine distinctions which few can understand until pointed out by lawyers and judges.

[26] 437 P.2d 416, 420 (Ariz. 1968).

Of the three possibilities, the first seems most appealing. When specific types of conduct are set out and excluded in the policy, the insured has a better chance of knowing what sort of activity on his part will prevent recovery in case of death. Moreover, the insurance company would remain in a more favorable competitive position than would be the case if it merely raised its rates. The second possibility — a blanket exclusion — is likely to produce extensive and repeated litigation. A simple exclusion against all acts of the insured which are "reckless, daring, or foolhardy" fails to communicate specifically what the insurer has agreed to; this indefiniteness would be construed against the insurer, and the exclusionary clause could be reduced to a nullity. The third alternative — raising premium rates and making no exclusion — would make difficult the company's survival in the highly competitive insurance industry, although this alternative would be less likely to produce litigation than either of the exclusionary possibilities.

What type of exclusion will be sufficient to withstand attack remains undecided; but there is an indication in the instant case that specificity will be the determining factor as to the validity of an exclusionary clause.[27]

Harry S. Bachstein, Jr.

LIENS — EQUITABLE — UNPAID SUBCONTRACTORS AND MATERIALMEN NOT ENTITLED TO EQUITABLE LIEN AGAINST UNDISBURSED CONSTRUCTION LOAN FUNDS. *Pioneer Plumbing Supply Co. v. Southwest Savings & Loan Ass'n* (Ariz. 1967).

Plaintiff savings and loan association entered into several construction loan agreements with the borrower, a development company. Each note was secured by an assignment of the loan proceeds and a mortgage on the property. It was agreed that a loan fund would be established and disbursed according to the percentage of project completion and that if the developer should default, plaintiff was entitled to the undisbursed construction loan fund to offset its losses.[1] Before completion of the project, the developer abandoned construction and stopped pay-

[27] 437 P.2d 416, 420 (Ariz. 1968). Speaking of the desire of insurance companies to exclude reckless and foolhardy acts of the insured, the court said, "With simplicity and clarity of expression they may remove all doubt."

[1] The contracts also provided that they were for the sole protection of the developer and plaintiff, and not for the benefit of third parties. As the court pointed out, this language precluded any recovery based upon a third party beneficiary theory. Pioneer Plumbing Sup. Co. v. Southwest Sav. & Loan Ass'n, 102 Ariz. 258, 261, 428 P.2d 115, 118 (1967).

ing on the notes. Defendants, a subcontractor and his supplier, filed timely mechanic's and materialmen's liens. Plaintiff brought an action to foreclose the mortgages securing the notes, and to apply the undisbursed loan fund to offset the amount owed it by the developer. Defendants counterclaimed, maintaining they should be entitled to a prior equitable lien on the remaining loan fund. Both defendants alleged through uncontradicted affidavits that they relied on representations made by the developer that they would be paid out of the construction loan funds. The trial court granted the plaintiff's motion for summary judgment and the defendants appealed. The Court of Appeals reversed, holding that the defendants were entitled to the claimed equitable lien.[2] On review, *held*, reversed. Where lender and contractor make construction loan agreements which provide that upon the contractor's default the lender is entitled to undisbursed construction loan funds to offset its losses, and the contractor defaults prior to completion, unpaid subcontractors and materialmen are not entitled to equitable liens on the undisbursed funds, although they were induced by the contractor to rely, and did rely, on such funds for payment. *Pioneer Plumbing Supply Co. v. Southwest Savings & Loan Ass'n*, 102 Ariz. 258, 428 P.2d 115 (1967).

Other than by contract with the borrower or lender, the statutory mechanic's lien is the normal procedure by which subcontractors and materialmen protect their interest in the labor and material they have furnished to a contractor.[3] The lender, however, usually holds a first mortgage, which, if foreclosed, takes priority over the mechanic's lien.[4] When foreclosure is necessary, the mechanic's lien claimant is left with little or nothing with which to satisfy his claim. However, relief for the materialmen might be found in an application of the doctrine of equitable liens.

An equitable lien is a right over property which constitutes a charge or encumbrance.[5] An equitable lien is said to arise either from an express contract[6] or from application of considerations of right and justice as applied to the relations of the parties in the circumstances of their dealings.[7]

For the lien to arise from an express contract, there must be an intent to give, charge, or pledge real or personal property as security

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[2] Pioneer Plumbing Sup. Co. v. Southwest Sav. & Loan Ass'n, 3 Ariz. App. 495, 415 P.2d 893 (1966).

[3] ARIZ. REV. STAT. ANN. §§ 33-981-1001 (1956), *as amended*, (Supp. 1967).

[4] *See* ARIZ. REV. STAT. ANN. § 33-992 (1956), *as amended*, (Supp 1967); Wylie v. Douglas Lumber Co., 39 Ariz. 511, 8 P.2d 256 (1932); Fickling v. Jackman, 203 Cal. 657, 265 P. 810 (1928).

[5] Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925).

[6] 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 1235-37 (5th ed. 1941).

[7] Mullens v. Geo. C. Wright Lumber Co., 182 Okla. 355, 77 P.2d 700 (1938); 1 L. JONES, A TREATISE ON THE LAW OF LIENS § 27 (3d ed. 1914).

for an obligation, and the property must be sufficiently identified.[8] For example, in each of the following situations an equitable lien may be imposed on the property or fund: an agreement which does not convey property but which provides that certain property will be security for the performance of an obligation;[9] a promise to give a mortgage;[10] an agreement in which the document evidencing the security is defective;[11] and an agreement to insure for the benefit of a conditional vendor.[12]

The second grouping of equitable liens, those which arise from considerations of right and justice, are impossible to classify on the basis of one single theory. However, due to the nature of such a lien, it will usually arise out of a situation where the elements of estoppel,[13] or unjust enrichment,[14] or both,[15] are present. This type of lien has been applied in favor of a vendor who has conveyed land before the consideration is paid;[16] a technical interloper who, ignorant of the state of title, improves another's land;[17] and also a vendee who has paid, but to whom conveyance has not been made.[18] It is usually stated that a promise to pay out of a particular fund will not create an equitable lien on that fund,[19] but if the court can find an intent to assign a share in the fund, or to treat it as security for payment, the lien will be allowed.[20]

A fact situation similar to the instant case occurs when a surety for a contractor is given an equitable lien on so much of the construction loan fund as is retained by the owner to guarantee the contractor's performance.[21] However, such lien is based on the doctrine of equitable subrogation which requires that the person seeking its benefit must

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[8] Higgins v. Manson, 126 Cal. 467, 58 P. 907 (1899); 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1235 (5th ed. 1941).

[9] Wilder v. Watts, 138 F. 426 (D.S.C. 1905).

[10] Hill v. Hill, 185 Kan. 389, 345 P.2d 1015 (1959); Davis v. Childers, 45 S.C. 133, 22 S.E. 784 (1895).

[11] Markham v. Wallace, 147 Ala. 243, 41 So. 304 (1906); Longdon v. Wakely, 62 Fla. 530, 56 So. 408 (1911).

[12] A.H. Thompson Co. v. Security Ins. Co., 252 Ky. 427, 67 S.W.2d 493 (1934).

[13] Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898 (1928).

[14] RESTATEMENT OF RESTITUTION § 161 (1936); 12 U.C.L.A. L. REV. 1246, 1249 (1965).

[15] Gulf Shore Dredging Co. v. Ingram, 193 So. 2d 232 (Fla. 1966).

[16] Hinkel v. Crowson, 188 Cal. 378, 206 P. 58 (1922); Wright v. Buchanan, 287 Ill. 468, 123 N.E. 53 (1919). *But see* Baker v. Fleming, 6 Ariz. 418, 59 P. 101 (1899) (Arizona does not recognize implied vendor's lien).

[17] Ensign v. Batterson, 68 Conn. 298, 36 A. 51 (1896); *cf.* McMillan v. Barber Asphalt Paving Co., 151 Wis. 48, 138 N.W. 94 (1912).

[18] Witte v. Hobolth, 224 Mich. 286, 195 N.W. 82 (1923).

[19] *See, e.g.*, Moeur v. Farm Builders Corp., 35 Ariz. 130, 274 P. 1043 (1929); Morrison v. Havens, 24 Cal. App. 2d 504, 75 P.2d 515 (1938).

[20] *See* Barnes v. Alexander, 232 U.S. 117 (1914).

[21] Prairie State Bank v. United States, 164 U.S. 227 (1896); National Sur. Co. v. County Bd. of Educ., 15 F.2d 993 (4th Cir. 1926).

have paid a debt due a third party before he can acquire that party's rights.[22]

California appears to be the first and only jurisdiction to apply the equitable lien doctrine to a fact situation like the principal case. The California Supreme Court, in 1928, held that, as between unpaid materialmen and the administratrix of the borrower's estate,[23] the materialmen were entitled to an equitable lien on the undisbursed construction loan funds where the construction was substantially complete and the materialmen justifiably had relied on that fund for payment.[24] The court reasoned that the lender and the borrower-owner by their conduct "induced or contributed to induce"[25] the materialmen to put value into the property and that to permit the owner to withhold the fund would be unjust.[26] The California courts, through a series of decisions,[27] have refined this doctrine to give an unpaid materialman, who has been induced by *either* the borrower or lender to rely on undisbursed construction loan funds as security, an equitable lien on those funds which has priority over a first mortgage.[28] The District Court of Appeals has pointed out that

> [I]t is the fund itself and the arrangement for progress payments therefrom, created by the mutual agreement of the borrower and the lender, that constitutes the material inducement to the subcontractors and the materialmen. . . .
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> . . . [T]he significant circumstance is the reliance on the fund which existed by the joint acts and mutual agreement of both the owners and the lender.[29]

In addition, California has provided by statute that the subcontractor who fears that he will not be paid can, by serving notice on the lender[30] and posting a bond equal to 125% of the claim,[31] require the fundholder

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[22] Aetna Life Ins. Co. v. Middleport, 124 U.S. 534 (1888).

[23] The lender did not claim an interest in the fund since the improvement, substantially complete, provided his security.

[24] Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898 (1928).

[25] *Id.* at 504, 271 P. at 901.

[26] Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898 (1928).

[27] *See* A-1 Door & Materials Co. v. Fresno Guar. Sav. & Loan Ass'n, 61 Cal. 2d 728, 394 P.2d 829, 40 Cal. Rptr. 85 (1964) (lien can attach although construction not completed); Pacific Ready Cut Homes v. Title Ins. & Trust Co., 216 Cal. 447, 14 P.2d 510 (1932) (the inducement can be by borrower *or* lender); Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898 (1928) (first case allowing the lien); McBain v. Santa Clara Sav. & Loan Ass'n, 241 Cal. App. 2d 829, 51 Cal. Rptr. 78 (1966) (explains the justification for the doctrine); Miller v. Mountain View Sav. & Loan Ass'n, 238 Cal. App. 2d 644, 48 Cal. Rptr. 278 (1965) (suggests the amount of the fund available to claimants should be the difference between the amount properly advanced, and the value of the labor and material expended. This position is unsupportable and would result in virtual denial of relief.)

[28] McBain v. Santa Clara Sav. & Loan Ass'n, 241 Cal. App. 2d 829, 51 Cal. Rptr. 78 (1966).

[29] *Id.* at 841, 843, 51 Cal. Rptr. at 86, 87.

[30] CAL. CODE CIV. PROC. § 1190.1(a) (West Supp. 1967).

[31] CAL. CODE CIV. PROC. § 1190.1(h) (West Supp. 1967).

to withhold sufficient money to answer the claim.

In a 1920 case,[32] Arizona allowed an equitable lien of the contractual type, arising out of an agreement that was legally insufficient to constitute a mortgage. The principles of an equitable lien arising out of contract were reaffirmed in 1929,[33] and again in 1965,[34] although the claims were denied for lack of the requisite intent. The lien claimed here, on a non-contractual basis, presented a question of first impression in the state.

The Arizona Supreme Court, in the instant case, founded its denial of the claimed equitable lien on three grounds. First, no intent was shown that the fund was to be security for the materialmen; existing Arizona case law requires a showing of such intent.[35] Second, the court felt that to impose an equitable lien would be to alter the written agreement, in view of the assignment of the fund to the lender, the recital that the contract was to benefit only the lender and borrower, and the disclaimer of the lender's responsibility for payment of materialmen. Third, the court interpreted the California decisions as refusing an equitable lien on the fund without specific inducement by the lender. The court felt that the terms of the agreement alone should control and in the absence of objectionable conduct on the part of the lender, no equities should be balanced.[36] The Court has made it clear that any change in the law with reference to balancing the interests of materialmen and lenders must come from the legislature.[37]

The high court of Arizona, given the choice of shifting some of the risks of the construction industry to the institutional leaders, or of leaving things unchanged, chose the latter. To leave the relative positions of the parties the same *is* certainly less controversial. The reasoning of the California courts, that reliance on the *fund* is the significant circumstance, (as distinguished from requiring reliance on inducement from the lender) since it existed by the joint acts and mutual agreement of both the owner and the lender, is more realistic. The interests of materialmen and other suppliers need more comprehensive protection. In most instances they have no real bargaining power and are required to assume a disproportionate amount of the risk of construction, and in a foreclosure action receive little or nothing for their efforts. Because it feels that the institutional lenders are in the best position to assume these risks, California has by statute and case law effectively

[32] Stephen v. Patterson, 21 Ariz. 308, 188 P. 131 (1920).
[33] Moeur v. Farm Builders Corp., 35 Ariz. 130, 274 P. 1043 (1929).
[34] Glendale v. Arizona Sav. & Loan Ass'n, 2 Ariz. App. 379, 409 P.2d 299 (1965).
[35] Stephen v. Patterson, 21 Ariz. 308, 188 P. 131 (1920).
[36] Pioneer Plumbing Sup. Co. v. Southwest Sav. & Loan Ass'n, 102 Ariz. 258, 265, 428 P.2d 115, 122 (1967).
[37] Pioneer Plumbing Sup. Co. v. Southwest Sav. & Loan Ass'n, 102 Ariz. 258, 428 P.2d 115 (1967).

shifted many risks and responsibilities of construction and development to them. This should be the Arizona law. Since the Supreme Court has made its position clear, the Arizona legislature should adopt statutory provisions similar to those of California. Such a law would give the suppliers meaningful protection for their interests and place the responsibility for speculative construction financing in the hands of those best able to assume it, the institutional lenders.

Hiram A. Cannon

LIFE INSURANCE — BINDING RECEIPT — INSURANCE EFFECTIVE ALTHOUGH APPLICANT DIED BEFORE COMPLETION OF INSURER'S INVESTIGATION. *Prince v. Western Empire Life Insurance Co.* (Utah 1967).

The plaintiff, an applicant for a life insurance policy, prepaid his first premium at the time of making the application, and was issued a binding receipt by the defendant insurer. This receipt stated that the insurance was effective as of the date of the medical examination if the insurer determined that the applicant was insurable on such date for the policy exactly as applied for. Plaintiff was accidently killed after the date of the medical examination but before undergoing an additional medical test previously requested by the defendant. The trial judge found for defendant on stipulated facts. On appeal, *held*, reversed. The issuance of a binding receipt for life insurance, which provides that insurance shall be effective on the date of medical examination if premium is prepaid and applicant is determined by the company to be insurable on such date, makes the policy effective upon completion of the medical examination unless at that time the applicant was not an insurable risk. *Prince v. Western Empire Life Insurance Co.*, 428 P.2d 163 (Utah 1967).

The binding receipt given to an applicant by a life insurance company is an attempt by the parties to make the coverage effective at some point prior to the actual receipt of the policy by the applicant.[1] There has been much litigation over the actual effect of the binding receipt, courts often being faced with having to decide if and when the insurance became effective.[2]

It is well settled that a contract is to be construed according to all its terms and an insurance contract is no exception. Many states have expressly so provided. A typical *statute* states:

> Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy

[1] *See generally* Comment, 7 STAN. L. REV. 292 (1955); Comment, 63 YALE L.J. 523 (1954); Note, 60 HARV. L. REV. 1164 (1947).
[2] *See* Annot., 2 A.L.R.2d 943 (1947).

> and as amplified, extended, or modified by any rider, endorsement or application attached to and made a part of the policy.[3]

Construction of an insurance contract that works a forfeiture will be avoided wherever possible[4] and any ambiguous provisions will be construed most strongly against the insurer in favor of the insured,[5] but unless ambiguity actually exists, the courts will not rewrite the contract for the parties.[6] Unfortunately, a binding receipt that one court finds ambiguous may be perfectly clear to another.[7]

There are two major types of binding receipts. The first is the *approval* type which states that the insurance shall be effective as of the date of the application or of the medical examination, whichever is later, *provided* the company *approves* the policy exactly as applied for. Two constructions of this type of binding receipt have evolved. Some courts apply strict construction principles to the receipt and hold that the approval of the company is a condition precedent to the insurance becoming effective.[8] If the applicant should die prior to the issuance of the policy and the insurer is aware of the death, the insurer obviously will not approve the application. But, if the applicant does not die during this period, the application is approved. Thus, although the insurer is permitted to charge for this interim period, it does not assume any risk.[9] The insurer's delay in acting upon the application

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[3] ARIZ. REV. STAT. ANN. § 20-1119 (1956).

[4] Western & S.L. Ins. Co. v. Vale, 213 Ind. 601, 12 N.E.2d 350 (1938); Haynes v. Midland Nat'l Life Ins. Co., 60 S.D. 212, 244 N.W. 110 (1932).

[5] Metropolitan Life Ins. Co. v. Grant, 268 F.2d 307 (9th Cir. 1959); Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir. 1947), *cert. denied*, 331 U.S. 849 (1947); Harford v. National Life & Cas. Ins. Co., 81 Ariz. 43, 299 P.2d 635 (1956); Brunt v. Occidental Life Ins. Co., 223 Cal. App. 2d 179, 35 Cal. Rptr. 492 (1963); Hart v. Travelers' Ins. Co., 236 App. Div. 309, 258 N.Y.S. 711 (1932), *aff'd*, 261 N.Y. 563, 185 N.E. 739 (1933).

[6] Whitney v. Union Cent. Life Ins. Co., 47 F.2d 861 (8th Cir. 1931); Peterson v. Hudson Ins. Co., 41 Ariz. 31, 15 P.2d 249 (1932); Northwestern Mut. Life Ins. Co. v. Neafus, 145 Ky. 563, 140 S.W. 1026 (1911); Adolf v. Union Nat'l Life Ins. Co., 170 Neb. 38, 101 N.W.2d 504 (1960).

[7] *Compare* Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir. 1947), *cert. denied*, 331 U.S. 849 (1947) (binding receipt which stated ". . . and if this application . . . is, prior to my death, approved by the company at its Home Office, the insurance applied for shall be in force as of the date of completion of said Part B . . ." (Part B is the medical examination) held to be ambiguous. "[I]nsurers who seek to impose upon words of common speech an estoric significance intelligible only to their craft, must bear the burden of any resulting confusion.") . . . *with* Northwestern Mut. Life Ins. Co. v. Neafus, 145 Ky. 563, 140 S.W. 1026 (1911) (binding receipt which stated ". . . provided, the application is approved by the company at its home office; and, in that event, the insurance as applied for will be in force from the date of the medical examination . . ." held to be clear and unambiguous. "[W]e have never gone to the extent of putting into the contract words that would make a radical change in its meaning, or that would make for the parties a contract they did not make for themselves.")

[8] *See, e.g.*, Dove v. Arkansas Nat'l Life Ins. Co., 238 Ark. 1033, 386 S.W.2d 495 (1965); Kammerer v. Metropolitan Life Ins. Co., 95 Ga. App. 609, 98 S.E.2d 391 (1957); Adolf v. Union Nat'l Life Ins. Co., 170 Neb. 38, 101 N.W.2d 504 (1960); Arcuri v. Prudential Ins. Co., 248 App. Div. 501, 290 N.Y.S. 567 (1936).

[9] Southwestern Life Ins. Co. v. Evans, 262 S.W.2d 512 (Tex. Civ. App. 1953)

does not imply approval[10] but *unreasonable* delay has been held to estop the insurer from raising that defense.[11]

Other courts have taken an opposite approach based on the assumed intent of the parties and have held that there is temporary insurance coverage *until* approval.[12] This result is justified on the ground of public policy; it would be unconscionable to permit the company, after it had used language to induce payment of a premium, to escape the burden of coverage which an ordinary applicant would reasonably believe the insurer had assumed.

The *insurable* type of binding receipt, perhaps the most commonly used type, provides that coverage shall be effective as of the date of application or medical examination, whichever is later, *provided the applicant is insurable* on that date, under the company's rules for the plan and rate exactly as applied for. As in the *approval* type of binding receipt, several jurisdictions construe the contract strictly and hold that there is no coverage unless the applicant was insurable; then the contract relates back to the appropriate date.[13]

A growing number of courts hold, however, that there is an immediate contract of insurance, with the proviso that if the applicant is not insurable the company has a right to terminate the coverage be-

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(permitting the insurer to charge for a period of time in which it did not assume any risk is not in violation of public policy).

There are advantages, other than immediate insurance protection, in having the policy relate back to the date of the application. The policy would become incontestable sooner, would reach maturity earlier with a corresponding acceleration of cash surrender values, and it would cover the period after "approval" and before "issue". It may be conceded that these are not inducements for the initial permium payment, but they are nevertheless advantages to the applicant.

[10] Lucas v. Metropolitan Life Ins. Co., 14 Cal. App. 2d 676, 58 P.2d 934 (1936); Gonsoulin v. Equitable Life Assur. Soc., 152 La. 865, 94 So. 424 (1922); Hughes v. John Hancock Mut.Life Ins. Co., 163 Misc. 31, 297 N.Y.S. 116 (Mun. Ct. 1937).

[11] Bellak v. United Home Ins. Co., 211 F.2d 280 (6th Cir. 1954) (where there was no adverse report from the medical examination and the insurer's standard practice was to accept all applications not rejected by the medical examiner, there will be an inference of approval if the insurer delays unreasonably in acting upon the application); Combined Am. Ins. Co. v. Parker, 377 S.W.2d 213 (Tex. Civ. App. 1964) (when it is the insurer's practice to either issue the policy or notify the applicant within a reasonable time of rejection, failure to notify the applicant within a reasonable time results in effective coverage.)

[12] *See, e.g.*, Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir. 1947), *cert. denied*, 331 U.S. 849 (1947); Wernecke v. Pacific Fidelity Life Ins. Co., 238 Cal. App. 2d 884, 48 Cal. Rptr. 251 (1965); Ransom v. Penn Mut. Life Ins. Co., 43 Cal. App. 2d 420, 274 P.2d 633 (1954); Life Ins. Co. of N. Am. v. De Chiaro, 68 N.J. Super 93, 172 A.2d 30 (1961); McAvoy Vitrified Brick Co. v. North Am. Life Assur. Co., 395 Pa. 75, 149 A.2d 42 (1959).

[13] Mofrad v. New York Life Ins. Co., 206 F.2d 491 (10th Cir. 1953); Cooksey v. Mutual Life Ins. Co., 73 Ark. 117, 83 S.W. 317 (1904); Suarez v. Southland Life Ins. Co., 158 So. 2d 536 (Fla. Dist. Ct. App. 1963); Maddox v. Life & Cas. Ins. Co., 79 Ga. App. 164, 53 S.E.2d 235 (1949); Gonsoulin v. Equitable Life Assur. Soc., 152 La. 865, 94 So. 424 (1922); Bearup v. Equitable Life Assur. Soc., 351 Mo. 326, 172 S.W.2d 942 (1943); Raymond v. Nat'l Life Ins. Co., 40 Wyo. 1, 273 P. 667 (1929).

fore the policy is issued.[14] These courts base their decisions either on an ambiguity in the receipt as drawn by the insurer, construing such ambiguity in favor of the applicant,[15] or on grounds of public policy.[16] As one court stated:

> [I]f the receipt meant anything, no other result could have been intended by the parties, for unless the insured was to be protected against injury or death during the interim period there would be no advantage to him paying his premium in advance.[17]

The question of the effect of the binding receipt arises only if the applicant dies prior to the issuance of the policy. The insurer, upon learning of the applicant's death may claim that the applicant was not in fact insurable on the date of the application or medical examination. Even those courts which hold that the insurability of the applicant is a condition precedent to the insurance becoming effective require that rejection of the risk by the insurer be based upon a *good faith* determination of the lack of insurability as of the time the temporary insurance was to have become effective.[18] However, at least one court put the burden on the beneficiary to prove that the insurer, acting in good faith, would have found that the deceased applicant was insurable on the appropriate date under the insurer's rules.[19] Other courts have held only that it is a jury question.[20]

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[14] Occidental Life Ins. Co. v. Lame Elk White Horse, 74 A.2d 435 (D.C. Mun. Ct. App. 1950); Reck v. Prudential Ins. Co., 116 N.J.L. 444, 184 A. 777 (Ct. Err. & App. 1936); Duncan v. John Hancock Mut. Life Ins. Co., 137 Ohio 441, 31 N.E.2d 88 (1940); Albers v. Security Mut. Life Ins. Co., 41 S.D. 270, 170 N.W. 159 (1918); *cf.* Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir. 1947), *cert. denied*, 331 U.S. 849 (1947).

[15] Ransom v. Penn Mut. Life Ins. Co., 43 Cal. App. 2d 420, 274 P.2d 633, 636 (1954) ("[H]ad it wished to make clear that its satisfaction was a condition precedent to a contract, it could easily have done so by using unequivocal terms."). *See also* cases cited note 5 *supra.*

[16] Metropolitan Life Ins. Co. v. Wood, 302 F.2d 802 (9th Cir. 1962) (insurability of the applicant at the time of the application is irrelevant); Francis v. Mutual Life Ins. Co., 55 Ore. 280, 106 P. 323 (1910) ("The clause seems to be a mere trick on the part of the insurance company to deceive the applicants into the belief that they have temporary insurance, and thereby induce them to part with their money in advance of the issuance of the policy."); Prudential Ins. Co. v. Lamme, 425 P.2d 346 (Nev. 1967) (applicant's insurability at the moment the application is received is irrelevant). The court agreed that this may, on occasion, allow one who is not insurable to secure temporary coverage, but:

> Notwithstanding this possible result in some instances, we think the policy considerations . . . carry the greater weight. The life insurance companies may still write C.O.D. insurance, or in the light of experience, choose to assume the risk sometimes involved in the use of the conditional receipt. *Id.* at 348.

[17] Stonsz v. Equitable Life Assur. Soc., 324 Pa. 97, 187 A. 403 (1936).

There are advantages, other than immediate insurance coverage, in having the policy relate back to the date of the application. See note 9 *supra.*

[18] New England Mut. Life Ins. Co. v. Hinkle, 248 F.2d 879 (8th Cir. 1957); Novellino v. Life Ins. Co. of N. Am., 216 A.2d 420 (Del. 1966); Simpson v. Prudential Ins. Co., 227 Md. 393, 177 A.2d 417 (1962); Allen v. Metropolitan Life Ins. Co., 83 N.J. Super 223, 199 A.2d 254 (1964).

[19] United Founders Life Ins. Co. v. Carey, 363 S.W.2d 236 (Tex. 1962).

[20] Wright v. Pilot Life Ins. Co., 379 F.2d 409 (4th Cir. 1967); Morgan v. State Farm Life Ins. Co., 240 Ore. 113, 400 P.2d 223 (1965).

The court in the instant case,[21] in which the *insurable* type of binding receipt had been used, seems to have taken a middle ground approach. The court, disturbed by the imbalance in the equities of the parties, and yet unwilling to break away from strict contract construction, rested its decision on a finding that the applicant was in fact insurable on the date in question[22] even though an additional medical examination had been requested by the insurer.

The court's finding of insurability was based on the fact that the insurer's doctor at the first medical examination had "*approved* the applicant for insurance." However, the binding receipt in question made the insurance coverage effective as of the date of medical examination "*provided* that proposed insured is determined . . . to be *insurable*[23] on such date for the policy *exactly as applied for*" (emphasis supplied). The court's opinion indicates that in requiring the applicant to undergo further medical tests, it appeared that the insurer was attempting to figure the *best rate* it could give to the applicant. This certainly would indicate that the insurer was not issuing the policy at the rate *exactly as applied for* which would have been necessary to make the insurance effective as of the date of the medical examination according to the terms of the binding receipt.

Thus, in its eagerness to find for the applicant, the court ignored the finding of the insurer that the applicant was *not* insurable for the policy exactly as applied for. There is no reason to believe this was other than a good faith determination; it was made prior to the applicant's death. The court has thus effectively eliminated this condition of the binding receipt.

There have been no decisions by the Arizona appellate courts concerning life insurance binding receipts. An applicant in Arizona, or even in a jurisdiction which has already attempted to resolve this dispute, is entitled to know, in advance, at what moment his insurance coverage is effective when he prepays a premium. The insurance company is likewise entitled to guard itself against having to pay a claim on a risk it did not agree to assume.

If a binding receipt is issued which attempts to afford the applicant insurance coverage from a particular date, but only if he is in fact insurable as of that date, and the court nevertheless holds that the receipt

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[21] Prince v. Western Empire Life Ins. Co., 428 P.2d 163 (Utah 1967).

[22] *Id.* at 169.

[23] The morals of the applicant, his habits, present amount of insurance carried, financial situation and many other factors, on which the medical examination has no bearing, may effect insurability. Good health and insurability are not synonymous. *See* New England Mut. Life Ins. Co. v. Hinkle, 248 F.2d 879 (8th Cir. 1957); Peninsular Life Ins. Co. v. Rosin, 104 So. 2d 792 (Fla. 1958).

The opinion in the instant case does not indicate whether or not the insurer raised this argument.

effectuated immediate temporary coverage, the insurer has been forced to assume a risk it did not wish to assume. Because many jurisdictions have not resolved this conflict, the insurer may decide not to issue a binding receipt at all. The applicant, in that event, can not obtain coverage until receipt of the policy, even though he actually may have been insurable several weeks prior to the delivery of the policy.

Perhaps the only real solution to this problem is statutory control of binding receipts which would define the rights of the parties. The statute *could* provide that, notwithstanding any conditions precedent to establishing effective coverage, immediate temporary coverage is in effect upon the issuance of a binding receipt and payment of premium. Insurance companies hardly could be expected to issue binding receipts upon such terms; this would enable uninsurable individuals to obtain insurance coverage for the period of time between the application and the rejection by the company, creating a possibility for defrauding insurance companies.

A far better approach would be to provide that coverage shall become effective as of a particular date but only if the applicant was in fact insurable on that date, based upon a *good faith* determination of the company under the company's rules and regulations which were in effect *on the date of the application;* the question of such insurability, if litigation arises, would be a jury question with the burden of proof upon the insurer. A statute of this type would protect the insurer against having to assume a risk it does not wish to assume and at the same time permit the applicant to obtain immediate coverage if he is in fact insurable.

David M. Berman

PROCESS — SERVICE BY PUBLICATION — COURT LACKS JURISDICTION WHERE SERVICE IS BY PUBLICATION IN AN IN PERSONAM ACTION. *Ticey v. Randolph* (Ariz. Ct. App. 1967).

Plaintiff brought an action for personal injuries predicated on the alleged negligence of two defendants in the operation of a motor vehicle. Service on each defendant was by publication pursuant to Rules 4(e)(1) and (3) of Arizona Rules of Civil Procedure.[1] A default judgment was

[1] ARIZ. R. CIV. P. 4(e)(1) (Supp. 1967) provides in part that:
When a defendant is a non-resident of the state, or is absent from the state, or is a transient person, or is one *whose residence is unknown* to the party, or is a corporation incorporated under the laws of any other state or foreign country which has no legally appointed and constituted agent in this state, or is *concealing himself* to avoid service of summons, a summons shall be issued as in other cases and service may be made in accordance with Sections 4(e)(2) *or* 4(e)(3) of this Rule. The methods of service herein provided shall be applicable for the assertion of *any claim*. . . . (emphasis supplied).
ARIZ. R. CIV. P. 4(e)(3) (Supp. 1967) provides in part that:

rendered against both. Defendant's motion to set aside the default was refused. On appeal, *held,* reversed. Although an affidavit is filed, stating that a resident defendant was absent from the state or in concealment to avoid service and that the other defendant could not be found after exercise of due diligence, the words "where by law personal service is not required" of Rule 4(e)(3) of the Arizona Rules of Civil Procedure restrict the court's jurisdiction, where service is effected by publication, to in rem or quasi in rem actions. *Ticey v. Randolph,* 5 Ariz. App. 136, 424 P.2d 178 (1967).

Service by publication was unknown at common law[2] and developed as a statutory method of service of process.[3] All jurisdictions have authorized its use,[4] and where the requirements of the statute are strictly complied with, publication is effective, in place of personal or substituted service, as notice of the commencement of an action.[5] The circumstances under which service by publication is authorized vary with each jurisdiction, but statutes most commonly permit its use when the defendant's residence cannot be ascertained after due diligence,[6] when he is absent from the state with intent to defraud creditors[7] or to avoid service,[8] or when he is concealing himself within the state.[9] Publication commonly is limited to cases where the plaintiff has made an

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> *Where by law personal service is not required,* and a person is subject to service under Section 4(e)(1), such service may be made by either of the methods set forth in Section 4(e)(2) *or by publication.* . . . (emphasis supplied).

[2] *See, e.g.,* Harrison v. Hanvey, 265 N.C. 243, 247, 143 S.E.2d 593, 596 (1965) ("Service by publication is in derogation of the common law."); Accident Indem. Ins. Co. v. Johnson, 261 N.C. 778, 136 S.E.2d 95 (1964).

[3] *See e.g.,* Shafe v. Shafe, 101 Ind. App. 200, 198 N.E. 826 (1935); South Texas Dev. Co. v. Martwick, 328 S.W.2d 230 (Tex. Civ. App. 1959).

[4] 42 AM. JUR. *Process* § 58 (1942).

[5] *See, e.g.,* Bekins v. Huish, 1 Ariz. App. 258, 260, 401 P.2d 743, 745 (1965):

> There is nothing within these rules which specifies that service by publication, by personal service out of the state or by registered mail have any different efficacy than service within the state in the usual manner.

Williams v. Batten, 156 Ga. 620, 625, 119 S.E. 709, 711 (1923) ("If service by publication has been properly perfected . . . a decree rendered thereon is just as valid as though the defendant had been personally served . . ."); Annot., 72 A.L.R. 186 (1931).

[6] *See* CAL. CODE CIV. PRO. § 412 (West 1954); McKendrick v. Western Zinc Mining Co., 165 Cal. 24, 25, 130 P. 865, 866 (1913), where the court stated:

> Service by publication could be made when the person on whom service is to be made . . . has departed from the state; or cannot, after *due diligence,* be found within the state; or conceals himself to avoid the service or summons . . . . (emphasis supplied).

[7] *See* WASH. REV. CODE § 4.28.100 (1953); Skala v. Brockman, 109 Neb. 259, 190 N.W. 860 (1922) (court upheld sufficiency of affidavit alleging that the defendant had departed to hinder and delay his creditors).

[8] *See* ARIZ. R. CIV. P. 4(e)(1) (Supp. 1967); Harrison v. Hanvey, 265 N.C. 243, 247-48, 143 S.E.2d 593, 597 (1965) (publication authorized where the defendant, a resident of the state, *departs* therefrom or keeps himself *concealed* therein with intent to defraud his creditors or to *avoid* the service of summons).

[9] *See* MINN. R. CIV. P. 4.04 (1951); Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965).

honest, conscientious or reasonable effort,[10] but has found it impossible or impractical to effect personal service.[11] Whether or not the plaintiff's efforts satisfy these requirements of "due diligence" is a question of fact.[12]

The leading case of *Pennoyer v. Neff*,[13] holding that constructive service in an in personam action is ineffectual for any purpose, dealt only with non-residents and generally has not been extended to residents.[14] Some jurisdictions have held that in certain instances in personam jurisdiction may be acquired over a *resident* when service is by publication.[15] As to non-residents, however, the general rule remains in accord with *Pennoyer v. Neff* — that jurisdiction in such cases is restricted to in rem or quasi in rem actions involving a res within the jurisdiction of the court.[16]

Arizona has never allowed service by publication to confer jurisdiction in an in personam action against either residents or non-resi-

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[10] *See, e.g.*, Larsen v. Larsen, 180 So. 2d 393 (Fla. 1965) (honest); Klinger v. Milton Holding Co., 136 Fla. 50, 186 So. 526 (1939) (conscientious); Davis v. Kressly, 78 S.D. 637, 107 N.W.2d 5 (1961) (reasonable).

[11] *See Potter v. Potter*, 39 Del. 478, 479, 2 A.2d 93, 94 (1938); *In re* Bergman's Survivorship, 60 Wyo. 355, 362, 151 P.2d 360, 366 (1944):

> Of course, resort to constructive service by publication is predicated upon *necessity*, and, if personal service could be effected by the exercise of reasonable diligence, substituted service is authorized. (emphasis supplied).

[12] *See, e.g.*, Chicago v. Logan, 56 Ill. App. 2d 291, 295, 205 N.E.2d 795, 797 (1965) (what constitutes a "diligent inquiry" to ascertain the residence of a defendant must be determined by examining the circumstances of each case); *c.f.* Turnquist v. Kjelbak, 77 N.W.2d 854 (N.D. 1956).

[13] 95 U.S. 714 (1877).

[14] *See* Clearwater Merc. Co. v. Roberts, Johnson, Rand Shoe Co., 51 Fla. 176, 40 So. 436 (1906); Harrison v. Hanvey, 265 N.C. 243, 249, 143 S.E.2d 593, 598 (1965):

> The great majority of cases which have considered the question have not applied to *residents* the doctrine of *Pennoyer v. Neff*, that a judgment *in personam* rendered in a state court against a non-resident upon constructive service cannot be enforced even in the state where it was rendered. They have "sustained the validity of a *personal* judgment recovered against a resident or a domestic corporation upon substituted or constructive service of process where he or it could not be personally served within the state, and the constitutionality of statutes authorizing such service has pretty generally been sustained so far as residents are concerned." (emphasis supplied).

[15] Clearwater Merc. Co. v. Roberts, Johnson, Rand Shoe Co., 51 Fla. 176, 40 So. 436 (1906) (domestic corporation, service by publication). *See* Knowles v. Gaslight & Coke Co., 86 U.S. (19 Wall.) 58, 61-62 (1873); Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965) (suggesting that a resident of the state who absconds to avoid service of process can be served by publication and an *in personam* judgment can be rendered); Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E.2d 688 (1963) (by implication); Annot., 126 A.L.R. 1474, 1476-77 (1940), *Supplemented in* 132 A.L.R. 1361 (1941). *Contra* McDonald v. Mabee, 243 U.S. 90 (1917); Baxter v. Continental Cas. Co., 48 F.2d 467 (8th Cir.), *appeal dismissed*, 284 U.S. 578 (1931); De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345 (1896); Barnett v. Cook County, 373 Ill. 516, 26 N.E.2d 862 (1940).

[16] *E.g.*, Goodwine v. Superior Court, 63 Cal. 2d 239, 407 P.2d 1, 47 Cal. Rptr. 201 (1965); Muggill v. Reuben H. Donelley Corp., 62 Cal. 2d 239, 398 P.2d 147, 42 Cal. Rptr. 107 (1965); State *ex rel.* Truitt v. District Court, 44 N.M. 16, 96 P.2d 710 (1939); Trinity Methodist Church v. Miller, 260 N.C. 331, 132 S.E. 2d 688 (1963).

dents.[17] In an early decision[18] the Arizona Supreme Court said of publication: "upon constructive service of summons, no judgment against defendant personally may be given; that is, to determine merely the personal rights and obligations of the defendant."[19] In *Knight v. Mewszel*,[20] interpreting Arizona's current publication rules,[21] the court of appeals held that service by publication on a resident defendant in an automobile accident case was not sufficient to confer jurisdiction to enter a personal money judgment against the defendant, even though a diligent but unsuccessful search had been made to locate and personally serve the defendant.[22] However, the recent Arizona Supreme Court decision in *Miller v. Corning Glass Works*,[23] while not mentioning *Knight* or the instant case, appears to have been decided upon the underlying assumption that service by publication would have given the court in personam jurisdiction if a proper affidavit had been filed.[24]

The instant case followed *Knight* by again strictly interpreting the rule, construing the words "where by law personal service is not required" as limiting the use of service by publication to actions traditionally in rem or quasi in rem.[25] The court held this notwithstanding an express acknowledgment that the decision leaves a gap in Arizona's service procedures;[26] notwithstanding wording in the Arizona Rules

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[17] Hook v. Hoffman, 16 Ariz. 540, 147 P. 722 (1915); Knight v. Mewszel, 3 Ariz. App. 295, 413 P.2d 861 (1966). *See* Stinson v. Johnson, 3 Ariz. App. 320, 414 P.2d 169 (1966).

[18] Hook v. Hoffman, 16 Ariz. 540, 147 P. 722 (1915).

[19] *Id.* at 544, 147 P. 724.

[20] 3 Ariz. App. 295, 413 P.2d 861 (1966).

[21] *Id.* at 297, 413 P.2d at 863, discussing ARIZ. R. CIV. P. 4(e)(1), (3):

> [t]he rules relied upon by the appellant allow service by publication "where by law personal service is not required," and we do not feel that the law in the instant case does away with the necessity of personal service before a transitory money judgment can be obtained against the defendants.

[22] *Id.*

[23] 102 Ariz. 326, 429 P.2d 438 (1967).

[24] The action was one in personam, a tort action in pursuit of a money judgment. The defendant contended that since the statements contained in the affidavit were not statements of fact but almost entirely allegations based on information and belief, the attempted service by publication was inadequate and did not confer jurisdiction on the trial court. The case seemingly was tried on the assumption that if the court did rule that the affidavit was sufficient, the service by publication would have provided jurisdiction.

The court held:

> We find that defendant's objections to the affidavit filed by plaintiff for service by publication are well taken, because the affidavit fails to show the circumstances warranting the utilization of the procedure under 4(e)(1) and does not set out the facts essential to justify service by publication. 102 Ariz. at 329, 429 P.2d at 180.

[25] It seems much more reasonable that the critical words in Rule 4(e)(3) intend to limit the use of service by publication to actions traditionally denominated *in rem* or *quasi in rem* actions. 5 Ariz. App. at 138, 424 P.2d at 180.

[26] We concur with appellees' complaint that there is a *gap* in our service of process procedures in "in personam" actions as to defendants intentionally avoiding service of process, where such avoidance goes to the extent of concealing one's place of abode and whereabouts, thus frustrating all

that could justify a different holding;[27] and notwithstanding language in an earlier Arizona decision which recognized the injustice of insulating a domiciliary from effective service where he cannot be found, is absent from, or hides himself within the state so as to avoid service of process.[28] The effect of this holding is to petrify the precedent of *Knight* and to allow the gap in our service of process provisions to continue.

There are compelling arguments in theory and policy for allowing service by publication to confer jurisdiction on a *resident* defendant who is temporarily absent from the state or evading service. The state, which accords a resident privileges and affords protection to him and his property by virtue of his domicile, also may exact reciprocal duties. The rights and privileges incident to domicile are not dependent on continuous presence or availability in the state; likewise the attendant duties should not depend on these factors.[29] No resident should be allowed, whether by flight, temporary absence, or concealment, to escape his legal obligations and thwart the efforts of the courts to enforce the rights of others against him.

Allowing service by publication on a *resident* defendant, when other methods are unreasonable or impossible to effect, to give the court in personam jurisdiction does not necessarily violate the due process clause of the fourteenth amendment.[30] The constitutional limitations

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methods of service provided by our rules. 5 Ariz. App. at 138, 424 P.2d at 180. (emphasis supplied).

The court, aware of this deficiency, stated: "[i]f this defect is to be remedied it must be done by a revision of the rules." *Id.* at 138, 424 P.2d at 180. This indicates that the court felt that publication *should* be effective in this case to render an in personam judgment, but held this way only because it felt bound to "strictly" construe the words of the statute.

[27] Rule 4(e)(1) states that, under certain outlined circumstances (to which the instant case conformed), effective service may be had by conforming with Rule 4(e)(3). Also, the wording "shall be applicable for the assertion of any claim," necessarily implies that this service is not limited in its scope, that it can be used for an in rem, quasi in rem, or in personam action. Rules 4(e)(1) and (3) are set out in full in note 1 *supra.*

[28] Onan & Sons v. Superior Court, 65 Ariz. 255, 265, 179 P.2d 243, 249 (1947), where the court stated:

> It seems to us to be absolutely just that a domiciliary should *not* be allowed to avoid his legal obligations by being able to hide or absent himself from the state so as to avoid service of process. No plaintiff should be compelled to pursue him and litigate in a strange forum where he is not known, where the cause of action did not arise, and where the law of the forum is not applicable to the facts involved in the action. (emphasis supplied).

[29] See Milliken v. Meyer, 311 U.S. 457 (1940); Harrison v. Harvey, 265 N.C. 243, 249, 143 S.E.2d 593, 598 (1965). *But see* A. EHRENZWEIG, CONFLICT OF LAWS § 28, at 94-95 (1962).

[30] *See* Annot., 126 A.L.R. 1474 at 1475 (1940):

> And in the great majority of the cases presenting the question, the courts . . . have sustained the validity of a personal judgment recovered against a resident or a domestic corporation upon substituted or constructive service of process where he or it could not be personally served within the state; and the constitutionality of the statutes authorizing such service has pretty generally been sustained so far as residents are concerned.

on the power of a court in the United States to exercise personal jurisdiction over a defendant without his consent derive from the due process clause of the fourteenth amendment and are directed to two basic inquiries. First, the defendant must be physically located within the geographic boundaries of the jurisdiction or must have had sufficient relation to the jurisdiction to justify its proceeding against him despite his physical absence.[31] The instant case satisfies this requirement in that the defendants were residents and the contact bringing about the action occurred within the state.

Second, the method of notifying the defendant must satisfy the standards of fairness established by the Supreme Court to assure the defendant an opportunity to defend against the plaintiff's claim. This second constitutional limitation was best expressed in *Mullane v. Central Hanover Trust Co.*[32] by Mr. Justice Jackson:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and to afford them an opportunity to present their objections.[33]

In 1917, in *McDonald v. Mabee*,[34] the Supreme Court held that a judgment obtained upon a promissory note by service by publication upon a resident of the state who, when the suit was commenced, although technically domiciled in the state, had left the state intending permanently to establish his home elsewhere, was absolutely void as violative of the due process clause. The court implied that a summons left at his last and usual place of abode, where his family still resided, might have been enough to confer jurisdiction upon the court, but held that an advertisement in a local newspaper was not sufficient notice to bind a person who had left the state intending not to return. "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."[35] Holmes' language justifies the holding in the *McDonald* case where a better method of notice was available to the plaintiff. However, if, as in the instant case, a resident defendant conceals his whereabouts well enough, he renders personal or substituted service impossible either within or without the state. Of necessity then, no better notice can be given than publication. The majority of state courts

[31] International Shoe Co. v. Washington, 326 U.S. 310 (1945); and more recently, McGee v. International Life Ins. Co., 355 U.S. 220 (1957).
[32] 339 U.S. 306 (1950).
[33] *Id.* at 314-15.
[34] 243 U.S. 90 (1917).
[35] *Id.* at 92.

have held such service constitutional,[36] and one can infer approval by the Supreme Court.[37]

Two alternatives are available to cure the patent inadequacy of Arizona's present service procedures. The first alternative is for the Arizona Supreme Court to overrule the decision in the instant case. Such action is invited by the expressed intent of the State Bar Committee[38] which drafted the revisions concerning service by publication. The committee's note, published as a supplement to Rule 4(e)(1), states that the amendments were intended to supplant the "outmoded, inadequate and conflicting" sections existing at that time,[39] and that the revision was made to bring directly to the attention of counsel the necessity of determining in each case whether personal service is or is not required.[40] Citing *Mullane,* and saying the question was one of constitutional law,[41] the Bar Committee stated:

> The choice of the general phrase used in the amendment is intended to give to Arizona *residents* the *maximum* privileges which the Constitution of the United States permits them to have. . . . (emphasis supplied).[42]

This expressed intent, especially to give Arizona residents the benefit of the full breadth of constitutionally permissible service, provides solid basis for reaching a different result from that of the instant case. The words "where by law personal service is not required" should be interpreted not as applying to an irrelevant distinction between in rem, quasi in rem and in personam proceedings,[43] but rather as applying to the *constitutional* standards for adequate notice, which are not violated in situations such as the instant case.

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[36] *E.g.*, Clearwater Merc. Co. v. Roberts, Johnson, Rand Shoe Co., 51 Fla. 176, 40 So. 436 (1906); Fernandez v. Casey & Swasty, 77 Tex. 452, 14 S.W. 149 (1890). *See generally* Annot., 126 A.L.R. 1474 (1940).

[37] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950):

> This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

[38] ARIZ. R. CIV. P. 4(e)(1), State Bar Committee Note (Supp. 1967).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950). In discussing the various distinctions between in rem and in personam actions the Supreme Court stated:

> But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between

A second alternative to cure this defect would be for the Supreme Court of Arizona to amend the Rule,[44] omitting the words "where by law personal service is not required" and expressly allowing, in specified circumstances, service by publication to render in personam jurisdiction over a resident.

Edward C. Voss III

REAL PROPERTY — BROKERS — BUYER'S DEFAULT ON CONTRACT FOR SALE OF LAND PRECLUDES BROKER'S RIGHT TO COMMISSION. *Ellsworth Dobbs, Inc. v. Johnson* (N.J. 1967).

Where the purchaser of land had been financally unable to close title after having signed a sales contract with the seller and the trial court had entered judgment against the seller for a broker's commission; on appeal, *held,* reversed. A broker is not entitled to recover his commission from the seller, even though the seller enters into a contract on mutually agreeable terms with a buyer procured by the broker, when it later develops that buyer cannot or *will not for any reason* complete the transaction by closing title. *Ellsworth Dobbs, Inc. v. Johnson,* 50 N.J. 528, 236 A.2d 843 (1967).

Nearly all jurisdictions allow the broker to receive his commission where the seller has bound the purchaser procured by the broker in a contract of sale regardless of the purchaser's financial ability.[1] The seller is said to have a right to a reasonable time to investigate the purchaser's circumstances;[2] therefore, by signing a contract with the purchaser, the seller accepts the buyer's ability.[3] Occasionally, a court

actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the state to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis.

[44] Heat Pump Equip. Co. v. Glen Alden Corp., 93 Ariz. 361, 380 P.2d 1016 (1963) (interpreting "procedural matters" within state constitution as giving Supreme Court of Arizona power to make rules relative to all procedural matters in any court); ARIZ. CONST. art. 6, § 5 (Supp. 1967); ARIZ. REV. STAT. ANN. § 12-109 (1939).

[1] *E.g.,* Brinton v. Motte, 244 S.W.2d 480 (Ky. App. 1951); Nunn v. Barber, 207 Okla. 393, 249 P.2d 999 (1952); Kruger v. Wesner, 274 Wis. 40, 79 N.W.2d 354 (1956); Annot., 74 A.L.R.2d 431, 433 (1960).

[2] *E.g.,* Greenwald v. Marcus, 3 Ill. App. 2d 495, 123 N.E.2d 139 (1954); Murphy v. Brown, 252 Iowa 764, 108 N.W.2d 353 (1961); Roberts v. Gilchrist, 397 S.W.2d 705, 710 (Mo. App. 1965).

[3] *E.g.,* Roche v. Smith, 176 Mass. 595, 58 N.E. 152 (1900); Flicker v. Ragan, 126 Misc. 185, 212 N.Y.S. 703 (Sup. Ct. 1925); Kingsland Land Corp. v. Lange, 191 Va. 256, 60 S.E.2d 872, 874-75 (1950) (dictum). When a prospective buyer enters into a contract conditioned upon some subsequent event, it is generally held that he becomes "ready, willing, and able," only upon the happening of the event, and thus if it does not occur, the broker is not entitled to a commission. *E.g.,* Diamond v. Haydis, 88 Ariz. 326, 356 P.2d 643 (1960) (conditioned on vendor's being able to negotiate buyer's note to third person and on approval of escrow agreement by vendor); Borowski v. Meyers, 195 Md. 226, 72 A.2d 701 (1950) (sale of business conditioned on amount of gross weekly receipts); Watson v. Odell, 58 Utah 276, 198 P. 772 (1921) (conditioned on approval by buyer's attorney).

qualifies this rule by stating that the broker must have acted in good faith, *i.e.*, without knowledge of the purchaser's financial inability at the time of production to the seller.[4] The vendor's safeguard has been to stipulate in the listing agreement that the broker's right to a commission is contingent on consummation of the sale.[5] However, frequently, but not universally, provisions in listing agreements that the broker's fee is not due until the seller receives certain portions of the purchase price from the buyer have been held only to postpone paying the commission to a more convenient time and not to make the broker's commission conditional on the purchaser's payments.[6]

Only a few states depart from these general rules.[7] In Louisiana, listing agreements are interpreted according to the seller's presumed intention that he is to become liable for the broker's commission only when a sale is consummated;[8] any default of the purchaser, then, precludes the broker's commission.[9] Contracts or agreements to the contrary are likely to be treated as unconscionable and unenforceable.[10]

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[4] Hare v. Bauer, 223 Minn. 285, 26 N.W.2d 359 (1947); R. A. Poff & Co. v. Ottaway, 191 Va. 779, 62 S.E.2d 865 (1951) (no commission where there is misrepresentation or withholding of material information); Parker v. West, 191 Va. 710, 62 S.E.2d 862 (1951) (no commission where the broker knows or has reasonable cause to believe purchaser is a straw man or one without means); Kruger v. Wesner, 274 Wis. 40, 79 N.W.2d 354 (1957). In *McGarry v. McCrone*, 97 Ohio App. 543, 118 N.E.2d 195 (1954), the broker knew of the prospective buyer's financial inability, and the court held that the seller, by signing the contract, did not waive his right to avoid liability on the broker's commission on the ground that the broker had not procured a buyer, ready, willing, and able.

[5] *E.g.*, J.J. Gumberg Co. v. Walworth Co., 346 F.2d 679 (3d Cir. 1965); Ridgway v. Chase, 122 Cal. App. 2d 840, 265 P.2d 603 (1954); Blau v. Friedman, 26 N.J. 397, 140 A.2d 193 (1958) (overruled by *Ellsworth Dobbs*).

[6] Deibler v. Graham, 62 A.2d 553 (D.C. Mun. Ct. App. 1948); Killiam v. Tenney, 229 Ore. 134, 366 P.2d 739 (1961) (broker absolutely entitled to commission despite provision that broker could retain fee from buyer's deposit); Lee v. Bossung, 127 Ind. App. 388, 138 N.E.2d 913 (1956) (agreement to pay commission at time purchaser made certain installments did not make commission contingent upon installments but merely provided a convenient time for payment of commission).

[7] Texas, while following the general rule, emphasizes that the contract between buyer and seller must be enforceable. So where the broker procured a customer to exchange properties and the contract of exchange was unenforceable because the customer's title was unmerchantable, the broker was denied a commission. W.A. Lucas & Co. v. Thompson, 29 S.W.2d 1024 (Tex. Comm'n App. 1930). *Contra*, Roche v. Smith, 176 Mass. 595, 58 N.E. 152 (1900).

[8] Nettles v. Vignes, 49 So. 2d 371 (La. App. 1950); Leaman v. Rauschkolb, 1 So. 2d 338 (La. App. 1941); Spiro v. Corpora, 174 So. 145 (La. App. 1937); Devereaux & Ashby v. Rochester, 10 La. App. 430, 120 So. 658 (1929).

[9] Nettles v. Vignes, 49 So. 2d 371 (La. App. 1950); Devereaux & Ashby v. Rochester, 10 La. App. 430, 120 So. 658 (1929). *But see* Boone v. David, 52 So. 2d 563 (La. App. 1951) (seller who voluntarily released buyer who had defaulted was obligated to pay broker's commission because the release was in derogation of broker's right to a commission which vested on signing of sales contract).

[10] McKelvy v. Milford, 37 So. 2d 370 (La. App. 1948) (held unenforceable because unfair, because the sellers were trapped by language they did not understand, against their intention, and because the broker was unjustly enriched); Leaman v. Rauschkolb, 1 So. 2d 338, 341 (La. App. 1941) (enforcement would lead to an "absurd consequence"); Spiro v. Corpora, 174 So. 145 (La. App. 1937).

In the District of Columbia[11] and in Maryland,[12] the broker is denied a commission when his purchaser proves financially unable to live up to the sales contract. Rhode Island has taken the position that in producing a buyer, the broker impliedly represents that the buyer is financially able. If the seller relies on the broker's representation and does not make his own independent valuation of the buyer's circumstances, he may refuse to pay the broker's commission if the buyer defaults because of financial inability.[13] Colorado, by statute, has precluded the broker from a commission unless the sale is consummated or defeated by fault of the vendor.[14]

Prior to *Ellsworth Dobbs, Inc. v. Johnson*,[15] the New Jersey courts had followed the general doctrines accepted by most states. However, re-evaluating these principles in terms of common expectations and fairness, the New Jersey Supreme Court concluded that the seller may rely on the broker's representations of the buyer's ability at all times; that, absent default by the seller, the broker's commission is not earned until title is closed in accordance with the terms of the sales contract; and that any agreement entitling the broker to a commission upon signing of a sales contract, at least where there is substantial inequality of bargaining power, is unenforceable as against public policy. That is, if the purchaser defaults for any reason, then the broker has no claim for a commission regardless of his good faith. The court reasoned that because part of the broker's original obligation is to produce an "able" buyer, it is just and reasonable that the seller rely on the broker to present "able" prospects without having to make an independent investigation of their circumstances. This right to rely should not terminate merely because the seller contracts with the prospect. The true test of the buyer's ability is the closing of title, not the signing of a sales contract.

Beyond that, continued the court, the ordinary and reasonable expectation of the ordinary seller and of the conscientious broker is that the broker will effect a sale, his commission to be paid from the proceeds thereof. The court asserted that brokers are affected with a public interest and cannot, therefore, take advantage of experience, specializa-

[11] Moore v. Burke, 45 A.2d 285 (D.C. Mun. Ct. App. 1946). *See also* Sweet v. H.R. Howenstein Co., 73 F.2d 660 (D.C. Cir. 1934); Wetzel v. De Groot, 86 A.2d 737 (D.C. Mun. Ct. App. 1952).

[12] Riggs v. Turnbull, 105 Md. 135, 66 A. 13 (1907) (no commission where buyer defaulted and was later released from contract by seller because of financial inability); Keener v. Harod, 2 Md. 63, 56 Am. Dec. 706 (1852).

[13] Gartner v. Higgins, 214 A.2d 849 (R.I. 1965); Valois v. Pelletier, 84 R.I. 176, 122 A.2d 148 (1956); Mangano v. Rooney, 77 R.I. 324, 74 A.2d 867 (1950); Butler v. Baker, 17 R.I. 582, 23 A. 1019 (1892).

[14] COLO. REV. STAT. ANN. § 117-2-1 (1963). *See* Dunton v. Stemme, 117 Colo. 327, 187 P.2d 593 (1947) (where buyer defaulted under substantially the same statute, no liability for commission).

[15] 50 N.J. 528, 236 A.2d 843 (1967).

tion, licensure, economic strength and membership in associations, to impose contractual provisions on sellers obligating them to pay commissions in spite of purchasers' defaults contrary to sellers' intent and understanding. Such provisions are unfair, unconscionable, and unenforceable.[16]

Arizona follows the general rule that a broker becomes entitled to a commission when he produces a buyer who is ready, willing, and able to purchase on the seller's terms.[17] If the seller accepts the buyer produced by the broker by entering into a binding written sales contract, it has been held that the broker has earned his commission notwithstanding the buyer's financial inability.[18] However, where the buyer and seller negotiate a sales contract, the terms of which differ materially from the seller's terms according to the listing agreement, the broker may be precluded from a commission, at least where one of the parties defaults, because he has not produced a buyer ready, willing, and able to purchase on the seller's terms.[19] A contractual provision that the broker's commission shall become due and payable in installments as installments on the purchase price are received from the buyer has been interpreted merely to postpone the payment to a more convenient time, not to set up conditions precedent to a broker's receiving his commission. Therefore, when purchasers defaulted, the whole of a broker's commission became immediately due and payable.[20] Some dicta indicates that the agency relationship between broker and seller may impress the broker with a duty to disclose circumstances within his knowledge which would prevent enforcement of the sales contract. If he allows the contract to be signed without disclosure, he may forfeit his commission.[21] However, if he acts in good faith and in ignorance of facts he would otherwise have a duty to disclose, he may have earned his

[16] *Id.*, 236 A.2d at 850-57. Nor, according to the *Dobbs* court, should a settlement by the seller which releases the buyer whose financial inability has become manifest operate to entitle broker to a commission. He has not produced an "able" buyer. 236 A.2d at 858. Arizona reached an analogous result in *Eason v. Heighton*, 49 Ariz. 237, 65 P.2d 1373 (1937), where it was held that the broker waived his right to a commission by advising the seller to abandon the sales contract with the buyer after the buyer's default. This holding in *Dobbs* is contrary to the general weight of authority. *See, e.g.*, Burnham v. Abegglen, 172 F.2d 1021 (9th Cir. 1951); Nickelsen v. Morehead, 238 Iowa 970, 29 N.W.2d 195 (1947); Parker v. West, 191 Va. 710, 62 S.E.2d 862 (1951). It is also contrary to the rule in Louisiana where courts generally deny brokers' commissions when purchasers default. *See, e.g.*, Boone v. David, 52 So. 2d 563 (La. App. 1951).

[17] Diamond v. Haydis, 88 Ariz. 326, 356 P.2d 643 (1960); Patton v. Paradise Hills Shopping Center, Inc., 4 Ariz. App. 11, 417 P.2d 382 (1966); Bradley v. Westerfield, 1 Ariz. App. 319, 402 P.2d 577 (1965).

[18] James v. Hiller, 85 Ariz. 40, 330 P.2d 999 (1958); Lockett v. Drake, 43 Ariz. 357, 31 P.2d 499 (1934); Eason v. Heighton, 49 Ariz. 237, 65 P.2d 1373 (1937) (dicta).

[19] Bishop v. Norell, 88 Ariz. 148, 353 P.2d 1022 (1960).

[20] James v. Hiller, 85 Ariz. 40, 330 P.2d 999 (1958).

[21] Diamond v. Chiate, 81 Ariz. 86, 300 P.2d 583 (1956); Sligh v. Watson, 69 Ariz. 373, 214 P.2d 123 (1950).

commission;[22] no case appears to have imposed an affirmative duty on the broker to investigate the circumstances of either buyer or seller where a sales contract is signed. In fact, where the broker, *after* the signing of the sales contract, learned that the buyer was financially unable and yet knowingly misrepresented to the seller that the buyer would consummate the sale, it was said in dicta that such misrepresentation would have no effect on the broker's right to a commission which had already been earned upon execution of the sales contract.[23]

While a number of Arizona cases have said the seller is liable on the broker's commission despite the purchaser's default on the sales contract, only two cases of record have actually granted a commission under such circumstances, and at least one of them expressed disenchantment with the result.[24] Other cases have shown a favorable inclination towards reasoning which would lead to adoption of a rule in Arizona similar to the *Dobbs* rule.[25] Such a rule would be more in line with common notions of justice than is the present one. When the ordinary seller agrees to pay a substantial commission measured as a percentage of the purchase price, he assumes the broker is going to sell the property for a commission from the sale's proceeds. The broker, whose business it is to produce able buyers, should sensibly have the obligation to ascertain that any buyer produced by him is in fact able. As a practical matter, a seller does not sign a contract with the broker's prospect except in reliance on the broker's having produced an able buyer, not merely a person *willing* to sign a sales contract.[26] A com-

[22] Diamond v. Chiate, 81 Ariz. 86, 300 P.2d 583 (1956); Sligh v. Watson, 69 Ariz. 373, 214 P.2d 123 (1950). *See also* Lockett v. Drake, 43 Ariz. 357, 31 P.2d 499 (1934).

[23] Lockett v. Drake, 43 Ariz. 357, 31 P.2d 499 (1934).

[24] James v. Hiller, 85 Ariz. 40, 330 P.2d 999 (1958); Lockett v. Drake, 43 Ariz. 357, 362, 31 P.2d 499, 500 (1934) ("It is unfortunate indeed that plaintiff is compelled to pay a commission, when the services of the broker did not produce the result which she anticipated . . . .").

[25] *See, e.g.*, Bishop v. Norell, 88 Ariz. 148, 353 P.2d 1022 (1960) (where buyer defaulted, summary judgment for broker's commission reversed on grounds that contract contained terms materially different from seller's terms in listing agreement); Sligh v. Watson, 69 Ariz. 373, 214 P.2d 123 (1950) (broker who should have been put on inquiry as to facts which made sales contract unenforceable denied commission; overruled as to evidentiary question in *Diamond v. Chiate*, 81 Ariz. 86, 300 P.2d 583 (1956)); Eason v. Heighton, 49 Ariz. 237, 65 P.2d 1373 (1937) (broker deemed to have waived right to commission by advising seller to abandon contract when buyer defaulted for financial reasons); Madsen v. Fisk, 5 Ariz. App. 65, 423 P.2d 141 (1967) (summary judgment for broker's commission reversed for trial on merits of listing agreement). In *Green v. Snodgrass*, 79 Ariz. 319, 289 P.2d 191 (1955), where the sales contract recited that down payment should be forfeited and divided between seller and his agent in event of purchaser's dafault, broker could not recover commission from seller, since the contract provided its own remedy. On virtually identical facts, the Alabama court has reached the same result on grounds that the broker, having prepared the sales contract, must pay the cost of ambiguity. Taylor Real Estate & Ins. Co. v. Greene, 274 Ala. 694, 151 So. 2d 397 (1963). At least one commentator has interpreted this case as holding that a broker is not entitled to commission in event of purchaser's default. Annot., 74 A.L.R.2d 431, 452 (Later Case Service 1966).

[26] *See* Butler v. Baker, 17 R.I. 582, 583, 23 A. 1019, 1019-20 (1892).

petent broker would seem to be able to check efficiently any prospect's resources and to have readily available the means to do so.

Brokers are able to impose unfair listing obligations, which are different from those that members of the public would assume the words of the listing agreements to impose, because of the very reasons which lead sellers to hire agents: that the ordinary seller has very little experience in real estate transactions and that the broker has a great deal. Yet these same reasons, because only licensed brokers can legally sell property for vendors, clothe brokers with a public interest which imposes on them the duty to deal with the public on reasonable terms.[27] Moreover, the fiduciary duty of the agent, the duty of utmost good faith to his principal,[28] should include the duty not to remain ignorant of facts material to the seller which can be readily ascertained. "Good faith" should mean more than ignorance. At the very least, it should impose the duty to disclose the fact of ignorance about the buyer's circumstances to the principal in order that he may make his own judgment.[29] Finally and undeniably, the true test of an "able" purchaser is his ability to close title.[30] As was said in *Ellsworth Dobbs*, the general rule does not permit the owner to entertain the reasonable expectation that he can rely on the broker's producing an "able" buyer. It "empties the word 'able' of substantially all of its significant content and imposes an unjust burden on vendors of property."[31] It was said in the Arizona Appeals case of *Madsen v. Fisk*:[32]

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[27] Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843, 857 (1967); McKelvy v. Milford, 37 So. 2d 370 (La. App. 1948); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (unconscionable contractual provisions which tend to injure public invalid); Mayfair Fabrics v. Henley, 48 N.J. 483, 226 A.2d 602 (1967) (dicta) (contractual provisions injurious to public arising from unequal bargaining positions are invalid); Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522 (1923) (a business clothed with a public interest has affirmative obligation to be reasonable in dealing with the public). *See also* Code of Ethics of National Association of Real Estate Boards, Preamble (1956):

> The Realtor is a creator of homes, both urban and rural, and by his activities helps mold the form of his future community, not only in the living of its people, but in its commercial and industrial aspects.
>
> Such functions impose obligations beyond those of ordinary business; they impose grave social responsibilities . . . .

[28] Walston & Co. v. Miller, 100 Ariz. 48, 410 P.2d 658 (1966); Baker v. Leight, 91 Ariz. 112, 370 P.2d 268 (1962); Hassenpflug v. Jones, 84 Ariz. 33, 323 P.2d 296 (1958); Sligh v. Watson, 69 Ariz. 373, 214 P.2d 123 (1950). *See also* Code of Ethics of National Association of Real Estate Boards, Article 11 (1956):

> In accepting employment as an agent, the Realtor pledges himself to protect and promote the interests of the client. This obligation of absolute fidelity to the client's interest is primary . . . .

[29] *See* Butler v. Baker, 17 R.I. 582, 584, 23 A. 1019, 1020 (1892).

[30] Analagously, where a broker sues a vendor who refused to enter into a contract, the broker must sustain the burden of showing his purchaser had the requisite ability *at the time fixed for performance*. *See, e.g.*, Globerman v. Lederer, 281 App. Div. 39, 117 N.Y.S.2d 549 (1952); C.O. Frick Co. v. Baetzel, 71 Ohio App. 301, 47 N.E.2d 1019 (1942); De Harpport v. Green, 215 Ore. 281, 333 P.2d 900 (1959).

[31] Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843, 853 (1967).

[32] 5 Ariz. App. 65, 69, 423 P.2d 141, 145 (1967).

> In view of the fact that this cause appears to be one which will require a trial on the merits, it might be well for the trial court to carefully consider the full meaning of the word "able" in the time honored phrase "ready, willing and able" so often found in cases relating to brokers' commissions.

James Wayne Johnson

TORTS — NEGLIGENCE — SERVICE STATION OPERATORS WHO SELL GASOLINE TO A RECOGNIZABLY INTOXICATED MOTORIST WHO THEN INJURES A THIRD PERSON ARE NOT NEGLIGENT. *Fuller v. Standard Stations, Inc.*, (Calif. Dist. Ct. App. 1967).

Plaintiff, a minor, brought an action against a motorist and the operators of two automobile service stations for injuries he sustained in an automobile accident, and for the deaths of his father, mother, sister, and brother in the same accident. On the day of the accident, the service station operators had sold gasoline to the motorist when he was recognizably intoxicated. A general demurrer of the automobile service station operators, based on cases refusing to impose liability on liquor vendors on similar facts, was sustained. On appeal, *held*, affirmed. An automobile service station operator who sells gasoline to a recognizably intoxicated motorist who then injures a third person by the negligent use of his motor vehicle is not liable for the third person's injuries. *Fuller v. Standard Stations, Inc.*, 58 Cal. Rptr. 792 (1967).

At common law a vendor of intoxicating liquor[1] was not liable to a third person for injury sustained by the latter as a result of the intoxication of the purchaser of the liquor.[2] The rationale for this rule was

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[1] The instant case involves a vendor of gasoline rather than a vendor of alcohol. The court, however, states that there is no distinction between the two sellers:

> *Fleckner v. Dionne* denied liability of a tavern keeper alleged to have sold liquor to a known inebriate who would forseeably drive his car, thus exposing others to danger. This case involves one who sells him gasoline. There is no significant distinction of logic, social policy or law between these sellers. Each purveys a different commodity, but these commodities play parallel roles in the combination of circumstances culminating in foreseeable injury. The Supreme Court's approval (in *Cole v. Rush*) of a rule exonerating the liquor seller as a matter of law impels us to the conclusion that the gasoline seller must also be exonerated as a matter of law. 58 Cal. Rptr. at 796.

Thus the issue in the instant case (a case of first impression) was the liability of a supplier of any chattel, not the nature of the chattel itself.

[2] *See, e.g.*, Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958); State v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951); Tarwater v. Atlantic Co., 176 Tenn. 510, 144 S.W.2d 746 (1940). The rule has been stated succinctly by the Wisconsin Supreme Court in *Demge v. Feierstein*:

> The cases are overwhelmingly to the effect that there is no cause of action at common law against a vendor of liquor in favor of those injured by the intoxication of the vendee. 222 Wis. 199, 203, 268 N.W. 210, 212 (1936).

that the proximate cause of the injury was not the furnishing of the alcohol but the drinking of it.[3]

A majority of jurisdictions have, to a great extent, abrogated the common law rule by enacting statutes which create a civil or criminal cause of action under certain circumstances against persons furnishing intoxicating liquors.[4] Under the Illinois statute, for example, anyone injured in person or property by an inebriate has a right of action against the negligent vendor of the alcohol.[5] In Alabama, a plaintiff has a cause of action against the negligent vendor of liquor if he is injured in person, property, or means of support by the intoxicated person or in consequence of his intoxication.[6] Absent such legislation, however, the majority of other jurisdictions still adhere to the common law rule[7].

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[3] *See, e.g.*, Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943); Moore v. Bunk, 154 Conn. 644, 228 A.2d 510 (1967); Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383 (1967).

[4] These statutes apply only to liquor vendors, and are not applicable to gasoline vendors. They do, however, serve to show the dissatisfaction of some legislatures with the common law rule and their desire to impose civil or criminal liability upon at least some vendors who sell to intoxicated vendees. Whether these statutes would *by themselves* impose similar liability on a gasoline vendor is speculative, but doubtful.

See ALA. CODE tit. 7, §§ 120, 121 (1958) (civil liability); ARK. STAT. ANN. § 48-901 (1964) (criminal liability); COLO. REV. STAT. ANN. § 41-2-3 (1963) (civil liability); CONN. GEN. STAT. REV. § 30-102 (Supp. 1966) (civil liability); DELA. CODE ANN. tit. 4, § 716 (1953) (civil liability); D.C. CODE § 25-121 (1967) (civil liability); FLA. STAT. ANN. § 562.50 (1965) (criminal liability); GA. CODE ANN. § 58-1061 (1965) (criminal liability); IDAHO CODE ANN. § 23-929 (Supp. 1967) (criminal liability); ILL. REV. STAT. ch. 43, § 135 (Supp. 1967) (civil liability); IND. ANN. STAT. § 12-615 (1956) (criminal liability); IOWA CODE § 123-46 (1966) (criminal liability); KAN. GEN. ANN. STAT. § 41-715 (1964) (Supp. 1965) (criminal liability); KY. REV. STAT. ANN. § 244.080 (1963) (criminal liability); LA. REV. STAT. § 26:683 (1950) (criminal liability); ME. REV. STAT. ANN. tit. 28, § 1058 (1965) (criminal liability); MASS. GEN. LAWS ANN. ch. 138 § 69 (1965) (criminal liability); MICH. STAT. ANN. § 18.993 (Supp. 1968) (civil liability); MINN. STAT. ANN. § 340.95 (1957) (civil liability); NEB. REV. STAT. §§ 53-180, 53-180.05 (Supp. 1965) (criminal liability); N.H. REV. STAT. ANN. § 175:6 (1965) (criminal liability); N.J. STAT. ANN. § 33:1-39 (Supp. 1966) (Commissioner can punish vendor for sale of intoxicating liquor to an habitual drunkard); N.M. STAT. ANN. § 46-10-13 (1954) (criminal liability); N.Y. GEN. OB. LAW § 11-101 (McKinney 1964) (civil liability); N.C. GEN. STAT. § 14-332 (1953) (civil liability); N.D. CENT. CODE § 5-01-21 (1959) (civil liability); OHIO REV. CODE ANN. § 4399.01 (Baldwin 1964) (civil liability); ORE. COMP. LAWS § 25-514 (1940) (civil liability); PA. STAT. ANN. tit. 47, § 4-493 (1) (1952) (criminal liability); R.I. GEN. LAWS ANN. § 3-11-1 (1957) (civil liability); S.C. CODE ANN. § 4-78 (1952) (criminal liability); S.D. CODE § 5-0227, 5.9905 (1939) (criminal liability); UTAH CODE ANN. § 32-7-14 (repl. ed. 1966) (criminal liability); VT. STAT. ANN. tit. 7, § 501 (1958) (civil liability); WASH. REV. CODE ANN. § 71.08.080 (1962) (civil liability); W. VA. CODE ANN. § 5907(50) (1961) (criminal liability); WIS. STAT. ANN. § 176.35 (1957) (civil liability); WYO. STAT. § 12-34 (1959) (civil liability). *See also* Annot., 4 A.L.R.3d 1332 (1965); Annot., 75 A.L.R.2d 833 (1961); Annot., 130 A.L.R. 352 (1941).

[5] ILL. REV. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1967).

[6] ALA. CODE tit. 7, §§ 120, 121 (1940).

[7] *See, e.g.*, Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958). See also Annot., 75 A.L.R.2d 833 (1961); Annot., 130 A.L.R. 352 (1941).

Courts in a few jurisdictions,[8] however, have qualified the common law rule to the extent that those injured are allowed a cause of action against the person supplying alcohol to a tort-feasor who was at the time of the supplying in such a condition as to be deprived of his will power or sense of responsibility. Relying on cases which have imposed liability upon persons for placing firearms in the hands of children,[9] or for leaving keys in unattended vehicles,[10] these courts have rejected the "proximate cause" argument by pointing out that under ordinary tort principles the consuming of the alcohol was foreseeable, and that such an intervening cause does not necessarily break the chain of causation.

Another possible limitation of the common law rule may be found in the "negligent entrustment" doctrine of the Restatement (Second) of Torts[11] which provides that under given circumstances a supplier of chattels can be liable for injuries sustained by third parties. A prerequisite to such liability is that the supplier know or have reason to know that, because of some incompetence on the part of the person supplied, the chattels will be used in a manner involving an unreasonable risk of harm to others. The negligent entrustment theory has been adopted frequently in decisions imposing liability upon one who lends his automobile to an incompetent or intoxicated driver who injures the plaintiff.[12] These courts have rejected the "proximate cause" argument.[13] While the doctrine has not been applied to liquor vendors, some jurists have confessed inability to distinguish between the defendant who knowingly sells liquor to a drunken driver and one who places an automobile at his disposal.[14]

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[8] *See e.g.*, Waynick v. Chicago's Last Dep't. Store, 269 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958); *cf.* McKinney v. Foster, 391 Pa. 221, 137 A.2d 502 (1948). *See also* Comment, *Common Law Liability of Liquor Vendors*, 12 BAYLOR L. REV. 388 (1960); Annot., 75 A.L.R. 2d 833, 837 (1961); Annot., 130 A.L.R. 352, 357 (1941).

[9] *See, e.g.*, Di Gironimo v. American Seed Co., 96 F. Supp. 795 (D. Pa. 1951); Anderson v. Settergen, 100 Minn. 294, 111 N.W. 279 (1907).

[10] *See* Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954); Moran v. Borden, 309 Ill. App. 391, 33 N.E.2d 166 (1941); Lomano v. Ideal Towel Supply Co., 25 N.J. Misc. 352, 51 A.2d 888 (1947).

[11] The RESTATSMENT (SECOND) OF TORTS § 390 (1965) reads:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

[12] *See, e.g.*, Johnson v. Casetta, 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (1961); Knight v. Gosselin, 124 Cal. App. 290, 12 P.2d 454 (1932); Rocca v. Steinmetz 61 Cal. App. 102, 214 P. 257 (1923).

[13] *See* Fleckner v. Dionne, 94 Cal. App. 2d 246, 252-53, 210 P.2d 530, 534-35 (1949) (dissenting opinion); Mitchell v. Ketner, 393 S.W.2d 755, 759 (Tenn. Ct. App. 1964).

[14] *See* Fleckner v. Dionne, 94 Cal. App. 2d 246, 252-53, 210 P.2d 530, 534-35

While adhering generally to the common law position,[15] Arizona has added a further qualification. In *Pratt v. Daly*[16] the court granted the spouse of a person severely debilitated by chronic alcoholism a cause of action for loss of consortium against one who had continued to sell alcohol to the habitual drunkard after having been requested to stop. Drawing an analogy to cases imposing liability on sellers of narcotics whose customers had become addicted,[17] the court noted that the excessive use of alcohol over a prolonged period could seriously impair a person's volition. They overcame the barrier of proximate cause by treating the sale as "merged" with the consumption.[18] A later Arizona case, however, refused to broaden the "habitual drunkard" exception. In *Collier v. Stamatis*[19] the court pointed out that the seller of intoxicating liquor was not liable at common law in tort for damage arising from voluntary intoxication. They reasoned that the proximate cause of the damage was the act of the consumer of the alcohol, and not the prior act of the vendor in selling it.

The instant case follows earlier California decisions supporting the common law position.[20] The court's basic reasoning is that the sale of

(1949) (dissenting opinion). In *Mitchell v. Ketner*, 393 S.W.2d 755 (Tenn. Ct. App. 1964) the court stated:

> We can see little difference in principle between the act of an owner entrusting an automobile to one known to be an habitual drunkard and the act of a tavern keeper in plying the driver of a car with intoxicants knowing that he is likely to drive upon the public highway where he will become a menace to third persons.

It is interesting to consider cases dealing with the negligent entrustment of cars to drunks by car owners, since in both that situation and the gasoline vendor situation the defendant is charged with having been negligent in allowing or making possible the drunk's use of an automobile on the public streets. *See* Buchanan Contracting Co. v. Denson, 262 Ala. 592, 80 So. 2d 614 (1955) (court stated that defendant company would have been liable for injuries to a third party arising from defendant's general manager's allowing an employee to drive a company truck when he knew the employee was drunk, had the evidence established the employee's degree of intoxication); Powell v. Langford, 58 Ariz. 281, 119 P.2d 230 (1941) (court sustained judgment against wife for allowing husband to drive her automobile, knowing that he was likely to become intoxicated); Pennington v. Davis-Child Motor Co., 143 Kan. 753, 755, 57 P.2d 428, 429, 430 (1936) (where the owner of an automobile allowed another its use knowing the other was intoxicated, one injured as a result of the drunk's negligent driving had a cause of action).

[15] *See e.g.*, Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940). *See also* Comment, *Sale of Intoxicating Liquor as Proximate Cause of Inebriate's Tort*, 3 ARIZ. L. REV. 98, 102 (1961).

[16] 55 Ariz. 535, 104 P.2d 147 (1940).

[17] Hoard v. Peck, 56 Barb. 202 (N.Y. Sup. Ct. (1867); Holleman v. Harward, 119 N.C. 150, 25 S.E. 972 (1896) (the court implies that the same principles apply to liquor); Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912); Moberg v. Scott, 38 S.D. 422, 161 N.W. 998 (1917).

[18] Pratt v. Daly, 55 Ariz. 535, 544, 104 P.2d 147, 151 (1940).

[19] 63 Ariz. 285, 162 P.2d 125 (1945).

[20] In *Fuller v. Standard Stations, Inc.*, 58 Cal. Rptr. 792, 794 (1967), the court stated:

> [T]he California tavernkeeper decisions unanimously declare that the customer's intoxication and not the sale of liquor is the proximate cause of the injury.

intoxicating liquor cannot be the proximate cause of subsequent injuries received by the purchaser[21] or by a third party.[22] In *Fleckner v. Dionne*[23] the court stated that the sale of alcohol to a recognizably inoxicated minor was too remote to be the proximate cause of injury to a third party. This was true even though the vendor knew or had reason to know that the minor was soon to operate a motor vehicle on the public streets.[24]

Considering the facts of the instant case, the negligent entrustment doctrine would seem to apply.[25] The court, however, comes to the conclusion that as a matter of law the vendor of gasoline must be exonerated, since (equating him with a vendor of liquor) the consumption rather than the sale is the proximate cause of the injury.[26] This reasoning is not in keeping with the mainstream of present day tort analysis.[27]

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[21] Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955) (wrongful death action); Lammers v. Pacific Electric Ry., 186 Cal. 379, 199 P. 523 (1921); Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (1943).

[22] Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949).

[23] Id.

[24] Id. at 251, 210 P.2d at 534.

[25] See, e.g., Johnson v. Casetta, 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (1961); Knight v. Gosselin, 124 Cal. App. 290, 12 P.2d 454 (1932); Rocca v. Steinmetz, 61 Cal. App. 102, 109, 214 P. 257, 260 (1923):

> If he were to intrust his car to a person whom he knew to be insane or intoxicated or utterly incompetent to run a car, it would certainly shock the common understanding to hold that he was not chargeable with negligence.

It is helpful to compare the *Restatement* negligent entrustment requirements with facts of this case:

	The Doctrine	*The Case*
1.	He supplied a *chattel to a third* person.	The service station attendant supplied the motorist with *gasoline.*
2.	*He knew or had reason to know*:	
	a. because of the third party's youth, inexperience or *incompetence*	The motorist was *recognizably intoxicated.*
	b. the chattel would be used in a manner involving an *unreasonable risk of harm*	Gasoline provides the means with which a *drunk* may operate his vehicle on the public streets.
	c. *to others* whom the supplier should have expected to share in or be endangered by its use.	It should be expected that *persons on a public street* will be endangered by a drunk driver.

[26] Fuller v. Standard Stations, Inc., 58 Cal. Rptr. 792, 796 (Dist. Ct. App. 1967).

[27] *See, e.g.*, Tucker v. Collar, 79 Ariz. 141, 285 P.2d 178 (1955); Palsgraf v. Long Island Ry., 248 N.Y. 339, 162 N.E. 99 (1928); Fuller v. Standard Stations, Inc., 58 Cal. Rptr. 792, 794, 795, 796 (Dist. Ct. App. 1967):

> Current judicial analysis considers the outer boundaries of negligence liabiilty in terms of duty of care rather than proximate causation . . . When the facts at hand are approached as a duty of care problem, there may be justification for a rule imposing liability on a service station operator who sells gasoline to a recognizably intoxicated motorist . . .
>
> Cole v. Rush and its California antecedents approach the initial adjudication of negligence via the obsolete gateway of proximate cause rather

Duty, rather than proximate cause, has become the focal point of negligence in the trend toward a risk analysis approach to tort liability.[28] Causation is primarily a question of fact for the jury, not a question of law for the court.[29]

The alarming increase of automobile accidents involving alcohol justifies a change in attitude toward vendors of either alcoholic beverages or "commodities [which] play parallel roles"[30] in that they have the potential of creating a foreseeable, unreasonable risk of harm to others, and it amply justifies departure from a rule formulated at a time when the threat was nonexistent.[31]

Jay M. Martinez

TORTS — SCHOOL DISTRICTS — LIABILITY FOR NEGLIGENT SUPERVISION OF EXTRACURRICULAR ACTIVITIES. *Chappel v. Franklin Pierce School District* (Wash. 1967).

A student was injured while being initiated into a high school club, an extracurricular student body organization for which the school district had assumed supervisory responsibility. This responsibility included tacit approval of and faculty participation in planning and supervising the off-campus initiation ceremony. The student's guardian ad litem instituted an action seeking damages. The trial judge dismissed the suit. On appeal, *held,* reversed and remanded. A school district may be held liable for injuries proximately caused by its negligent or inadequate supervision of extracurricular activities which are under its auspices and control. *Chappel v. Franklin Pierce School District,* 71 Wash. Dec. 2d 16, 426 P.2d 471 (1967).

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than duty. Thus these cases may be unreliable and ripe for disqualification or disapproval.

The court went on to say that as an intermediate appellate court it had to adhere to the pronouncements of the California Supreme Court. *See also* RESTATEMENT (SECOND) OF TORTS §§ 281, 302, 302A, 430, 435 (1965).

[28] W. PROSSER, LAW OF TORTS §§ 36, 50 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 281 (1965).

[29] *See, e.g.,* Fuller v. Standard Stations, Inc., 58 Cal. Rptr. 792 (Dist. Ct. App. 1967); Mosley v. Arden Farms, 26 Cal. 2d 213, 157 P.2d 372 (1945); Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966). *See also* W. PROSSER, LAW OF TORTS § 52 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 434 (1965); Annot., 65 A.L.R.2d 923, 931 (1959).

[30] Fuller v. Standard Stations, Inc., 58 Cal. Rptr. 792, 796 (Dist. Ct. App. 1967).

[31] The situation has been summarized well by one writer:

> The situation presents a conflict between specific rules developed under entirely different conditions from those existing today and well settled principles of law. It is clear that the latter should control. It should not be necessary to wait for legislation to meet the problem. Where a plaintiff alleges and proves that the vendor knew or ought to have known that the vendee was about to drive an automobile on the highways in an intoxicated condition recovery should be allowed. Campbell, *Work of the Wisconsin Supreme Court: Torts,* 1941 WIS. L. REV. 110, 117 (1941).

In the many jurisdictions still adhering to the common law rule of sovereign immunity, school districts are protected from tort liability.[1] Most of these states hold that school districts are agencies of the state and as such are immune from liability in tort actions.[2] In another group of jurisdictions, including Washington,[3] sovereign immunity has been either modified or completely abolished by legislative enactment[4] or judicial decision.[5] In these jurisdictions school districts are generally vulnerable to tort actions,[6] and the specific issue of a school district's liability for injuries sustained as a result of the activities of school-approved organizations has been resolved according to general tort law and the facts of each particular case.[7]

At one time Arizona followed the common law rule of sovereign immunity and school districts, as agencies of the state, were protected

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[1] Tesone v. School Dist., 152 Colo. 596, 384 P.2d 82 (1963); Buch v. McLeon, 115 So. 2d 764 (Fla. 1959); Boyer v. Iowa High School Athletic Ass'n, 258 Iowa 285, 138 N.W.2d 914 (1965); Koehn v. Board of Educ., 193 Kan. 263, 392 P.2d 949 (1964); Mire v. Lafourche Parish School Bd., 62 So. 2d 541 (La. Ct. App. 1952); Daskiewicz v. Board of Educ., 301 Mich. 212, 3 N.W.2d 71 (1942); Rhoades v. School Dist., 115 Mont. 352, 142 P.2d 890 (1943); Dahl v. Hughes, 347 P.2d 208 (Okla. 1959); Shields v. School Dist., 408 Pa. 388, 184 A.2d 240 (1962); Jensen v. Juul, 66 S.D. 1, 278 N.W. 6 (1938); Rogers v. Butler, 170 Tenn. 125, 92 S.W.2d 414 (1935); Kellams v. School Bd., 220 Va. 252, 117 S.E.2d 96 (1960).

[2] School Dist. v. Rivera, 30 Ariz. 1, 243 P. 609 (1926); Buch v. McLeon, 115 So. 2d 764 (Fla. 1959); Mire v. Lafourche Parish School Bd., 62 So. 2d 541 (La. Ct. App. 1952); Dahl v. Hughes, 347 P.2d 208 (Okla. 1959); Ford v. School Dist., 121 Pa. 543, 15 A. 812 (1888); Jensen v. Juul, 66 S.D. 1, 278 N.W. 6 (1938); Kellams v. School Bd., 22 Va. 252, 117 S.E.2d 96 (1960). Other frequently cited reasons for the rule are grounded on statutory or constitutional provisions. These take many forms: that school funds cannot be used to satisfy judgments; that no authority exists to raise money for the purpose of paying judgments; that the school would go bankrupt if it had to pay such claims (and other reasons based on the precarious fiscal status of the school); that the school board has no authority to commit a tort and the school has authority to perform only those functions required by statute. While it is apparent that these arguments retain some validity today, it has been suggested that they ignore the availability of liability insurance to cover such expenses. Stroup, *School Tort Liability*, 43 N.D.L. Rev. 782, 784 (1967).

[3] Wash. Rev. Code § 28.58.030 (1964); Sherwood v. Moxee School Dist., 58 Wash. 2d 351, 363 P.2d 138 (1961).

[4] Cal. Gov't. Code § 815-996.6 (West 1966); Conn. Gen. Stat. Rev. § 10-235 (1960); Hawaii Rev. Laws §§ 37-1 to -2, 38-4 to -9.5, 245A (Supp. 1963); Mass. Gen. Laws Ann. ch. 41 § 100C (1966); Nev. Rev. Stat. § 41.031 to .38 (1963); N.J. Rev. Stat. § 18:5-50.4 (1940); N.Y. Educ. Law §§ 2023, 2560, 3812 (McKinney 1953); Ore. Rev. Stat. § 243.610 (1967); Utah Code Ann. § 63-30-1 to -34 (1953); Wash. Rev. Code § 28.58.030 (1964); Wyo. Stat. Ann. § 21-158 (1957).

[5] Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Muskopf v. Corning Hosp. Dist., 55 Cal. App. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Moliter v. Kaneland Community Unit Dist., 24 Ill. 2d 467, 182 N.E.2d 145 (1962); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Walsh v. Clark County School Dist., 419 P.2d 774 (Nev. 1966); Holytz v. Malwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); Aigler, *Law Reform by Rejection of Stare Decisis*, 5 Ariz. L. Rev. 15 (1964).

[6] Muskopf v. Corning Hosp. Dist., 55 Cal. App. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Moliter v. Kaneland Community Unit Dist., 24 Ill. 2d 467, 182 N.E.2d 145 (1962).

[7] *See generally* L. Garber, Yearbook of School Law 63-69 (1967); Annot., 86 A.L.R. 2d 489 (1962).

from tort actions.[8] In 1963, in *Stone v. Arizona Highway Commission*,[9] agencies of the state were deprived of the shield of sovereign immunity by judicial decision. Since that decision there have been no cases decided at the appellate level dealing with a school district's liability for injuries sustained during supervised extracurricular activities.[10]

The holding in the instant case, that a school district must live up to an ordinary standard of care in all situations where a duty is owed, is generally in accord with the law of those jurisdictions that have abolished school district immunity.[11] The unusual feature, however, is that the Washington court appears to have broadened the potential liability by increasing the scope of the school district's duty to students.[12] That a duty is owed to students involved in everyday on-campus activities would appear to be obvious.[13] The injury to the student in the *Chappel* case, however, took place after school hours and away from campus at a private home.[14] How far this liability should extend is not clear. Because a school district approves of an organization's existence on campus should not subject it to liability for every action of that organization and its individual members.[15] The extent of a school district's duty in cases of this type appears to depend upon the amount of authority that is asserted over its student organizations.[16] The direct involvement of the faculty adviser in planning the initiaton ceremony, in the instant case, was sufficient asserted authority for the Washington Supreme Court to extend the school district's duty to protect its students to even off-campus, after-hours events.[17]

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[8] Sawaya v. Tucson High School Dist., 78 Ariz. 389, 281 P.2d 105 (1955); School Dist. v. Rivera, 30 Ariz. 1, 243 P. 609 (1926).

[9] 93 Ariz. 384, 381 P.2d 107 (1963), noted in 6 ARIZ. L. REV. 102 (1964).

[10] School districts were not specifically referred to in the *Stone* case, but it is reasonable to conclude that school districts in Arizona are no longer protected. Linn, *Tort Liability And The Schools*, 43 N.D.L. REV. 765, 770 (1967). *See* Veach v. Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967).

[11] Pirkle v. Oakdale Union Grammar School Dist., 40 Cal. 2d 207, 253 P.2d 1 (1953); Wright v. San Bernardino High School Dist., 121 Cal. App. 2d 342, 263 P.2d 25 (1953); Simpson v. Harlem River Houses Children's Center, 28 Misc. 2d 696, 208 N.Y.S.2d 133 (App. Div. 1960); Morris v. Douglas County School Dist., 241 Ore. 23, 403 P.2d 775 (1965); Sherwood v. Moxee School Dist., 58 Wash. 2d 351, 363 P.2d 138 (1961).

[12] *Compare* Chappel v. Franklin Pierce School Dist., 71 Wash. Dec. 2d 16, 426 P.2d 471 (1967) *with* Coates v. Tacoma School Dist., 55 Wash. 2d 392, 347 P.2d 1093 (1960).

[13] Fahy v. Board of Educ., 286 App. Div. 1001, 144 N.Y.S.2d 575 (1955); Kidwell v. School Dist., 53 Wash. 2d 672, 335 P.2d 805 (1959).

[14] 71 Wash. Dec. 2d 16, 426 P.2d 471, 473 (1967).

[15] Rubtchinsky v. State Univ. College, 46 Misc. 2d 679, 260 N.Y.S.2d 256 (Ct. Cl. 1965); Coates v. Tacoma School Dist., 55 Wash. 2d 392, 347 P.2d 1093 (1960).

[16] Chappel v. Franklin Pierce School Dist., 71 Wash. Dec. 2d 16, 426 P.2d 471 (1967); Sherwood v. Moxee School Dist., 58 Wash. 2d 351, 363 P.2d 138 (1961); Coates v. Tacoma School Dist., 55 Wash. 2d 392, 347 P.2d 1093 (1960).

[17] The court made it clear that school districts in Washington are liable for injuries proximately caused by the negligence of their approved and supervised organizations. Once it has been decided that a duty exists, Washington school districts have been held to the same standard of care as an individual under the circum-

The court further stressed that not only negligent supervision over sponsored activities, but also tacit approval or knowledge of an activity such as an initiation, might create liability, if the school fails to take the necessary measures to prevent foreseeable injuries that could result from such activities.[18] Thus far, other jurisdictions have not had occasion to make this extension of duty in order to attach liability to school districts. The trend in Washington, from its abrogation of school district immunity by statute[19] to the implications of the instant case, has been to place more and more responsibility on schools either to protect their students from injuries or to pay the consequences. This advanced trend is one that many other states might choose to follow in the future.[20]

The significance of the instant case is its cautionary message to school districts rather than any final determination of liability or nonliability on retrial. Schools and school districts, from the elementary through the university level, always should be aware of their general duty to safeguard students involved in school activities and the corresponding liability that will attach for a failure to live up to the standard of care set for them. Accompanying the authority and control that schools and school districts are asserting through the ever-increasing number of extracurricular activities of their students and student organizations are the burdens of responsibility and potential liability.

What measures and supervision will be necessary in order for schools to avoid liability?[21] It is suggested that mere written warnings and verbal admonishments against certain activities, *e.g.*, initiations, traditional poolings of freshmen, etc., may not be enough to protect a school from tort liability.[22] This is especially true when the actions of an approved organization are known and these activities are potentially dangerous, as most of them are.[23] A school must either see to it that such activities are adequately supervised or take the necessary measures to prevent them altogether in order to protect its students from injuries and itself from liability.[24]

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stances. Chappel v. Franklin Pierce School Dist., 71 Wash. Dec. 2d 426 P.2d 471, 474 (1967).

[18] *Id.* 426 P.2d at 475.

[19] WASH. REV. CODE § 28.58.030 (1964) (provides that a school district in Washington may be sued for an injury arising from some act or omission of such district, but also contains an exception to liability when an injury results from the use of athletic apparatus, appliances or manual training equipment).

[20] *See generally* L. GARBER, YEARBOOK OF SCHOOL LAW 63-87 (1967).

[21] L. GARBER, YEARBOOK OF SCHOOL LAW 63, 76 (1967). *See also* R. HAMILTON, THE LAW AND PUBLIC EDUCATION 279, 290 (1959).

[22] Chappel v. Franklin Pierce School Dist., 71 Wash. Dec. 2d 16, 426 P.2d 471, 475 (1967). *See also* R. SEITZ, LAW AND THE SCHOOL PRINCIPAL 69, 87 (1961).

[23] Sherwood v. Moxee School Dist., 58 Wash. 2d 351, 363 P.2d 138 (1961).

[24] R. SEITZ, LAW AND THE SCHOOL PRINCIPAL 31, 46 (1961).

TRUSTS — SPENDTHRIFT TRUSTS — LIMITED TO TESTAMENTARY TRUSTS CREATED FOR CHILDREN ONLY. *First National Bank v. Taylor* (Ariz. Ct. App. 1967); *Arizona Bank v. Morris* (Ariz. Ct. App. 1967).

In the absence of a statutory restraint on alienation, the interest of the beneficiary of a trust is normally subject to voluntary[1] or involuntary[2] alienation. The usual device for preventing such transfers is the spendthrift trust.[3] A rigid definition of such a trust is looked upon with disfavor.[4] Perhaps the best approximation is that suggested in decisions dealing with the trust:[5] it is a restraint imposed by the terms of the trust instrument, or by statute, on the alienation or transfer, either voluntary or involuntary, of the interest of the beneficiary. The enforceability of a spendthrift trust is based primarily on a public policy to allow a donor to condition his bounty according to his own wishes, so long as he violates no specific law.

The purpose of a spendthrift trust is to provide a fund for the maintenance of the beneficiary and at the same time secure the fund against the beneficiary's own improvidence or incapacity. Provisions which prevent creditors from reaching the trust fund are generally incidents of such trusts. It is never the object of a spendthrift trust to restrain the beneficiary from spending income after he has received it from the trustee, or to restrain his creditors from reaching such income.[6]

English courts have consistently opposed spendthrift trusts on the grounds that alienability of legal or equitable interests should not be restrained, that spendthrift trusts tend to encourage weaklings and improvidents, and that such trusts mislead and defraud creditors of the beneficiaries.[7] American courts, on the other hand, have generally up-

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[1] *See, e.g.*, Lewes Trust Co. v. Smith, 28 Del. Ch. 64, 37 A.2d 385 (1944); Philip v. Trainor, 100 So. 2d 181 (Fla. App. 1958); Rappold v. Rappold, 224 Md. 131, 166 A.2d 897 (1961); Woodard v. Snow, 233 Mass. 267, 124 N.E. 35 (1919); E. GRISWOLD, SPENDTHRIFT TRUSTS § 10 (2d ed. 1947); *cf.* RESTATEMENT (SECOND) OF TRUSTS §§ 152-53 (1959).

[2] *See, e.g.*, Miller v. Maryland Cas. Co., 207 Ark. 312, 180 S.W.2d 581 (1944); Showalter v. G. H. Nunnelley Co., 201 Ky. 595, 257 S.W. 1027 (1924); Reilly v. Mackenzie, 151 Md. 216, 134 A. 502 (1926); Equitable Life Ass. Soc'y v. Patzowsky, 131 N.J. Eq. 49, 23 A.2d 561 (Ct. Err. & App. 1942); *cf.* RESTATEMENT (SECOND) OF TRUSTS §§ 152-53 (1959).

[3] *See, e.g.*, Nichols v. Eaton, 91 U.S. 716 (1875); Suskin & Berry v. Rumley, 37 F.2d 304 (4th Cir. 1930); Hearst v. Hearst, 123 F. Supp. 756 (N.D. Cal. 1954); Wagner v. Wagner, 244 Ill. 101, 91 N.E. 66 (1910); Central Nat'l Bank v. Eells, 5 Ohio Misc. 187, 215 N.E.2d 77 (1965). *See also* E. GRISWOLD, SPENDTHRIFT TRUSTS § 25 (2d ed. 1947); RESTATEMENT (SECOND) OF TRHSTS §§ 152-53 (1959).

[4] E. GRISWOLD, SPENDTHRIFT TRUSTS § 1 (2d ed. 1947).

[5] *See, e.g.*, Zouck v. Zouck, 204 Md. 285, 104 A.2d 573 (1954) (spendthrift trust could be reached under a support and separation agreement); Pilkington v. West, 246 N.C. 575, 99 S.E.2d 798 (1957); Sproul-Bolton v. Sproul-Bolton, 383 Pa. 85, 117 A.2d 688 (1955); Hines v. Sands, 312 S.W.2d 275 (Tex. Civ. App. 1958). *See also* Annot., 34 A.L.R.2d 1335 (1954).

[6] *See* G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 40 (4th ed. (1963).

[7] Brandon v. Robinson, 18 Ves. J.R. 424 (1811). For the general approach of

held the legality of spendthrift trusts, recognizing that inalienable equitable interests may be validly created, that such trusts are necessary for the protection of inexperienced or incompetent persons, and that creditors should not be misled by the appearance of wealth which the beneficiary may manifest because they can inquire into the source of the beneficiary's income and demand a statement of assets as a condition to giving credit.[8]

Although spendthrift trusts are widely recognized,[9] there is little uniformity among the laws of the various jurisdictions. In four states,[10] fairly comprehensive statutes have been enacted. In the great majority of states, there are statutes and decisions upholding the validity of spendthrift trusts either with[11] or without substantial qualification.[12] Alaska, Idaho, New Mexico, and Wyoming have not answered problems relating to spendthrift trusts.[13] A small number of jurisdictions have followed the English view and denied the validity of spendthrift trusts.[14]

English judges and scholars see J. GRAY, RESTRAINTS ON THE ALIENATION OF PROP-589 (2d ed. 1895).

[8] *See* G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 40 (4th ed. 1963). For a history of spendthrift trusts in the United States, see E. GRISWOLD, SPENDTHRIFT TRUSTS §§ 1-33 (2d ed. 1947).

[9] *See, e.g.*, Nichols v. Eaton, 91 U.S. 716 (1875) (dictum); Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882); *In re* Moulton's Estate, 233 Minn. 286, 46 N.W.2d 667 (1951); Annot., 34 A.L.R.2d 1335 (1954); Annot., 24 A.L.R.2d 1105 (1952).

[10] *See* DEL. CODE ANN. tit. 12, § 3536 (1953); LA. REV. STAT. ANN. §§ 9:2002-2007 (1965); NEV. REV. STAT.§§ 166.010-160 (1963); OKLA. STAT. ANN. tit. 60, § 17.25 (1963).

[11] Spann v. Carson, 123 S.C. 371, 116 S.E. 427 (1923); Patton v. Winters, 20 Tenn. App. 601, 101 S.W.2d 708 (1936). *See also* RESTATEMENT (SECOND) OF TRUSTS § 153 (1959) (restraint good if principal payable to the beneficiary at a future time, but not if payable immediately or payable after the death of the beneficiary).

[12] Dean Griswold, in his admirable work on spendthrift trusts has dealt at length with the decisions and statutes of the various states. For an indepth analysis see E. GRISWOLD, SPENDTHRIFT TRUST: (2d ed. 1947). *See, e.g.*, ALA. CODE tit. 58, § 1 (1958); ARIZ. REV. STAT. ANN. § 14-104 (1956); CAL. CIV. CODE §§ 859, 867 (1954); CONN. GEN. STAT. ANN. § 52-321 (1960); DEL. CODE ANN. tit. 12, § 3536 (1959); GA. CODE ANN. § 108-114 (1959); ILL. REV. STAT. ch. 22, § 49 (1958); IND. ANN. STAT. § 56-604 (1962); KAN. STAT. ANN. § 58-2404 (1964); LA. REV. STAT. ANN. §§ 9:2002-2007 (1965); MICH. STAT. ANN. §§ 26.63, 26.69 (1957); MINN. STAT. ANN. §§ 501.14, 501.20 (1947); MONT. REV. CODE ANN. §§ 86-106, 86-112 (1964); NEV. REV. STAT. §§ 166.010 to -.160 (1963); N.Y. ESTATES, POWERS & TRUSTS LAW § 7-1.5 (McKinney 1967); N.C. GEN. STAT. § 41-9 (1966); N.D. CENT. CODE § 59-03-10 (1960); OKLA. STAT. ANN. tit 60, § 175.25 (1963); PA. STAT. ANN. tit. 48 § 136 (1959); S.D. CODE § 59.0306 (1939); TENN. CODE ANN. § 26-601 (1955); VA. CODE ANN. § 55-19 (1949); WASH. REV. CODE ANN. § 6.32.250 (1963); WIS. STAT. ANN. §§ 231.13, 231.19 (1957); Antone v. Snodgrass, 244 Ala. 501, 14 So. 2d 506 (1943); *In re* Estate of Setrakian, 178 Cal. App. 2d 833, 338 P.2d 247, 3 Cal. Rptr. 444 (1960); Wagner v. Wagner, 244 Ill. 101, 91 N.E. 66 (1910); Medwedeff v. Fisher, 179 Md. 192, 17 A.2d 141 (1941); *In re* Moulton's Estate, 233 Minn. 286, 46 N.W.2d 667 (1951); Clark v. Clark, 411 Pa. 251, 191 A.2d 417 (1963); Hines v. Sands, 312 S.W.2d 275 (Tex. Civ. App. 1958). *See generally* 2 G. BOGERT, TRUSTS AND TRUSTEES § 222 (2d ed. 1965); 2 A. SCOTT, TRUSTS § 151 (3d ed. 1967).

[13] 2 G. BOGERT, TRUSTS AND TRUSTEES § 222 (2d ed. 1965).

[14] *See, e.g.*, Ratliff's Ex'rs v. Commonwealth, 139 Ky. 533, 101 S.W. 978 (1907); Brahmey v. Rollins, 87 N.H. 290, 179 A. 186 (1935); Tillinghast v. Bradford, 5 R.I.

Arizona has expressly recognized the spendthrift trust by a unique[15] statute,[16] which text writers have referred to as "peculiar"[17] and "far from clear."[18] It first appeared in 1901 as Arizona Revised Statute sec-

205 (1858). For the English view see Brandon v. Robinson, 18 Ves. J.R. 424 (1811). *See also* J. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (2d ed. 1895).

[15] First Nat'l Bank v. Taylor, 5 Ariz. App. 327, 329, 426 P.2d 633, 665 (1967). The only similar statute is that found in Georgia. GA. CODE ANN. § 108-114 (1959). *See generally*, 2 G. BOGERT, TRUSTS AND TRUSTEES § 212 (2d ed. 1965).

[16] ARIZ. REV. STAT. ANN. § 14-104 (1956):

> A. When a person apprehends that his estate will be squandered if left to the management or control of his child because of such child's idleness, dissipation or extravagance, the person may by his will leave his estate to a trustee appointed by will with full power of management and control, the income or increase of which shall be paid to the child for his maintenance and support after deducting expenses of managment.
>
> B. The superior court of the county where the estate is located, or where the trustee resides, may at any time remove the trustee if it appears that the estate is being wasted or improperly managed, and may appoint another trustee for the management thereof, taking bond from him in a principal amount at least equal to the value of the estate, for the faithful performance of the trust.
>
> C. If the child entitled to the estate or any part thereof, shall, at any time, make it appear to the satisfaction of the court that the cause for leaving the estate in trust no longer exists and that there is no danger of it being squandered by idleness, dissipation or extravagance, the court shall dissolve the trust, and place the estate in possession of the person who would have been entitled to it had the trust not been created.

[17] 2 A. SCOTT, TRUSTS § 152.1 (1939).

[18] E. GRISWOLD, SPENDTHRIFT TRUSTS § 155 (2d ed. 1947).

tion 4232,[19] and was re-enacted when Arizona became a state.[20] The statute as amended became section 3647 of the Arizona Revised Code of 1928,[21] and later appeared as section 41-112 of the Arizona Code of 1939.[22] The Arizona statute is unusual in several respects. First, it specifically mentions only a trust *created by will.* Second, it refers only to a trust created in favor of a *child* of the settlor. Finally, aside from the title of the statute which reads "Spendthrift trusts; creation, termination," there is no language in the statute which expressly provides for the inalienability of either income or principal.

Although the Arizona statute and its predecessors have been on the books for sixty-six years, it was not construed until *First National Bank v. Taylor.*[23] The case involved a testatrix' directions to her execu-

[19] Should any *father or mother,* in consequence of the idleness, dissipation or extravagance of his or her *child or children,* apprehend that his, her, or their estate will be squandered if left to *their* management or control, it shall be lawful for such father or mother, *by last will and testament,* to leave such estate in the hands of trustees, to be appointed by said will, which trustees shall have the entire management and control of said estate, the profit of which, after deducting expenses of said management, shall be paid over to the *child or children* entitled to the same for his, her or their maintenance and support; and, it shall be lawful, at any time, for the court of probate in the county where such estate may be situated, or where such trustee or trustees may reside, to take cognizance of the same and to remove such trustee or trustees from the management of the same: *Provided* it shall be made to appear that such estate is being wasted or improperly managed; and to appoint other trustees for the management thereof taking bond and security from such trustees in sum at least equal to the value of such estate for the faithful performance of the trust; and *if the child or children entitled to such estate, or any part thereof shall, at any time, make it appear to the satisfaction of said court that the causes for leaving said estate in trust no longer exist, and that there is no danger of its being squandered by idleness, dissipation or extravagance, it shall be the duty of said court to dissolve said trust and* place the said estate in the hands of *the person or persons* who would have been entitled to the same had such trust not been created. (emphasis added).

There is no heading to the section but printed in the right hand margin are the following words: "Testator may leave property of dissipated children in the care of trustees."

Dean Griswold has suggested that this statute might have had its origin in a curious provision of the Howell Code of 1864 ch. XLII, § 43:

> Any person owning any real estate within this Territory or interest therein may, by deed, convey the same to his legitimate child or children, and natural child or children, or his child or children by adoption, *and to the issue of such child or children* during their natural lives, whether such issue be begotten and born before the date of such conveyance or afterwards, and in such conveyance may inhibit the alienation of such estate during the natural lives of such child or children *and of such issue.* The estate so conveyed shall vest in the persons therein named or described, in accordance with the conditions of such conveyance, and shall not be liable for any debts contracted or liabilities incurred by the grantor, after the date of such conveyance. (emphasis added).

This provision of the Howell Code was repealed by ARIZ. REV. STAT. § 3257 (1887).

[20] ARIZ. REV. STAT. § 1224 (1913).

[21] ARIZ. REV. CODE § 3647 (1928). The basic provisions of this statute were substantially similar to the 1901 statute. There were, however, two notable changes: The word "person" was substituted for the words "father or mother," and the word "child" substituted for the words "child or children."

[22] ARIZ. CODE ANN. § 41-112 (1939) (This statute was identical to the 1928 statute, and became, with insignificant changes, the present § 14-104).

[23] 5 Ariz. App. 327, 426 P.2d 663 (1967).

tor to divide her estate into five shares, one for each of her children. The two eldest offspring were to receive their shares immediately. She directed that the shares of the younger children be held in trust, the income to be paid them for their respective lives, with the remainder to be held in trust for her grandchildren. The will also contained a spendthrift provision which prohibited the trust beneficiaries from making any voluntary or involuntary transfers of income or principal prior to accrual.

The three youngest children brought suit in superior court alleging that they were sufficiently responsible in the management of their affairs to have the spendthrift trust terminated under section 14-104 C. The trial court found that they were, and terminated the trust. The court of appeals reversed, holding that lifetime beneficiaries of a trust could not terminate the trust in violation of the settlor's intent that it continue and benefit residuary beneficiaries.[24]

The question of the validity of the spendthrift provision protecting the grandchildren's interest from creditors was not before the court, and the court made no mention of that issue in its decision. However, in determining the extent of the trial court's power to terminate the trust, the court construed the statute as applying "to testamentary trusts established only for the children of the testator."[25] Since this trust was established for the benefit of grandchildren as well, the trial court was not jusified in terminating it. Moreover, the court held the statute provided for termination only when *"the* cause for leaving the estate in trust"[26] no longer existed. Since this trust had purposes other than the protection of profligate children, *e.g.*, the "benefit and education of grandchildren,"[27] the termination provision was inapplicable.

The court in *Taylor* was inconsistent in its construction of the statute. On the one hand, it gave subsection A of the statute a literal, narrow construction. In construing subsection C, however, it did not stress the literal wording of the statute but emphasized the legislative intent.[28]

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[24] First Nat'l Bank v. Taylor, 5 Ariz. App. 327, 330-31, 426 P.2d 663, 666-67 (1967).

[25] 5 Ariz. App. 327, 330, 426 P.2d 663, 666 (1967).

On motion for hearing, 5 Ariz. App. 422, 527 P.2d 556 (1967), another statute, which had been overlooked in the prior opinion, was called to the attention of the court. A.R.S. § 14-101 provides, *inter alia* that under Title 14, unless the context otherwise requires, children include descendants of every degree, but they shall be counted only for the child they represent.

The court confessed error in overlooking this statute, but stated that further consideration of the spendthrift statute and its language at the time of its original enactment impelled it to adhere to its previous decision.

[26] 5 Ariz. App. 327, 331, 426 P.2d 663, 667 (1967).

[27] *Id.*

[28] The search in statutory interpretation is always to find the true intent of the legislature . . . . [W]e do not believe that our legislature intended by

The decision limits the statute to spendthrift trusts established only for the children of the testator. However, it leaves certain other questions unanswered or in doubt: did the legislature, by allowing spendthrift provisions for testamentary trusts for the benefit of children, intend to exclude all others? Would a spendthrift provision, in an *inter vivos* trust, be upheld in Arizona?

While not squarely deciding this question, a later decision, *Arizona Bank v. Morris*,[29] has shed some light on it. The case involved a garnishment proceeding by a judgment creditor against the trustee of an *inter vivos* spendthrift trust established by the judgment debtor. The court held that the judgment debtor could not place his assets in a spendthrift trust for himself, and thus insulate his assets from garnishment by a party who, subsequent to the creation of the trust, had recovered a judgment against him.

The holding of the court was in accord with the weight of authority.[30] What was alarming, however, was the following dictum:

> Thus, in Connecticut, unless a trust qualifies under the statute, it is not subject to the protection usually accorded a spendthrift trust. The Arizona statute should be given the same restrictive interpretation.
>
> . . . .
>
> In the absence of any legislative direction to the contrary, this Court will limit the benefits of the spendthrift trust to that interest created pursuant to A.R.S. § 14-104.[31]

The court thus strongly implies that it will draw a distinction between a spendthrift provision in a testamentary trust and a spendthrift provision in an *inter vivos* trust. This writer has been unable to find any other jurisdiction in the United States which has made such a distinction.[32] If the rationale behind spendthrift trusts in Arizona is

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this statute that the formally expressed desires of testators to establish trusts for grandchildren should be frustrated merely because there is incorporated in the will provisions for inalienability of the trust estate by the beneficiaries. First Nat. Bank v. Taylor, 5 Ariz. App. 327, 330, 426 P.2d 663, 666 (1967).

This writer has been unable to find any materials on legislative hearings or committee reports dealing with this statute or any of its predecessors. The court does not provide citations to any such sources. The origin of the 1901 provision, therefore, is shrouded with uncertainty. The uniqueness of the statute increases the uncertainty involved in attempting to determine the "true intent of the legislature."

[29] 435 P.2d 73 (Ariz. Ct. App. 1967); *modified*, 436 P.2d 499 (Ariz. Ct. App. 1967).

[30] *See, e.g.*, Byrnes v. Comm'r, 104 F.2d 144 (9th Cir. 1939); Nelson v. California Trust Co., 33 Cal. 2d 501, 202 P.2d 1021 (1949); Pilkington v. West, 246 N.C. 575, 99 S.E.2d 798 (1957); RESTATEMENT (SECOND) OF TRUSTS § 156 (1959). For a discussion of all aspects of trusts created for the benefit of the settlor, see E. GRISWOLD, SPENDTHRIFT TRUSTS §§ 471-99 (2d ed. 1947).

[31] Arizona Bank v. Morris, 435 P.2d 73, 75, 76 (Ariz. Ct. App. 1967).

[32] The RESTATEMENT (SECOND) OF TRUSTS §§ 152-53, 337-38 (1959) does not draw such a distinction, nor does Dean Griswold. E. GRISWOLD, SPENDTHRIFT TRUSTS §§ 471-99, 565-66 (2d ed. 1947). Courts in other jurisdictions have upheld

that the owner of property should be allowed to condition his bounty in any way he chooses as long as he does not violate any laws in so doing, then the basis of the distinction is unclear. A person should be allowed to condition his bounty in life as well as in death. The result may be explained, however, by the court's giving such weight to the countervailing policy considerations, *e.g.*, the protection of creditors, that it feels required to give the statute a restrictive interpretation, regardless of the resulting statutory scheme.[33]

Apparently, then, after *Morris* an *inter vivos* trust which contains a spendthrift provision will not be upheld in this state. What can be done, therefore, to restrain the voluntary or involuntary transfer of the beneficiary's interest in an *inter vivos* trust?

One approach would be to rely on a narrow application of the *Morris* case, using a standard spendthrift provision in *inter vivos* trusts restraining the beneficiary, if he is someone other than the settlor, from any voluntary or involuntary transfers. The language in *Morris* was only dictum. It can be argued that while A.R.S. § 14-104 by its terms is limited to testamentary trusts, the legislature, by allowing spendthrift trusts, did not intend to exclude all others. This would make the enforceability of *inter vivos* spendthrift trusts depend solely on common law principles. There are no binding, contrary statutes or decisions in Arizona dealing with *inter vivos* spendthrift trusts; therefore, the *Restatement* should be followed.[34] The *Restatement* does not draw any distinction between *inter vivos* and testamentary spendthrift trusts, and it upholds the validity of each.[35] Judge Molloy's opinion in *Taylor* lends strong support to this approach.

While dictum is not binding upon the courts, especially when it is found in a case of first impression like *Morris*,[36] there seems to be a generally restrictive attitude toward spendthrift trusts in Arizona, at least among the judges of one division of the court of appeals.[37] It might, therefore, be quite difficult to sustain an argument such as the preceeding one. This approach would subject the client's rights to a great degree of uncertainty. A more reasonable suggestion would be to use

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inter vivos trust spendthrift provisions. *See In re* Moulton's Estate, 233 Minn. 286, 46 N.W.2d 667 (1951); *In re* Bower's Trust Estate, 346 Pa. 85, 29 A.2d 519 (1943) (*Inter vivos* trust containing a spendthrift privision terminated upon application of settlor and beneficiaries); Hines v. Sands, 312 S.W.2d 275 (Tex. Civ. App. 1958) (Spendthrift provision of a profit sharing trust was valid).

[33] The court hints at such an argument in Arizona Bank v. Morris, 435 P.2d 73, 76 (Ariz. App. 1967), when it cites a passage from Utley v. Graves, 258 F. Supp. 959 (D.D.C. 1966). *See also* E. GRISWOLD, SPENDTHRIFT TRUSTS § 555 (2d ed. 1947).

[34] *See* Arizona Bank v. Morris, 435 P.2d 73, 76 (Ariz. Ct. App. 1967).

[35] RESTATEMENT (SECOND) OF TRUSTS § 152, illustrations 1 and 3, § 153, illustration 1 (1959).

[36] 435 P.2d 73, 74 (Ariz. Ct. App. 1967).

[37] *See* Arizona Bank v. Morris, 435 P.2d 73, 75 (Ariz. Ct. App. (1967).

a provision which is not a "spendthrift" clause, but which accomplishes similar results.

The provision would have two basic clauses — a forfeiture on alienation, followed by a discretionary power in the trustee. It would provide that in the event of an attempted voluntary or involuntary transfer by the beneficiary of the reserved income of the trust, the right of the beneficiary to the income would cease; thereafter the trustee, in his discretion, would have the *power* to expend for the comfort and support of the beneficiary, but in no case could he be compelled to pay any part of the income to the beneficiary. The accumulations of unpaid income would likewise be held in trust. It could also be provided that in the event of the beneficiary's death, the principal would be payable to a third party. Any other provisions could be included to meet the particular needs of the settlor.[38]

Other alternatives are available to the draftsman. A discertionary power can be given to the trustee to pay income, or distribute principal, among several beneficiaries. This would enable the trustee, if the interest of one of the beneficiaries was jeopardized, to cease payment to him and pay to the other beneficiaries.[39]

A support clause could provide that only so much of the income would be paid to the beneficiary as was necessary for his comfort and well being or for the support and well being of his family. If this provision were used, the restricted nature of the beneficiary's interest, rather than any express provision, would prevent the transfer.[40]

Finally, a combination of several forms might be utilized.[41] This would be of particular benefit in a jurisdiction such as Arizona where the validity of certain spendthrift trusts is in doubt. The trust instrument could contain a spendthrift clause, together with a forfeiture clause if creditors attempt to reach the beneficiary's interest, followed by a discretionary trust to pay to members of the beneficiary's family.

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[38] G. Bogert, in his *Handbook of The Law of Trusts* § 44 (4th ed. 1963), refers to a similar device known as a "protective trust." *See generally* E. GRISWOLD, SPENDTHRIFT TRUSTS § 574 (2d ed. 1947); RESTATEMENT (SECOND) OF TRUSTS § 150 and comment *C* (1959).

[39] *See, e.g.*, Brownell v. Leutz, 149 F. Supp. 98 (D.N.D. 1957); (discretionary power to determine principal and income); Estate of Canfield, 80 Cal. App. 2d 443, 181 P.2d 732 (1947); Athorne v. Athorne, 100 N.H. 413, 128 A.2d 910 (1957); RESTATEMENT (SECOND) OF TRUSTS § 155 (1959); *cf. In re* Estate of Gardiner, 5 Ariz. App. 239, 425 P.2d 427 (1967).

[40] *See, e.g.*, Reilly v. State, 119 Conn. 508, 177 A. 528 (1935); Jones v. Coon, 229 Iowa 756, 295 N.W. 162 (1940) (trust also contained a forfeiture provision); Seattle First Nat'l Bank v. Crosby, 42 Wash. 2d 234, 254 P.2d 732 (1953); RESTATEMENT (SECOND) OF TRUSTS § 154 (1959).

[41] *See* Duncan v. Elkins, 94 N.H. 13, 45 A.2d 297 (1946); O'Connor v. O'Connor, 141 N.E.2d 691 (Ohio Cuyahoga County C.P. 1957) (Spendthrift trust did *not* prevent invasion of trust by wife and children to secure alimony and support payments).

These suggestions have not been made for the purpose of evading the law. They are merely alternative possibilities of dealing with a unique statute and the restrictive interpretation given it by the courts of this state.

The desirability of spendthrift trusts, whether testamentary or *inter vivos*, is, really a question not of logic but of policy.[42] The fundamental inquiry is whether spendthrift trusts *should* be sustained. Being a question of policy, its solution rests more appropriately in the legislature than in the courts. Obviously there are competing factors. When spendthrift trusts are considered from the point of view of creditors of the beneficiary, it can be urged that it is against public policy to allow a property owner to escape liability for his debts.[43] The money-lending class of the community can argue that is misled by the appearance of wealth which the beneficiary manifests. Several attacks on spendthrift trusts have been sustained on these grounds.[44] Such arguments are stronger in the case of a restraint on creditors than in the case of invalidating a voluntary assignment of the beneficiary's interest. In certain situations, however, a spendthrift trust can serve a useful purpose, for example, where it is created in moderate amount for a widow, or for a person who is unable competently to manage his own affairs. Likewise, a *non-testamentary* spendthrift trust may be quite useful to the settlor who wants to avoid the expense and delay connected with the administration of estates or who does not want a will defeated because it lacks the requisite formalities, or because it is subjected to the more formidable incompetency standards applicable to wills.[45]

In the absence of statutory revision, the courts will be the final expositors of the law of spendthrift trusts in Arizona. It appears that a blanket ban of all *non-testamentary* spendthrift trusts is not so desirable a policy as one that would allow some limited use of them, since difficulty arises not so much from the mere existence of spendthrift trusts as from their unlimited extent. Arguments for and against spendthrift trusts, whether *inter vivos* or testamentary, could be resolved by legis-

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[42] E. GRISWOLD, SPENDTHRIFT TRUSTS § 554 (2d ed. 1947).

[43] Certainly no man should have an estate to live on, but not an estate to pay his debts with. Certainly property available for the purposes of pleasure or profit should be also amenable to the demands of justice. Tillinghast v. Bradford, 5 R.I. 205, 212 (1858).

See 2 G. BOGERT, TRUSTS AND TRUSTEES § 222 (2d ed. 1965); 2 A. SCOTT, TRUSTS § 152 (3d ed. 1967).

[44] *See, e.g.*, Meade v. Rowe's Ex'r, 298 Ky. 111, 182 S.W.2d 30 (1944); Brahmey v. Rollins, 87 N.H. 290, 179 A. 186 (1936); Sherrow v. Brookover, 174 Ohio St. 310, 189 N.E.2d 90 (1963). *See also* G. BOGERT, TRUSTS AND TRUSTEES § 222 (2d ed. 1965); 2 A. SCOTT, TRUSTS § 152 (3d ed. 1967).

[45] *See* Leaphart, *The Trust as a Substitute For a Will*, 78 U. PA. L. REV. 626 (1930). *See also* A. CASNER, STUDY OUTLINE: THE REVOCABLE TRUST AN ESSENTIAL TOOL FOR THE PRACTICING LAWYER § 6.2 (1965).

lation expressly authorizing spendthrift trusts of a fixed and reasonable amount while allowing creditors to reach assets in excess of that amount.[46] Through such legislation, abuses would be minimized while retaining the advantages of a moderately limited trust.

Jay M. Martinez

WORKMEN'S COMPENSATION — ELECTION OF REMEDIES — QUESTION OF ELECTION IS ONE OF LAW TO BE DECIDED BY TRIAL COURT. *Morgan v. Hayes* (Ariz. 1967).

Plaintiff sued employer in the superior court for negligence. Employer moved to dismiss, claiming the court lacked jurisdiction because the plaintiff had already elected to take under the Workmen's Compensation Act by applying for and receiving compensation benefits. Defendant sought a preliminary hearing before the court on the jurisdictional question. Plaintiff opposed this, contending that he was entitled to a jury trial on the question, because fact issues — including whether the plaintiff was mentally and physically competent at the time of the signing of the application for compensation, and whether he knew of his right to sue his employer when he accepted compensation checks — were in dispute. Judge Hays held a preliminary hearing and then reserved his ruling pending the jury trial on other issues. Obeying a writ of mandamus from the Arizona Supreme Court, directing that he determine the matter, he subsequently granted employer's motion to dismiss for lack of jurisdiction. The court of appeals denied plaintiff's petition for certiorari and it was taken to the supreme court. On certiorari, *held,* affirmed. Whether there was an election to take under the Workmen's Compensation Act is a jurisdictional question, one of law, which is to be decided by the trial court prior to jury trial. *Morgan v. Hays,* 102 Ariz. 150, 426 P.2d 647 (1967), *cert. denied,* 88 S. Ct. 105 (1967).

In the great majority of state courts, disputed questions related to whether the workmen's compensation act bars the employee's common law tort action are normally triable by the jury.[1] These questions[2] in-

[46] *See* CAL. CIV CODE §§ 859, 867 (1954); N.Y. ESTATES, POWERS & TRUSTS § 7-1.5 (McKinney 1967). *See also* E. GRISWOLD, SPENDTHRIFT TRUSTS § 556 (2d ed. 1947).

[1] In a few jurisdictions, the jury does not decide *all* of the questions. For instance, in Pennsylvania, the jury determines whether there is an employer-employee relationship. Walters v. Kaufman Dep't Stores, 334 Pa. 233, 5 A.2d 559 (1939), note 3 *infra.* The trial court, however, determines whether the employment was casual in character or in the regular business of the employer. Vescio v. Pennsylvania Elec. Co., 336 Pa. 502, 9 A.2d 546, (1939), note 9 *infra.*

[2] Whether or not each of the questions will arise in a given jurisdiction is dependent, of course, upon the compensation act of that jurisdiction.

clude whether there is an employer-employee relationship;[3] whether the injury arose out of and in the course of the employment;[4] whether the employer employed enough people to fall within the coverage of the act;[5] whether the business was extra-hazardous;[6] whether the employee, although actually employed by an independent contractor, was engaged in a part or process in the trade or business of the principal employer;[7] whether the employee had an occupational disease or, instead, had suffered an accident compensable under the act;[8] whether the employment was casual in character or in the regular business of the employer;[9] and whether sufficient notice had been posted.[10] Disputed issues such as these arising in federal diversity cases *must* be determined by the jury.[11]

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[3] Jeffrey Mfg. Co. v. Hannah, 268 Ala. 262, 105 So. 2d 672 (1958); Miller v. Long Beach Oil Dev. Co., 167 Cal. App. 2d 546, 334 P.2d 695 (1959); J & K Constr. Co. v. Molton, 154 Colo. 214, 390 P.2d 68 (1964); Rogers v. Barret, 46 So. 2d 490 (Fla. 1950); Westlund v. Kewanee Pub. Serv. Co., 11 Ill. App. 2d 10, 136 N.E.2d 263 (1956); Chafee v. Stenger, 351 Mich. 57, 104 N.W.2d 805 (1960); Clark v. Luther McGill, Inc., 240 Miss. 509, 127 So. 2d 858 (1961); Simmons v. Kansas City Jockey Club, 334 Mo. 99, 66 S.W.2d 119 (1933); Mirabile v. Bartlett-Hayward Co., 249 App. Div. 667, 291 N.Y.S. 285 (1936); Meriden Creamery Co. v. McCullough, 200 Okla. 440, 195 P.2d 765 (1948); Walters v. Kaufman Dep't Stores, 334 Pa. 233, 5 A.2d 559 (1939); Western Hills Hotel, Inc. v. Ferracci, 299 S.W.2d 335 (Tex. Civ. App. 1957).

[4] Dalgleish v. Holt, 108 Cal. App. 2d 561, 237 P.2d 553 (1951); Bassi v. Morgan, 60 Ill. App. 2d 1, 208 N.E.2d 341 (1965); Zarba v. Lane, 322 Mass. 132, 76 N.E.2d 318 (1947); Wilkinson v. Achber, 101 N.H. 7, 131 A.2d 51 (1957); Nicolasi v. Sparagna, 135 N.J.L. 131, 50 A.2d 867 (Ct. Err. & App. 1947); Laskoski v. De Mers, 10 App. Div. 2d 896, 199 N.Y.S.2d 717 (1960), *appeal dismissed*, 8 N.Y.2d 843, 203 N.Y.S.2d 888 (1960); Ramseth v. Maycock, 209 Ore. 63, 304 P.2d 415 (1956). *Contra*, Burgess v. Gibbs, 262 N.C. 462, 137 S.E.2d 806 (1964).

[5] Gilpin v. Lev, 70 Ill. App. 2d 66, 217 N.E.2d 477 (1966); Dube v. Robinson, 92 N.H. 312, 30 A.2d 482 (1943); Young v. Maryland Mica Co., 212 N.C. 243, 193 S.E. 285 (1937); Dial v. Wilke, 127 S.W.2d 379 (Tex. Civ. App. 1939).

[6] Theme v. Harris, 346 Ill. App. 575, 105 N.E.2d 778 (1952).

[7] Gigliotti v. United Illuminating Co., 151 Conn. 114, 193 A.2d 718 (1963); Cannon v. Crowley, 318 Mass. 373, 61 N.E.2d 662 (1945). This issue concerns whether or not an employee of an independent contractor is performing acts that could appropriately be performed by the principal employer's (contractee's) own employees. The principal employer is not permitted to circumvent the workmen's compensation act by the delegation of such acts to the independent contractor. If the employee is performing acts appropriate to the employees of the principal employer, that employer's compensation coverage will include him. Of course, an employee of an independent contractor who is negligently injured by the principal employer may find it advantageous to argue that he was not engaged in a "part or process" of the principal employer's business, and therefore, not subject to workmen's compensation. He would then still be in a position to bring a common law action.

[8] General Printing Corp. v. Umback, 100 Ind. App. 285, 195 N.E. 281 (1935); Dawson v. E. J. Brooks & Co., 134 N.J.L. 94, 45 A.2d 892 (Sup. Ct. 1946); Blue Diamond Coal Co. v. Aistrod, 183 Va. 23, 31 S.E.2d 297 (1944).

[9] Clayton v. Ainsworth, 122 N.J.L. 109, 4 A.2d 274 (Ct. Err. & App. 1939). *Contra*, Vescio v. Pennsylvania Elec. Co., 9 A.2d 546, 336 Pa. 502 (1939).

[10] Kampman v. Cross, 194 S.W. 437 (Tex. Civ. App. 1917); McVey v. Chesapeake & Potomac Tel. Co., 106 W.Va. 331, 145 S.E. 578 (1928). "Notice" involves informing the employee of his right to accept or reject coverage. Notices must be posted in a conspicuous place.

[11] Byrd v. Blue Ridge Elec. Cooperative, 356 U.S. 525 (1958); Magneau v. Aetna

The issue of an employee's election to take compensation arises infrequently in comparison with many of the above issues, but it is usually treated as a question of fact and resolved in the same manner. Courts in Arkansas,[12] Indiana,[13] Massachusetts,[14] New Mexico,[15] New York,[16] and Texas,[17] let the issue of election go to the jury when the facts are in dispute.[18] However, courts in California,[19] North Carolina,[20] and South Carolina[21] have used language strongly suggesting that, should the "election" issue arise, it would be jurisdictional and one of law to be decided by the trial court even though the facts were sharply contested.

Although Arizona has many reported cases concerning the Workmen's Compensation Act, most involve appeals from the Industrial Commission, and relatively few involve common law negligence actions. Consequently, decisions concerning judge or jury determination have been rendered on only two of the issues which arise when an employer claims immunity from a common law negligence action under the Workmen's Compensation Act. In *Jeune v. Del E. Webb Construction Co.*,[22] the court stated that the jury should decide the factual issue of notice if it is in dispute.

Freight Lines, 360 U.S. 273 (1959). In *Byrd*, the *Erie* doctrine, enunciated in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), apparently is refined. The Court states that "outcome" is not the only consideration, and that the importance of following the state rule requiring judicial determination of immunity, deemed to be "a form and mode of enforcing the immunity," is outweighed by the importance of maintaining the judge-jury relationship in the federal courts. It has been suggested, however, that the real basis of the decision in *Byrd* was the seventh amendment's guarantee of the right to trial by jury, and that the *Erie* doctrine was not refined, but instead, "gave way" to the command of the seventh amendment. See Whicher, *The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict*, 37 TEX. L. REV. 549 (1958-59); 43 MINN. L. REV. 580 (1958-59). Although the Court in *Byrd* is not explicit in its language, it may be surmised from the opinion that an employer's plea of immunity from suit is to be treated as an affirmative defense, rather than a question of jurisdiction.

[12] Haynes Drilling Corp. v. Smith, 200 Ark. 1098, 143 S.W.2d 27 (1940).

[13] Talge Mahogany Co. v. Burrows, 191 Ind. 167, 130 N.E. 865 (1921).

[14] Young v. Duncan, 218 Mass. 346, 106 N.E. 1 (1914). *But see In re* Nealon's Petition, 334 Mass. 248, 134 N.E.2d 886 (1956). Massachusetts apparently differentiates between a defendant-employer (an "insured") and a defendant-third party. If a defendant is *not* an "insured," the election issue will be decided by the judge. *See* Cozzo v. Atlantic Ref. Co., 299 Mass. 260, 264, 12 N.E.2d 744, 747 (1938).

[15] Addison v. Tessier, 62 N.M. 120, 305 P.2d 1067 (1957).

[16] Lassell v. Mellon, 219 App. Div. 740, 220 N.Y.S. 235 (1927).

[17] Leonard v. Hare, 161 Tex. 28, 336 S.W.2d 619 (1960).

[18] Disputed factual issues typically arise around the question of the employee's knowledge of his rights when he accepted benefits. *E.g.*, did he *know* of his alternative remedies? Did he *know* that pursuing one remedy precluded pursuing the other? If he signed a release, did he *know* it was a release, or instead, did he believe it to be a mere receipt for salary? In light of his recent injury, was he mentally *competent to know* what he did at the time he applied for compensation?

[19] Freire v. Matson Navigation Co., 109 P.2d 1022 (Cal. Ct. App. 1941), *aff'd*, 19 Cal. 2d 8, 118 P.2d 809 (1941).

[20] Burgess v. Gibbs, 262 N.C. 462, 137 S.E.2d 806 (1964).

[21] Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1957).

[22] 76 Ariz. 418, 421, 265 P.2d 1076, 1078 (1954).

The court has held, in previous cases, that when an employer claims immunity because the employee elected to take compensation, the trial court must decide that "election" issue prior to trial. In an early case, *S. H. Kress Co. v. Superior Court*,[23] the court said, "Statutes direct that the superior court has no jurisdiction to hear this case if the injured boy's exclusive remedy is under the Workmen's Compensation Act, for the right to appeal is by statute only. . . ."[24] Citing *Kress*, the Ninth Circuit Court of Appeals reasoned in *Taylor v. Hubbell*[25] that if the employee had elected to take compensation, that would be his exclusive remedy, leaving the court without jurisdiction to hear a common law action; therefore, the question of election was jurisdictional and for the trial court to decide. The Arizona Supreme Court, in *State ex rel. Industrial Commission v. Pressley*[26] and *State ex rel. Industrial Commission v. Reese*,[27] followed the holding in *Hubbell*.

The decision in the instant case, therefore, merely reaffirms the court's prior decisions. The court reiterates that if the plaintiff had elected to receive compensation, then his compensation would be determined by the Industrial Commission, and the superior court would not have jurisdiction. Any right to a jury determination of the election issue as a *jurisdictional* question is thought to be outweighed by the possibility of a directed verdict and delay involved.[28]

The dissent[29] argues that the employee's election must be pleaded affirmatively as a defense and cannot be raised by a motion to dismiss. They accuse the majority of depriving the plaintiff of a jury trial by confusing jurisdiction with the employee's right to pursue a remedy.[30]

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[23] 66 Ariz. 67, 182 P.2d 931 (1947).

[24] *Id.* at 72, 182 P.2d at 934.

[25] 188 F.2d 106 (9th Cir. 1951), *cert. denied*, 342 U.S. 818 (1951).

[26] 74 Ariz. 412, 250 P.2d 992 (1952).

[27] 74 Ariz. 425, 250 P.2d 1001 (1952).

[28] Clearly, the court was not faced with an "either-or" proposition. It was not limited to holding that the election issue was either jurisdictional, and for the trial court to decide, or defensive, and thus for the jury. Two other holdings were available. First, the court could have held the issue was jurisdictional and was to be submitted with the other issues to the jury in a trial of the case on the merits. Second, it could have held that the issue was jurisdictional and, pursuant to Rule 42(b), Arizona Rules of Civil Procedure, ordered a separate jury trial to decide it. For the court's unenlightening discussion dismissing jury determination of the election issue, see Morgan v. Hays, 102 Ariz. 150, 155, 426 P.2d 647, 652 (1967), *cert. denied*, 88 S. Ct. 105 (1967).

[29] *Id.* at 156, 426 P.2d at 653. J. Struckmeyer and C. J. Bernstein.

[30] The dissenting opinion argues that art. 18, § 6 of the Arizona Constitution, which provides that "[t]he right of action to recover damages for injuries shall never be abrogated," guarantees a right of action to recover damages for personal injuries suffered during the course of employment, and that this right of action — the right to bring suit — is a right to pursue a remedy. They assert that ARIZ. REV. STAT. ANN. § 23-1022 (1956) speaks in terms of the "right to pursue a remedy" rather than in terms of "jurisdiction." The statute reads: "The right to recover compensation pursuant to the provisions of this chapter for injury sustained by an employee shall be the exclusive *remedy* against the employer, except as provided by § 23-906 . . . ." (Emphasis supplied by the court). Morgan v. Hays, 102 Ariz. 150, 159, 426 P.2d

The problem, to them, is aptly summarized by Justice Frankfurter in his dissent to *Yonkers v. United States*[31] where he stated, " 'Jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls."[32]

The opinion of the majority no doubt will cause employees desiring a jury trial on the election issue to seek to invoke the jurisdiction of a federal court.[33] Furthermore, an employee desiring a jury trial would probably be wise to attempt to have the federal court hear his case whenever he has reason to believe that a disputed issue will arise from a plea by his employer that the Workmen's Compensation Act is his exclusive remedy, since the holding of the instant case might extend to other issues when the facts are in dispute. Although the *Jeune* decision, which permitted the jury to try the issue of notice, would seem to negate the need for such a procedure, there is some language in the principal case which intimates that *Jeune* is no longer the law. The court states that since it finds that the plaintiff made his election, "[i]t is not necessary for us to pass upon the other matters raised by the petitioner in regard to the *jurisdiction* of the court. . . ."[34] (Emphasis supplied) Since the notice issue was one of the "other matters,"[35] it now might be deemed a jurisdictional question for the trial court. Logically, of course, the notice issue should be treated the same as the election issue. And, logically, other issues previously mentioned should be treated likewise. The implication of the court's statement, therefore, is that the trial court must decide all disputed issues arising from an employer's plea of immunity.

647, 656 (1967), *cert. denied*, 88 S. Ct. 105 (1967). To the minority, the majority's error in confusing jurisdiction with the plaintiff's right to pursue a remedy originated in the *Kress* care. In *Kress*, the court acting upon a writ of prohibition, stated that the superior court would have no jurisdiction to hear the case if the respondent's (the plaintiff in superior court) exclusive remedy was under the Workmen's Compensation Act, because statutes directed that only the supreme court could review an award of the Industrial Commission. The dissenters in the instant case point out that it was true that only the supreme court could review an award of the commission. They note, however, that the respondent was not appealing an award of the commission; he merely was asserting his right to bring a negligence action, pursuant to art. 18, § 6. The processing of a claim by the Industrial Commission could not deprive the superior court of jurisdiction. *Id.* at 160, 426 P.2d at 657.

[31] 320 U.S. 685, 695 (1944).

[32] Morgan v. Hays, 102 Ariz. 150, 159, 426 P.2d 647, 656 (1967), *cert. denied*, 88 S. Ct. 105 (1967).

[33] *See* note 11 *supra*. A plea of immunity from suit is treated as an affirmative defense in federal diversity cases, and the jury decides factual issues related to the plea.

[34] Morgan v. Hays, 102 Ariz. 150, 156, 426 P.2d 647, 653 (1967), *cert. denied*, 88 S. Ct. 105 (1967).

[35] *See* Petitioner's Brief for Certiorari, Morgan v. Hays, *cert. denied*, 88 S. Ct. 105 (1967). It would appear that the court should have decided the notice issue prior to the election issue, since if the court found that notice had in fact been posted, the plaintiff would not have had the right to make an election. Workmen's Compensation would have been his only remedy. The court apparently was "anxious" to rule again on the election issue.

The court in the instant case could have held, of course, that the election issue was defensive in nature and for the jury to decide.[36] It also could have held that the jury should decide the issue, even though it was jurisdictional in nature.[37] Past decisions did not present an insurmountable barrier to either holding. The court had never accorded the election issue more than a cursory treatment. It had never attempted to explain why the question of election should be a jurisdictional question for the court. *Pressley* and *Reese* had merely endorsed *Hubbell,* a federal case, without serious analysis or discussion of the right to a trial by jury. *Hubbell,* itself, in holding the question of election jurisdictional, premised its decision on questionable application of the *Kress* opinion[38] and ignored *Miles v. Lavender,*[39] an early federal case holding that, under Arizona law, the question of whether the employee had made a binding election was for the jury.[40] Perhaps the *Hubbell* court felt that it was bound to follow *Kress* and that *Kress* decreed that the election question was jurisdictional, to be decided by the trial court. Perhaps, also, as suggested by one commentator, *Hubbell* did not actually hold that the issue was to be decided by the judge in *all* cases.[41]

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[36] This was the dissent's primary contention. *See* Morgan v. Hays, 102 Ariz. 150, 157-59, 426 P.2d 647, 654-56 (1967), *cert. denied,* 88 S. Ct. 105 (1967).

[37] *See* note 28 *supra.* The court recognizes that the jury could have decided the issue as a jurisdictional question, but that the possibility of a directed verdict and the delay involved precluded jury determination.

[38] *See* note 30 *supra.*

[39] 10 F.2d 450 (9th Cir. 1926).

[40] The court in *Miles* stated that the employee had made an election, but it was for the jury to determine whether it was binding. The decision may be distinguishable, therefore, from *Hubbell,* where the court's essential inquiry was whether the employee had made an election in the first instance. However, it seems that *Miles* would be distinguishable only on the basis of its terminology. The court in *Hubbell* could have just as well used *Miles* terminology and stated that the employee had made an election; however, whether it was binding was a question for the judge, rather than the jury as *Miles* had held. The basic question in both cases was the same: is the employer immune from suit because the employee is subject to workmen's compensation?

[41] M. UDALL, ALTERNATE REMEDIES FOR INDUSTRIAL INJURIES § 16:

> In *Hubbell,* tried in the U.S. District Court, both parties were agreed that the election question was one for the jury. However, the trial court determined the issue as a matter of law and refused to submit it to the jury. The Court of Appeals affirmed plaintiff's judgment on the ground that whether there had been an election went to the jurisdiction of the court, and that such questions could be decided without aid of jury. In effect the holding, turning on a Federal jurisdictional point, was that there was no reversible error in the trial court's action. However, the procedure followed was not recommended as proper and desirable in every instance. In *State v. Pressley* the Arizona Court seized upon this holding and expanded it into a doctrine that questions of election MUST in every situation be determined by the court. It is submitted that the holding is squarely against Article 2, Section 23, of the Constitution preserving trial by jury as an absolute right in all situations and as to all issues. Other decisions indicate that the Supreme Court is without power to adopt any rule abridging or modifying a party's universal right to jury trial. It is suggested that the criticized portion of the *Pressley* decision was made in unjustified reliance on the *Hubbell* case, without a proper understand-

Furthermore, the court in the instant case had for its consideration the *Jeune* decision, a decision which cannot be reconciled logically with the election cases. The court, therefore, had an "out" which it might have exploited effectively had it been disposed to do so.

The decision is explainable only by the supposition that the court felt bound by precedent — no matter how ill-conceived. Surely, sound reasoning commanded a contrary conclusion. The decision represents an evident encroachment upon the right to trial by jury,[42] a right said to be "inviolate" by the Arizona constitution,[43] and held to be absolute in prior decisions of the court.[44] One searches in vain for any compelling reason justifying this encroachment. To the contrary, one finds that it is almost universally recognized that it is the jury's function to decide disputed fact issues which arise when an employer asserts that the employee's exclusive remedy is compensation. Qualms about the possibility of a directed verdict and the delay involved may be well-founded, but who is to deny that these problems exist whenever a jury determines factual issues? The vast majority of courts which permit the jury to determine the factual issues obviously do not embrace the view that the practical problems override the employee's right to a jury trial. Jurisdictional determinations primarily involve disputed issues of law, and should not be extended unnecessarily to include disputed questions of fact. It is hoped that a reconsideration of this decision in the near future will restore to the right of trial by jury the protection the court has so often in the past accorded it.

Dennis Joseph Skarecky

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ing of the peculiar basis of the *Hubbell* holding, and without consideration of the constitutional point just discussed.

[42] As stated in the dissent to the instant case, the Arizona Constitution preserves the right to trial by jury in a common law negligence action. An employee should not be deprived of this right by simply labeling the election issue "jurisdictional." The determination of whether the employee's exclusive remedy is compensation is just another factual issue to be decided, like all other factual issues, by the jury. *See* Morgan v. Hays, 102 Ariz. 150, 159-61, 426 P.2d 647, 656-58 (1967), *cert. denied*, 88 S. Ct. 105 (1967).

[43] ARIZ. CONST. art. 2, § 23 provides: "The right to trial by jury shall remain inviolate . . . ."

[44] The court stated in *United States Fidelity & Guar. Co. v. State*, 65 Ariz. 212, 216, 177 P.2d 823, 826 (1947):

> That the right to trial by jury is a most substantial right is beyond question . . . it has been referred to as the birthright of every free man, and a right which is justly dear to the American people, . . . and this court was and is without authority to adopt a rule abridging, enlarging, or modifying that right. . . .

See also Mounce v. Wightman, 30 Ariz. 45, 48, 243 P. 916, 917 (1926):

> There is no doubt that in all cases, both at law and in equity, a party is entitled to a jury under our constitution as a matter of absolute right.