Notes

ADMINISTRATORS AND EXECUTORS — COSTS OF ADMINISTRATION — EXECUTOR'S AND ATTORNEY'S FEES NOT ASSESSED AGAINST ENTIRE ESTATE WHERE COMMUNITY DEBTS ARE INSIGNIFICANT. — *In re Foreman's Estate* (Ariz. 1965).

The testator left a community estate of $32,052 cash, a ranch valued at $241,000, and community debts of $434. The trial court ordered that costs of administration, including attorney's and executor's fees, be charged solely against the deceased's half of the community estate. On intermediate appeal, the Arizona Court of Appeals ordered the costs of administration to be assessed against the entire community estate, thereby doubling the amount of executor's fees permitted by the trial court.[1] On a motion for review, the Supreme Court of Arizona *held,* vacated, and reinstated the order of the trial court. Where community debts are insignificant when compared to the aggregate community assets, and the survivor's half interest in the estate is not benefitted by probate, then the estate submitted to probate will consist of only the deceased's undivided one-half interest; the interest of the surviving spouse will not be subject to payment for attorney's fees; and, the executor's fees will be based upon the assessed value of the deceased's half interest in the community estate alone, not upon the entire community estate.[2] *In re Foreman's Estate,* 99 Ariz. 147, 407 P.2d 102 (1965).

Those community property states which adhere to the double ownership theory of community property[3] have had to determine whether or not to probate the entire community estate when the testator dies and community debts exist.[4] California decided in 1872 that the existence of community debts at the time of death would not be a criterion used in determining what portion of the estate should

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[1] *In re* Foreman's Estate, 1 Ariz. App. 41, 399 P.2d 175 (1965).

[2] The case also includes an issue, not treated herein, regarding the assessment of the family allowance against the surviving spouse's one-half interest in the community estate.

[3] Arizona, California, Idaho, Louisiana, New Mexico and Nevada all follow the theory that the husband and wife each owns an undivided half interest in the community estate. See Evans, *The Ownership of Community Property,* 35 HARV. L. REV. 47, 55-62 (1921); SMITH AND TORMEY, SUMMARY OF ARIZONA COMMUNITY PROPERTY 4 (1964); and, Rappeport, *The Husband's Management of Community Real Property,* 1 ARIZ. L. REV. 14, 18-19 (1959).

[4] See Estate of Wilson, 19 Ariz. 205, 168 Pac. 503 (1917); Davenport v. Simons, 68 Idaho 21, 189 P.2d 90 (1948); CAL. PROB. CODE § 202; IDAHO CODE § 15-1201 (1947); NEV. REV. STAT. § 123.260 (1957); N. M. STAT. ANN. § 29-1-9 (Supp. 1965).

be probated. Instead, the California Legislature adopted the policy that when the husband dies and the community is thereby dissolved, the entire community property will be subject to expenses of administration.[5] Similar statutes were also adopted in Nevada[6] and New Mexico.[7]

On the other hand, the statutes of Louisiana and Idaho merely provide that the entire community estate shall be liable for community debts.[8] Because neither jurisdiction has a statute which requires probate when community debts exist, the courts undertook the obligation of formulating a procedure to be followed, and decided that when a spouse dies and community debts exist, the entire community estate should be probated.[9]

The Louisiana decisions manifest a dichotomy, in one instance indicating that when the wife dies the husband can make a bona fide settlement of community debts without administering the entire estate,[10] and in the other, that where the husband dies leaving unliquidated community debts the entire estate is liable for them and must be probated.[11] The Idaho courts, by comparison, have interpreted their statute to mean that the death of either spouse will enable the probate court to exercise jurisdiction over the entire community estate for the purpose of administration, and, in particular, satisfying community debts.[12]

The policy in Arizona has been to probate the entire community estate when a spouse dies and community debts exist.[13] This procedure evolved as a result of a paucity of statutory direction[14] and from the dictum in a 1917 case,[15] which has been subsequently relied upon by

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[5] CAL. CIV. CODE § 1402 (1872). Section 1402 is presently enacted as CAL. PROB. CODE § 202.

[6] NEV. REV. STAT. § 123.260 (1957).

[7] N. M. STAT. ANN. § 29-1-9 (Supp. 1965).

[8] IDAHO CODE § 15-1201 (1947); LA. CIV. CODE art. 2403 (1952).

[9] Davenport v. Simons, 68 Idaho 21, 189 P.2d 90 (1948); First National Bank of Abbeville v. Broussard, 202 La. 315, 11 So. 2d 602 (1943); and, Oriol v. Herndon, 38 La. Ann. 759 (1886).

[10] First National Bank of Abbeville v. Broussard, 202 La. 315, 11 So. 2d 602 (1943). A similar approach has been taken by the Texas courts. See Woodley v. Adams, 55 Tex. 526 (1881); Carter v. Carter, 60 Tex. 59 (1883); and V.A.T.S. PROB. CODE §§ 156, 160 (1956).

[11] Oriol v. Herndon, 38 La. Ann. 759 (1886).

[12] Davenport v. Simons, 68 Idaho 21, 189 P.2d 90 (1948); IDAHO CODE § 15-1201 (1947).

[13] *In re* Monaghan's Estate, 71 Ariz. 334, 337, 227 P.2d 227, 229 (1951).

[14] The only statute akin to the problem was Section 3108 of the REV. STAT. OF ARIZ. (1901), which provided only that the entire community would be liable for community debts.

[15] Estate of Wilson, 19 Ariz. 205, 206-207, 168 Pac. 503, 504 (1917), in which Justice Ross, while searching for additional reasons not to probate the estate in question, indicated there was no need to administer the entire community estate unless it "was shown that there were community debts that should be paid out of the community property."

the Arizona courts.[16]

In all of the above jurisdictions,[17] with the exception of Louisiana,[18] personal representatives' fees are fixed by statute and based upon a percentage of the value of the estate probated.[19] In states where probate of the entire community estate is mandatory,[20] and in jurisdictions which follow the rule which Arizona has adopted,[21] a substantial hardship on the estate of the surviving spouse often occurs, because the fee to which the executor is legally entitled is often in excess of what he actually deserves.[22]

The instant case corrects an inequity which had arisen in Arizona,[23] due, in part, to the joint operation of Section 14-662 of the Arizona Revised Statutes and the general rule.[24] In the instant case, Justice Bernstein, writing for the majority, attacked the decision of the Appellate Court and reasoned that the community debts could have easily been paid from the community assets on hand, thus obviating the need to submit the survivor's interest to probate.[25] He also concluded that the executor's efforts were scarcely increased by the fact that the widow's interest was brought before the probate court.[26] In addition,

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[16] Nowland v. Vinyard, 43 Ariz. 27, 31, 29 P.2d 139, 140 (1934) (dicta), where the court said: ". . . there is really no necessity for administration of [the entire estate] unless there are debts."; *In re* Monaghan's Estate, 65 Ariz. 9, 173 P.2d 107 (1946) (relying upon *Nowland, supra*); and, *In re* Monaghan's Estate, 71 Ariz. 334, 337, 227 P.2d 227, 229 (1951) (dicta), where it was said: "If, however, there are community debts the entire community estate should be probated and the cost of probating same should be borne by the whole community estate." The rule was characterized by the court as a basic principle of the Arizona Law of Wills, but no authority for this statement was cited.

[17] See note 3, *supra.*

[18] Louisiana's compensation statutes provide that the executor is entitled to 2½% of the estimated value of which he is seized and 2½% of the amount of money that has actually passed through his hands for the purpose of paying legacies and other charges of the will. See LA. CIV. CODE arts. 1683, 1684 (1952).

[19] ARIZ. REV. STAT. ANN. § 14-662 (1956); IDAHO CODE § 15-1107 (1947); NEV. REV. STAT. § 150.020 (1957); and, N. M. STAT. ANN. § 31-10-1 (1953). In Arizona, many attorneys, as a matter of custom, rely upon Section 14-662 of the ARIZ. REV. STAT. ANN. (1956), even though attorney's fees are not mentioned in the statute.

[20] California, Nevada and New Mexico.

[21] See discussion in text, *supra.*

[22] The problem was previously resolved in McCullough v. United States, 134 F. Supp. 673 (W.D. La. 1955), which held that where there was a community estate of $45,000 cash and community debts of $309, then the widow's share of the community estate was not to be charged with any portion of the administration expenses.

[23] See *In re* Foreman's Estate, 1 Ariz. App. 41, 399 P.2d 175 (1965), *vacated* in *In re* Foreman's Estate, 99 Ariz. 147, 407 P.2d 102 (1965). The community debts amounted to $434.70, and costs of administration, as authorized by statute and the custom totalled $36,321.50.

[24] See note 14, *supra.*

[25] *In re* Foreman's Estate, 99 Ariz. 147, 149, 407 P.2d 102, 104 (1965).

[26] *Ibid.* The court at this point felt that the case of Estate of O'Reilly, 27 Ariz. 222, 227, 231 Pac. 916, 918 (1925), was controlling wherein it had been stated that where the executor had no duty other than that of subtracting advances from the distributive shares of the heirs and then distributing them, that such action entailed "no appreciable service of administration on the part of the executor for which compensation should be allowed. . . ."

by reinterpreting the dicta of previous Arizona cases which had indicated that when there were no community debts there would be no need for probate,[27] he found support for the policy of not probating the entire estate where community debts exist but are insignificant.[28]

By modifying the older Arizona view, the instant case eliminates reasons for earlier manifestations of discontent[29] by: (1) proscribing the award of large executor's fees in cases where little effort has been exercised in probating the survivor's one-half interest; (2) preventing the unnecessary administration of portions of estates in cases where the cash on hand is sufficient to pay insignificant community debts; and, (3) by promoting a "speedy and practical method of clearing the estate" of debts, which originally was the intended purpose of a probate proceeding.[30] But, it wisely establishes a flexible rule that "community debts" be "insignificant" when compared to "community assets"[31] before the court will deem the probate unnecessary, thereby insuring that each case will be tried upon its merits.

Staff

CRIMINAL LAW — ASSAULT AND BATTERY WITH AUTOMOBILE — WILFUL AND GROSS NEGLIGENCE ABOLISHED AS SUBSTITUTE FOR INTENT. — *State v. Balderrama* (Ariz. 1964).

The defendant, while intoxicated and driving at a speed of 35 to 40 miles per hour, caused injury to a ten year old boy as the child was crossing an intersection just after alighting from a school bus. The trial court convicted the defendant of the crimes of leaving the scene

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[27] La Tourette v. La Tourette, 15 Ariz. 200, 215, 137 Pac. 426, 429 (1914); Roberson v. Teel, 35 Ariz. 166, 170-71, 275 Pac. 2, 4 (1929).

[28] *In re* Foreman's Estate, 99 Ariz. 147, 150, 407 P.2d 102, 105 (1965).

[29] The court stated in *In re* Monaghan's Estate, 65 Ariz. 9, 22, 173 P.2d 107, 115 (1946): "On the other hand, it may be well urged that the vested interest of the survivor should not be subject to the cost and expense of administration since the probate adds nothing to the survivor's title or right of possession." In Estate of O'Reilly, 27 Ariz. 222, 227, 231 Pac. 916, 918 (1925), the court said: "We are of the opinion that the statute providing commissions for executors and administrators contemplated the performance of some service on the part of such officers for which the fee is to be paid." Justice Krucker in *In re* Foreman's Estate, 1 Ariz. App. 41, 42, 399 P.2d 175, 176 (1965) explained: "This may be a harsh rule in many instances . . . , but it is not for this court to change the clear and established law of this State. It seems to us that this might be the subject of appropriate legislation." Finally, in Frazer, "Another Look at Monaghan—with Postscript on Foreman," State Bar of Arizona Annual Special Report, 1965, p. 88, it was stated: "In regard to the Court of Appeals' conclusion that the law in Arizona is clear in cases where the entire estate is probated, attorney and executor fees must be borne by the whole community estate, I respectfully disagree."

[30] Newland v. Vinyard, 43 Ariz. 27, 31, 29 P.2d 139, 140 (1934).

[31] *In re* Foreman's Estate, 99 Ariz. 147, 150, 407 P.2d 102, 105 (1965).

of an accident,[1] and assault with a deadly weapon.[2] The defendant appealed from conviction of the latter crime only. On appeal, *held*, reversed and dismissed, *Brimhall v. State*[3] overruled insofar as it is inconsistent. A conviction for assault with a deadly weapon cannot "be sustained in a case involving a motor vehicle where the State relies on allegations of wilful and gross negligence as a substitute for the specific intent to do harm[4] . . . . Assault with a deadly weapon . . . under statutes such as Arizona's which are enactments of the common law, is malum in se, and in the class of crimes in which *intent* must be proved."[5] *State v. Balderrama*, 97 Ariz. 134, 397 P.2d 632 (1964).

Slightly less than half of the state jurisdictions have considered the question of whether or not "wilful, gross negligence," "wanton conduct," or "reckless conduct"[6] while driving an automobile is sufficient to sustain a conviction of assault or battery, or some type of aggravated assault. Most of these jurisdictions have affirmed convictions based on reckless conduct.[7] This has led at least one contemporary text writer to state categorically that a criminally negligent battery with an automobile has become a well established part of the American common law;[8] however, the text writers have made almost no attempt to evaluate the reasoning normally used. In the cases two major viewpoints appear. First, assault and battery is a lesser included crime in manslaughter, and if death had occurred, and the facts would have supported a conviction of negligent manslaughter, then a conviction of assault or battery is proper if death has not occurred.[9] Second, the necessary intent to cause injury may be inferred, implied, or imputed from the reckless conduct since the reckless driving was intentional and one intends the natural and probable consequences of his acts.[10]

The first viewpoint is difficult to justify since involuntary manslaughter may occur without criminal assault and battery, *e.g.*, man-

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[1] ARIZ. REV. STAT. ANN. § 28-661 (1956).

[2] ARIZ. REV. STAT. ANN. § 13-249 (1956):

> Assault with deadly weapon or force . . . A person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury . . . .

[3] 31 Ariz. 522, 255 Pac. 165 (1927).

[4] State v. Balderrama, 97 Ariz. 134, 135, 397 P.2d 632, 633 (1964).

[5] *Id.* at 138, 397 P.2d at 635.

[6] In short, more than ordinary negligence. See 8 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 5374 (1950, Supp. 1964).

[7] See the cases collected in 61 C.J.S. *Motor Vehicles* § 597 (1949, Supp. 1965); 8 BLASHFIELD, *op. cit. supra* note 6, §§ 5374-77; Hall, *Assault and Battery by the Reckless Motorist*, 31 J. CRIM. L., C. & P.S. 133 (1940); Tulin, *The Role of Penalties in Criminal Law*, 37 YALE L.J. 1048 (1928); see generally AMERICAN DIGEST SYSTEM, *Automobiles*, Key Number 347.

[8] PERKINS, CRIMINAL LAW 85 (1957).

[9] *E.g.*, State v. Agnew, 202 N.C. 755, 164 S.E. 578 (1932).

[10] *E.g.*, State v. Hamberg, 34 Del. 62, 143 Atl. 47 (Del. Gen. Sess. 1928); Luther v. State, 177 Ind. 619, 98 N.E. 640 (1912); State v. Schutte, 87 N.J.L. 15, 93 Atl. 112 (Sup. Ct. 1915), *aff'd*, 88 N.J.L. 396, 96 Atl. 659 (1916).

slaughter resulting from a criminally negligent omission. Since battery is not always included in manslaughter, it is clear that the two are not different degrees of the same crime, but are two separate and distinct offenses, neither being necessary to the other.[11]

The second viewpoint confuses intent to commit the act that caused the injury with intent to cause the injury.[12] Moreland criticizes:

> Intent is commonly taken to mean either (1) a purpose, design, or hope that certain consequences will occur from the act, or (2) a knowledge that they are substantially certain to be produced by it . . . [Reckless battery] does not satisfy even the second requisite, since . . . the consequences were only *probable*, not *substantially certain*. To accept such reasoning would be to adopt a definition of "intent" which would be peculiar to assault and battery cases.[13]

Tulin offers a stinging criticism of this adulteration of intent which he refers to as an "immaculate conception":[14]

> [It is] classic negligence clothed in the familiar outer garments of intent. The disguise is achieved by the simple process of going back far enough in the chain of causation to reach a certain type of conduct which can plausibly be termed intentional. Then by combining this with the abstraction of natural and probable consequences the result is obtained . . . abolishing almost completely the distinction between "intentional" and "non-intentional" conduct.[15]

Tulin continues, stating his view of the true reason why courts started convicting reckless motorists of assault and battery, or some type of aggravated assault:

> The courts having taken it upon themselves to weigh the efficiency of the penalties ascribed by the legislatures for reckless driving, have come to the conclusion that they are not efficient, and . . . have increased the penalty by the simple process of squeezing the case into the most easily accessible category—assault and battery.[16]

In the 1927 case of *Brimhall v. State*,[17] now overruled by the instant case, Arizona followed the majority of the decisions. In *Brimhall* the court affirmed a conviction of aggravated assault[18] against a driver who

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[11] State v. Thomas, 65 N.J.L. 598, 48 Atl. 1007 (1901); Note, *Negligent Battery in Criminal Law*, 30 KY. L.J. 418 (1942).
[12] 30 KY. L.J., *supra* note 11, at 420.
[13] Moreland, *The Criminally Negligent Battery*, 32 KY. L.J. 188, 189 (1944).
[14] Tulin, *The Role of Penalties in Criminal Law*, 37 YALE L.J. 1048, 1059 (1928).
[15] *Id.* at 1055.
[16] *Id.* at 1057.
[17] 31 Ariz. 522, 255 Pac. 165 (1927).
[18] ARIZ. REV. STAT. ANN. § 13-245 (1956):
A. An assault or battery is aggravated when committed under any of the following circumstances . . . . 5. When a serious bodily injury is inflicted upon the person assaulted.

drove, intoxicated and without lights, on the wrong side of the road at night and collided with another car, seriously injuring one of its occupants. The court stated that where the injury results from reckless and wanton conduct "showing an utter disregard for the safety of others, the law imputes to the wrongdoer a wilful and malicious intention even though he may not in fact have entertained that intention."[19] There was a strong dissent by Justice Alfred C. Lockwood in which he said in part: "[C]riminal neglect can supply the place of the intent only when the legislative power has expressly so provided."[20] He called the majority holding "judicial legislation on the broadest scale."[21]

Justice Lockwood is vindicated. Reckless criminal assault and battery has been eliminated from Arizona case law. Although at first blush the holding in the instant case appears to relate only to assault with a deadly weapon, it also specifically overruled *Brimhall*, which was based on aggravated assault. In Arizona, aggravated assault or battery is, in reality, just a simple assault or battery plus some aggravating feature. Therefore, it would appear a safe assumption that the instant holding applies to Arizona statutes starting with simple assault and battery and moving up to the more serious assaults, including a fortiori the "assault with intent" statutes. Now, specific intent in fact must be proved when prosecuting under one of the assault and battery statutes in Arizona; it cannot be imputed by law from wanton, reckless conduct. This overruled imputation of intent from recklessness must not be confused with a legitimate inference of intent in fact from the circumstances of the case, *e.g.*, an argument between two parties, one subsequently starting his auto, steering and accelerating it directly at the other, striking him.[22]

The decision in the instant case is sound. The plain and simple truth is that grossly negligent conduct is not, when referring to the harmful result, intentional conduct. An apple is not an orange. That it would be desirable to create law which would make it a crime to injure another while driving in a reckless manner cannot be disputed with any conviction. However, as the court stated in the instant case: "There is today no necessity for the courts to torture statutes to cover the modern problems presented by the automobile. If present laws specifically dealing with automobiles are inadequate, and additional criminal sanctions are needed, the remedy lies with the legislature."[23]

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[19] Brimhall v. State, 31 Ariz. 522, 526, 255 Pac. 165, 166 (1927).
[20] *Id.* at 540, 255 Pac. at 171.
[21] *Ibid.*
[22] People v. Flummerfelt, 153 Cal. App. 2d 104, 313 P.2d 912 (1957). The cited case and other proper instances of a legitimate inference of intent are discussed by the Arizona Supreme Court in the instant case, cited *supra* note 4 at 136-7, 397 P.2d at 634.
[23] *Supra* note 4 at 140, 397 P.2d at 636.

Statutes making a negligent or reckless battery a crime have been created in at least two states, Texas[24] and New York.[25] To preserve the integrity of our legal machinery, it would be most desirable if courts in other state jurisdictions had the courage to reverse themselves, instead of continuing to breed these Cinderella crimes by waving the magic wand of bald fiction over the vehicle of recklessness, transforming it into a pumpkin of intent.

George C. Wallach

CRIMINAL LAW — HABEAS CORPUS — WRIT OF HABEAS CORPUS MAY BE UTILIZED TO TEST LEGALITY OF RESTRAINT OF ONE ON PROBATION. — *Garnick v. Miller* (Nev. 1965).

Petitioner, in the absence of her counsel, changed her plea to a felony charge from not guilty to guilty. Sentence was imposed, execution thereof suspended, and petitioner released on probation. Subsequently, petitioner sought her freedom by an original habeas corpus application to the Supreme Court of Nevada. *Held,* writ granted. The writ of habeas corpus may be utilized to test the legality of restraint of one on probation. *Garnick v. Miller,* 403 P.2d 850 (Nev. 1965).

Although the origin of the writ of habeas corpus is uncertain,[1] it has been included in American jurisprudence as a carryover of English common law.[2] Historically, the writ was a pretrial device to prevent the arbitrary imprisonment of an individual without bringing him to

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[24] VERNON'S TEX. PEN. CODE ANN. Art. 1149 (1961):
> Assault with motor vehicle. If any driver or operator of a motor vehicle or motorcycle shall wilfully or with negligence . . . collide with or cause injury less than death to any other person he shall be held guilty of aggravated assault . . . .

The penalty is $25 to $1000, or one month to two years in prison, or both. Ordinary negligence is sufficient for this offense, see Vogt v. State, 159 Tex. Crim. 207, 261 S.W.2d 176, 177, *cert. denied,* 346 U.S. 901 (1953).

[25] N.Y. PEN. LAW § 244:
> Assault in third degree
> A person who . . . . 2. Operates or drives or directs or knowingly and wilfully permits any one subject to his commands to operate or drive any vehicle of any kind in a culpably negligent manner, whereby another suffers bodily injury . . . .

The maximum penalty is $500 or one year in prison, or both. This offense requires more than ordinary negligence, *e.g.,* "disregard of the consequences which may ensue from the act," People v. Biocchio, 259 App. Div. 267, 18 N.Y.S.2d 786, 787 (1940).

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[1] See Dobie, *Habeas Corpus in the Federal Courts,* 13 VA. L. REV. 433 (1927); 61 HARV. L. REV. 657 (1948).

[2] See 45 MINN. L. REV. 453, 454 (1961); 61 HARV. L. REV. 657, 658 (1948).

trial.[3] Today it is primarily used as a means of post-conviction review.[4] For this reason, when considering the meaning of "custody" as a requirement for issuance of the writ, early definitions can be misleading.

The instant case involves a construction of the Nevada habeas corpus statute.[5] That statute, like Arizona's,[6] provides a method by which a person "restrained of his liberty" can test such "restraint." The court reasoned that a person on probation remains in the legal custody of the state and under the control of its agents, and, to that extent, such a person is "restrained of his liberty."[7] The courts apparently use the terms "restraint" and "custody" interchangeably, both terms referring to a deprivation of freedom of action.[8] Thus, the question is whether the degree of restraint is sufficient to entitle the petitioner to relief. Inherent in this question is the further question of whether the cause is rendered moot because of the lack of actual custody by the respondent to whom the application is directed.[9] Also involved is the question of whether, by acceptance of the parole, probation, or bail, the petitioner abandons or waives his right to a writ of habeas corpus.[10]

The authority for the position adopted in the instant case was *Jones v. Cunningham*,[11] a recent United States Supreme Court decision which held the writ available to a person on *parole* from a federal penetitiary. At least four other jurisdictions[12] are in accord with the instant holding and two of those cite *Jones v. Cunningham* as their authority.[13] Although the state courts are divided on the related

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[3] HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1236 (1953).

[4] Comment, 11 STAN. L. REV. 769, 770 (1959):
> As a postconviction remedy, the writ of habeas corpus was historically restricted to a collateral attack on the final judgment where it appeared that the convicting court lacked jurisdiction. . . . It subsequently became available to redress the denial of constitutional rights and certain other fundamental errors, either through an expanded concept of "jurisdictional defects" or by squarely recognizing exceptions to the traditional limits.

[5] NEV. REV. STAT. § 34.360 (1957):
> Every person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint.

[6] ARIZ. REV. STAT. ANN. § 13-2001 (1956):
> A person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may petition for and prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint.

[7] Garnick v. Miller, 403 P.2d 850, 852 (Nev. 1965).

[8] *Cf.* Annot., 92 A.L.R.2d 682, n.2 (1963).

[9] *Id.* at 682.

[10] *Id.* at 689.

[11] 371 U.S. 236 (1963).

[12] *In re* Engle's Petition, 218 F. Supp 251 (S.D. Ohio, 1963); *In re* Osslo, 51 Cal. 2d 371, 334 P.2d 1 (1958); *Ex parte* Bosso, 41 So. 2d 322 (Fla. 1949); Noble v. Siwicki, 197 A.2d 298 (R.I. 1964).

[13] *In re* Engle's Petition, 218 F. Supp 251 (S.D. Ohio, 1963); Noble v. Siwicki, 197 A.2d 298 (R.I. 1964).

question,[14] when parole (not probation) is involved, several states have held that a parolee's restraint of liberty is such as will entitle him to relief by writ of habeas corpus.[15] These decisions are usually based upon the theory that the parolee remains a *constructive* prisoner. Following the Supreme Court's ruling in *Jones v. Cunningham*, a lower federal court held that a *state* prisoner who is released on parole remains in "custody" within the meaning of the *federal* habeas corpus statute, and that the parole does not render moot an appeal from a habeas corpus proceeding conducted prior to his release.[16]

Although the status of a man free on bail seems closely related to that of a man on parole or probation, a majority of the states have held that a person at large on bail is not entitled to a writ of habeas corpus.[17] The usual reasons given for such a rule are that a person at large on bail already enjoys the liberty he seeks by the writ of habeas corpus, and that it is futile to direct the sheriff to produce in court or release a prisoner he does not hold in custody and who may be beyond the jurisdiction of the court.[18] However, a minority of states allow the writ, usually on the theory that a bailed prisoner remains in *constructive custody*.[19] Attempts have been made to obtain a writ directed to the bondsman or bail sureties of the petitioner on the theory that they have custody, and exercise restraint over the petitioner. In at least one case this was successful.[20]

The Supreme Court of Arizona has held that actual or physical restraint is prerequisite to the issuance of a writ of habeas corpus, and one at large on bail is not so restrained as to be entitled to the writ.[21] However, the court has said that a man does not necessarily have to be "confined" for the writ to issue.[22] Arizona has yet to rule on the precise point involved in the instant case, though as mentioned, the parole decisions will probably have great weight when such a question is presented. Any attempt to predict the position of the Arizona court on this point should consider that, since 1962, a proba-

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[14] *Cf.* Annot., 92 A.L.R.2d 682, 685 (1963).

[15] *In re Jones*, 57 Cal. 2d 860, 372 P.2d 310 (1962); Sellers v. Bridges, 153 Fla. 586, 15 So. 2d 293 (1943).

[16] United States *ex rel.* Sadness v. Wilkins, 312 F.2d 559 (2d Cir. 1963).

[17] For other jurisdictions in accord, see Annot., 77 A.L.R.2d 1307-11 (1961).

[18] *Cf.* Unverzagt v. United States, 5 F.2d 494 (9th Cir.), *cert. denied*, 269 U.S. 566 (1925). *But see* Mackenzie v. Barrett, 141 Fed. 964 (7th Cir. 1905). Also, see generally Annot., 77 A.L.R.2d 1307-08 (1961) citing 27 states in accord.

[19] *E.g.*, Bates v. Bates, 79 App. D.C. 14, 141 F.2d 723 (D.C. Cir. 1944); Mackenzie v. Barrett, 141 Fed. 964 (7th Cir. 1905); *In re* Peterson, 51 Cal. 2d 177, 331 P.2d 24, *appeal dismissed*, 360 U.S. 314 (1958); *Ex parte* Rash, 64 Idaho 521, 134 P.2d 420 (1943).

[20] *Ex parte* Messervy, 80 S.C. 285, 61 S.E. 445 (1908); *cf.* Territory *ex rel.* Goss v. Cutler, Macahon 152 (Kan. 1860); Respublicia v. Arnold, 3 Yeats 263 (Pa. 1801).

[21] Petition of Walker, 92 Ariz. 125, 374 P.2d 878 (1962); *Ex parte* Newman, 33 Ariz. 41, 262 Pac. 10 (1927).

[22] Petition of Walker, 92 Ariz. 125, 129, 374 P.2d 878, 881 (1962).

tioner has had the right to appeal his conviction.[23] Prior to that time the law in Arizona was such that a probationer did not have the right to appeal the decision of the court that placed him on probation, on the theory that he had waived this right by accepting the probation.[24] In expressly overruling this doctrine the Arizona Supreme court reasoned:

> Conviction of a felony strips one of his right to work at various jobs for which a license is required. One who is placed on probation is subjected to an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline. In either case the defendant is worse off than he would be had he not been convicted.[25]

At the very least, this language indicates that the Arizona court feels that one on probation is, to a degree, "restrained" of his liberty. While Arizona has denied habeas corpus relief to one on bail on the theory that his liberty is not sufficiently restrained, this is not necessarily incompatible with allowing habeas corpus to a probationer. Presuming that Arizona would follow the decision of the United States Supreme Court in *Jones v. Cunningham* (allowing habeas corpus to a parolee)[26] the next logical step would be to allow probationers the right of application for writs of habeas corpus, as was done in the instant case.

As a general proposition, it is submitted that fantasy rather than realism pervades the assumption that one released on probation possesses no further interest in establishing the illegality of a prior criminal conviction. The serious legal and economic disabilities adhering to a probationer who is encumbered with a prior criminal conviction which is constitutionally suspect but unassailable via habeas corpus are readily apparent. Some of the possible penalties include (1) the loss of the right to practice law or medicine; (2) the loss of the right to vote; (3) the loss of the right to hold a federal civil service position; and (4) the loss of the right to become a candidate for public office.[27] Consequently, any court having this issue before it should take these factors into consideration, should hold that one on probation is indeed "restrained" of his liberty, and should therefore consider the writ of habeas corpus.

Gary Lester Stuart

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[23] State v. Heron, 92 Ariz. 114, 374 P.2d 871 (1962).

[24] Brooks v. State, 51 Ariz. 544, 78 P.2d 498 (1938), wherein it was held: A defendant who has pleaded guilty and been convicted and accepts benefits of probation, instead of permitting case to go to judgment at that time and appealing from it, is estopped from bringing error committed at the time of the trial to the Supreme Court for review, since his choice between benefits of suspension and contesting the case further is final.

[25] See note 23, *supra.*

[26] See note 11, *supra.*

[27] See 48 VA. L. REV. 112, 116 (1962).

CRIMINAL LAW — PUBLIC TRIAL — EXCLUSION OF GENERAL PUBLIC VIOLATES CONSTITUTIONAL RIGHT OF DEFENDANT TO PUBLIC TRIAL. — *State v. Schmit* (Minn. 1966).

Defendant was brought to trial upon an indictment charging him with the crime of sodomy. Upon a motion by the prosecutor over the defendant's objection, the trial judge ordered the exclusion from the courtroom of all spectators except friends of the defendant and members of the press and bar, because of the obscene nature of the case and the anticipated testimony. The jury found the defendant guilty of indecent assault. On appeal, *held*, reversed. An order excluding all but specific classes of spectators from the trial of a criminal case solely upon the grounds of the obscene nature of the crime and anticipated testimony exceeds the power of the court to limit attendance and violates the defendant's constitutional right to a public trial. *State v. Schmit*, 139 N.W.2d 800 (Minn. 1966).

The right to a public trial in a criminal case is guaranteed by the Constitution of the United States[1] and the State Constitutions of all but four states.[2] In those four states the right is firmly secured by statutory provisions[3] or as a matter of common law.[4] The courts of all states subscribe to the principle that the right to a public trial is a basic and fundamental right mandatory in its application.[5]

Notwithstanding the uniform adherence to the broad principle that an accused is to have a public trial, there is disagreement among the courts as to what constitutes a public trial and to what extent exclusion of spectators is permissible.[6] All courts are in agreement that the right to a public trial is not absolute and must of necessity give way to certain administrative and physical limitations.[7] Hence, courts have held that overcrowding of the courtroom,[8] and disorderly conduct of

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[1] U.S. CONST. Amend. VI.

[2] These states are Massachusetts, Nevada, New York and Virginia.

[3] NEV. REV. STAT. ANN. Title 14, § 169.160 (1963); N.Y. CODE CRIM. PROCED. § 8.

[4] Massachusetts impliedly recognizes the guarantee by statute. MASS. LAWS. ANN. ch. 278 § 16(A) (1932), which provides that upon trial for certain crimes the presiding justice shall exclude the general public from the courtroom, exempting only those who have a direct interest in the case. This section was held constitutional in *Commonwealth v. Blondin*, 324 Mass. 564, 87 N.E.2d 455, *cert. denied* 339 U.S. 984 (1949).

A similar statute is found in Virginia. VA. CODE. ANN. § 19-219 (1950). This section vests discretion in the trial judge to exclude all persons whose presence is not necessary.

Statutes similar to these have been held unconstitutional as an infringement upon the right to a public trial, *e.g.*, People v. Yaeger, 113 Mich. 228, 71 N.W. 491 (1897).

[5] See generally Annot., 48 A.L.R.2d 1436 (1956).

[6] For a discussion of opposing views, see generally Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381 (1931-32); Note, *The Accused's Right to a Public Trial*, 49 COLUM. L. REV. 110 (1949).

[7] See generally Annot., note 5 *supra*.

[8] Davis v. United States, 247 Fed. 394 (8th Cir. 1917); People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

spectators[9] are valid grounds for limiting attendance of the general public. Further, when the presence of spectators might render a young witness incapable of testifying because of the embarrassing subject matter, a temporary exclusion may be ordered.[10] Notwithstanding these exclusions based on administrative and physical necessity, the courts have held that the guarantee of a public trial requires the presence of some spectators to preclude the possibility of a "secret trial."[11]

Disagreement occurs only as to the interpretation of the word "public,"[12] especially in cases of an obscene or salacious nature.[13] A majority of the courts scrupulously protect an accused's right to a public trial by interpreting the guarantee broadly.[14] Several decisions have pointed out that a "public trial" means that the public must be free to attend and that attendance cannot be limited to particular classes.[15] Courts adhering to this view consider a general exclusion order as violative of this right, even though no prejudice to the defendant is shown.[16] Such courts have reversed convictions obtained at trials where orders were issued restricting attendance to members of the bar,[17] press,[18] relatives and friends,[19] persons having business with the court,[20] or combinations thereof.

The opposing minority view interprets the guarantee of a public trial less rigorously and will allow any reasonable exclusion short of a secret trial.[21] Before these courts will reverse a conviction on the ground of deprivation of the right to a public trial, actual prejudice to the defendant must be shown.[22] Courts upholding reasonable exclusion orders consider *inter alia* protection of public morals,[23] preven-

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[9] Davis v. United States, *supra* note 8; Myers v. State, 97 Ga. 76, 25 S.E. 252 (1895).

[10] United States v. Kolbi, 172 F.2d 919, 924 (3d Cir. 1949); Callahan v. United States, 240 Fed. 683 (9th Cir. 1917).

[11] Benedict v. People, 23 Colo. 126, 129, 46 Pac. 637, 638 (1896); Robertson v. State, 64 Fla. 437, 440, 60 So. 118, 119 (1912).

[12] State v. Schmit, 139 N.W.2d 800 (Minn. 1966).

[13] See generally Note, 49 COLUM. L. REV. 110 (1949).

[14] See Annot., 156 A.L.R. 265 (1945); Annot., 48 A.L.R.2d 1436 (1956).

[15] People v. Byrnes, 84 Cal. App. 2d 72, 78, 190 P.2d 290, 294 (1948); People v. Hartman, 103 Cal. 242, 245, 37 Pac. 153, 154 (1894).

[16] Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944); People v. Yaeger, 113 Mich. 228, 71 N.W. 491 (1897); State v. Beckstead, 96 Utah 528, 88 P.2d 461 (1939).

[17] People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954); State v. Hensley, 75 Ohio St. 255, 79 N.E. 462 (1906).

[18] United States v. Kolbi, 172 F.2d 919 (3d Cir. 1948); State v. Keeler, 52 Mont. 205, 156 Pac. 1080 (1916).

[19] Wade v. State, 207 Ala. 1, 92 So. 101 (1921); People v. Yaeger, 113 Mich. 228, 71 N.W. 491 (1897).

[20] People v. Byrnes, 84 Cal. App. 2d 72, 190 P.2d 290 (1948).

[21] State v. Schmit, 139 N.W.2d 800 (Minn. 1966).

[22] Reagan v. United States, 202 Fed. 488 (9th Cir. 1913); Benedict v. People, 23 Colo. 126, 46 Pac. 637 (1896).

[23] State v. Keeler, 52 Mont. 205, 156 Pac. 1080, 1084 (1918) (dissenting opinion); State v. Johnson, 26 Idaho 609, 612, 144 Pac. 784, 785 (1914).

tion of embarrassment to witnesses,[24] and the effect of spectators on the impartiability of juries.[25]

In the instant case, the Minnesota court noted that ". . . there is a vast difference between a trial from which everyone but a special class of persons is excluded and one which everyone except a designated few is free to attend."[26] The court further stated that the admission of only limited classes such as newspaper reporters and friends of the defendant, could not fulfill the requirement of a public trial.[27] The court reasoned, ". . . The constitutional mandate contemplates that an accused be afforded all possible benefits that a trial open to the public is designed to assure."[28] Noting that a showing of prejudice to the defendant was not a requisite for reversal, the court pointed out that a violation of a fundamental right implies prejudice. To require proof of prejudice would be to "render the constitutional mandate illusory."[29]

In 1918 in *Keddington v. State*,[30] the Supreme Court of Arizona ruled, that where the court excluded all spectators except members of the press, such exclusion order did not render the proceedings a "secret trial"; hence the constitutional guarantee of public trial had not been violated.[31] This decision is often cited as authority for the position of the Arizona Court that when someone is exempted from the exclusion order the defendant has not been denied the right to a public trial.[32] The issue was not placed before the Arizona Court again until 1965, in *State v. White*,[33] where the court upheld the discretionary power of the trial judge to "limit the spectators *because of the nature of the case*,"[34] and exclude all but newspaper reporters. (Emphasis added.) The court explained that the ". . . trial court, in its sound discretion, . . . [may] make reasonable exclusion orders consistent with the rights of an accused in a proper case in the interest of public morals or safety."[35]

Although the constitutional guarantee of a public trial is a basic and fundamental right, it is not absolute. Under compelling situations,

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[24] Moore v. State, 151 Ga. 648, 659, 108 S.E. 47, 52 (1921); State v. Callaghan, 100 Minn. 63, 69, 110 N.W. 342, 344 (1907).
[25] Dutton v. State, 123 Md. 373, 386, 91 Atl. 417, 423 (1914).
[26] State v. Schmit, 139 N.W.2d 800 (Minn. 1966).
[27] *Id.* at 806.
[28] *Ibid.*
[29] *Id.* at 807.
[30] Keddington v. State, 19 Ariz. 457, 172 Pac. 273 (1918).
[31] *Id.* at 459.
[32] *Id.* at 464.
[33] State v. White, 97 Ariz. 196, 398 P.2d 903 (1965). The Arizona Supreme Court stated that where the defendant requested the exclusion of all spectators the trial court properly exercised its discretion in restricting public attendance to newspaper reporters. This case is noted in 7 ARIZ. L. REV. 308 (1966).
[34] State v. White, *supra* note 33, at 198.
[35] *Ibid.*

benefits may be derived by reasonable exclusions for the protection of witnesses and parties to the case, or the public morals. However, the position of the Arizona Court, that as long as one specific class or person is exempted from the exclusion order the defendant has not been denied the right to public trial, threatens to be unreasonable and arbitrary when exercisable at the discretion of a trial judge. This interpretation places too much emphasis on the protection of morals when compared with considerations of the protection of the defendant's constitutionally vested right. Certainly reasonable exclusions will have to be accepted. However, except for these, the constitutional mandate should be interpreted as requiring a trial which the public is free to attend.

John E. Lundin

DOMESTIC RELATIONS—CHILD CUSTODY—BEST INTERESTS OF CHILD MAY REQUIRE REVERSAL OF TRIAL COURT CUSTODY AWARD FAVORING FIT PARENT OVER MATERNAL GRANDPARENTS.—*Painter v. Bannister* (Iowa 1966).

Six months after petitioner's wife was killed in an automobile accident, petitioner asked his four-year-old son's maternal grandparents to temporarily care for the boy. The grandparents accepted and took him to their farm home in Iowa. One and one-half years later petitioner remarried, and soon thereafter, requested his son's return. When respondents refused, petitioner filed a writ of habeas corpus and was awarded custody of the boy. The Iowa Supreme Court stayed execution of the trial court judgment until the matter could be determined on appeal. On appeal, *held*, reversed and remanded. After considering all factors presented in the record of a custodial dispute between a natural parent and the maternal grandparents, an appellate court may determine that the best interests of the child require reversal of a trial court custody award to the natural parent, notwithstanding a finding of parental fitness. *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966).

The welfare or best interests of the child is the paramount and controlling consideration in determining questions of child custody.[1] In a custody dispute between a parent and a third party, the courts also recognize the primary custodial right of the natural parent which

[1] *E.g.*, Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321 (1881); see PLOSCOWE & FREED, CASES AND MATERIALS ON FAMILY LAW 470-74 (1963).

emanates from the natural law,[2] the common law,[3] and frequently, from statutory law.[4] However, the parental right is not absolute, but is subordinated to the "best interests" test.[5] Thus, custody will not be awarded to a parent found to be unfit.[6] On the other hand, where the parent is found to be fit, the courts reason that the best interests of the child will be served by placing him in the home of the parent.[7]

The difficulty in awarding the custody of children arises not from a wide difference of opinion regarding the propriety of these fundamental principles, but from the application of these principles to the circumstances and facts of each case.[8] The standard of unfitness necessary to deprive a parent of his child usually must import some type of moral delinquency. Thus, courts frequently determine that chronic alcoholism,[9] or adultery,[10] or cruelty,[11] or a criminal conviction[12]

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[2] *In re* Crews, 106 Kan. 438, 186 Pac. 498, 498 (1920), where the court stated:

> Since the trial court found that the father was a fit person in all respects to have the custody of his infant son, and the mother was dead, the law of the land accords with the law of nature, and there is no just law under the sun which would deny him that custody, no matter how reluctantly an affectionate grandparent may yield thereto.

[3] People *ex rel.* Portnoy v. Strasser, 303 N.Y. 539, 104 N.E.2d 895 (1952); People *ex rel.* Kropp v. Shepsky, 305 N.Y. 465, 113 N.E.2d 801, 803 (1953), where the court stated: "No court can, for any but the gravest reasons, transfer a child from its natural parent to any other person . . . since the right of a parent . . . to establish a home and bring up children is a fundamental one and beyond the reach of any court."

[4] *Cf.* ARIZ. REV. STAT. ANN. § 14-846 (1956).

[5] See Weinman, *The Trial Judge Awards Custody*, 10 LAW & CONTEM. PROB. 721 (1943-44); 67 C.J.S. *Parent and Child* §§ 11-12 (1950).

[6] Clifford v. Woodford, 83 Ariz. 257, 320 P.2d 452 (1957); Matter of Vanderbilt, 245 App. Div. 211, 281 N.Y.S. 171 (1935); Carpenter v. Carpenter, 189 Pa. Super. 297, 150 A.2d 724 (1959); see generally Simpson, *The Unfit Parent*, 39 U. DET. L. J. 347 (1962).

[7] See MADDEN, PERSONS AND DOMESTIC RELATIONS §§ 107-109 (1931); Weinman, *supra* note 5; 67 C.J.S. *Parent and Child* § 11 (1950).

[8] See generally authorities cited note 5 *supra*.

[9] Harris v. Harris, 186 Cal. App. 2d 788, 9 Cal. Rptr. 300 (Dist. Ct. App. 1960) (mother lay around house nude, drank, and took overdoses of sleeping pills); Usery v. Usery, 229 Ore. 196, 367 P.2d 449 (1961) (award of custody to alcoholic mother reversed); Walton v. Coffman, 110 Utah 1, 169 P.2d 97 (1946) (custody denied alcoholic mother who drank and went to beer halls); *but see* Swigart v. Swigart, 65 Ohio L. Abs. 582, 115 N.E.2d 871 (Ohio App. 1953) (mother who drank excessively was not denied continued custody of her child where neglect not shown).

[10] *In re* Two Minor Children, 53 Del. 565, 173 A.2d 876 (1961) (one circumstance held to defeat right to custody is continuance of an adulterous relationship); Parker v. Parker, 222 Md. 69, 158 A.2d 607 (1960) (presumption against awarding custody to adulterous mother not overcome); *but see* Bennett v. Bennett, 146 So. 2d 588 (Fla. 1962) (adultery or marital misconduct of itself does not necessarily demonstrate parental unfitness); Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300 (1952) (custody awarded to mother who had been guilty of adultery with man she later married).

[11] *In re* Smith, 222 N.Y.S.2d 705 (Sup. Ct. 1961); Vehle v. Vehle, 259 S.W.2d 229 (Tex. Civ. App. 1953) (custody award to father reversed where father was neglectful and irresponsible as to providing and caring for his family); *but see* Mills v. Mills, 218 Ga. 686, 130 S.E.2d 221 (1963) (evidence that a husband had knocked his wife over a stove with their baby in her arms was held to be insufficient evidence of cruel treatment towards the child to deprive him of custody).

[12] Yancey v. Watson, 217 Ga. 215, 121 S.E.2d 772 (1961) (father, who had

will cause a natural parent to be an unfit custodian. However, the courts have generally refused to allow a parent's religious or political beliefs to adversely affect their determination on his parental fitness.[13] Similarly, an otherwise fit parent will not be denied custody solely because a third party claimant is financially better able to care for the child.[14] The ultimate determination of whether a particular parent is a fit custodian rests in the discretion of the trial court.[15] Its decision largely depends on the child's welfare as disclosed by his observable affections, and on the appearance and demeanor of the parent and the witnesses. For this reason, appellate courts generally will not reverse trial court custody awards unless there has been a manifest abuse of discretion.[16]

In custody disputes, Arizona recognizes the parental preference rule, although it is clearly subordinated to the "best interests" test.[17]

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been convicted of the involuntary manslaughter of his wife, was denied custody as against the maternal grandparents); *but see* Urquhart v. Urquhart, 196 Cal. App. 2d 297, 16 Cal. Rptr. 469 (Dist. Ct. App. 1961) (custody restored to a mother who had served time for armed robbery and had faced prior charges of shoplifting and forgery).

[13] See Weinman, *supra* note 5, at 732-33.

[14] See MADDEN, *op. cit. supra* note 7, at 372-73; Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321, 323 (1881), where Brewer, J., announced: "[T]he law of nature, which declares the strength of a father's love, is more to be considered than any mere speculation whatever as to the advantages which possible wealth and social position might otherwise bestow."

[15] See generally Bronson, *Custody on Appeal*, 10 LAW & CONTEM. PROB. 737 (1943-44); Weinman, *supra* note 5; Simpson, *supra* note 6, at 355, where he states: "Certainly no judge likes to think that his judgment is in violation of the best interests of the child . . . . This thinking also illustrates the semantic problem involved with the vague tests used . . . the subject is not one that lends itself to categorization." See also Vallimont v. Medford, 182 Kan. 334, 321 P.2d 190, 196 (1958), where the court stated:

> While the standard of fitness required of parents is difficult to specify without being somewhat ambiguous, conduct which makes a parent unfit may be defined within limits. . . . [T]he word [unfit] usually although not necessarily imports something of moral delinquency. Parents who treat the child with cruelty or inhumanity, or keep the child in vicious or disreputable surroundings, are said to be unfit. Parents who abandon the child, or neglect or refuse, when able so to do, to provide proper or necessary support and education required by law, or other care necessary for the child's well being are said to be unfit. Violence of temper or inability or indisposition to control unparental traits of character or conduct might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from other moral defects.

[16] See, *e.g.*, Andro v. Andro, 97 Ariz. 302, 400 P.2d 105 (1965); Lucas v. Lucas, 119 Ind. 360, 86 N.E.2d 300 (1949); Oliver v. Oliver, 217 Md. 222, 140 A.2d 908 (1958); Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 848, 850 (1949), where the dissent stated:

> [T]he judge who sees and hears the witnesses, who is face to face with the children and the parents, is in a far better position to make a decision calling for the exercise of discretion than is the appellate judge whose only source of guidance is the cold print, the lifeless pages, of the record.

[17] Clifford v. Woodford, 83 Ariz. 257, 320 P.2d 452 (1957); Ariz. State Dep't of Pub. Welfare v. Barlow, 80 Ariz. 249, 296 P.2d 298 (1956); Harper v. Tipple, 21 Ariz. 41, 184 Pac. 1005 (1919); *cf.* ARIZ. REV. STAT. ANN. § 14-846 (1956). See also Andro v. Andro, 97 Ariz. 302, 400 P.2d 105 (1965); Smith v. Smith,

Thus, Arizona follows the accepted view that a natural parent is entitled to the custody of his child unless he is shown to be unfit.[18] However, in *Clifford v. Woodford*,[19] the court was narrowly divided as to what constituted parental unfitness. There, in affirming an award to the stepfather, the majority found the natural father to be an unfit custodian where, during a twelve year period of separation, he had been delinquent in alimony and support payments, and rarely communicated with the children or remembered them with gifts. A vigorous dissent by two of the justices made it clear that they did not believe the evidence warranted a finding of unfitness.[20]

In the principal case, the Iowa Supreme Court reversed the trial court's custody award to the boy's father when, after a thorough review and analysis of the record, the court concluded that the child's best interests would be served if he remained with his grandparents. The court mentioned the "presumption of parental preference,"[21] which exists by statute in Iowa,[22] but felt the presumption had been rebutted. However, in refusing to recognize the father's right, the court did not find him unfit; to the contrary, it specifically admitted the father to be fit.[23]

In determining how the child's best interests could be served, the Iowa Supreme Court made a comprehensive comparison of the respective attributes of the claimants.[24] Included in the analysis were the father's agnostic or atheistic views, his political liberalism, his old and beat-up home, his lack of a college degree, and his "easy come easy go" attitude toward money. The grandparents were noted for their regular church attendance, their well-kept, roomy, and comfortable home, their college degrees, and their highly respected standing in the community.[25] The court reasoned that if the child were placed in the home of his father, he would be exposed to an "unstable, unconventional, arty, Bohemian and probably intellectually stimulating life,"[26] whereas, the grandparent's home would provide the boy "with a stable, dependable, conventional, middle-class, middlewest background and an opportunity for a college education and profession, if he desires it."[27]

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90 Ariz. 190, 367 P.2d 230 (1961); Galbraith v. Galbraith, 88 Ariz. 358, 356 P.2d 1023 (1960); Cone v. Righetti, 73 Ariz. 271, 240 P.2d 541 (1952).

[18] Clifford v. Woodford, *supra* note 17.

[19] 83 Ariz. 257, 320 P.2d 452 (1957).

[20] *Id.* at 268, 320 P.2d at 459.

[21] Painter v. Bannister, 140 N.W.2d 152, 156 (Iowa 1966).

[22] CODE OF IOWA § 668.1 (1946).

[23] Painter v. Bannister, 140 N.W.2d 152, 154 (Iowa 1966), where the court said: "We are not confronted with a situation where one of the contesting parties is not a fit or proper person. . . . There is no suggestion in the record that Mr. Painter is morally unfit."

[24] Compare Weinman, *supra* note 5, at 734, where it is explained: "The unfitness which deprives a parent of his natural right to the custody of his children must be positive and not comparitive."

[25] Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966).

[26] *Id.* at 156.

[27] *Id.* at 154.

The court had previously recognized the generally accepted view that in a custody dispute, the trial court findings should not be overturned unless there has been an abuse of discretion.[28] But, in the principal case, the court did not acknowledge these prior pronouncements. The only criticism directed at the trial court was for its failure to give proper recognition to the testimony of a child psychologist,[29] upon which the Iowa Supreme Court placed a great deal of reliance.[30]

In substituting its judgment for that of the trial court, the Supreme Court of Iowa has determined that the "best interests" test can be applied to deprive a fit parent of his child. As in any custody decision, reasonable minds might differ as to the fairness and wisdom of the particular application of the test. However, based on the special love and affection a parent has for his child, the presumption of a child's best interests being fostered in the custody of its natural parents is generally not rebutted without a finding of parental unfitness.[31] Because of this presumption, which is inherent in our society, it seems that the Iowa Supreme Court has established an objectionable precedent in denying an admittedly fit parent custody of his child by comparing his parental qualifications with those of others.

Nicholas G. Stucky

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[28] Patzner v. Patzner, 250 Iowa 155, 93 N.W.2d 55 (1958); Maron v. Maron, 238 Iowa 587, 28 N.W.2d 17 (1947).

[29] Painter v. Bannister, 140 N.W.2d 152, 156 (Iowa 1966), where it is reported that the reason for the trial court's disregard of the child psychologist's testimony was "because of exaggerated statements and the witness' attitude on the stand." The Iowa Supreme Court then admitted: "We, of course, do not have the advantage of viewing the witness' conduct on the stand," and then went on to say, "but we have carefully reviewed his testimony and find nothing in the written record to justify such a summary dismissal of the opinions of this eminent child psychologist."

[30] *Id.* at 156. For an excellent discussion on the propriety and admissibility of expert testimony in custody cases, see generally Foster & Freed, *Child Custody*, 39 N.Y.U.L. REV. 615 (1964).

[31] See authorities cited note 7 *supra; cf.* Vallimont v. Medford, 182 Kan. 334, 321 P.2d 190, 194 (1958) where the court, affirming the judgment of the lower court granting a writ of habeas corpus brought by a father against the maternal grandparents; quoted from *In re* Kailer, 123 Kan. 229, 255 Pac. 41, 42 (1927):

> [I]t is quite correct to say that the welfare of children is always a matter of paramount concern, but the policy of the state proceeds on the theory that their welfare can best be attained by leaving them in the custody of their parents and seeing to it that the parents' right thereto is not infringed upon or denied. This is the law of the land on this subject. And it *never* (Emphasis added.) becomes a *judicial* question as to what is for the welfare and best interests of children until the exceptional case arises where the parents are dead, or where they are unfit to be intrusted with the custody and rearing of their children and have forfeited this right because of breach of parental duty. . . .

The court then went on to quote from Stout v. Stout, 166 Kan. 459, 201 P.2d 637, 642 (1949):

> It will suffice to say that if there is any language to be found in any of our decisions justifying the construction that the children of a natural parent may be given to third persons without a finding such parent is an unfit person to have their custody it should be and is hereby disapproved.

EVIDENCE — BLOOD TESTS — EFFECT OF TESTS UPON THE PRESUMPTION OF LEGITIMACY. — *Houghton v. Houghton* (Neb. 1965).

On May 4, 1961, plaintiff wife sued for divorce, at which time she and the defendant husband had one child. After the filing of the original petition, the plaintiff became pregnant, and on July 16, 1963, filed a supplemental petition, asking for custody of the child, and child support. The child referred to in the supplemental petition was born October 1, 1963, and was fully developed at birth. The defendant filed a cross-petition, admitting that he was the father of the first child, but denying having had any sexual relations with the plaintiff subsequent to October 10, 1962. The trial court found the defendant to be the father of the second child, and ruled that the negative results of the blood tests of the plaintiff, the defendant, and the second child did not overcome the presumption of legitimacy of the child. On appeal, *held,* reversed. The court will take judicial notice of the scientific accuracy and reliability of blood grouping tests,[1] even though there was no express statutory authority for such tests. The presumption of legitimacy is not conclusive, but rebuttable; and here the results of the blood tests conclusively determined that the defendant could not have been the father of the child. *Houghton v. Houghton,* 179 Neb. 275, 137 N.W.2d 861 (1965).

The presumption of legitimacy of a child born to a married mother is one of the strongest known to the law.[2] At the common law, the presumption of legitimacy was in reality a rule of substantive law, and was virtually conclusive.[3] In 1846, however, an English case alleviated this harsh rule by making the presumption rebuttable.[4] Generally, this has been the law in the United States, although the quantum of evidence allowed to rebut the presumption varies from state to state.[5] One type of evidence which has been held to rebut the presumption of legitimacy is the blood grouping test.[6]

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[1] Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717, 720 (1950), where the court said:

> It is plain we should hold, as we do, that this unanimity of respected authorities justifies our taking judicial notice of the general recognition of the accuracy and value of the [blood] tests when properly performed by persons skilled in giving them. The law does not hesitate to adopt scientific aids to the discovery of truth which have achieved such recognition.

Accord, State v. Dantonio, 18 N.J. 570, 115 A.2d 35 (1955); Commonwealth v. Coyle, 190 Pa. Super. 509, 154 A.2d 412 (1959).

[2] Fitzsimmons v. DeCicco, 44 Misc. 2d 307, 253 N.Y.S.2d 603 (1964).

[3] See 9 WIGMORE, EVIDENCE § 2527 (3d Ed. 1940).

[4] Hargrave v. Hargrave, 9 Beav. 552, 50 Eng. Rep. 457 (R.C. 1846). Under this decision, the only evidence that could rebut the presumption was the impotency of the husband, that he was absent during the period within which the child must have been conceived, or that he was present under circumstances in which sexual intercourse could not have occurred.

[5] See Annot., 53 A.L.R.2d 572 (1957).

[6] See generally Annot., 46 A.L.R.2d 1000 (1956); MCCORMICK, EVIDENCE § 178 (1954).

The results of blood grouping tests are generally admissible in actions where paternity is at issue.[7] The courts, however, are divided on the weight to be accorded the tests. Some courts hold that blood tests which indicate nonpaternity are to be given only the same weight as other evidence.[8] Other courts hold that these tests should be given great weight, but should not be conclusive evidence of nonpaternity.[9] And still others hold that the results of blood grouping tests are to be conclusive on the issue of nonpaternity, in the absence, of course, of evidence impeaching the witness or showing the test to have been improperly administered.[10] Because the blood grouping test has nearly reached that stage of perfection, some courts take judicial notice not only of their accuracy but of the conclusiveness of their results, as in the instant case. This latter group seems to represent the best approach, in view of the fact that properly perfected modern scientific methods leave little room for error.

The promulgation of a uniform law,[11] which has been adopted in only five states and the United States for the Panama Canal Zone,[12] has actually added no uniformity at all, because each jurisdiction either modifies, amends, or omits some part of the act. It would appear that, as the instant case indicates, the trend is toward the view which allows the results of blood tests to rebut the presumption of legitimacy.[13]

In Arizona, a statute provides that there are no illegitimate children.[14] This does not mean, however, that there are no proceedings in which the issue of parternity is involved.[15] Arizona has not adopted the uniform act on blood tests, and the courts of record have not been faced with the problem of how blood tests would affect the issue of paternity. Should the problem arise, a recent case not involving a

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[7] 44 J. CRIM. L. 472, 473-74 (1953).

[8] *E.g.*, Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 442 (1946); Arais v. Kalesnikoff, 10 Cal. 2d 428, 74 P.2d 1043 (1937); Ross v. Marx, 24 N.J. Super. 25, 93 A.2d 597 (1952). See also 34 So. CAL. L. REV. 180 (1958).

[9] *E.g.*, Beck v. Beck, 153 Colo. 90, 384 P.2d 731 (1963); State *ex rel.* Steiger v. Gray, 30 Ohio 2d 394, 145 N.E.2d 162 (1957); Commonwealth v. Gromo, 190 Pa. Super. 519, 154 A.2d 417 (1959). See also 3 VILL. L. REV. 180 (1958).

[10] *E.g.*, Jordan v. Davis, 143 Me. 185, 57 A.2d 209 (1948); Commonwealth v. D'Avella, 339 Mass. 642, 162 N.E.2d 19 (1959); Anonymous v. Anonymous, 1 App. Div. 2d 312, 150 N.Y.S.2d 344 (1956); J. v. J., 35 Misc. 2d 243, 228 N.Y.S.2d 950 (1962); Saks v. Saks, 189 Misc. 667, 71 N.Y.S.2d 797 (1947); Commonwealth v. Coyle, 190 Pa. Super. 509, 154 A.2d 412 (1959). See also Bowen, *Blood Tests And Disputed Parentage*, 18 MD. L. REV. 111 (1958); 38 CORN. L. Q. 75 (1952); 9 DE PAUL L. REV. 281 (1960); 5 VILL. L. REV. 489 (1960).

[11] UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY §§ 1-10.

[12] California, EVIDENCE CODE §§ 890-897; New Hampshire, N. H. REV. STAT. ANN. 522:1-10 (1955); Oregon, ORE. REV. STAT. 109:250-262 (1953); Pennsylvania, 28 PA. STAT. ANN. §§ 307.1-11 (1958); Panama Canal Zone, 8 C.Z.C. §§ 491-497, 76 (A) STAT. 696 (1962).

[13] See 44 J. CRIM. L. 472, 473-74 (1953).

[14] ARIZ. REV. STAT. ANN. § 14-206 (A) (1956).

[15] See ARIZ. REV. STAT. ANN. § 12-631 (1956).

blood test would indicate that Arizona is free to adopt what has here been termed the better view.[16] In that case, the court stated that it would follow the requirement of clear and convincing evidence to rebut the presumption of legitimacy. A blood test should be accepted as both clear and convincing *and* conclusive on the issue of paternity. There is little, if any, chance of error in a properly administered blood grouping test.[17] As this fact is brought more to the attention of the courts, the view of the instant case will become the majority view, and should be adopted in Arizona.

J. William Brammer, Jr.

FEDERAL ESTATE TAX — FLIGHT INSURANCE — PROCEEDS INCLUDED IN GROSS ESTATE. — *Commissioner v. Estate of Noel* (U.S. 1965).

Decedent's wife paid the premium of a standard flight insurance policy on decedent's life, she being named as beneficiary. After decedent signed the policy, the clerk handed it directly to the wife. Under the terms of the policy, decedent could assign it or change beneficiaries, but only by a written endorsement upon the policy. The wife collected the proceeds following his death in a plane crash. Decedent's executor did not include the proceeds on the estate tax return. The Commissioner determined that the proceeds should have been included and was sustained by the Tax Court. The Court of Appeals reversed, holding the policy not to be "insurance under policies upon the life of the decedent" and therefore not includible in the estate. On writ of certiorari to the United States Supreme Court, *held,* reversed. Flight insurance is "insurance under policies upon the life of the decedent" within the meaning of Internal Revenue Code of 1954, § 2042. The rights to assign policies or change beneficiaries are incidents of ownership. Physical inability to exercise these incidents will not remove the proceeds from the estate. *Commissioner v. Estate of Noel,* 380 U.S. 678 (1965).

The estate tax reaches the proceeds of most insurance policies upon the life of a decedent.[1] This is part of a comprehensive tax scheme that

[16] State v. Mejia, 97 Ariz. 215, 218, 399 P.2d 116, 118 (1965), where the court stated:

> . . . we do not agree that the party opposing the presumption [of legitimacy] must produce evidence so as to persuade the triers of the fact beyond a reasonable doubt. We agree with the majority of the jurisdictions which place the burden on the party opposing the presumption to rebut it by clear and convincing evidence.

[17] See generally Brilhart, *Medical Evidence To Exclude Paternity,* 1 ARIZ. BAR J. 19 (1965); 16 MERCER L. REV. 306 (1964); 5 VILL. L. REV. 489, 490 (1960).

[1] INT. REV. CODE OF 1954, § 2042.

reaches all property in which the decedent had an interest at death,[2] and specifically includes such non-probate assets as dower and curtesy interests,[3] transfers in contemplation of death,[4] transfers with retained life estates,[5] transfers taking effect at death,[6] revocable transfers,[7] annuities,[8] joint interests with right of survivorship,[9] and general powers of appointment,[10] as well as life insurance proceeds.[11]

The treatment accorded "insurance under policies upon the life of the decedent" has varied over the years.[12] Under the current code, proceeds are included in the gross estate if payable to the personal representative,[13] or when payable to another beneficiary if ". . . the decedent possessed at his death any of the incidents of ownership . . . ."[14] Among these incidents are the powers to assign policies and to change beneficiaries.[15] When one with incidents of ownership parts with physical possession of the policy, but retains his legal powers, he has not surrendered the incidents in a manner sufficient to remove the proceeds from his estate.[16]

The Court of Appeals, in its opinion in the instant case, had attempted to limit the code so it would only encompass conventional life insurance, thereby excluding the proceeds of flight insurance from the estate.[17] To do so, it overruled the case of *Leopold Ackerman*[18] and the *Ackerman* test, that the risk of payment is contingent upon loss of life, substituting therefor an analysis based upon the necessity for an inevitable contingency of death. The test proposed by the Court of Appeals

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[2] INT. REV. CODE OF 1954, § 2031 (a), provides:
> The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

INT. REV. CODE OF 1954, § 2033, provides: "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."

[3] INT. REV. CODE OF 1954, § 2034.

[4] *Id.* § 2035.

[5] *Id.* § 2036.

[6] *Id.* § 2037.

[7] *Id.* § 2038.

[8] *Id.* § 2039.

[9] *Id.* § 2040.

[10] *Id.* § 2041.

[11] *Id.* § 2042.

[12] See generally 6 B.C. IND & COM. L. REV. 619 (1965); 59 NW. U.L. REV. 839 (1965).

[13] INT. REV. CODE OF 1954, § 2042 (1).

[14] *Id.* § 2042 (2).

[15] *E.g.*, Commissioner v. Treganowan, 183 F.2d 288 (2d Cir.), *cert. denied*, Estate of Strauss v. Commissioner, 340 U.S. 853 (1950); Fried v. Granger, 105 F. Supp. 564 (W.D. Pa. 1952), *aff'd*, 202 F.2d 150 (3d Cir. 1953).

[16] Commissioner v. Estate of Noel, 380 U.S. 678 (1965); Piggot's Estate v. Commissioner, 340 F.2d 829 (6th Cir. 1965); Fried v. Granger, 105 F. Supp. 564 (W.D. Pa. 1952), *aff'd*, 202 F.2d 150 (3d Cir. 1953).

[17] Estate of Noel v. Commissioner, 332 F.2d 950 (3d Cir. 1964), *rev'd*, 380 U.S. 678 (1965).

[18] 15 B.T.A. 635 (1929).

would seem to exclude all death benefits under accident insurance policies and term life insurance.[19] The Supreme Court, which had once before indicated approval of the *Ackerman doctrine*,[20] held the proceeds includible, using language that effectively reaches any kind of insurance benefit accruing because of the decedent's death.[21]

The Arizona estate tax provisions also fail to define "insurance under policies upon the life of the decedent."[22] Presumably, however, the state would follow the instant case and include flight insurance within the phrase. As under the Federal act, insurance proceeds payable to beneficiaries other than the personal representative are included in the estate if the decedent possessed incidents of ownership at the time of his death.[23]

Arizona's community property law has a profound effect on both federal and state estate taxes. Under the presumption that property acquired during marriage in the name of either spouse is community property,[24] only half the proceeds payable to a beneficiary other than the personal representative would be included in the decedent's estate and subject to tax.[25] However, if the beneficiary is other than the surviving spouse, the surviving spouse may be deemed to have made a gift under the Federal gift tax of one half the proceeds.[26] So long as the beneficiary is the spouse, there is no substantial difference in the

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[19] The Court of Appeals directed its discussion to accident insurance policies under which various benefits may be paid upon any of several contingencies. Certainly it did not mean to be so inclusive as the language of the opinion implies. Death is not an inevitable contingency within the period of a term insurance policy. If the evitability of the contingency is controlling, term insurance should be excluded from the estate.

If not life insurance, the proceeds would almost certainly been subject to income tax. They would not have been exempted under INT. REV. CODE OF 1954, § 101, nor would they have been damages exempt under § 104.

[20] See Helvering v. Le Gierse, 312 U.S. 531 (1941).

[21] Commissioner v. Estate of Noel, 380 U.S. 678, 681 (1965), where it was said:

> This view of the Board of Tax Appeals is wholly consistent with the language of the statute which makes no distinction between "policies on the life of the decedent" which are payable in all events and those payable only if death comes in a certain way or within a certain time.

The court mentioned the long administrative and Congressional acquiesence as indicative of the validity of the *Ackerman* approach.

[22] ARIZ. REV. STAT. ANN. § 42-1511(A)(6), (7) (1956).

[23] *Id.* § 42-1551(A)(7)(a).

The payment of premiums rule, omitted from the INT. REV. CODE OF 1954, is also still available to the Arizona Tax Commission under § 42-1511(A)(7)(b).

[24] Schwartz v. Schwartz, 52 Ariz. 105, 79 P.2d 501 (1938); Blackman v. Blackman, 45 Ariz. 374, 43 P.2d 1011 (1935). See generally SMITH & TORMEY, SUMMARY OF ARIZONA COMMUNITY PROPERTY LAW (1964).

[25] See United States v. Stewart, 270 F.2d 894 (9th Cir. 1959), cert. denied, 361 U.S. 960 (1960); Rule v. United States, 105 Ct. Cl. 176, 63 F. Supp. 351 (1945); *cf.* Chase Manhattan Bank v. Commissioner, 259 F.2d 231 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959).

[26] See Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959). Arizona has not enacted a gift tax.

tax payable whether the proceeds are community or separate property because of the marital deduction.[27]

The Supreme Court, in the instant case, did suggest that the proceeds from flight insurance could be removed from the gross estate by a proper and effective assignment. It is submitted that under most circumstances the proceeds would still have to be included under the provisions reaching transfers in contemplation of death.[28] Although the standards here remain nebulous and the ordinary expectation of eventual death is not sufficient to make transferred propery includible, the act reaches more than traditional gifts causa mortis.[29] "The quality which brings the transfer within the statute is indicated by the context and the manifest purpose."[30] A heightened apprehension of death from aircraft disaster makes flight insurance a profitable business. Thus testamentary motive seems inherent in flight insurance transactions. Even purchase by the decedent directly in the name of the beneficiary should be suspect as being in contemplation of death. The most likely loophole in the present code would be through policies purchased by the beneficiary, who directly receives full incidents of ownership, without involvement of the insured.[31] The history of insurance motivated aircraft disasters makes it unlikely and undesirable that such policies be made available.

James C. Gries

REAL PROPERTY—LEASE AGREEMENTS—CONSTRUCTION OF LEASE CLAUSE COVERING TENANT'S LIABILITY FOR NEGLIGENCE. — *General Accident Fire & Life Assurance Corp. v. Traders Furniture Co.* (Ariz. Ct. App. 1965).

This action was brought by plaintiff fire insurer to recover for damages caused to a building which the insured landlord had leased to defendant tenant. The lease provided, in part, that any fire insurance would be carried at the landlord's expense; that the landlord would make the premises tenantable in case of damage by fire, the tenant agreeing to continue paying rent during the restoration period; and that, on termination of the lease, the tenant would return the premises

[27] INT. REV. CODE OF 1954, § 2056. See United States v. Stapf, 375 U.S. 118 (1963). Of course, the estate tax depends on the overall estate not just the individual items.

[28] INT. REV. CODE OF 1954, § 2035; ARIZ. REV. STAT. ANN. § 42-1511(A)(2) (1956).

[29] United States v. Wells, 283 U.S. 102 (1931).

[30] *Id.* at 116.

[31] With no involvement by the decedent, the policy would be subject neither to estate tax nor to gift tax. INT. REV. CODE OF 1954, § 101, exempts life insurance benefits from the income tax.

"in good condition and repair, loss by fire and ordinary wear and tear excepted." During the lease period, the building was damaged by fire due to the tenant's simple negligence. Plaintiff paid the insurance claim to the landlord, and, as his subrogee, brought a negligence action against the tenant to recover the amount paid. The trial court granted summary judgment in favor of defendant. On appeal, *held*, affirmed. By the terms of the lease, the parties thereto contemplated that the risk of loss by fire should be insured against. Giving the ordinary meaning to the lease clause "loss by fire," as used in relation to fire insurance policies, such clause includes damage resulting from fire caused by acts of God, accidents, or the tenant's *negligence* (but would not include damage due to fire caused by the tenant's arson). Therefore, in the absence of specific language in the lease excluding fires due to the tenant's negligence from the operation of the clause, the tenant has no obligation to reimburse the landlord or his fire insurer for loss by fire caused by his negligence. *General Accident Fire & Life Assurance Corp. v. Traders Furniture Co.*, 1 Ariz. App. 203, 401 P.2d 157 (1965).

At common law, the landlord was not obligated to rebuild or repair the leased premises, if destroyed or damaged during the term, unless he had expressly covenanted to do so.[1] But, the tenant was held to his express covenant to pay rent, despite damage to or destruction of the demised premises during the term.[2] Because this rule was considered unjust, many legislatures enacted statutes providing that, where the leased premises are destroyed or rendered unfit for occupancy without fault of the tenant, and there is no written agreement to the contrary, the tenant may quit and surrender the premises without further liability for rent.[3] Such legislation is designed to release the tenant from his common law liability on his covenant to pay rent if the damage or destruction is caused by accident or an act of God. The tenant's liability for rent and for damages to the leased premises where the destruction or damage is caused by his own negligence is not affected by such legislation; and unless the lease provides that the tenant shall be released from liability to the landlord for his tortious conduct, he must answer to him therefor.[4]

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[1] Grizzle v. Runbeck, 74 Ariz. 92, 244 P.2d 1160 (1952); Friedman v. Le Noir, 73 Ariz. 333, 241 P.2d 779 (1952); Witty v. Matthews, 52 N.Y. 512 (1873).

[2] Galante v. Hathaway Bakeries, Inc., 6 App. Div. 2d 142, 176 N.Y.S.2d 87 (1958); Vann v. Rouse, 94 N.Y. 401 (1884).

[3] E.g., ARIZ. REV. STAT. ANN. § 33-343 (1956):

> The lessee of a building which, without fault or neglect on the part of the lessee, is destroyed or so injured by the elements or any other cause as to be untenentable or unfit for occupancy, is not liable thereafter to pay rent to the lessor or owner unless expressly provided by written agreement, and the lessee may thereupon quit and surrender possession of the premises.

[4] Galante v. Hathaway Bakeries, Inc., 6 App. Div. 2d 142, 176 N.Y.S.2d 87 (1958); see 32 AM. JUR. *Landlord and Tenant* § 783, at 669 (1941).

The question whether certain lease provisions release the tenant from liability to the landlord for his negligence has been much controverted. A phrase commonly incorporated into the surrender clause of a lease is: "upon termination of the lease, the tenant shall return the premises to the lessor in good condition and repair . . . *loss by fire excepted.*"[5]

The earlier cases construed the words "loss by fire excepted" to mean loss by fire other than that caused by the negligent conduct of the tenant.[6] The courts, in seeking to determine the intention of the parties,[7] applied the rule that contractual provisions purporting to release a party from tort liability are to be strictly construed against the party relying on them.[8] The law does not favor contracts of this nature, hence provisions absolving a party from liability must be clear and explicit.[9] In *Carstens v. Western Pipe & Steel Co. of California,* the Washington court stated:

> It would be natural and customary for the lessee to want to escape liability for purely accidental fires and for the lessors to be willing to grant that relief, but it would not be natural that the lessors would be willing to release the lessee from damages caused by its own active negligence. Such a concession would hardly be looked for in a contract between business men. If the parties intend such a contract we would expect them to so state in clear terms.[10]

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[5] The unqualified use of the clause "upon termination of the lease, the tenant shall return the premises to the lessor in good condition and repair" imposes an absolute duty upon the tenant to rebuild or repair irrespective of the cause of destruction. Certain exceptions are inserted into the lease to relieve (or partially relieve) the tenant from liability for loss due to certain causes. Loss by fire is a typical exception. Matan, *Liability for Loss by Fire Among Insurer Tenant and Landlord,* 18 OHIO ST. L.J. 423, 424 (1958), reprinted in 25 INSURANCE COUNSEL JOURNAL 335, at 336 (1958).

[6] Morris v. Warner, 207 Cal. 498, 279 Pac. 152 (1929); Brophy v. Fairmont Creamery Co., 98 Neb. 307, 152 N.W. 557 (1915); Carstens v. Western Pipe & Steel Co. of California, 142 Wash. 259, 252 Pac. 939 (1927); see 32 AM. JUR. *Landlord and Tenant* § 783, at 669 (1941).

[7] In construing agreements, the primary duty of the court is to determine and give effect to the intention of the parties. The court endeavors to place itself in the position of the contracting parties and to read the instrument in the light of the circumstances surrounding them at the time it was made. Rental Development Corp. of America v. Rubenstein Construction Co., 96 Ariz. 133, 393 P.2d 144 (1964); Ashton v. Ashton, 89 Ariz. 148, 359 P.2d 400 (1961).

[8] A contract providing for exemption from liability for negligence is generally void and unenforceable if it is contrary to some rule of public policy. However, where private individuals rather than the public are involved in the contract, a term releasing one party from liability to the other for negligence is not deemed repugnant to any public policy. Santa Fe Ry. v. Grant Brothers Construction Co., 228 U.S. 177 (1913). But contracts of this type are not favored by the law, and are therefore strictly construed. Tyler v. Dowell, 274 F.2d 890 (10th Cir. 1960); see 17 C.J.S. *Contracts* § 262, at 1160 (1963); WILLISTON, CONTRACTS § 1825, at 5167 (Rev. ed. 1938).

[9] *Ibid.*

[10] 142 Wash. 259, 265, 252 Pac. 939, 941 (1927).

Other courts, following this reasoning, thus concluded that the language "loss by fire excepted" did not expressly or impliedly exempt the tenant from liability for a fire loss caused by his negligence.[11] The law was well settled on this subject until about fifteen years ago.

In 1950, a federal court, in a case based on Minnesota law, broke away from the older interpretation of the "loss by fire" clause.[12] Factually, the case was strikingly similar to the older cases except that the court found that "it was the understanding of the parties that the landlord would take out insurance."[13] The lease further provided, in part, that the lessor had the option to rebuild at his own expense or to terminate the lease, the tenant agreeing not to use anything on the premises that would increase the insurance rates.[14] The court, in construing the "loss by fire" clause, stated:

> [T]here is no public policy in Minnesota inimical to resort to fire insurance covering loss by fire occurring with or without negligence and there is no reason for applying any "strict construction" to a lease entered into in contemplation of having a fully appreciated and guarded against fire risk carried by an insurance company.[15]

Having surmounted the strict construction barrier, the court applied the fundamental rule of contract law that words in an instrument are to be given their ordinary meaning.[16] The usual meaning of "fire" in a fire insurance policy is fire resulting from acts of God, accident, or *negligence.*[17] Since the parties, by the terms of the contract, contemplated fire insurance, "fire" as used in the lease was intended to have the same meaning. Therefore, the words "loss by fire excepted" released the tenant from liability for his negligent act.

Since this decision, courts which have interpreted the meaning of the clause "loss by fire excepted,"[18] where insurance was mentioned in

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[11] See note 6 *supra.*

[12] General Mills, Inc. v. Goldman, 184 F.2d 359 (8th Cir. 1950).

[13] *Id.*, 184 F.2d 359, at 364.

[14] *Id.*, 184 F.2d 359, at 360.

[15] *Id.*, 184 F.2d 359, at 364.

[16] See RESTATEMENT, CONTRACTS § 235a (1932); 17A C.J.S. *Contracts* § 301, at 142 (1963).

[17] United States Fire Ins. Co. v. Phil-Mar Corp., 166 Ohio St. 85, 139 N.E.2d 330 (1956); see 29A AM. JUR. *Insurance* § 1306, at 428 (1960); Annot., 10 A.L.R. 728 (1921).

[18] Where the surrender clause contains a clause exempting the tenant for "accidental" fire, the courts have held both for and against the tenant.. In Hardware Mutual Insurance Co. of Minnesota v. C. A. Snyder, Inc., 242 F.2d 64 (3rd Cir. 1957), it was held that the tenant was released since "accident" includes many unfortunate occurrences not anticipated in the ordinary course of affairs. Negligence is understood to mean "accident." *Contra,* Dilks v. Flohr Chevrolet Inc., 411 Pa. 425, 192 A.2d 682 (1963), holding the tenant liable, reasoning that, even though "accident" generally means an occurrence proceeding from negligence or other causes, language releasing a tenant from liability must be clear and unequivocal.

the lease, have reached variant conclusions. While Iowa[19] and North Carolina[20] have held that the clause does not release the tenant from liability for his negligent acts,[21] Ohio,[22] Illinois,[23] and now Arizona[24] have held that it does.[25]

The better view is the one followed by Arizona and the other jurisdictions mentioned which have disapproved of the strict construction rule. There is clearly no public policy forbidding a person's purchasing fire insurance to cover loss due to his own negligence. Similarly, there would seem to be no compelling public policy requiring that the clause "loss by fire" be s trictly construed against the tenant where the parties contemplated insurance. The strict construction rule, accordingly, should be relaxed in such cases, the reason for the rule failing. Also, the practical effect of holding the tenant to liability for his own negligence is that the landlord must insure against fires caused by acts of God and accident, while the tenant must insure himself (by a separate policy) against fires caused by his own negligence.[26] It seems unnatural that, in

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[19] Sears, Roebuck and Co. v. Poling, 248 Iowa 582, 81 N.W.2d 462 (1957) (even though the landlord agreed in the lease to keep the premises insured).

[20] Winkler v. Appalachian Amusement Co., 238 N.C. 589, 79 S.E.2d 185 (1953) (even though the landlord agreed in the lease to insure the building and equipment).

[21] Where the lease contains a "loss by fire excepted" clause, but there is no reference to insurance in the lease, the courts have followed the older rule that the tenant is not released from responsibility for his own negligence. See Galante v. Hathaway Bakeries Inc., 6 App. Div. 2d 142, 176 N.Y.S.2d 87 (1958), where the tenant was held liable for his own negligence, the landlord carrying insurance but no reference to insurance being made in the lease.

[22] United States Fire Ins. Co. v. Phil-Mar Corp., 166 Ohio St. 85, 139 N.E.2d 330 (1956).

[23] Cerny-Pickas & Co. v. C. R. Jahn Co., 7 Ill. 2d 393, 131 N.E.2d 100 (1955).

[24] General Accident Fire & Life Assurance Corp. v. Traders Furniture Co., 1 Ariz. App. 203, 401 P.2d 157 (1965).

[25] California undoubtedly falls in this category also. In Fred A. Chapin Lumber Co. v. Lumber Bargains Inc., 189 Cal. App. 2d 613, 11 Cal. Rptr. 634 (Ct. App. 1961), the lease provided that the "lessor agrees to maintain in full force and pay premiums for fire . . . insurance to cover the value of the buildings." Even though the lease did not contain a "loss by fire excepted" clause, the court nevertheless held that the lessee was not liable for negligent fire damage. It reasoned that the clause was inserted for the benefit of the lessee, and that he had an equitable lien on the proceeds of such insurance, offsetting the amount of damage. If the lessor failed to maintain fire insurance as agreed, his liabiilty for breach of the lease would offset the lessee's liability for negligent use of the premises. This is the most radical case concerning the tenant's release from liability. *Contra*, Poslosky v. Firestone Tire and Rubber Co., 349 S.W.2d 847 (Mo. Sup. Ct. 1961), where the lease contained no "loss by fire excepted" clause but provided that the landlords would keep the premises insured to full insurance value and that all moneys collected would be used to restore the property if the tenant elected not to terminate. The court, in holding the tenant liable, stated that the clause could not be construed to mean that the landlord would look only to the insurance proceeds for damage due to the tenant's negligence.

[26] It would be very difficult for the tenant to procure insurance since the standard fire policy does not cover property of others and liability policies covering this narrow field are not generally available. Even assuming the tenant could procure a fire insurance policy, there would be some overlap of coverage between the

the usual situation, ordinary businessmen would intend such a result.[27] Finally, the landlord's fire insurance premium payments necessarily are made from the rent paid by the tenant, since the premium cost is one determinant of the rental amount. Practically, the tenant pays the cost of the insurance protection. Equitably, he should not be required to pay twice, *i.e.*, for the insurance protection as well as for the loss insured (or to have been insured) against.[28]

Hamilton E. McRae III

REAL PROPERTY—JOINT TENANCY—TENANCY SEVERED WHEN JOINT TENANTS EXECUTE A CONTRACT OF SALE.—*Smith v. Tang* (Ariz. 1966).

The appellant, who had entered into an antenuptial agreement in Ohio renouncing any rights in or to decedent's estate following his death, had shortly thereafter married decedent and moved with him to Arizona, held residential property in joint tenancy with her husband which had been purchased solely with the husband's separate funds. The appellant and her husband entered into a contract to sell the property, signing escrow instructions and delivering them with their deed to the escrow agent. The purchaser's down payment was paid to the husband, who deposited it in his separate bank account. Both the contract of sale and the escrow instructions were silent as to whether the appellant and her husband intended to hold the purchase price as joint tenants. Before the balance of the purchase price was paid, the appellant's husband died. The appellant then executed and delivered a separate deed to the property to the escrow agent, who then paid the balance of the purchase price to her. On joint motions for partial summary judgment, the trial court granted that of the husband's administrator, sustaining the estate's counterclaim against the plaintiff-widow to recover one-half of the net sale proceeds of the joint tenancy property.

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tenant's and the landlord's policies. The standard policy covers fire loss by acts of God, accident, and the insured's negligence. Since the risk of loss by acts of God and accident is insured against in both the tenant's and landlord's policies, a double profit results to the insurance industry. Matan, *Liability for Loss by Fire Among Insurer Tenant and Landlord*, 18 OHIO ST. L.J. 423, 424 (1958), reprinted in 25 INSURANCE COUNSEL JOURNAL 335, at 336 (1958).

[27] Where an insurance company has a right of subrogation against the tenant, it is very unlikely that the premium on the landlord's policy is reduced since computation of a reduction would be arbitrary speculation. Even assuming that loss of subrogation rights throws the net loss experience out of balance, a more realistic approach is to slightly increase the landlord's policy premiums in order to cover the risk of loss due to the tenant's negligence rather than to place the ultimate risk of loss on the tenant.

[28] Where, by the lease provisions, the parties contemplated fire insurance, the tenant should be released from liability for his negligence under the "loss by fire excepted" clause. It is immaterial whether the landlord did or did not in fact purchase a fire policy.

On appeal, *held,* affirmed. The appellant was entitled to only one-half of the net sale proceeds,[1] because she and her husband entered into the contract of sale and signed escrow instructions without evidencing an intent to hold the sale proceeds as joint tenants. The court applied the doctrine of equitable conversion, found a severance of the joint tenancy's unity of interest, and found that no joint tenancy was created in the sale proceeds. *Smith v. Tang,* 412 P.2d 697 (Ariz. 1966).

As stated by Blackstone and frequently reiterated by the courts, a joint tenancy arises only if there are present the four unities of time, title, interest, and possession.[2] The parties must acquire the same interest in the land, at the same time, from one instrument, and must all be entitled to possession.[3] Inherent in the joint tenancy relationship is the right of survivorship.[4] Since joint tenants are owners of the whole, when one joint tenant dies, the survivors take no new title by their survivorship but hold under the original deed.[5]

Generally, a joint tenancy is severed when the estate is conveyed.[6] The authorities, however, are not in accord as to the effect of a contract of sale on severance of the sellers' pre-existing joint tenancy title. A majority of the courts which have decided this question have held that an agreement to sell does not, of itself, terminate the joint tenancy; it is terminated only where the selling joint tenants manifest their intent to do so.[7] A minority of courts hold that such a contract to sell is itself evidence of an intent to sever the joint tenancy (absent clear evidence of a contrary intent), since, under the doctrine of equitable conversion, the sellers' interest in the land is altered.[8] Once the contract of the sale is made and the deed is placed in escrow, the sellers no longer have both the legal and equitable title to the land. The sellers retain bare legal title as security for payment of the purchase

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[1] Smith v. Tang. 412 P.2d 697 (Ariz. 1966), the option is unclear as to whether the proceeds were recovered as a tenant in common or under community property.

[2] 2 BLACKSTONE, COMMENTARIES 180 (8th ed. 1788).

[3] Harrington v. Emmerman, 186 F.2d 757 (D.C. Cir. 1950).

[4] Kleemann v. Sheridan, 75 Ariz. 311, 256 P.2d 553 (1953); *In Re* Peterson's Estate, 182 Wash. 29, 45 P.2d 45 (1935).

[5] 4 POWELL, REAL PROPERTY § 619 (1965); 2 TIFFANY, REAL PROPERTY § 419 (3d ed. 1939).

[6] *In Re* Putnam's Estate, 219 Cal. 608, 28 P.2d 27 (1934). See Annot., 64 A.L.R.2d 918 (1959) for a collection of cases on this point.

[7] See County of Fresno v. Kahn, 207 Cal. App. 2d 213, 24 Cal. Rptr. 394 (Dist. Ct. App. 1962); Fish v. Security-First Nat'l Bank, 31 Cal. 2d 378, 189 P.2d 10 (1948); Watson v. Watson, 5 Ill. 2d 526, 126 N.E.2d 220 (1955); Hewitt v. Biege, 183 Kan. 352, 327 P.2d 872 (1958); Simon v. Chartier, 250 Wis. 642, 27 N.W.2d 752 (1947); Kingsford v. Ball, 2 Giff. Appx. 1, 66 Eng. Rep. 294 (Ex. 1852); *In Re* Hayes' Estate, 1 Ir. R. 207 (C.A. 1920). See also Annot., 64 A.L.R.2d 936-39 (1959).

[8] *In Re* Baker's Estate, 247 Iowa 1380, 78 N.W.2d 863 (1956); *In Re* Sprague's Estate, 244 Iowa 540, 57 N.W.2d 212 (1953); Buford v. Dahlke, 158 Neb. 39, 62 N.W.2d 252 (1954). See generally Annot., 64 A.L.R.2d 939-41 (1959).

price and the buyer has the equitable or beneficial title to the estate by equitable conversion.[9]

In Arizona the courts have looked with disfavor on the joint tenancy relationship between husband and wife because its inherent survivorship feature is contrary to community property principles.[10] The Arizona Supreme Court has stated that, except for *stare decisis*, joint tenancy between spouses would not be allowed in Arizona.[11] For a joint tenancy to exist in Arizona, the four common law unities must co-exist, and there must also be present a clearly manifested intent of the parties to hold the land as joint tenants with the right of survivorship.[12] This is usually accomplished by having the grantee spouses sign a formal written acknowledgment, frequently appearing on the face of the deed they are accepting, that title is being taken in joint tenancy with right of survivorship, not as a tenancy in common or as community property.[13] Mere recital in the deed, over the signature of the grantor alone, that the land is being conveyed in joint tenancy with right of survivorship and not as a tenancy in common has been held insufficient.[14]

In the instant case, the court adopted the minority view, that the contract of sale and the escrow instructions, as worded, had the effect of severing the unity of interest in the joint tenancy relationship before the full purchase price was paid, so as to comply with what it considered Arizona community property principles. The court found that the interest shared by the selling joint tenants was different following the making of the sale contract, since they then held only the bare legal title as security for payment of the purchase price, the latter, of course, being only personal property.[15]

The Arizona decision seems not to have been based as much on a finding of severance of unity of interest in the real property, as on the court's hostility towards inter-spousal joint tenancies.[16] Arizona statutes provide that property conveyed in this state by more than one person is conveyed as a tenancy in common and not as a joint tenancy,[17] and property acquired by either spouse during the marriage is community property.[18]

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[9] See cases cited note 7 *supra*. *Contra*, Swenson & Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466, at 478-79 (1954); Comment, 2 DRAKE L. REV. 76, at 90-91 (1953).

[10] Estate of Baldwin, 50 Ariz. 265, 71 P.2d 791 (1937); Blackman v. Blackman, 45 Ariz. 374, 43 P.2d 1011 (1935).

[11] Henderson v. Henderson, 58 Ariz. 514, 121 P.2d 437 (1942).

[12] Estate of Baldwin, 50 Ariz. 265, 71 P.2d 791 (1937).

[13] *Ibid.*

[14] *Ibid.*

[15] Smith v. Tang, 412 P.2d 697 (Ariz. 1966).

[16] Smith v. Tang, note 15 *supra*, where the court said, "There is not a complete severance of the joint tenancy where all joint tenants execute a contract to sell . . . . accordingly, if the escrow fails, the property reverts to the joint tenants in the same form of ownership as prior to the contract to sell."

[17] ARIZ. REV. STAT. ANN. § 33-431 (1956).

[18] ARIZ. REV. STAT. ANN. § 25-211 (1956).

While the decision in the instant case may be subject to criticism as a misapplication of the doctrine of equitable conversion,[19] it is consonant with the reasoning of *Estate of Baldwin*[20] and other Arizona cases discussing the requirements for the creation of a joint tenancy.[21] The case is important because it shows the care legal draftsmen must exercise in Arizona in order to preserve a joint tenancy title through the process of converting the property originally held into cash (in the case of a sale for cash alone) or into other property (in the case of a sale or exchange where the consideration, in whole or in part, is other than cash).[22] The contract of sale (and, perhaps, the escrow instructions as well) should contain a clause stating that the grantors intend to receive and hold the sale proceeds of their joint tenancy property as joint tenants with the right of survivorship and not as tenants in common or as community property.

Robert A. Scheffing

TORTS — DAMAGES — RIGHT TO RECOVER FOR MENTAL DISTRESS AND ITS PHYSICAL CONSEQUENCES WHERE THERE HAS BEEN NO IMPACT. — *Falzone v. Busch* (N.J. 1965).

Plaintiff was seated in her husband's parked automobile when the defendant's automobile "veered across the highway and headed in the direction of the plaintiff, coming so close to plaintiff as to put her in fear for her safety."[1] As a direct result she became ill and required medical attention. Plaintiff sued for damages from the fright, which she alleged caused her physical injuries. The trial court granted defendant's motion for summary judgment on the ground that there was no impact. On appeal, *held*, reversed. Despite a lack of physical impact, plaintiff may recover for substantial bodily injury or sickness resulting from fright caused by defendant's negligence. *Falzone v. Busch*, 45 N.J. 559, 214 A.2d 12 (1965).

The rule which requires impact before there can be recovery for physical injuries resulting from negligently inflicted fright or mental

[19] See cases cited note 6 *supra* for the proposition that the equitable conversion doctrine should not be applied in this factual situation. *Accord*, Swenson & Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466, at 478-79 (1954).

[20] 50 Ariz. 265, 71 P.2d 791 (1937).

[21] See also Henderson v. Henderson, 58 Ariz. 514, 121 P.2d 437 (1942); Blackman v. Blackman, 45 Ariz. 374, 43 P.2d 1011 (1935).

[22] The scrivener must exercise the same care when joint tenants exchange their property for other than cash, such as for securities, or other real property, or for chattels.

[1] Falzone v. Busch, 45 N.J. 559, 214 A.2d 12, 13 (1965).

distress originated in England in 1888.[2] Although the English courts repudiated the "impact" rule in 1901,[3] it was retained by the American courts and became the favored rule during the early 1900s.[4] Dissatisfaction with the rule caused many of the American courts to either limit its application or to repudiate it, and today the clear majority of the states which have ruled upon the issue no longer require impact.[5]

The states still following the "impact" rule have diluted its strict effect by finding exceptions to it. For example, recovery has been allowed without impact where physical suffering resulted from a *wilfully caused* emotional disturbance.[6] Recovery has also been allowed for the physical consequences of fright where the impact resulted from an attempt to avoid a hazard negligently created by another.[7] Indeed, some of the courts have virtually abrogated the rule by allowing recovery for physical injury traceable directly to fright when there was *any* impact, however inconsequential.[8]

New Jersey was among the first states to adopt the "impact" rule,[9] reasoning that: (1) there is a lack of precedent for allowing recovery without impact; (2) the negligent act without impact could not be

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[2] Victorian Rys. Comm'rs v. Coultas, [1888] 13 A.C. 222 (Vict.).

[3] Dulieu v. White & Sons, [1901] 2 K.B. 669. See also Hornbrook v. Stokes Bros., [1925] 1 K.B. 141; Janvier v. Sweeney, [1919] 2 K.B. 316.

[4] Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); see Annot., 64 A.L.R.2d 100, 134 (1959); 2 HARPER & JAMES, TORTS § 18.4 (1956); PROSSER, TORTS § 55 (3d ed. 1964). *Contra*, Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890).

[5] See Annot., 64 A.L.R.2d 100, 143 (1959), containing an alignment of the courts under the two rules as of 1959. See also RESTATEMENT (SECOND), TORTS § 436(2) (1964); 2 HARPER & JAMES, TORTS § 18.4 (1956).

[6] Savage v. Bois, 77 Ariz. 355, 272 P.2d 349 (1954); Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930); Spiegel v. Evergreen Cemetery Co., 117 N.J.L. 90, 186 Atl. 585 (1936); Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925).

[7] Freedman v. Eastern Mass. St. Ry., 299 Mass. 246, 12 N.E.2d 739 (1938); Tuttle v. Atlantic City R.R., 66 N.J.L. 327, 49 Atl. 450 (1901); Buchanan v. West Jersey R.R., 52 N.J.L. 265, 19 Atl. 254 (1890) (Plaintiff threw herself to the railroad station platform to avoid being struck by a protruding timber on a passing train).

[8] Homans v. Boston El. Ry., 180 Mass. 456, 62 N.E. 737 (1902) (a slight bump); Porter v. Delaware Lackawanna & W.R.R., 73 N.J.L. 405, 63 Atl. 860 (1906) (Dust in the eye and a small object falling upon the neck were held to constitute sufficient impact to allow recovery for physical injuries resulting from a woman's fright in seeing a bridge collapse nearby. The court stated that either one by itself was sufficient to satisfy the impact requirement). Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke).

Other limitations on the "impact" rule are: (1) the burial right cases, (2) the contract relationship cases, (3) the immediate physical injury cases, (4) the Workman's Compensation cases, (5) the food cases, and (6) the right of privacy cases. For a detailed treatment of these limitations, see McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 32-65 (1949). See also 2 HARPER & JAMES, TORTS § 18.4 (1956).

[9] Ward v. West Jersey & Seashore R.R., 65 N.J.L. 383, 47 Atl. 561 (1900) (Plaintiff was permitted, without warning from defendant railroad, to drive upon a public crossing of its tracks in the face of an approaching train. The defendant, by improperly lowering the gates before the plaintiff was off the tracks, subjected him to "great danger of being run down and killed" by the train, causing him severe physical injuries resulting from fright. Recovery was denied on the grounds that there was no impact).

the proximate cause of the physical injury; and, (3) public policy does not favor recovery when there is no impact, because it would result in a flood of litigation which, due to the difficulty of proof, is too susceptible to fraudulent claims. Other jurisdictions upholding the "impact" rule have reasoned that, since there can be no recovery for mere fright, there can be no recovery for its consequences.[10] These four reasons constitute the principal arguments advanced by the courts for maintaining the "impact" rule.

The argument that, since there can be no recovery for mere fright there can be none for its consequences, has posed little difficulty to those courts choosing not to following the "impact" rule. The basis for disallowing recovery for fright alone is the lack of any immediate personal injury.[11] Thus, when actual physical injuries are present, as in the instant case, this argument is no longer tenable.[12]

The lack of precedent argument has little weight today, since the majority of the jurisdictions in which the issue has been considered have allowed recovery without impact.[13] In addition, opponents of the "impact" rule contend that to deny recovery on the basis of no precedent is to ignore the natural development of the law.[14] If lack of precedent were allowed to be a substantial reason, "every case of first instance would be decided against the party invoking the new rule of law or the new application of an old rule. It would put an end to all growth or progress of the law through judicial decision."[15]

Proponents of the "lack of proximate cause" argument contend that for a person of ordinary physical and mental vigor, physical suffering is not the probable or natural consequence of fright alone, and, therefore, the negligent acts could not be the proximate cause of the physical injuries.[16] However, as stated in the instant case, this

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[10] Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). See McNiece, *supra* note 8, at 24-25; Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 265 (1921).

[11] Mitchell v. Rochester Ry., *supra* note 10; Ewing v. Pittsburg, C., C. & St. L. Ry., 147 Pa. 40, 23 Atl. 340 (1892).

[12] Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 320, 73 So. 205, 207 (1916), where the court said:

> So the damages suffered where the only manifestation is fright are too subtle and speculative to be capable of admeasurement by any standard known to the law; but when the damages are physical and objective as consequent upon the physical pain and incapacity manifested by and ensuing upon a miscarriage, the damages are quite as capable of being measured by a jury as if they had ensued from an impact or blow.

See McNiece, *supra* note 8, at 25-27; Throckmorton, *supra* note 10, at 266.

[13] See authority cited note 5 *supra*.

[14] Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890).

[15] Throckmorton, *supra* note 10, at 274.

[16] Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Ward v. West Jersey & Seashore R.R., 65 N.J.L. 383, 47 Atl. 561 (1900). See Throckmorton, *supra* note 10, at 268-272.

argument is contrary to modern medical evidence.[17] The overwhelming view is that emotional distress can cause both mental and physical disorders in a person of "ordinary physical and mental vigor."[18] In addition, by allowing recovery for serious physical injuries where there is only a trivial and unrelated impact, the courts are in reality admitting the causal connection between the injury and the negligently-induced fright.[19]

The only argument that retains any weight is the public policy argument that damages are too speculative and that the impact requirement is a guard against fraudulent claims and voluminous litigation.[20] Proponents of the majority view reason that, although there is a danger of fraudulent claims, the situation is not alleviated under the "impact" rule as it exists today because of its numerous exceptions;[21] and that, although litigation may be increased, it is the purpose of the courts to administer relief where the plaintiff is entitled to redress.[22] Actually, it does not appear that the courts following the majority view have any greater volume of litigation than those courts still requiring the technical impact.[23] In the instant case, the court met the argument that the damages are too speculative by reasoning that, although there may be difficulties in proving a causal connection between the fright and the subsequent physical injuries, the problem is not limited to non-impact cases but in fact may arise in any type of personal injury

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[17] Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965).

[18] Robb v. Pennsylvania R.R., 210 A.2d 709 (Del. 1965); Batalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729 (1961); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957); Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Smith, *Relation of Emotions to Injury & Disease*, 30 VA. L. REV. 193 (1944) (An extensive listing of clinical disorders which can be produced or aggravated by psychic stimuli is set out at 217-220).

[19] Orlo v. Connecticut, 128 Conn. 231, 21 A.2d 402, 404 (1941); Robb v. Pennsylvania R.R., 210 A.2d 709, 712 (Del. 1965).

[20] Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Bosley v. Andrews, 393 Pa. 161, 168, 142 A.2d 263, 266 (1958). (The Pennsylvania Supreme Court stated that to allow recovery "would open a Pandora's Box"). PROSSER, TORTS § 55 (3d ed. 1964), where the author states, "It is now more or less generally conceded that the only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims, which has loomed very large in the opinions as an obstacle."

[21] See McNiece, *supra* note 8, at 80-81; HARPER & JAMES, *supra* note 4, at 1034, where the author states that the "impact" rule "has come to lack substance and invite easy circumvention by the very litigants whose fraud it was designed to guard against."

[22] Batalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 730 (1961), where the court said, "It is fundamental to our common-law system that one may seek redress for every substantial wrong." Lambert v. Brewster, 97 W.Va. 124, 138, 125 S.E. 244, 249 (1924), where the court reasoned: "As for public policy, the strongest policy which appeals to us is that fundamental theory of the common law that for every wrong there should be a remedy."

[23] See Annot., 64 A.L.R.2d 100, 112, n.7 (1959); McNiece, *supra* note 8, at 31; Smith, *supra* note 18, at 211, n.47.

litigation.[24] The court argued that the difficulty of proof alone should not be a basis for barring these actions:

> In many instances, just as in impact cases, there will be no doubt as to the presence and extent of the damage and the fact that it was proximately caused by defendant's negligence. In the difficult cases, we must look to the quality of genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out the dishonest claims.[25]

The principal problem in allowing recovery for fright-induced physical injuries is in *proving* that the negligence has proximately caused physical consequences. The courts allowing recovery without impact have not found an all-embracing rule to solve this problem, but have relied upon the ability of the court and jury to reach the proper result in each case. The "impact" rule, although proclaimed to be the answer, has also failed to provide a test of satisfactory proof. Not only does the impact requirement fail to provide a solution to the problem of proof, but often it unjustly prevents recovery where redress should be granted.[26] The reasoning of the instant court rejecting the impact requirement is well supported by modern authority in permitting redress for valid claims which would otherwise fail under the "impact" rule.

Jack E. McCall

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[24] Falzone v. Busch, 45 N.J. 559, 214 A.2d 12, 15 (1965).

[25] *Id.* at 16, where the court quoted Batalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729 (1961).

This reasoning has been widely accepted by courts dismissing the impact requirement. Orlo v. Connecticut, 128 Conn. 231, 21 A.2d 402, 405 (1941); Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205, 207 (1916); McNiece, *supra* note 8, at 31; Throckmorton, *supra* note 10, at 276.

[26] McNiece, *supra* note 8, at 80-81; where the author states:

> While the rule was designed to defeat fabricators, now with all the available exceptions, it is possible for any fabricator to succeed in his case by merely including the one necessary magic element to come within the bounds of an exception. The only one who is defeated is the honest litigant who will not falsify, and who, if he does not come squarely within an exception, will not obtain redress for an injury which everyone agrees was foreseeable and culpably caused by another.

TORTS—PARENTAL IMMUNITY RULE—AUTOMOBILE NEGLIGENCE SUIT BY CHILD'S NEXT FRIEND AGAINST DECEASED PARENT'S ESTATE ALLOWED. — *Dean v. Smith* (N.H. 1965).

Plaintiff, as next friend of her minor children, petitioned for permission to sue the administrator of the estate of her deceased husband for injuries received by the children in the automobile accident that killed the father. The deceased father's insurance company intervened to have the petition dismissed on grounds of parental immunity. The issue was reserved and transferred to the New Hampshire Supreme Court. On reserved question, *held*, the action would lie. Suits by or on behalf of unemancipated children for injuries negligently inflicted in the operation of an automobile by a parent can be maintained against the estate of that deceased parent. *Dean v. Smith*, 106 N.H. 314, 211 A.2d 410 (1965).

The original rule prohibiting an unemancipated minor from maintaining a personal injury tort action against its parents appears to have had its inception in a Mississippi case decided in 1891.[1] Until that time it was generally assumed, at least by a number of legal writers, that no bar existed as to such action.[2] The Mississippi case involved a minor daughter suing her mother for false imprisonment (eleven days in an insane asylum). In refusing the child recovery, the court ruled that a minor child was under a disability to maintain an action for personal torts against its parents and that protection against parental violence and wrong-doing should be through the criminal laws because civil redress was undesirable. No distinction was made between negligent and wilfull, wanton and malicious acts, and the court cited no judicial decisions or other authority for its ruling.[3]

Since 1891 most of the courts in this country that have ruled upon the subject have applied the parental immunity rule.[4] These courts have given various reasons for adopting the rule, some of the more

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[1] Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891). This is the title of the case as it appears in the official report. It is frequently miscited as Hewellette v. George.

[2] See, *e.g.*, COOLEY, TORTS 171 (1879 ed.); EVERSLEY, DOMESTIC RELATIONS 578 (3d ed. 1906); REEVE, DOMESTIC RELATIONS 287 (1816).

[3] Hewlett v. George, *supra* note 1. The authorities are in agreement that there are no earlier reported cases on the issue. It is interesting to note that there was authority existing at that time to indicate that a child could sue its parents in matters affecting the child's property. See, *e.g.*, Duke of Beaufort v. Berty, 1 P.Wms. 703, 24 Eng. Rep. 579 (1721); Alston v. Alston, 34 Ala. 15 (1859).

[4] See Annot., 19 A.L.R.2d 423 (1951). The persuasiveness of the Mississippi decision was perhaps enhanced by its rapid adoption by two highly respected courts. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905). *But see* Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952), in which the Washington court subsequently reexamined and limited the rule's application.

common being: (1) public interest in maintaining family tranquility,[5] (2) fear of undermining parental authority and discipline,[6] (3) avoidance of fraud and collusion[7] and (4) the possibility of the negligent parent subsequently inheriting any recovery.[8]

A number of the more modern decisions have departed from a strict application of the parental immunity rule. In some jurisdictions parents committing wilfull and malicious acts have been held to have forfeited the protection of the rule.[9] Other courts have refused to grant immunity in cases when it was considered that the parents had abdicated their parental responsibility.[10] Still others have denied the immunity when the parent's liability was covered by insurance, and it was obvious that the family relationship would be aided rather than harmed. Finally, a number of jurisdictions have held the rule inapplicable when the family relationship had been terminated by death and the action was brought under a wrongful death or survival act.[12]

The precise question as to whether the parental immunity rule should extend to protect a parent's estate was decided for the first time in 1940 when two different courts ruled on the question.[13] Both courts adhered strictly to the rule and held that such actions would not lie. Since 1940, however, four of the five additional jurisdictions that have ruled upon the question have held such actions maintainable.[14] The

[5] See, *e.g.*, Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923). *But see* PROSSER, TORTS § 116, at 887 (3d ed. 1964).

[6] See, *e.g.*, Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927). Wisconsin has since abrogated the parental immunity rule except in restricted situations. This was accomplished by case decision in Goller v. White, 20 Wis. 2d 402, 122 N.W. 2d 193 (1963).

[7] See, *e.g.*, Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938).

[8] See, *e.g.*, Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905). *But see* Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930); McCurdy, *Torts Between Persons In Domestic Relations*, 43 HARV. L. REV. 1030, 1073 (1930).

[9] See, *e.g.*, Gillette v. Gillette, 168 Cal. App. 2d 102, 335 P.2d 736 (1959); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).

[10] See, *e.g.*, Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); Borst v. Borst, *supra* note 4.

[11] See, *e.g.*, Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939). *Contra*, Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948); Owens v. Auto Mut. Idem. Co., 235 Ala. 9, 177 So. 133 (1937).

[12] See, *e.g.*, Minkin v. Minkin, 336 Pa. 49, 7 A.2d 461 (1939), in which the court said that the wrongful death legislation was a declaration of public policy on the subject and necessarily displaced any policy (parental immunity) to the contrary. See also Palcsey v. Tepper, 71 N.J. Super. 294, 176 A.2d 818 (1962), in which action was permitted under a survival act.

[13] Cannon v. Cannon, 20 N.Y.S.2d 605 (App. Div. 1940) (suit against father as administrator of negligent mother's estate *and* individually as owner of the automobile involved). In Lasecki v. Kabara, 235 Wis. 645, 294 N.W. 33, 35 (1940), the court said, "It is . . . shocking to our concept of justice that an unemancipated child, who has no cause of action against his living parent, may, if the parent die, and contingent upon such event, have a cause of action against his parent's estate or his administrator."

[14] Davis v. Smith, 126 F. Supp. 497 (E.D. Pa. 1954); Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Dean v. Smith, 106 N.H. 314, 211 A.2d 410 (1965); Palcsey v. Tepper, *supra* note 12 (all permitting child to maintain the action). *Contra*, Castellucci v. Castellucci, 188 A.2d 467 (R.I. 1963).

current trend of reasoning would appear to be that when the negligent parent is dead, there is no sound reason to deny the cause of action.

The instant case of *Dean v. Smith*[15] is in line with the modern trend of limiting the application of the parental immunity rule. As pointed out by the court in its decision, "[I]t is the responsibility of the judiciary to examine this court-made rule [parental immunity] and to make such alterations as the interests of justice may require even though the Legislature has chosen not to change it, as was their privilege."[16] The court determined that there was little likelihood of disrupting family relations or of weakening parental rights and duties when the child's action was against the estate of the deceased parent. Furthermore, with liability insurance being the rule rather than the exception, the child's suit against the parent's estate would usually be a suit against an insurance carrier and would not harm the family finances. Finally, with the negligent parent dead, there would be little likelihood of fraud or collusion.[17]

Analytically, it would seem that there is no sound reason to deny a child the right to maintain an action against the estate of his deceased parent. As one court so aptly pointed out, "The rationale of the rule of parental immunity has been extinguished by the death of the parent and neither logic nor justice persuades that it remain."[18]

Although the Arizona Supreme Court has not yet ruled on any aspect of the parental immunity rule, it is quite likely that the question will be before the court in the not too distant future. An examination of the recent cases involving the rule reveals that the issue arises most frequently in cases involving automobile accidents. With the increasing accident rate and the prevalence of liability insurance in our state,[19] it is only a matter of time before an injured minor attempts to recover from a negligent parent's insurance carrier.

While the New Hampshire Court in the instant case had to overrule a prior decision in arriving at its logical conclusion,[20] the Arizona

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[15] 106 N.H. 314, 211 A.2d 410 (1965).

[16] Dean v. Smith, 106 N.H. 314, 211 A.2d 410, 413 (1965). This language was used by the court to answer an argument that the New Hampshire Legislature had rejected a bill to abrogate the parental immunity rule in 1955. See similar language as used by the Arizona Supreme Court in Hernandez v. County of Yuma, 91 Ariz. 35, 36, 369 P.2d 271, 272 (1962), discussing abrogation of the governmental immunity rule.

[17] *Id.* at 413.

[18] Brennecke v. Kilpatrick, *supra* note 14, at 73. See also 7 ARIZ. L. REV. 148 (1965) (same reasoning applied to husband and wife tort immunity).

[19] ARIZ. REV. STAT. ANN. § 28-1142(B) (1956), which requires persons involved in serious accidents to demonstrate financial responsibility by producing existing liability insurance policy or by posting bond.

[20] In overruling Worrall v. Moran, 101 N.H. 13, 131 A.2d 438 (1957), the court said, "Finding no supportable rationale upon which this judically created exception to the ordinary rules of liability can be predicated, justice demands and reason dictates that a change be made from the previous holding in such a situation." Dean v. Smith, 106 N.H. 314, 211 A.2d 410, 413 (1965).

court will have the opportunity to write upon a clean slate. The court should apply the rule, if at all, only in those instances when the alleged negligence involves reasonable exercise of parental discretion or authority. The rule, thus limited, would still serve its primary purpose of protecting *harmonious* family relationships from disrupting law suits. When, however, the relationship has already been severed (as in the instant case) or when other circumstances indicate that the family relationship will not be harmed by allowing suit, the reason for the rule is extinguished and right and equity demand its complete abrogation.

Michael J. O'Grady

WATER RIGHTS—NON-NAVIGABLE STREAMS—FEDERAL POWER COMMISSION HAS AUTHORITY TO ISSUE LICENSES FOR PROJECTS ON NON-NAVIGABLE STREAMS NOTWITHSTANDING STATE OBJECTION.—*State of California v. Federal Power Commission* (9th Cir. 1965).

The Federal Power Commission granted the applicant, Turlock Irrigation District, a license for the construction and operation of a large irrigation and power project utilizing the waters of a non-navigable intrastate stream. Part of the project was to be constructed on public lands owned by the United States. Attached to the license were certain conditions for the purpose of protecting salmon runs in the river. The irrigation district brought an action, complaining that the imposition of such conditions was not within the authority of the Federal Power Commission. The State of California intervened, contending that the conditions imposed were not adequate for conservation purposes. On proceeding to review the orders, *held,* affirmed. The Federal Power Commission has authority under the Federal Power Act[1] to issue licenses for water projects using federal lands and to impose such conditions in the license as the Commission determines to be in the public interest, even though a state government objects to the granting of the license and the conditions imposed. *State of California v. Federal Power Commission,* 345 F.2d 917 (9th Cir. 1965).

There is no question about the authority of the Federal Power Commission to grant licenses and specify conditions for hydro-electric projects on navigable streams,[2] because a state's control over waters within its borders[3] is subject to the commerce power.[4]

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[1] 49 Stat. 838 (1935), 16 U.S.C. § 797(e) (1958).

[2] First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946). The rule is the same where the navigable stream lies wholly within one state. See City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958).

[3] United States v. Appalachian Electric Power Company, 311 U.S. 377 (1940).

[4] *E.g.,* United States v. Chandler-Dunbar Water Power Company, 229 U.S. 53 (1913); Gibbons v. Ogden, 9 Wheat. 1 (1824).

Recent conflict over authority to regulate projects on non-navigable streams dates from the *Pelton Dam* case,[5] in which the Federal Power Commission granted a license to build a dam on the non-navigable intrastate Deschutes River in Oregon, the project utilizing some federal reserved land. The license was granted over the objection of the State of Oregon, which contended that the dam would interfere with the migration of anadromous fish. The order of the Commission authorizing the project, speaking in what one writer has termed "all too typical summary fashion,"[6] dealt with the State's objection as follows:

> . . . [I]t is clear that the state laws involved cannot stand as a complete legal bar to Federal authorization of a project lacking a state permit if, in the judgment of the Commission, that project is best adapted to comprehensive plans and would be of unmistakable public benefit.[7]

The Court of Appeals set aside the Power Commission's order as an infringement on the rights of the State of Oregon, stating that the Commission had encroached upon the sovereignty of that State.[8] "The fundamental principle . . .is that Oregon has the right to regulate its own waters in its own chosen way."[9]

The Court of Appeals decision was largely based on a prior case which construed the Desert Land Act of 1877[10] as severing the water rights from federal lands in the western states and subjecting all appropriated flows of non-navigable streams to the plenary control of the states.[11] The Supreme Court of the United States reversed the decision,[12] reasoning that to grant the state governments concurrent authority over non-navigable waters within their borders would result in "duplication of regulatory control."[13] The authority to issue licenses for water projects utilizing federal lands was held to be exclusively in the Federal Power Commission.[14]

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[5] Federal Power Commission v. State of Oregon, 349 U.S. 435 (1955).

[6] Schwartz, *Federalism and Anadromous Fish*, 23 GEO. WASH. L. REV. 535, 536 (1955).

[7] Portland General Electric Company, 10 F.P.C. 445 (1951).

[8] State of Oregon v. Federal Power Commission, 211 F.2d 347 (9th Cir. 1954).

[9] *Id.* at 351.

[10] 19 Stat. 377 (1877), 43 U.S.C. § 321 (1952).

[11] California Oregon Power Company v. Beaver Portland Cement Company, 295 U.S. 142 (1935).

[12] Federal Power Commission v. State of Oregon, 349 U.S. 435 (1955).

[13] *Id.* at 441.

[14] The decision was widely noted, with one writer commenting:

> . . . [I]t seems that the Court, as it has many times, especially in recent years, has sought to assert in what it may deem a field of some confusion the superiority of the federal government.

Munro, *The Pelton Decision: A New Riparianism?*, 36 ORE. L. REV. 221, 251 (1957). See Goldberg, *Interposition-Wild West Water Style*, 17 STAN. L. REV. 4 (1964); Trelease, *Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 399 (1961); Note, 60 COLUM. L. REV. 967 (1960).

The instant case follows the decision in *Pelton Dam* in holding that, because federal lands are utilized, the Federal Power Commission's authority over the power project is superior to the state's authority. Thus the wishes of the state government will not be controlling even where both the stream and the project are intrastate. The Commission is the "guardian of the public domain"[15] and a license is required for even the slightest use of federal lands.[16] Such licenses are granted and restricted by considerations of the resulting benefit to the public.[17] Since the federal government owns, as a proprietor, large amounts of land in the western states,[18] the importance of plenary federal control under the Property Clause, (Article IV Section 3 of the Constitution) over the licensing of water and power projects using federal lands is readily seen.

The limits of federal sovereignty, under this and other constitutional powers, which affect non-federal lands and water uses continues to be questioned. Persons favoring state control fear that, following reasoning like that of the instant case, a paramount federal right to water arising on or flowing through federal lands may be asserted and that such right will impair water rights acquired under state appropriation systems.[19] After the *Pelton Dam* case this concern led to the introduction of numerous bills in Congress for the purpose of defining the federal and state powers over western water.[20] They range from the Barrett Bill,[21] which attempted to vest control of water in the west in the state governments, to the most recently introduced bill,[22] which attempts "to strike a fair balance between the exercise of Federal power, employed in the development of water resources and, on the other hand, the protection of preexisting property rights in those same waters."[23]

It is submitted that when the rights and interests of more than one state are involved, or when the federal government's proprietary interest or other national interests may be involved,[24] there is good

[15] Federal Power Commission v. Idaho Power Company, 344 U.S. 17, 23 (1952).
[16] 49 Stat. 839 (1935), 16 U.S.C. § 797(e) (1958).
[17] Alabama Power Company v. Federal Power Commission, 128 F.2d 280, 288 (D.C. Cir. 1942).
[18] In Arizona the Federal Government owns, controls, manages, or holds in trust 71.8% of the total land. REPORT OF THE ARIZONA TOWN HALL ON PUBLIC LAND 35 (1965).
[19] Munro, *supra* note 14.
[20] For a discussion of early bills, see Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604 (1957).
[21] S. 863, 84th Cong., 1st Sess. (1955).
[22] S. 1636, 89th Cong., 1st Sess. (1965).
[23] 111 Cong. Rec. 5976 (daily ed. March 29, 1965) (remarks of the Bill's sponsor, Senator Kuchel).
[24] Other powers used by the Federal Government to assert control over water rights include the commerce power, *e.g.*, United States v. Chandler-Dunbar Water Power Company, 229 U.S. 53 (1913); the spending power, *e.g.*, United States v. Gerlach Live Stock Company, 339 U.S. 725 (1950); the treaty power, Arizona v. California, 283 U.S. 423 (1931); and the war power, *e.g.*, Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

reason for exercising federal power over non-navigable streams and there is a basis for that power to be exercised. It would seem, however, that in a situation such as the instant case, where an intrastate stream and an intrastate power project are involved, and where there does not appear to be a threat to any of the above referred to national interests, that a state government may be in a better position to anticipate the needs and safeguard the interests of its citizens.

Peter G. Dunn

WATER RIGHTS — PUBLIC AND PRIVATE WATER — WATER IN A SLOUGH FED BY THE COLORADO RIVER IS PUBLIC WATER. — *Brasher v. Gibson* (Ariz. Ct. App. 1965).

Plaintiff and defendant own property abutting Cibola Slough,[1] which is fed by a natural channel from the Colorado River. Defendant began construction of a dike across the slough. Plaintiff objected to the construction of the dike, which would divide the slough in half, preventing freedom of access to the whole slough. Defendant claimed a right to construct the dike on the theory that the slough constituted private waters. The trial court granted judgment for the defendant. On appeal, *held,* reversed. The waters of Cibola Slough are public waters subject to appropriation; and, by way of dictum, the court said that except where rights of prior appropriators have intervened, riparian rights are the same in Arizona as elsewhere. *Brasher v. Gibson,* 2 Ariz. App. 91, 406 P.2d 441 (1965), *aff'd on rehearing,* 410 P.2d 129 (Ariz. App. 1966).[2]

A navigable stream is deemed dedicated to the public for its use and enjoyment,[3] and, although the statement has been made that sloughs without original waters of their own are not generally considered as part of the watercourse of a stream,[4] there have been exceptions to this generalization.[5] California has decided that the waters of a slough fed by the natural flow of a river for the greater part of the year must be regarded as part of the river, subject to the same rules

[1] In Dunlieth & Dubuque Bridge Co. v. County of Dubuque, 55 Iowa 558, 566, 8 N.W. 443, 447 (1881), the court defines a slough as an arm of a river apart from the main channel. For other definitions of the term, see 39 WORDS AND PHRASES 523-524 (1953).

[2] On rehearing, the majority opinion stated that the rule of riparian rights would exist in Arizona only in very limited circumstances. One judge dissented and stated that it was his view that under the constitutional provisions of Arizona the doctrine of riparian rights has been completely abrogated and should not be applied at all; that water is a precious commodity in Arizona and cannot be subjected to riparian rights.

[3] *E.g.,* United States v. Chandler Dunbar Water Power Co., 229 U.S. 53 (1912).

[4] 1 KINNEY, IRRIGATION AND WATER RIGHTS § 315, at 514 (2d ed. 1912).

[5] *E.g.,* Turner v. James Canal Co., 155 Cal. 82, 99 Pac. 520 (1909).

of law as the river water.[6] Furthermore, it has been held that where a creek flows through a slough the slough is part of the natural watercourse,[7] and that when river waters are diverted into a slough, the waters of the slough constitute part of the river.[8]

Nine states follow the "Colorado doctrine" of water rights and have declared that prior appropriation is the sole basis of the right to use surface water.[9] Riparian rights have been denied or repudiated in these states.[10] However, certain rights of a riparian nature have been recognized in a few of these states, and some courts have held that a riparian owner of land abutting a stream owns the land to the middle of the stream, whether the stream is navigable[11] or non-navigable.[12] In addition, the right to ownership of accreted lands[13] and the right of the riparian owner to protect the banks of a stream from damage due to the flow of water[14] have been recognized.

Rights connected with the flow of water past riparian lands have also been recognized in some of the "Colrado doctrine" states, as is illustrated by a Montana case holding that a riparian owner has the right to have unpolluted water flow past his land if the polution results in damage to the riparian.[15] Similarly, the right to the use of the flow of water by a riparian owner has been recognized in Idaho, where the court held that a riparian owner's right to use water for domestic purposes and stock watering and to have the water flow by his land is a right the law recognizes as inferior to a right acquired by appropriation but superior to the rights of a stranger or intermeddler.[16]

The Arizona Constitution rejects common law riparian rights,[17] and it is declared by statute that specified categories of water are subject to appropriation.[18] An appropriator's right commences with the issuance

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[6] *Ibid.*

[7] Bachman v. Reynolds Irr. Dist., 56 Idaho 507, 55 P.2d 1314 (1936).

[8] Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 Pac. 1059 (1909).

[9] TRELEASE, BLOOMENTHAL AND GERAUD, CASES ON NATURAL RESOURCES 3 (1965). The nine states are Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming and Alaska.

[10] *E.g.*, Clough v. Wing, 2 Ariz. 371, 17 Pac. 453 (1888); Snow v. Abolos, 18 N.M. 681, 140 Pac. 1044 (1914); Stowell v. Johnson, 7 Utah 215, 26 Pac. 290 (1891).

[11] *E.g.*, Johnson v. Johnson, 14 Idaho 561, 95 Pac. 499, 505 (1908), where the court said that where the government grants land bordering on a navigable stream and there is nothing in the grant to limit it to the water's edge, the grantee takes to the middle of the stream. The general rule, however, is that the state owns the bed of a navigable stream and a riparian grantee does not take to the middle of the stream. See, *e.g.*, 56 AM. JUR. *Waters* § 453 (1947).

[12] *E.g.*, Hanlon v. Hobson, 24 Colo. 284, 51 Pac. 433 (1897).

[13] *E.g.*, Smith v. Whitney, 105 Mont. 523, 74 P.2d 450 (1938).

[14] Fischer v. Davis, 24 Idaho 216, 133 Pac. 910 (1913).

[15] Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. 416 (1897).

[16] Hutchinson v. Watson Slough Ditch Co., *supra* note 8.

[17] ARIZ. CONST., art. 17, § 1.

[18] ARIZ. REV. STAT. ANN., § 45-101(A) (1956).

of a permit.[19] However, in an early Arizona case decided under a territorial statute similar to the present constitutional provisions denying riparian rights, the court said riparian rights were the same in Arizona as elsewhere, as long as prior appropriation rights had not intervened.[20]

Similarly, during the territorial period the Arizona court accepted the common law rule relating to percolating ground waters,[21] which is somewhat analogous to the riparian surface rights doctrine. Consequently, when the problem came before the court in *Bristor v. Cheatham*,[22] the court felt itself bound to follow the lead set by the territorial court and held that the reasonable use doctrine would apply to percolating ground waters. It was noted that the statute makes "definite underground streams" subject to appropriation but makes no reference to percolating ground waters.[23] The court decided that this indicated the intent of the legislature to exclude percolating ground waters from the appropriation doctrine. Thus, although Arizona has, by statutory provision, expressly abrogated riparian rights as they apply to surface diversions and irrigation, it seems that there still are discernible and functioning common law property rights relating to water, even though shortly after *Hill v. Lenormand*[24] was decided in 1888, the court reconsidered the question of riparian rights and held that this doctrine is no part of Arizona law.[25]

In the instant case, the court reasoned that the waters of Cibola Slough supplied by the natural flow of the Colorado River, a navigable stream dedicated to the use of the public, were part of the waters of the river and retained the character of public waters. The right to exclusive use of the waters must be acquired by appropriation. The defendant had not attempted to meet the requirements for an appropriation; therefore, he had no right to divide the slough, excluding others from using any part of it.

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[19] ARIZ. REV. STAT. ANN., § 45-142 (Supp. 1965), and Parker v. McIntyre, 47 Ariz. 484, 56 P.2d 1337 (1936). If a person wishes to appropriate water from the Colorado River, then he must do so in accordance with the decision in Arizona v. California, 373 U.S. 546 (1963), which held that water from the mainstream of the Colorado River can be acquired only by a contract with the Secretary of the Interior of the United States.

[20] Hill v. Lenormand, 2 Ariz. 354, 16 Pac. 266 (1888).

[21] Howard v. Perrin, 8 Ariz. 347, 76 Pac. 460 (1904).

[22] 75 Ariz. 227, 255 P.2d 173 (1953).

[23] ARIZ. REV. STAT. ANN., § 45-101(A) (1956). For a discussion of what constitutes a definite underground stream, see Water Conservation Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931), *rehearing denied*, 39 Ariz. 367, 7 P.2d 254 (1932).

[24] Hill v. Lenormand, *supra* note 20.

[25] Clough v. Wing, *supra* note 10. This doctrine was later confirmed in Boquillas Land & Cattle Co. v. The St. David etc. Ass'n, 11 Ariz. 128, 89 Pac. 504 (1907), *aff'd sub nom.* Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339 (1909); Chandler v. Austin, 4 Ariz. 346, 42 Pac. 483 (1895).

Although the issue before the court was whether or not the waters of the slough were public or private, the judges also considered the rights of the litigants to the use of the slough. The court reasoned that if the rights of prior appropriators are not involved, it is not inconsistent with Arizona's constitutional provisions to apply the rules of common law riparian rights.

Although the holding in the instant case is important to Arizona water law, perhaps its most unsettling implication is found in the dictum suggesting that some facet of riparian rights may exist in Arizona. The extent to which vestigial common law rights apply is not made clear. The court was not required to specify whether the right of access to a body of water is merely one basis or, in fact, the principal basis of riparian ownership.[25] Nor did the court have to elucidate all the rights of landowners abutting a stream, slough or lake.

With the construction of more reservoirs and enlarged recreational uses in Arizona, conflicts between abutting owners for the best shoreline, and between such owners and the public may become more frequent. Courts will have to consider and evaluate the rights and interests as between riparians and others seeking access to, or use of the lakes or reservoirs for recreation. The instant case indicates that when these conflicts arise the courts may re-examine the common law of riparian rights.

M. Byron Lewis

[26] Embrey v. Owen, 6 Exch. 353, 369, 155 Eng. Rep. 579, 585 (1851). The court said that the riparian proprietor's right of access to the stream is the basis of riparian rights.