Notes

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — DEFENDANT IS NOT ENTITLED TO EXCLUSION OF PUBLIC FROM RAPE TRIAL. — *State v. White* (Ariz. 1965).

The defendant was convicted of second degree rape. At the defendant's request, the trial was conducted without a jury, but the trial judge denied his motion to exclude the entire public from the trial, only partly limiting those to be admitted to the court room. On appeal, *held,* affirmed.[1] There is no right to a private or secret trial.[2] The trial judge may, in his discretion, make reasonable orders of exclusion; but, a refusal to give exclusionary orders violates no recognized right of a defendant. *State v. White,* 97 Ariz. 196, 398 P.2d 903 (1965).[3]

Defendants in criminal trials are guaranteed public trials by the United States Constitution[4] and, independently thereof, by each of the individual states.[5] These guarantees rest on grounds which would seem to preclude any right to a private trial.[6] In a recent case the United States Supreme Court, in rejecting a contention that there is a right to trial without jury, stated in part:

> The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. For example, although a defendant can, under some circumstances, waive his right to a public trial, *he has no absolute right to compel a private trial . . . .*[7] (Emphasis supplied.)

---

[1] Reversed on other grounds.

[2] A private trial or secret trial is one from which all persons not necessary to the conduct of the trial have been excluded. Whether there is a jury or not does not affect this definition.

[3] This case note is restricted in scope to criminal proceedings. See generally 21 AM. JUR. 2d *Criminal Law* §§ 257-270 (1965); Annot., 48 A.L.R.2d 1436 (1956); 23 C.J.S. *Criminal Law* § 963 (1961); 5 WHARTON, CRIMINAL LAW AND PROCEDURE § 2029 (12th ed. 1957); Radin, *The Right to a Public Trial,* 6 TEMP. L.Q. 381 (1932).

[4] The Sixth Amendment right to a public trial does not apply directly in state courts, Gaines v. Washington, 277 U.S. 81 (1928), but in *In re* Oliver, 333 U.S. 257 (1948), the Fourteenth Amendment due process provision was held to guarantee public trials in state courts.

[5] The right to a public trial, or in some states the right to have justice administered openly, is guaranteed by the constitutions of forty-three states. Nevada and New York have statutes directly guaranteeing such a right. In Massachusetts and Virginia statutes recognize the right by implication. Maryland and Wyoming recognize the right by judicial decision. Although New Hampshire is often cited as the one state not formally recognizing the right, there is a case somewhat in point. "The law does not, indeed, authorize any court to act arbitrarily, and unreasonably exclude persons, but the right to have the courts open is the right of the public and not of the individual [spectator]." State v. Copp, 15 N.H. 212, 215 (1844).

[6] See generally Auld, *The Comparative Jurisprudence of Criminal Process,* 1 U. TORONTO L.J. 82 (1935); Sullivan, *The 'Public' Interest in Public Trial,* 25 PA. B.A.Q. 253 (1954). Both articles discuss a variety of benefits flowing to the body politic from public trials.

[7] Singer v. United States, 85 Sup. Ct. 783, 790 (1965).

Apparently no state provides a general guarantee of private trials to defendants. Although a few state constitutional and statutory provisions suggest such a right, they have been strictly construed. For example, a constitutional provision authorizing the private trial of certain crimes has been construed to preclude private trials of any other crimes,[8] and a statute authorizing defense motions to exclude the public has been held to create no *right* to have the public excluded, leaving the trial court with full discretion to grant or deny such motions.[9]

Of importance in considering whether there should be a right to a private trial is the question of whether the public has a right to be present. The Supreme Court has never had occasion to determine whether members of the public have a right, under the Constitution, to be present, or, even, whether such right exists apart from the defendant's right to have the trial open to the public.[10] The English law, however, recognizes such a right.[11] Some American state courts, while not directly so holding, have made statements supporting the public's right to attend.[12] In the 1950's three actions were brought in state courts to test the public's right to be present.[13] One case held that members of the public had no standing to enforce a right to be present, if indeed such a right exists.[14] The other two held that members of the public

---

[8] Carter v. State, 99 Miss. 435, 54 So. 734 (1911).

[9] People v. King, 199 Cal. App. 2d 333, 18 Cal. Rptr. 624 (Dist. Ct. App. 1962).

[10] See note 4 *supra*.

[11] See 10 HALSBURY'S LAWS 414-415 (3d ed. 1955):

> As a general rule all persons have a right to be present in court, provided there is sufficient accommodation and there is no disturbance of the proceedings. It is usual, where cases involving indecent details are called on, to direct females and boys to leave the court, but if an adult woman should insist on being present at the hearing of a case, there is no power to prevent her being present. There is, however, an inherent jurisdiction in the court to exclude the public if it becomes necessary to do so for the administration of justice.

[12] *E.g.*, Neal v. State, 86 Okla. Crim. 283, 192 P.2d 294, 296 (1948), where the court said: "In criminal causes the constitution neither classifies nor limits the public in its right to attend criminal prosecutions." See also Brown v. State, 222 Miss. 863, 77 So. 2d 694 (1955); Lyles v. State, 330 P.2d 734 (Okla.Cr. 1958). *Contra, Ex parte* Sturm, 152 Md. 114, 136 Atl. 312, 315 (1927), where the court said: "The privilege of the public to attend trials in court is not unrestricted."

[13] Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (Dist. Ct. App. 1956); United Press Ass'ns. v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896 (Ct. App.), *appeal dismissed*, 164 Ohio St. 261, 130 N.E.2d 701 (1955).

Although all three of these actions were brought by representatives of the press, none of the courts gave substantial consideration to the special problems associated with freedom of the press. They were content to view the petitioners as having the same standing as any member of the public. See generally Freedman, *News Media Coverage of Criminal Cases and the Right to a Fair Trial*, 40 NEB. L. REV. 391 (1961); Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 N.Y.U.L. REV. 810 (1961); *Free Press v. Fair Trial*, 39 CONN. B.J. 140 (1965).

[14] United Press Ass'ns. v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954). The public interest is adequately protected by the defendant's right to demand a public trial. Even if the public does have a right to be present, the right is in the public as a whole and is not enforceable by individual members of the public.

have sufficient standing to enforce a right to be present at trials, subject to the court's power to make reasonable exclusionary orders to assure a fair trial.[15]

Whatever may be the public's right to be present, the defendant is guaranteed that he shall not be prejudiced by public behavior at his trial.[16] In the recent Billie Sol Estes case,[17] in a five to four decision, the Supreme Court held that the televising of such highly publicized and notorious proceedings violated due process of law. Mr. Justice Clark's Opinion of the Court, which recognized the right to a public trial, was joined by Chief Justice Warren and Justices Goldberg and Douglas in reasoning that the televising of criminal trials is inherently a denial of due process. Mr. Justice Harlan limited his separate concurrence to the facts of the case, "a heavily publicized and highly sensationalized affair."[18] He felt that the issue of constitutionality of television in a "non-notorious"[19] trial should not be determined until required by the facts of a future case. Justices Stewart, Black, Brennan, and White reasoned in dissent that televising should not now be categorized as per se a denial of due process and that proof of actual prejudice should be required before televising would constitute a denial of due process.

Arizona's law relating to public and private trials is in accord with the law of the rest of the country. Arizona's Constitution guarantees not only that every defendant has a right to a public trial,[20] but also that all justice will be administered openly.[21] Although failing to mention the latter constitutional provision,[22] the Arizona Supreme Court, in the instant case, made it clear that Arizona recognizes no right to a private trial. However, in denying exclusion of the public to satisfy the defendant's sensitivities, the court emphasized the right of the trial court, "in its sound discretion, to make reasonable exclusion orders consistent with the rights of an accused in a proper case in

---

[15] Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (Dist. Ct. App. 1956); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896 (Ct. App.), *appeal dismissed*, 164 Ohio St. 261, 130 N.E.2d 701 (1955). *Kirstowsky* put more emphasis on the necessity of assuring fair trials than did *Scripps*.

[16] See Turner v. Louisiana, 379 U.S. 466 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Moore v. Dempsey, 261 U.S. 86 (1923).

[17] Estes v. Texas, 85 Sup. Ct. 1628 (1965).

[18] *Id.* at 1663.

[19] *Ibid.*

[20] ARIZ. CONST. art. 2, § 24 provides: "In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial . . . ."

[21] ARIZ. CONST. art. 2, § 11 provides: "Justice in all cases shall be administered openly, and without unnecessary delay."

[22] In E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896 (Ct. App.), *appeal dismissed*, 164 Ohio St. 261, 130 N.E.2d 701 (1955), cited in the instant case, a similar provision was interpreted as providing for a public right to open courts.

the interest of public morals or safety."[23] While the public's interest in public trials has been recognized in Arizona,[24] our court has not yet determined whether that interest is a right enforceable by individual members of the public.

The particular facts of the instant case did not call for a discussion of the law protecting the defendant from unfairness or prejudice caused by hostile, unruly, or other prejudicial behavior of the public at his trial. From the opinion, it is not possible to ascertain whether the defendant felt that he was denied a fair trial.[25] If such a contention should arise, however, the Arizona courts would be bound by the rules exemplified by *Estes v. Texas*[26] to shield criminal trials from any public behavior prejudicial to fair trials.

James C. Gries

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — DUE PROCESS REQUIRES PRELIMINARY DETERMINATION BY COURT IN ABSENCE OF JURY OF VOLUNTARINESS OF ADMISSIONS AGAINST INTEREST, EXCULPATORY OR OTHERWISE. —*State v. Owen* (Arizona 1964).

On the first appeal to the Arizona Supreme Court,[1] the defendant's conviction for rape was affirmed, the supreme court holding that a written statement by the accused was not a confession, but an exculpatory statement; therefore, the defendant was not entitled to a preliminary hearing out of the presence of the jury concerning the voluntariness of his statement.[2] Upon a writ of certiorari, the United States Supreme Court vacated the judgment and remanded the case[3] for proceedings

---

[23] State v. White, 97 Ariz. 196, 198, 398 P.2d 903, 904 (1965).

[24] Keddington v. State, 19 Ariz. 457, 463-464, 172 Pac. 273, 275 (1918), where the court said:

> *If the provision for a public trial is for the benefit and protection of society,* as well as for the benefit and protection of the accused, we can see no objection to a course of conduct in the trial that preserves the benefit to the one as fully as to the other. (Emphasis supplied.)

In the instant case the court added: "The community is deeply interested in the right to observe the administration of justice and we feel the presence of its members at a public trial is as basic as that of a defendant." 97 Ariz. 196, 198, 398 P.2d 903, 904 (1965).

[25] See Brief for Appellant, pp. 7-10, State v. White, 97 Ariz. 196, 398 P.2d 903 (1965). Appellant's argument pointed out a general risk of racial prejudice and risk of harm to his business. He did not specifically charge any actual prejudice or substantial risk of prejudice to his right to a fair trial.

[26] 85 Sup. Ct. 1628 (1965). See also cases cited note 16 *supra.*

---

[1] State v. Owen, 94 Ariz. 404, 385 P.2d 700 (1963).

[2] The trial judge had also stated, in the presence of the jury, that it was for the jury to determine the voluntariness of a statement or confession.

[3] Owen v. Arizona, 378 U.S. 574 (1964).

not inconsistent with *Jackson v. Denno*.[4] On remand, *held*, reversed. " . . . [I]n Arizona when a question is raised as to voluntariness of a statement constituting either admissions against interest, exculpatory or otherwise, or a confession, it must be resolved by the judge outside the presence of the jury. If he determines it was involuntary, it will not be admitted. If he determines it was voluntary, it may be admitted."[5] *State v. Owen*, 96 Ariz. 274, 394 P.2d 206 (1964).

In the general law, it would appear that admissions against interest have not been included in the rules governing admissibility of confessions because they are not confessions as that term is defined.[6] Of the state jurisdictions that have considered the question of voluntariness as a prerequisite to admissibility into evidence of admissions against interest, a diminishing minority have held that a preliminary showing of voluntary origin is unnecessary.[7] For example, the North Dakota court states that evidence of involuntariness of the admission merely bears upon the weight the jury should give to it.[8] The Massachusetts court has held that it is not error for the trial court to refuse a requested preliminary hearing on the question.[9] However, the overwhelming majority of state jurisdictions considering the question have held that an admission against interest must be voluntary to be admissible into evidence.[10] It is not clear in many of the majority jurisdictions whether

---

[4] 378 U. S. 368 (1964). The only issue decided in the *Jackson* case is the correct trial procedure when a question is raised concerning the voluntariness of a *confession*. The Arizona Supreme Court interpreted this as tantamount to a ruling that admissions against interest require the same type of treatment as confessions.

[5] State v. Owen, 96 Ariz. 274, 277, 394 P.2d 206, 208 (1964). At the same page the court also said that if the admission or confession is admitted, the defendant may introduce evidence tending to contradict its voluntariness, and the jury may, in effect, disagree with the judge and reject it.

[6] *E.g.*, State v. Johnson, 95 Utah 572, 83 P.2d 1010, 1013 (1938), where the court said:

> A confession admits the commission of the crime, that is, admits all the elements of the crime including guilty participation. An admission on the other hand admits only some part or elements of the crime, but not the guilt, and leaves the rest including guilty participation to be proved by other evidence.

Due to the paucity of material dealing with admissions in criminal cases, the remainder of this case note is primarily confined to a discussion of admissions against interest, exculpatory or otherwise. An excellent summary of the law concerning admissibility of confessions is available in *Jackson v. Denno, supra* note 4, and in major legal works. See generally 20 AM. JUR. *Evidence* §§ 477-541 (1939); 23 C.J.S. *Criminal Law* §§ 816-843 (1961); 16 C.J. *Criminal Law* §§ 1464-1518 (1918).

[7] *E.g.*, Brown v. State, 48 Del. 427, 105 A.2d 646, 649 (1954) (dictum); State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958); Commonwealth v. Haywood, 247 Mass. 16, 141 N.E. 571 (1923); State v. Braathen, 77 N.D. 309, 43 N.W.2d 202 (1950); State v. Lucero, 70 N.M. 268, 372 P.2d 837 (1962). *Compare* People v. Mowry, 6 Ill. 2d 132, 126 N.E.2d 683 (1955), *with* People v. Hiller, 2 Ill. 2d 323, 118 N.E.2d 11 (1954).

[8] State v. Braathen, *supra* note 7.

[9] Commonwealth v. Haywood, *supra* note 7.

[10] *E.g.*, Drake v. State, 257 Ala. 205, 57 So. 2d 817 (1952); Fields v. State, 235 Ark. 986, 363 S.W.2d 905 (1963); People v. Underwood, 37 Cal. Rptr. 313,

an admission is considered prima facie involuntary, requiring the prosecution to lay a predicate of voluntariness in every instance, such as Alabama[11] holds; or whether, as South Dakota[12] and Oregon[13] hold, the admission is considered prima facie voluntary, requiring the prosecution to show its voluntariness only where the defense properly raises the question.

About half of the majority jurisdictions have discussed the issue of whether the jury should be absent during a preliminary inquiry into voluntariness, and they state that it is "proper" or the "better practice" to excuse the jury.[14] Only Florida states that the jury *must* be absent.[15] Beyond the exclusion of the jury, the majority jurisdictions make no statement concerning specific procedures the judge is to follow.

The United States Supreme Court seems always to have favored the view that admissions must be voluntary.[16] However, Mr. Justice Jackson, speaking for the Court in 1953 in *Stein v. New York*,[17] stated that the weight of authority did not impose the same procedural requirements as for confessions, and that in the face of this " . . . it cannot be said that any such requirement is imposed by the Fourteenth Amendment." Mr. Justice Jackson's concept of due process has been

---

389 P.2d 937 (1964); McRae v. People, 131 Colo. 305, 281 P.2d 153 (1955); State v. McCarthy, 133 Conn. 171, 49 A.2d 594 (1946); Louette v. State, 152 Fla. 495, 12 So. 2d 168 (1943); Harris v. State, 214 Ga. 739, 107 S.E.2d 801 (1959); State v. Foster, 44 Hawaii 403, 354 P.2d 960 (1960); State v. Stump, 254 Iowa 1181, 119 N.W.2d 210 (1963), *cert. denied* 375 U.S. 853 (1963); Rohlfing v. State, 230 Ind. 236, 102 N.E.2d 199 (1951); State v. Turner, 193 Kan. 189, 392 P.2d 863 (1964); Glasscock v. Commonwealth, 307 S.W.2d 188 (Ky. Ct. App. 1957); State v. Bueche, 243 La. 160, 142 So. 2d 381 (1962); Stewart v. State, 232 Md. 318, 193 A.2d 40 (1963); State v. Hinojosa, 242 S.W.2d 1 (Mo. 1951); State v. Guffey, 261 N.C. 322, 134 S.E.2d 619 (1964); State v. Hamson, 104 N.H. 526, 191 A.2d 89 (1963); People v. Reilly, 181 App. Div. 522, 169 N.Y. Supp. 119 (1918), *aff'd*, 120 N.E. 113 (N.Y. 1918); State v. De Righter, 145 Ohio St. 552, 62 N.E.2d 332 (1945); Brown v. State, 384 P.2d 54 (Okla. Crim. App. 1963); State v. Rollo, 221 Ore. 428, 351 P.2d 422 (1960); State v. Durkee, 68 R.I. 73, 26 A.2d 604 (1942); State v. Hinz, 78 S.D. 422, 103 N.W.2d 656 (1960); Turner v. State, 187 Tenn. 309, 213 S.W.2d 281 (1948); State v. Louden, 15 Utah 2d 64, 387 P.2d 240 (1963); State v. Long, 95 Vt. 485, 115 Atl. 734 (1922); Harris v. Commonwealth, 185 Va. 26, 37 S.E.2d 868 (1946).

[11] Drake v. State, 257 Ala. 205, 57 So. 2d 817 (1952).

[12] State v. Hinz, 78 S.D. 422, 103 N.W.2d 656 (1960).

[13] State v. Rollo, 221 Ore. 428, 351 P.2d 422 (1960).

[14] *E.g.*, Hines v. State, 260 Ala. 668, 72 So. 2d 296 (1954); Fields v. State, 235 Ark. 986, 363 S.W.2d 905 (1963); State v. McCarthy, 133 Conn. 171, 49 A.2d 594 (1946); Louette v. State, 152 Fla. 495, 12 So. 2d 168 (1943); State v. Foster, 44 Hawaii 403, 354 P.2d 960 (1960); State v. Aguirre, 167 Kan. 266, 206 P.2d 118 (1949); State v. Bueche, 243 La. 160, 142 So. 2d 381 (1962); State v. Bellew, 282 S.W.2d 536 (Mo. 1955); State v. Guffey, 261 N.C. 322, 134 S.E.2d 619 (1964); Brown v. State, 384 P.2d 54 (Okla. Crim. App. 1963); Turner v. State, 187 Tenn. 309, 213 S.W.2d 281 (1948); State v. Louden, 15 Utah 2d 64, 387 P.2d 240 (1963).

[15] Louette v. State, *supra* note 14.

[16] Ashcraft v. Tennessee, 327 U.S. 274 (1946); Bram v. United States, 168 U.S. 532 (1897).

[17] 346 U.S. 156, 162-63 n.5 (1953).

changed by the Supreme Court's remand of the instant case,[18] which was construed by the Arizona Supreme Court to clearly indicate that admissions against interest in criminal cases are now entitled to the same protection as confessions under command of the Fourteenth Amendment and due process of law.[19]

Prior to the instant case, Arizona courts had consistently treated admissions against interest, exculpatory or otherwise, as excluded from the admissibility rules applying to confessions. They had always held that it was unnecessary to lay a foundation of voluntary origin in order for such statements to be admissible into evidence.[20]

The instant case, therefore, makes a significant change in Arizona criminal procedure. It not only brings admissions against interest, exculpatory or otherwise, within the rules of admissibility that apply to confessions, but it provides a clear statement of the procedure for all three.[21] Now, *when a question is raised*[22] concerning voluntariness, the judge *must* conduct a preliminary hearing *outside the presence of the jury.* He *must* resolve the evidentiary conflicts *himself* and make a *definite* determination of whether the purported admission or confession is voluntary or involuntary. If he finds it involuntary, it cannot be admitted into evidence. If he finds it voluntary, it is admitted and can be heard by the jury. However, the defendant is not deprived thereafter of his right to present evidence contradicting the voluntary nature of the admission or confession, and the jury is privileged to disagree with the judge, find the confession involuntary, and disregard it.[23] By this rule then, the judge may not, under any circumstances,

---

[18] *Supra* note 3.

[19] State v. Owen, 96 Ariz. 274, 276, 394 P.2d 206, 207-08 (1964). The language of the court is:

> However, since the Supreme Court vacated the judgment of this Court we are of the opinion that it was intended that we follow the rule that statements or admissions, which have been induced by a method in violation of a defendant's constitutional rights, are subject to the same exclusionary rule as a confession.

[20] *E.g.*, State v. Romo, 66 Ariz. 174, 185 P.2d 757 (1947).

[21] Prior to the instant case and *Jackson v. Denno, supra* note 4, it was not entirely clear, upon close examination of the holdings in the Arizona confession cases, what was required with reference to the presence or absence of the jury during a preliminary inquiry into voluntariness, and whether the judge must first make a definite determination of the question.

[22] Recent dicta indicate that if counsel does not directly raise the issue of voluntariness, it may also be raised by "suggestions" in the evidence — necessitating commencement of the instant procedure upon the trial judge's own motion. State v. Miranda, 98 Ariz. 18, 401 P.2d 721, 728 (1965) (confession); State v. Simoneau, 98 Ariz. 2, 401 P.2d 404, 407-8 (1965) (confession); State v. Farrell, 1 Ariz. App. 112, 399 P.2d 915, 918-19 (1065) (admission). Also, concerning exculpatory statements, State v. Cobb, 406 P.2d 421 (Ariz. App. 1965) holds that where there is no direct objection, or suggestion in the evidence, of involuntariness, there is no error in failure to invoke the instant procedure though no foundation of voluntariness is laid.

[23] State v. Owen, 96 Ariz. 274, 277, 394 P.2d 206, 208 (1964).

submit the issue of voluntariness to the jury merely upon a finding that there is a conflict in the evidence; he must first definitely resolve the conflict himself.[24]

Independent of the specific procedure to be followed, it is difficult to understand how the premise, "voluntariness of admissions against interest is immaterial," could have survived the "Visceral Test"[25] of constitutionality for so long. Nevertheless, this defect in the law has finally been rectified by order of the Supreme Court of the United States. The concepts embodied in the holding of the instant case are now recognized in Arizona as part of an accused's right to due process of law under the Fourteenth Amendment. In addition to providing the defendant with two opportunities to prove the matter involuntary, the holding in the instant case provides perhaps the ultimate safeguard against placing the jurors in the dubious position of being required to allow a guilty defendant to go free if they find a confession or admission to be involuntary although they believe it to be true and material to a finding of "beyond a reasonable doubt," — a situation that provides potent pressure to find the matter voluntary.[26]

George C. Wallach

CONSTITUTIONAL LAW — RELIGIOUS FREEDOM — RIGHT TO REJECT BLOOD TRANSFUSIONS WHERE NO STATE INTEREST INVOLVED. — *In Re Brooks' Estate* (Ill. 1965).

The appellant, an adult Jehovah's Witness without minor children, had for two years refused blood transfusions on religious grounds, and had released the doctor and the hospital from any liability which might arise from failure to receive these transfusions. Acting on the doctor's testimony that approaching death had so weakened appellant's mental and physical faculties as to render her incompetent, the probate court, without notice to appellant or her husband, entered an order declaring her incompetent, appointed a conservator, and approved authorization of blood transfusions. On appeal, *held*, order reversed. The court's appointment of a conservator and the authorization of blood transfusions without notifying appellant or her husband was an unconstitutional infringement upon their right to the free exercise of religion, since no minor children were involved, the responsible parties were released from

---

[24] For a criticism of the requirement that this procedure be mandatory, see the opinions of the dissenting Justices in *Jackson v. Denno, supra* note 4 at 401-40.

[25] This test, brought to the writer's attention by a member of the Arizona Bar, is best described as: One's sense of natural justice and fair play tells him it is wrong, and it is time to do something about it. This is perhaps not so very different from the motivation that inspired the makers of our Constitution.

[26] For a criticism of this viewpoint, see the opinions of the dissenting Justices in *Jackson v. Denno, supra* note 4 at 401-40.

any possible liability, and in no other way had the state shown that the appellant's action presented a clear and present danger to society. *In Re Brooks' Estate,* 32 Ill. App. 2d 361, 205 N.E.2d 435 (1965).

Originally freedom to exercise religious beliefs, as guaranteed by the First Amendment,[1] merely protected individuals from encroachment by the federal government.[2] However, after the Supreme Court began to give the Fourteenth Amendment's due process clause a substantive effect, it held, in *Cantwell v. Connecticut,*[3] that the First Amendment's guarantee of religious freedom was enforceable against the states through the Fourteenth Amendment.[4] In *Cantwell,* the Court explained that the First Amendment's protection of religious freedom involved two factors: the freedom to believe and the freedom to act, and stated that while the former is absolute and not subject to any state regulation, the latter is relative and subject to regulation under the state police powers when a particular religious practice presents "a clear and present danger to society."[5]

Since *Cantwell,* courts, in applying the clear and present danger test, have found that various individual religious practices do not present sufficient danger to any legitimate interest of society for the state to lawfully proscribe them.[6] Recently, however, courts in three cases

---

[1] U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This note will not concern itself with the Establishment clause, but will limit itself to the protection afforded by the Free Exercise clause.

[2] Permoli v. New Orleans, 44 U.S. (3 How.) 589 (1845).

[3] 310 U.S. 296 (1940) (reversing a conviction for breach of the peace and for violation of a state statute prohibiting the sale of religious literature without a license).

[4] U.S. CONST. amend. XIV: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." See 49 A.B.A.J. 345 (1963), where it is suggested that the recent school prayer controversy may compel the Court to reconsider its decision in *Cantwell,* where it said that First Amendment guarantees also protect individuals, through Fourteenth Amendment due process of law, from action by the several states, and to hold that the First Amendment religious freedom guarantees are not made binding upon the states by the Fourteenth Amendment.

[5] 310 U.S. at 303-04. The clear and present danger test did not appear in an earlier line of decisions which held that polygamous practices were not exempt from being criminally punished by the states even though polygamy was advocated for religious reasons. Reynolds v. United States, 98 U.S. 145 (1878). *Accord,* Davis v. Beason, 133 U.S. 333 (1890). *But cf.* American Communications Asso., C.I.O. v. Douds, 339 U.S. 382 (1950), where the Court split 3-3 on the question of whether the public had an interest in an individual's belief. See Antieau, *Clear and Present Danger — Its Meaning and Significance,* 25 NOTRE DAME LAW. 601 (1950), for a discussion of the evolution of the clear and present danger test.

[6] Sherbert v. Verner, 374 U.S. 398 (1963) (holding unconstitutional a state statute requiring unemployment compensation claimants to be available for Saturday employment as made applicable to a Sabbatarian); Board of Education v. Barnette, 319 U.S. 624 (1943) (striking down as an unconstitutional violation of the Free Exercise clause, statutes which provide for compulsory flag ceremonies in public schools); People v. Woody, 40 Cal. App. 2d 69, 394 P.2d 813 (1964) (holding unconstitutional a statute prohibiting the consumption of peyote and providing for criminal punishment, as applied to various Indians who consume peyote as an act of worship); Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942)

have sustained the appointment of conservators to consent to needed blood transfusions against the religious beliefs of the imperiled persons.[7] Applying the clear and present danger test, the courts reasoned that the blood transfusions did not violate these persons' constitutional rights concerning the free exercise of religion since there was a sufficient danger present to a valid state interest to justify interference with individual religious practices. One of these, an Illinois case, concerned parents' refusal to authorize blood transfusions for their child who was in danger of dying.[8] In a New Jersey case, a pregnant woman who had minor children had refused blood transfusions for herself and for her unborn infant, thereby endangering both of their lives.[9] The most recent of these cases, decided by the Circuit Court of Appeals for the District of Columbia, involved a woman who had minor children, who had not released the responsible parties from any liability, and who had refused blood transfusions while in danger of death.[10]

As these decisions illustrate, the state's police power includes the protection of the safety, health, and welfare of society by compulsory medical treatments, especially where they benefit a minor.[11] An example of the application of the police power in this area is a statute imposing criminal penalties upon parents or guardians of minors who fail to provide medical care. Even religious convictions prohibiting such care do not qualify as a defense to a criminal prosecution under this statute.[12]

As distinguished from the three blood transfusion cases referred to above, the instant case held that no valid state interest would be protected by allowing interference with the appellant's free exercise of religion since no minor children were involved, and since the responsible parties had been released from liability.[13] Despite the absence of minors, the court might well have found that the state has an over-

---

(upholding a statute prohibiting public handling of dangerous snakes as applied to a religious sect); and, Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1949) (the court here followed Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942) in prohibiting public display of poisonous snakes by religious groups).

[7] Application of President & Directors of Georgetown College, 118 App. D.C. 80, 331 F.2d 1000 (D.C. Cir. 1964), *cert. denied* 377 U.S. 978 (1964); People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied* 377 U.S. 985 (1964).

[8] People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952).

[9] Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied* 377 U.S. 985 (1964).

[10] Application of President & Directors of Georgetown College, 118 App. D.C. 80, 331 F.2d 1000 (D.C. Cir. 1964), *cert. denied* 377 U.S. 978 (1964).

[11] See Jacobson v. Mass., 197 U.S. 11 (1905), where the court upheld compulsory smallpox vaccinations administered to a child whose religious beliefs prohibited such treatment as being a valid exercise of state police powers.

[12] People v. Pierson, 176 N.Y. Crim. 201, 68 N.E. 243 (1903). See also Note, 21 MD. L. REV. 262 (1961) for a discussion of parental criminal liability for failure to provide adequate medical aid for their minor children. Annot., 12 A.L.R.2d 1047 (1950).

[13] In Re Brooks' Estate, 32 Ill. App. 2d 361, 205 N.E.2d 435 (1965).

riding interest in protecting the welfare of all of its citizens and not just that of minors. However, the court rejected appellee's contention that such a state interest would justify interference with the free exercise of religion, even though this free exercise placed the participant's life in peril.[14]

Although the result in the instant case can be rationally justified: (1) under the clear and present danger test as followed by the Illinois Supreme Court; or (2) under the balancing approach as applied by recent majority opinions of the Supreme Court;[15] or (3) perhaps even more readily under an absolute freedoms approach urged by Mr. Justice Black, and others, in dissenting opinions;[16] the test adopted would not seem to be the dispositive factor in such a case. The question could be considered to be whether a state is required by the Constitution's protection of religious freedoms to allow one of its citizens to commit murder, or other serious crime, in the name of religion;[17] and if not, whether the state might not also preclude suicide committed in the name of religion. In this light, it would seem that the Illinois court, or any other state court, might constitutionally order blood transfusions on the facts of the instant case.

Robert A. Scheffing

CRIMINAL LAW — HOMICIDE — FELONY MURDER RULE DOES NOT EXTEND TO NON-DANGEROUS FELONIES. — *People v. Phillips* (Cal. 1965).

The defendant, a chiropractor, represented to the mother of an eight year old child that he could cure the child's eye cancer, knowing that he could not do so. Relying on the representation, and foregoing an operation recommended by the University of California at Los Angeles Hospital to save the child's life, the mother submitted her child to the defendant's care, for which she was charged a substantial fee. The child died five months later, as the proximate result of the conduct of the defendant, who was subsequently indicted and tried for murder. At the trial, the jury was instructed, *inter alia*, on the felony murder rule in California, and the defendant was convicted of murder in the second degree. The underlying felony was that of grand theft by false pretenses based on defendant's false representations to obtain

---

[14] In Re Brooks' Estate, 32 Ill. App. 2d 361, 205 N.E.2d 435, 439 (1965).

[15] See Konigsberg v. State Bar of California, 366 U.S. 36 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); and Dennis v. United States, 339 U.S. 162 (1950).

[16] See Konigsberg v. State Bar of California, 366 U.S. 36, 56 (1961) (dissenting opinion); and Barenblatt v. United States, 360 U.S. 109, 134 (1959) (dissenting opinion).

[17] See Reynolds v. United States, 98 U.S. 145, 166 (1878).

his fee.[1] On appeal, *held*, reversed. It was prejudicial error to instruct the jury on the felony murder rule, binding the jury to find the defendant guilt yof second degree murder if it found him guilty of theft by false pretenses, because the rule does not extend to non-dangerous felonies such as grand theft. *People v. Phillips*, 42 Cal. Rptr. 868 (Dist. Ct. App. 1965).

The felony murder rule generally followed in the United States is that a homicide proximately caused by the perpetration of a separate felony is murder.[2] Originally, the American jurisdictions applying the felony murder rule followed the English lead and applied it to homicides committed in the perpetration of *any* felony.[3] Today, the majority of American jurisdictions no longer apply the rule to every felony which results in murder, but have limited its first degree murder application to specific felonies enumerated by statute. A minority of jurisdictions retain a modified version of the original rule,[4] restricting its application, however, to those felonies which are found to be inherently dangerous.[5] In some situations, even courts which have generally followed the majority view have applied the inherent danger rule to convict of second degree murder when a particular homicide resulted from a felony not enumerated in the statute.[6] Under both views, it is essential that the actor be guilty of perpetrating a separate felony which is not part of the homicide itself.[7]

California follows the majority rule, and like most other states, applies the first degree felony murder rule to a homicide resulting from the perpetration of arson, rape, robbery, burglary and mayhem.[8] In addition, California has extended the rule, by case law, to include second degree murder convictions when the homicide has resulted from the

---

[1] CAL. PEN. CODE ANN. § 487, which in substance provides that Grand Theft is the theft of money, labor or property of the value of more than 200 dollars. Arizona has adopted this section of the California Code. See ARIZ. REV. STAT. ANN. § 13-663(A) (1963). ARIZ. REV. STAT. ANN. § 13-103 (1956) provides that a felony in Arizona is a crime punishable by imprisonment in the state prison, or by death. Grand Theft in Arizona is punishable by imprisonment in the state prison, Clark v. State, 23 Ariz. 470, 204 Pac. 1032 (1922). Therefore, the theft alleged in the instant case would also be a felony in Arizona.

[2] PERKINS, CRIMINAL LAW 34 (1957); *But see* Turk v. State, 48 Ohio App. 489, 194 N.E. 425 (1934), in which the Ohio court refused to recognize the felony murder rule in any form.

[3] See MORELAND, CRIMINAL LAW 217 (1952).

[4] *E.g.*, KAN. GEN. STAT. ANN. § 21.401 (1923).

[5] Dabney v. State, 113 Ala. 38, 21 So. 211 (1897); See generally 26 AM. JUR. *Homicide* § 39 (1940).

[6] Thiede v. State, 106 Neb. 48, 182 N.W. 570 (1921); People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924); See generally 26 AM. JUR. *Homicide* § 193 (1940).

[7] See MORELAND, CRIMINAL LAW 42 (1952); State v. Glover, 330 Mo. 709, 50 S.W.2d 1049 (1932).

[8] CAL. PEN. CODE § 189; "All murder . . . which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem . . . is murder in the first degree; and all other kinds of murders are of the second degree."

perpetration of "*a* felony."[9] The California Supreme Court has stated, "Whenever one, in doing an act with the design of committing *a* felony, takes the life of another, even accidently, this is murder."[10] (Emphasis added.) It can be presumed from the language of the court, therefore, that California has not always intended to limit the application of the felony murder rule to felonies which are inherently dangerous.

Arizona also follows the majority rule, and has, by statute, enumerated the same felonies as California as those to which a resulting homicide will be deemed to be murder in the first degree.[11] Arizona cases in which the felony murder rule has been applied have involved only those felonies enumerated in the statute, or non-enumerated felonies which were inherently dangerous.[12] Like California, Arizona has held that the perpetration of certain other felonies not enumerated in the statute, which result in a homicide, may be deemed to be murder in the second degree if the death is proximately caused by the felonious act.[13] The Arizona Supreme Court recently held that although kidnapping is not one of the five crimes within the purview of the felony murder rule, a killing in the perpetration of kidnapping did justify a charge of murder in the second degree.[14] The language used by the Arizona court in a 1937 case involving an abortion was: "A homicide committed in the perpetration of *a* felony which is not one of the class making the homicide murder in the first degree is murder in the second degree."[15] (Emphasis added.) From the language used by the court, i.e. *"a felony,"* not an inherently dangerous felony, it appears that Arizona, like California, has not restricted the application of the rule in second degree murder convictions to those felonies which are inherently dangerous.

In the instant case, the District Court of Appeals, in reversing the second degree murder conviction, reasoned that the court should not apply the felony murder rule to the specific crime involved, but must, instead, look to the particular felony, which was in this case the obtaining of money by false pretenses, to determine whether ". . . the felony is inherently so dangerous to human life that it screams its warning.'[16] To

---

[9] People v. De La Roi, 36 Cal. App. 2d 287, 97 P.2d 836 (1939); People v. Reid, 193 Cal. 491, 225 Pac. 859 (1924).

[10] People v. Doyell, 48 Cal. 85, 94 (1874); *accord,* People v. Hubbard, 64 Cal. App. 27, 220 Pac. 315 (1923).

[11] Arizona adopted CAL. PEN. CODE § 189 in 1901. See ARIZ. REV. STAT. ANN. § 13-452 (1956).

[12] *E.g.,* State v. Hitchcock, 87 Ariz. 277, 350 P.2d 681 (1960) (robbery); State v. Singleton, 66 Ariz. 49, 182 P.2d 920 (1947) (burglary-rape); Kinsey v. State, 49 Ariz. 201, 65 P.2d 1141 (1937) (abortion).

[13] Kinsey v. State, 49 Ariz. 201, 65 P.2d 1141 (1937).

[14] State v. Jones, 95 Ariz. 4, 385 P.2d 1019 (1963).

[15] Kinsey v. State, 49 Ariz. 201, 204, 65 P.2d 1141 (1937).

[16] People v. Phillips, 42 Cal. Rptr. 868, 878 (Dist. Ct. App. 1965).

support its decision not to extend the rule to non-dangerous felonies, the court cited *Perkins* on *Criminal Law*: "Homicide is murder if the death ensues in consequence . . . of some other felony unless such other felony was not dangerous of itself and the method of its perpetration did not appear to involve any appreciable human risk."[17] The court then reasoned that because the crime of obtaining money by false pretenses does not usually involve substantial human risk, nor "scream" of inherent danger, the jury should not have been instructed on the felony murder rule.

By its ruling in the instant case, California has restricted the felony murder rule for second degree murder convictions to inherently dangerous felonies, and has abolished any possibility for a second degree murder conviction when the homicide results from a felony which is not generally considered to be inherently dangerous. By so holding, the court has refused to take the more reasonable position that it is not the name of the crime that makes it dangerous or non-dangerous, but is rather the means of commission of the crime under consideration which determines the degree of danger. This decision also carries the unduly broad inference that if the felony committed is one of those enumerated in the statute the rule applies *ipso facto*. It seems that the better rule would be to examine each felonious act to ascertain the danger involved to human life, for it is very possible, as exemplified by the instant case, that the commission of a crime normally non-dangerous can be as inherently dangerous as any of the felonies enumerated in the statute to which the felony murder rule *ipso factor* applies, or to those normally classified as inherently dangerous.

If the legislators feel that the statutory felony murder rule is a necessity for deterrence of felonies, they should re-examine their statutes with the view of broadening them to include all those felonious acts which, when committed, are in fact dangerous to human life, regardless of whether the felony involved is normally considered to be of the inherently dangerous variety. And alternatively, the legislatures could eliminate the felony murder statutes completely and adhere strictly to the general requisites for the various degrees of homicide. Either alternative would clearly eliminate the technical reversal which prevented the court in the instant case from punishing a dangerous criminal.

Robert D. Andrews

---

[17] PERKINS, CRIMINAL LAW 34 (1957).

CRIMINAL LAW—SENTENCING—STATUTE PROHIBITING DIFFERENT PUNISHMENTS FOR THE SAME OFFENSE APPLIES ONLY WHEN THE ELEMENTS OF TWO CRIMES ARE IDENTICAL.—*State v. Green* (Ariz. 1965).

The defendant entered the bedroom of a woman and forcibly raped her. He was convicted of both burglary and rape and sentenced to consecutive prison terms. On appeal he contended that punishment for two crimes is improper when they both arise out of the same criminal transaction, basing this contention on a state statute which provides:

> An act or omission which is made punishable in different ways by different sections of the laws may be punished under either, but in no event under more than one . . . .[1]

On appeal, *held,* affirmed. The statute prohibiting different punishments for the same act or omission is not violated when a defendant is given individual sentences for two or more crimes even though both were committed as part of the defendant's plan to rape his victim. *State v. Green,* 98 Ariz. 254, 403 P.2d 809 (1965).

In determining whether two crimes committed during the same criminal transaction may both be punished despite statutory prohibitions against double punishment,[2] a minority of states follow what may be termed the intent and objective test. Under this test, if two or more crimes are committed as a part of the same criminal intent and objective, the defendant may be sentenced for either of the crimes but not for more than one.[3]

Recently, the Supreme Court of California applied the intent and objective test to a case involving grand theft and burglary, holding that since the crimes arose out of the same criminal transaction, sentencing for both was improper.[4] The court said that the act of burglary was only incidental to the main objective of grand theft so that in reality there was but one criminal act although two statutes were violated.[5] The intent and objective test is now followed in California with separate sentences being reversed for burglary and assault with a deadly weapon,[6]

---

[1] ARIZ. REV. STAT. ANN. § 13-1641 (1956).

[2] States with statutory prohibitions against double punishment include the following: California, CAL. PEN. CODE § 654:

> An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other . . . .

Alabama, CODE OF ALA. Title 15 § 287 (1958); New York, N. Y. PENAL CODE § 1938; Utah, UTAH CODE ANN. § 76-1-23 (1953).

[3] This rule is adhered to in Alabama and California. See Wildman v. State, 165 So. 2d 396 (1963); People v. Quinn, 61 Cal. 2d 551, 393 P.2d 705 (1964).

[4] People v. McFarland, 58 Cal. 2d 748, 376 P.2d 449 (1962). Justice Schauer in dissent accused the majority of setting aside long and settled doctrines and of failing to consider decisions from other jurisdictions.

[5] 376 P.2d at 457.

[6] People v. Frye, 218 Cal. App. 2d 799, 32 Cal. Rptr. 699 (1963).

burglary and robbery,[7] conspiracy to commit burglary and attempted burglary,[8] and for robbery and possession of narcotics.[9] In each of these cases, the court felt that the actor had but one criminal objective despite the fact that he violated two criminal statutes. Clearly, if the intent and objective test had been followed in the instant case, it would not have been proper to sentence the defendant for both burglary and rape, since the burglary was a part of the criminal objective of rape.

A majority of states having statutory prohibitions against double punishment for the same act or omission do not apply the intent and objective test.[10] Courts in these states hold that the statute is violated only when a defendant is convicted and sentenced for two crimes resulting from a single act.[11] If the elements of two crimes are not identical,[12] or if each offense requires proof of different physical actions,[13] or if different evidence is required for conviction of the separate offenses,[14] punishment for both crimes is not a violation of the statute.[15]

In a recent case,[16] the Supreme Court of Arizona relied on California cases decided before the intent and objective test was announced in holding that burglary and grand theft arising out of the same criminal transaction were separate and distinct crimes and therefore the imposition of consecutive sentences was proper. These earlier California cases have followed the majority view with separate sentences being sustained for both soliciting and receiving a bribe,[17] both burglary and grand theft,[18] and for both grand theft and murder.[19]

---

[7] People v. Jones, 211 Cal. App. 2d 63, 27 Cal. Rptr. 429 (1962).
[8] People v. Keller, 212 Cal. App. 2d 210, 27 Cal. Rptr. 805 (1963).
[9] People v. Quinn, 61 Cal. 2d 551, 393 P.2d 705 (1964).
[10] Most states do not have specific statutory prohibitions against double punishment. Courts in these jurisdictions have, however, had occasion to determine whether a course of conduct violates more than one statute based on facts similar to the instant case. *E.g.*, New Jersey and Pennsylvania have held that a burglary immediately followed by a felony committed within the building constitutes two separate crimes since the subsequent felony is separate and distinct from the offense of breaking and entering. State v. Quatro, 44 N.J. Super. 120, 129 A.2d 741 (1957); Commonwealth v. Ashe, 343 Pa. 102, 21 A.2d 920 (1941).
[11] *E.g.*, State v. Boodry, 96 Ariz. 259, 394 P.2d 196 (1964) (improper to sentence defendant for both rape and incest arising out of a single act of sexual intercourse); People v. Repola, 305 N.Y. 740, 113 N.E.2d 42 (1953) (sentence for both possession and sale of drugs was improper when there was a single sale); State v. Huntsman, 115 Utah 283, 204 P.2d 448 (1949) (defendant who committed a single act of sexual intercourse could not be sentenced for adultery, incest, fornication, rape, and carnal knowledge, but only for the most serious of these violations).
[12] People v. Jackson, 2 N.Y.2d 259, 140 N.E.2d 282 (1957).
[13] State v. Jones, 13 Utah 2d 35, 368 P.2d 262 (1962).
[14] Rogerson v. Harris, 111 Utah 330, 178 P.2d 397 (1947).
[15] See statutes cited note 2 *supra*.
[16] State v. Hutton, 87 Ariz. 176, 349 P.2d 187 (1960). See also State v. Vallejos, 89 Ariz. 76, 358 P.2d 178 (1960).
[17] People v. Megladdery, 40 Cal. App. 2d 748, 106 P.2d 84 (1940).
[18] People v. Guarino, 132 Cal. App. 2d 554, 282 P.2d 538 (1955).
[19] People v. Stoltz, 196 Cal. App. 2d 258, 16 Cal. Rptr. 285 (1961).

In a more recent case,[20] the Supreme Court of Arizona sustained consecutive sentences for the crimes of kidnapping with intent to commit rape and rape, justifying the result by reasoning that a defendant who kidnaps with intent to rape and then rapes his victim should be punished more severely than one who kidnaps and then decides not to rape.[21]

In the instant case, the defendant who committed burglary and then raped his victim was subjected to greater punishment than a defendant who violated only one statute in his criminal activity. The court stated that there was not a single act punished twice in violation of the statute but instead two acts, completely separable, pointing out that the elements of rape and burglary are entirely different.

Unfortunately, courts in neighboring states with identical statutes have reached opposite results when faced with the double punishment problem. The rule of the majority of jurisdictions, followed in the instant case, would seem to be the more reasonable of the two positions. Under the California intent and objective test, a defendant who plans to rape a woman or commit any serious crime may commit burglary and several other crimes knowing that he can only be punished for the most serious offense committed during the criminal transaction. Under the rule of the instant case, each criminal act subjects the defendant to separate punishment. This approach insures punishment commensurate with the criminal conduct. The defendant is protected in Arizona against unreasonably severe sentences by the statutory provision[22] that appellate courts may review and modify any sentences thought to be excessive.

Peter G. Dunn

CRIMINAL LAW — STATUTORY RAPE — REASONABLE MISTAKE OF AGE ESTABLISHES LACK OF MENS REA AS A DEFENSE.—*People v. Hernandez* (Cal. 1964).

The prosecutrix, age seventeen years and nine months, voluntarily had sexual intercourse with the defendant, who was then charged with statutory rape under the California Penal Code.[1] The defendant pleaded

---

[20] State v. Jacobs, 93 Ariz. 336, 380 P.2d 998 (1963).

[21] This reasoning is found in the opinion by Mr. Justice Udall in the instant case, 403 P.2d 809, 811.

[22] ARIZ. REV. STAT. ANN. § 13-1713 (1956). An appeal may be taken by the defendant only from:

3. A sentence on the grounds that it is illegal or excessive.

---

[1] CAL. PENAL CODE § 261 (1956). "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: (1) Where the female is under the age of 18 years . . . ."

not guilty, offering to prove that he had a reasonable belief that the prosecutrix was over eighteen. At the trial this evidence was excluded; the defendant was then convicted, fined one hundred fifty dollars, and sentenced to two years probation. On intermediate appeal, the District Court of Appeal affirmed.[2] On appeal, the Supreme Court of California *held*, reversed. The defendant's reasonable belief that the prosecutrix had reached the age of consent was a valid defense to the charge of statutory rape. *People v. Hernandez*, 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

California, along with other jurisdictions, has combined the early English statute prohibiting "carnal knowledge and abuse" of a girl under ten,[3] with the common-law crime of forcible rape[4] to form a single offense denominated rape.[5] Illicit sexual intercourse with a female under the age of consent is commonly known as "statutory rape."[6]

The purpose of statutory rape laws is to prevent the victimization of immature girls. That purpose is implemented by excluding the defense of mistake of fact,[7] normally an available defense in criminal prosecutions.[8] A California court supplied an example of such an exclusion in the leading case of *People v. Ratz*.[9] There, in deciding that the

---

[2] People v. Hernandez, 29 Cal. Rptr. 253 (2d Dist. 1963), *vacated* in 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

[3] PERKINS, CRIMINAL LAW 111 (1957); see Statute of Westminster I, 1275, 3 Edw. 1, c. 13.

[4] See generally 4 BLACKSTONE, COMMENTARIES 210 (16th ed. 1825).

[5] See note 1, *supra*. See also ARIZ. REV. STAT. ANN. § 13-611 (Supp. 1964).

[6] See BLACK, LAW DICTIONARY 1427 (4th ed. 1951). Since neither force nor lack of consent was an element of carnal knowledge and abuse of a child (4 BLACKSTONE, *op. cit. supra* note 4, at 212) the courts developed a conclusive presumption of incapacity to consent in the crime denominated rape. See, *e.g.*, People v. Gordon, 70 Cal. 467, 11 Pac. 762 (1886); Stephen v. State, 11 Ga. 225 (1852); Golden v. Commonwealth, 289 Ky. 365, 158 S.W.2d 967 (1942).

[7] See State v. Newton, 44 Iowa 45 (1876); Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1895); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892); Zent v. State, 3 Ohio App. 473 (1914); Edens v. State, 43 S.W. 89 (Tex. Crim. 1897); Lawrence v. Commonwealth, 71 Va. (30 Gratt.) 845 (1878).

[8] MODEL PENAL CODE § 2.04, comment at 135-38 (Ten. Draft No. 4, 1955); 1 BISHOP, CRIMINAL LAW § 303, at 205 (9th ed. 1923); 1 WHARTON, CRIMINAL LAW § 399, at 572 (12th ed. 1932). See CAL. PENAL CODE § 26 (1956), providing:

> All persons are capable of committing crimes except those belonging to the following classes; . . . , Four. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.

[9] 115 Cal. 132, 46 Pac. 915 (1896). This case declares that the purpose of statutory rape laws is to protect society, the family and the infant. But since fornication is not a crime in California (*In re* Lane, 58 Cal. 2d 99, 22 Cal. Rptr. 857, 372 P.2d 897 (1962)) protection of society and the family must be much less important than protecting the infant because the threats to society and the family and the problems of illegitimacy, unwed mothers, and venereal disease are still present when the girl is past the age of consent.

offender is presumed to have a reckless criminal intent and must assume the risk of the girl being under the age of consent,[10] the court relied upon the rule stated in abduction cases and numerous dicta indicating that an intent to do an immoral but legal act[11] supplies the necessary mens rea when an unintended criminal act results.[12]

The instant case is the first in any jurisdiction to allow the defense of mistake of age.[13] In establishing the defense and overruling *Ratz*, the court reasoned that the *Ratz* rule conflicted with the California Penal Code Section 20,[14] which requires a unity of act and intent, and also with Section 26,[15] which allows intent to be negated by mistake of fact. Construing Sections 20 and 26 as applying to all crimes unless excluded by necessary implication, the court held that intent to exclude mens rea as a necessary element of the crime is not implied by the rape statute.[16]

In *Hernandez* the court also emphasized the legal and sociological consequences which resulted from raising the age of consent of the female victim from fourteen to eighteen. It felt that the intent of the California Legislature in drafting the rape statute in effect at the time of the *Ratz* decision[17] was to protect "infants" and other females under fourteen,[18] but that some girls who were approaching the age of eighteen could no longer be classified in that category.[19] It reasoned that intercourse with girls who are approaching eighteen lacks the qualities of abnormality and physical danger present when they are

---

[10] People v. Ratz, 115 Cal. 132, 133, 46 Pac. 915, 916 (1896).

[11] The immoral but legal act performed in *Ratz* was fornication.

[12] This rule is first stated in 1 BISHOP, CRIMINAL LAW § 247 (1st ed. 1856). Expansion of the rule can also be noticed in: State v. Ruhl, 8 Iowa 447 (1859) (abduction of girl under 15), which also relied on State v. Newton, 44 Iowa 45 (1876) (attempted intercourse with girl under ten). See also Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875) (abduction of girl under 16). In each of these cases the defendant actually intended to commit a crime, so that criminal liability could have been based on the unlawful act doctrine, somewhat analogous to the misdemeanor-manslaughter or felony-murder rules.

[13] However, two states have adopted statutes permitting the defense. Illinois provides that sexual intercourse with a person under sixteen is a felony, but that a reasonable belief that the person was above the statutory age is an affirmative defense. ILL. ANN. STAT. ch. 38, § 11-4 (Smith-Hurd 1964). Mistake of fact is not a defense, however, to a prosecution for the misdemeanor of sexual intercourse with a person under eighteen. ILL. ANN. STAT. ch. 38, § 11-5 (b) (Smith-Hurd 1964). New Mexico also sets the statutory age at sixteen and allows mistake of fact as a defense, unless the female is under the age of thirteen. N. M. STAT. ANN. § 40A-9-3, 4 (1964). See also MODEL PENAL CODE § 213.6 (Proposed Official Draft, 1962).

[14] CAL. PENAL CODE § 20 (1956). "To constitute a crime there must be a unity of act and intent. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

[15] CAL. PENAL CODE § 26 note 8, *supra*.

[16] People v. Hernandez, 39 Cal. Rptr. 361, 364, 393 P.2d 673, 676 (1964).

[17] Cal. Stat. 1889, ch. 191, § 1, at 223.

[18] See People v. Hernandez, 39 Cal. Rptr. 361, 364, 393 P.2d 673, 676 (1964).

[19] *Ibid.*

younger,[20] and also that the element of victimization decreases as girls become older and more sophisticated, and consequently, the need for protection is less compelling.[21]

Even though the instant case can only persuade, and not bind the Arizona courts, its impact should be considerable because: (1) Arizona has adopted verbatim the California statutes defining rape,[22] criminal responsibility,[23] and reasonable mistake of fact,[24] construed by the court in *Hernandez*; and (2) there are no controlling judicial interpretations which would prevent Arizona from following the *Ratz* decision.

Whereas the California court in deciding the instant case was compelled to overrule contrary precedent which had been established in *Ratz* and followed in a subsequent decision,[25] the Arizona courts have no such contrary authority which binds them. There is dictum which could be interpreted as meaning that the perpetrator acts at his own peril when he has sexual intercourse with a female not his wife;[26] nevertheless, another statement in the same case modifies this interpretation by clearly indicating that the court was not concerned with a girl approaching eighteen, but with one considerably younger.[27] The Arizona courts could use the latter statement to support a position following the instant case, reasoning that the intent of the legislature was to protect only the young and innocent and not those girls old enough to be mistaken for eighteen.

If Arizona decides to follow *Hernandez*, the courts will encounter a statement in *Troutner v. State*[28] interpreting Section 13-134 of the Arizona Revised Statutes (providing that among the group of persons

---

[20] *Ibid.* The court relied on PLASCOWE, SEX AND THE LAW 184-85 (1st ed. 1951). See MODEL PENAL CODE § 207.4, comment at 252 (Tent. Draft No. 4, 1955).

[21] People v. Hernandez, 39 Cal. Rptr. 361, 364, 393 P.2d 673, 676 (1964).

[22] Section 13-611 of the ARIZ. REV. STAT. ANN. (1956) was revised in 1962, and "statutory rape" was defined by a separate subsection as rape in the second degree. At the same time Section 13-614 of the ARIZ. REV. STAT. ANN. (1956) was amended in part by adding subsection (B) in which the legislature allowed a punishment of less than a year to be imposed for a conviction of rape in the second degree. According to William S. Barnes, member of the committee which recommended the change, in an interview in Tucson, Arizona, May 28, 1965, the purpose of the revisions was to lessen the punishment demanded and thereby make it easier to convince jurors they should convict.

[23] ARIZ. REV. STAT. ANN. § 13-135 (1956).

[24] ARIZ. REV. STAT. ANN. § 13-134 (1956).

[25] People v. Griffin, 117 Cal. 583, 49 Pac. 711 (1897).

[26] Callaghan v. State, 17 Ariz. 529, 532, 155 Pac. 308, 310 (1916). "If sexual intercourse is attempted with a female under 18 years of age, no matter whether it be with her consent or not, the felonious intent is present on the part of the male." A close analysis of this dictim, however, shows that such statements have not been made upon a consideration of the issue of a reasonable mistake of fact as a defense. In the quotation above, it is clear that the actor was presumed to have known the age of the female.

[27] Callaghan v. State, 17 Ariz. 529, 532, 155 Pac. 308, 310 (1916). See also Taylor v. State, 55 Ariz. 29, 97 P.2d 297 (1940).

[28] 17 Ariz. 506, 154 Pac. 1048 (1916).

not to be punished for acts or omissions are those who performed the act or made the omission under an ignorance or mistake of fact which thereby disproves any criminal intent) to refer only to crimes "in which 'criminal intent' or guilty knowledge is an essential ingredient."[29] However, this statement in *Troutner* was based upon an interpretation of the statute as it existed in 1916,[30] and because the statute has since been materially revised, the reasoning of the court in *Troutner* may no longer be applicable.

The defense of mistake to a charge of statutory rape has never been considered at the appellate level in Arizona,[31] and because of a lack of contrary binding authority, the courts are free to follow the *Hernandez* decision if the question arises. There are several reasons why the defense should be established. First, following such a course would accomplish legal consistency by permitting a defense available to most other criminal charges.[32] Second, it would achieve one of the purposes for revising Arizona's rape statute by eliminating the juror's duty to convict in a situation where criminal punishment seems unjust.[33] Finally, by accepting current standards of sexual morality, it would eliminate the possibility of enforcing strict liability for a criminal offense when social policy does not warrant such strictness.[34] *Hernandez* provides the reasoning and authority for an improvement which Arizona should accept either by legislative action[35] or judicial decision.

Brian Edward Smith

---

[29] *Id.*, at 511, 154 Pac., at 1050.

[30] REV. STAT. OF ARIZ., PENAL CODE § 24 (1913). The statute made no effort to distinguish between children under fourteen years of age, lunatics, and persons of insane character, from others who might plead a mistake of fact as a defense. However, the statute has been revised and children under 14 years of age, lunatics and persons of insane character are now dealt with in the ARIZ. REV. STAT. ANN. § 13-135 (1956). Section 13-134 of the ARIZ. REV. STAT. ANN. (1956) now classifies persons who act under a reasonable mistake of fact with persons who act while unconscious or by misfortune or accident. Also included in this subsection are married women acting under threats of their husbands, and others who act under threats to their lives. This revision in the statute clearly indicates that the legislative intent was not to classify a mistake of fact as a mistake made by an insane person, as the *Troutner* decision has done.

[31] *But see* Lenord v. State, 15 Ariz. 137, 143, 137 Pac. 412 (1913). In this case the trial court instructed that in order to be convicted of any criminal offense there must exist a union or joint operation of act and intent. This instruction to which the Supreme Court of Arizona alluded was not quoted by the court.

[32] Historically, mens rea has been an essential element for the commission of crimes. 4 BLACKSTONE, *supra* note 4, at 21; Levitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117 (1922). The only three exceptions which have arisen are: (1) the public welfare offenses (Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55 (1933); (2) the crime of bigamy (Commonwealth v. Mash, 7 Met. 472 (1844); and (3) statutory rape (Smith v. State, 34 Ala. App. 45, 38 So. 2d 341 (1948), *cert. denied*, 251 Ala. 559, 38 So. 2d 347 (1948)).

[33] See note 22, *supra*. Also of significance is the fact that by adopting the defense the courts would help in eliminating the situation which forces many county attorneys to promulgate ad hoc justice by selecting only the most flagrant statutory rape cases to be prosecuted.

[34] See note 32, *supra*.

[35] See note 13, *supra*.

PROPERTY — ADVERSE POSSESSION — MISTAKEN BOUNDARY DISPUTES. *Rorebeck v. Criste* (Ariz. Ct. App. 1965).

The adjoining properties of plaintiff and defendant were separated by a fence located 23 feet onto the defendant's land. For a portion of the 14 year period of occupation, plaintiff and her predecessor in title mistakenly believed that the fence marked the true boundary line. In a quiet title suit, the Superior Court (sitting without a jury) upheld the plaintiff's claim of title by adverse possession.[1] On appeal, *held*, affirmed. Where one by mistake occupies and claims property as his own with no knowledge that he is encroaching on the property of another, he may acquire title by adverse possession. *Rorebeck v. Criste*, 1 Ariz. App. 1, 398 P.2d 678 (1965).

Adverse possession[2] must be actual, open and notorious, exclusive, continuous (for the statutory period), hostile and under a claim of right.[3] Hostile, as applied to an occupant holding adversely, does not import actual enmity or ill will but only means that the occupant claims possession as owner, denying validity to claims set up by other persons.[4] Claim of right means that the entry of the adverse claimant must be with an intent to claim the land as his own and to hold it for himself.[5] Thus, claim of right means no more than hostile; and if the possession is hostile, it is under a claim of right.[6]

Where there is a mistake in the true boundary line, the courts have been in disagreement on the hostility required for adverse possession. One line of authority holds that hostility is determined by

---

[1] It appears that there was a partial misapplication of the adverse possession rules concerning mistaken boundaries. In order for possession by mistake to ripen into title, the mistake must exist throughout the statutory period (10 years in Arizona). If the mistake exists for only a portion of the statutory period, the mistaken boundary rules apply only to that period. Once the mistake is discovered, the regular adverse possession rules apply. In 1945, plaintiff's predecessor (her husband) purchased the property mistakenly believing the fence correctly located the boundary. In 1948, a survey disclosed to plaintiff and her predecessor that the fence was on defendant's land. The rules for mistaken boundary should have been applied only for the three year period (1945-1948), not for the full statutory period.

[2] ARIZ. REV. STAT. ANN. § 12-521(A)(1) (1956):

> "Adverse possession" means an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

ARIZ. REV. STAT. ANN. § 12-526(A) (1956):

> A person who has a cause of action for recovery of any lands, tenements, or hereditaments from a person having peaceable and adverse possession thereof, cultivating, using and enjoying such property, shall commence an action therefore within ten years after the cause of action accrues, and not afterward.

[3] See generally 2 C.J.S. *Adverse Possession* § 8 (1936); SMITH, REAL PROPERTY SURVEY 29 (1956).

[4] Gusheroski v. Lewis, 64 Ariz. 192, 167 P.2d 390 (1946).

[5] Peters v. Gillund, 186 S.W.2d 1019 (Tex. Civ. App. 1945). See also 2A WORDS AND PHRASES 223 (1955).

[6] Kimball v. Anderson, 125 Ohio St. 241, 181 N.E. 17 (1932).

the objective manifestation of possession,[7] the other, that hostility is controlled by the subjective intent of the possessor.[8]

Courts following the objective manifestation theory hold that possession is the most important element in the acquisition of title, and that such possession is no less adverse because of a mistake in boundary.[9] The visible and exclusive possession with the intent to possess constitutes hostile character, not the remote belief of the possessor.[10] Under this theory, the court need not probe the mind of the possessor in order to establish hostile intent. The objective intent manifested by continued possession for the statutory period is sufficient proof of the necessary hostility.[11] In the leading case of *French v. Pearce*,[12] the court stated, "[T]he possession alone and the qualities immediately attached to it are regarded. No intimation is there as to the motive of the possessor." It is only necessary for a person to take possession of the property as his own, managing it and taking the rents and profits in order for the possession to be adverse.[13]

Courts adhering to the subjective hostile intent theory require that there be a subjective hostile intent in order for possession to be adverse.[14] However, there has been much disagreement over the nature of the required hostility. Some jurisdictions require that the possessor actually have an intent to dispossess the true owner.[15] Others hold that if the possessor has an intent, even though under mistake, to claim title to the land, his intent is hostile.[16]

The view that there must be an intent to dispossess the true owner[17] is carried over from the feudal concept of disseisin where an intent to disseise was necessary.[18] Disseisin could not be committed by mistake alone because the intention of the possessor to claim another's land

---

[7] *E.g.*, French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680 (1831) (leading case); De Rosa v. Spaziani, 142 N.Y.S.2d 839 (1955); Norgard v. Busher, 220 Ore. 297, 349 P.2d 490. See annot., 80 A.L.R.2d 1161 (1960).

[8] *E.g.*, Wilson v. Pum Ze, 167 Kan. 31, 204 P.2d 723 (1949); Preble v. Main Cent. R.R., 85 Me. 260, 27 Atl. 149 (1893) (leading case); Faubion v. Elder, 49 Wash. 2d 300, 301 P.2d 153 (1956).

[9] See note 7 *supra*.

[10] Hallowell v. Borchers, 150 Neb. 322, 34 N.W.2d 404 (1948).

[11] *Id.* at 411. The court quoted from 1 R.C.L. 733, "the mere fact of possession is allowed to override the intention; and it is held that a possession beyond the true boundary lines, irrespective of the intention with which it was taken, becomes adverse."

[12] 8 Conn. 439, 21 Am. Dec. 680, 682 (1831).

[13] *Ibid.*

[14] See note 8 *supra*.

[15] *E.g.*, Webb v. Curtis, 235 Ark. 599, 361 S.W.2d 87 (1962); Preble v. Main Cent. R.R., 85 Me. 260, 27 Atl. 149 (1893); Rullis v. Jacobi, 79 N.J. Super. 525, 192 A.2d 186 (1963).

[16] *E.g.*, Rorebeck v. Criste, 1 Ariz. App. 1, 398 P.2d 678 (1965); Goodno v. South Florida Farms Co., 95 Fla. 90, 116 So. 23 (1928); Mooney v. Canter, 311 S.W.2d 1 (Mo. 1958).

[17] See note 15 *supra*.

[18] Comment, 19 ORE. L. REV. 117, 136 (1940).

was an essential ingredient.[19] The mistake is therefore a material consideration, and one of the following two hypothetical intentions must be determined.[20] If the possessor's intent is to claim only to the true boundary line, his intent is said to be conditional and therefore not hostile; if his intent is to claim to the occupied line even though it is not the true line, his intent is absolute and hostile.[21] To distinguish between conditional and absolute intents is unrealistic and unworkable because, if the possessor has been occupying by mistake, he has not considered the possibility that the land may not be his. The thought has not entered his mind as to whether he claims only the land to the true boundary. Therefore, nothing is accomplished by speculating what would have been his intent had he known all the facts, when obviously his real intent is to claim title to the land because he thinks it is included in his deed.[22]

Some courts applying the subjective intent theory take a more liberal view that the intention is important rather than the mistake,[23] thus holding that the intent is hostile if the possessor claims title to the land, even though under the mistaken belief that it is his.[24] These courts are not concerned with what might have been his intention if he had known that the land was not his. Nor is the operation of the rule affected by the fact that the possessor had no intention to claim beyond the true boundary line or to take property belonging to another.[25] This view, which does not differ materially from the objective theory, is followed by Arizona.[26]

The two Arizona cases in point[27] quote from Corpus Juris the liberal subjective rule that possession with intent to claim title is adverse.[28] However, in applying this rule, the Arizona courts have put very little emphasis on true subjective intent. Possession has been treated as the most important element of hostility. In the *Rorebeck* case, the court stated:

---

[19] Comment, 17 MD. L. REV. 61, 64 (1957), citing Davis v. Furlow, 27 Md. 536 (1867).

[20] See 4 TIFFANY, REAL PROPERTY § 1159, at 473 (3d ed. 1939).

[21] Wilson v. Pum Ze, 167 Kan. 31, 204 P.2d 723 (1949).

[22] See 97 A.L.R. 14, 20 (1939).

[23] See note 16 *supra.*

[24] Alabama, Colorado, Michigan, Missouri, and Wyoming hold that in absence of positive proof or unambiguous circumstances to the contrary, exclusive possession is presumed to be hostile. See 80 A.L.R.2d 1161, 1181 (1960); 97 A.L.R. 1 (1929).

[25] 3 AM. JUR. 2d *Adverse Possession* § 40, at 127 (1962).

[26] Rorebeck v. Criste, 1 Ariz. App. 1, 398 P.2d 678 (1965); Trevillian v. Rais, 40 Ariz. 42, 9 P.2d 402 (1932). Compare Cook v. Stevens, 51 Ariz. 467, 77 P.2d 1100 (1938); Gunther & Shirley Co. v. Presbytery of Los Angeles, 85 Ariz. 56, 331 P.2d 257 (1958).

[27] Rorebeck v. Criste, 1 Ariz. App. 1, 398 P.2d 678 (1965); Trevillian v. Rais, 40 Ariz. 42, 9 P.2d 402 (1932).

[28] 2 C.J. *Adverse Possession* § 245, at 141 (1915).

> [T]here need be merely a showing that one in possession of the land claims the exclusive right thereto and denies (by word or act) the owner's title : . . . In our opinion, the existence of the fence and its repair by the parties is one visible indication of a possession hostile to defendants and to the world.[29]

While the Arizona courts have cited a liberal subjective intent rule as controlling in mistaken boundary situations, it appears that the objective theory has in fact been applied.[30]

In recent years, there has been a definite trend to the objective manifestation theory.[31] It is not clouded or confused by a subjective test which in effect requires a dishonest intent to take another's property, nor is it subject to distortion by coaching or by fabricated testimony.[32] It affords protection to the man who needs and deserves the protection of the statute the most, i.e., one who, for a long period of time, occupies and improves land beyond his boundary innocently and inadvertently. *Rorebeck* has in effect confirmed this standard for Arizona.

Hamilton E. McRae III

REAL PROPERTY — RESTRICTIVE COVENANTS — DEFENSE OF CHANGING NEIGHBORHOOD CONDITIONS. — *Decker v. Hendricks* (Ariz. 1964).

Plaintiff property owners in a subdivision restricted to residential use sought a mandatory injunction against defendant, who had constructed a warehouse on his lot within the subdivision. This lot was contiguous to an unrestricted business area. The trial court granted relief, ordering removal or modification of the structure within six months and permanently enjoining any violative use. On appeal, *held*, affirmed. The trial court's exclusion of evidence which would have shown the existence of several businesses in the area immediately outside the subdivision was not reversible error primarily because such evidence would have revealed no neighborhood changes so radical or fundamental as to defeat the original purposes of the restriction. *Decker v. Hendricks*, 97 Ariz. 36, 296 P.2d 609 (1964).

---

[29] 1 Ariz. App. 1, 398 P.2d 678, 681 (1965).

[30] It is interesting to note that in 4 TIFFANY, REAL PROPERTY § 1159, at 471 (3rd ed. 1939), the case of Trevillian v. Rais, 40 Ariz. 42, 9 P.2d 402 (1932), is grouped with cases following the objective manifestation doctrine of French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680 (1831).

[31] See 80 A.L.R.2d 1161, 1183 (1960).

[32] In Hallowell v. Borchers 150 Neb. 322, 333, 34 N.W.2d 404, 410 (1948), the court stated " . . . it is clear that not too much importance should be attached to what an occupant may claim on the witness stand. . . . Any honest witness, unless coached by counsel, would be likely to answer a question as to whether he claimed more than to the true boundary in the negative. . . ."

Covenants restricting the use of land have been enforced by the courts since the leading English case of *Tulk v. Moxhay*.[1] Historically, some courts have regarded restrictive covenants as mere contract rights on the basis of the *Tulk* case,[2] while federal courts[3] and others have regarded them as creating property interests.[4] Under either theory, restrictive covenants will be enforced unless a successful defense lies. In early English law the only defense to granting injunctive relief was that the complainant had caused or had allowed changes which would make enforcement of restrictions inequitable.[5] In the United States the defense has been broadened so that, if changes occur in the neighborhood which are so substantial[6] as to defeat the purpose of the restriction, the courts hold the restrictions unenforceable.[7] However, courts differ about whether to consider *only* those changes occurring *inside* or to consider also changes occurring *outside* the restricted area.[8]

Restrictive covenants have been enforced by the Arizona courts since the leading case of *Continental Oil Co. v. Fennemore*.[9] In that case, the primary defense against enforcement was the change of neighborhood conditions,[10] but the court considered only the changes *inside* the restricted area.[11] Most of the authorities cited by the Arizona court, however, dealt with changes *outside* as well as those *inside* the areas.[12]

---

[1] 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

[2] BURBY, LAW OF REAL PROPERTY § 96, at 142 (2d ed. 1943).

[3] Adaman Mutual Water Co. v. United States, 278 F.2d 842, 849 (9th Cir. 1960). For discussion of whether a restrictive covenant is a compensable property right in eminent domain proceedings in Arizona and elsewhere see Adaman Mutual Water Co. v. United States, *supra*, at 847.

[4] See Pound, *Equity — Equitable Servitudes, The Progress of the Law, 1918-1919*, 33 HARV. L. REV. 813 (1919). See also 53 MICH. L. REV. 634 (1955).

[5] Duke of Bedford v. Trustees of British Museum, 2 My. & K. 552, 571, 39 Eng. Rep. 1055, 1062 (Ch. 1822); Sayers v. Collyer, [1882] 28 Ch. D. 103.

[6] This requirement is frequently referred to as "the need for radical changes." See cases cited note 8, *infra*. See generally 14 CAL. JUR. 2d §§ 113-19, at 131-38 (1954).

[7] *E.g.*, Hurd v. Albert, 214 Cal. App. 15, 3 P.2d 545 (1931); Piper v. Reder, 44 Ill. App. 2d 431, 195 N.E.2d 224 (1963), *rehearing denied* (1964); Trustees of Columbia College v. Thacher, 87 N.Y. Civ. Proc. 311, 41 Am. Rep. 365 (1883). See 5 RESTATEMENT, PROPERTY § 564 (1944); Annot., 4 A.L.R.2d 1111 (1949).

[8] *E.g.*, Monroe v. Menke, 314 Mich. 268, 22 N.W.2d 369 (1946) (outside changes considered); Tull v. Doctors Building, 255 N.C. 23, 120 S.E.2d 817 (1961) (inside changes considered); Adams v. Masters, 333 S.W.2d 629 (Tex. Civ. App. 1960) (inside and outside changes considered).

[9] 38 Ariz. 277, 299 Pac. 132 (1931).

[10] *Id.* at 281, 299 Pac. at 133-34.

[11] *Id.* at 284-88, 299 Pac. at 134-36 (dictum).

[12] See Trustees of Columbia College v. Thacher, 87 N.Y. Civ. Proc. 311, 41 Am. Rep. 365 (1883) (erection of elevated railway outside restricted area held sufficient change); Swan v. Mitshkun, 207 Mich. 70, 173 N.W. 529 (1919) (changes held insufficient, relying on ten previous Michigan decisions most of which considered outside changes); Miles v. Hollingsworth, 44 Cal. App. 539, 187 Pac. 167 (1919) (considered the "vicinity" changes insufficient); Jackson v. Stevenson, 156 Mass. 496, 31 N.E. 691 (1892) (general growth of city sufficient change); Bohm v. Silberstein, 220 Mich. 278, 189 N.W. 899 (1922) (examined facts about

Although the Arizona court in this leading case did not mention a necessity that change be substantial, this meaning is implicit in the court's saying that most jurisdictions refused enforcement of a restriction where change in neighborhood property use would make such enforcement oppressive and inequitable.[13]

In subsequent restrictive covenants cases, the Arizona court has considered changes: *inside* the restricted area in two cases;[14] a single change *outside* the restricted area in another case;[15] and, in a fourth case, the development of an *entire city*.[16] In the most recent of these cases, the court described as "the rule generally prevalent in this country" the principle that "Equity will enforce the terms of restrictive covenants unless the change *in the surrounding area* is so fundamental or radical as to defeat or frustrate the original purposes of the restrictions. . . ." (Emphasis added.)[17]

The instant case presents Arizona's first mandatory injunction for breach of a restrictive covenant.[18] Normally, courts "balance the equities" where injunctive relief is sought,[19] but here the Arizona court refused to do so because "equitable discretion should not be used to protect an intentional wrongdoer."[20] In this respect[21] the principal case

---

surrounding neighborhood and found no appreciable changes within 18-block subdivision). Of the thirteen other authorities cited by the Arizona court (Continental Oil Co. v. Fennemore, *supra*, note 9, at 286-87, 299 Pac. at 135-36), excluding Frick v. Northern Trust Co., 106 N.J.L. 571, 146 Atl. 914 (1929) (memorandum decision), only one, Sanders v. Campbell, 231 Mich. 592, 204 N.W. 767 (1925) (405-lot tract), did not consider changes outside the restricted tract.

[13] Continental Oil Co. v. Fennemore, *supra*, note 9, at 284, 299 Pac. at 134.

[14] See O'Malley v. Central Methodist Church, 67 Ariz. 245, 254, 255, 194 P.2d 444, 451 (1948) (by implication) (unenforceable restrictions); Condos v. Home Development Co., 77 Ariz. 129, 133-35, 267 P.2d 1069, 1071-73 (1954) (no request to consider outside changes except to answer "monopoly" question).

[15] Murphey v. Gray, 84 Ariz. 299, 327 P.2d 751 (1958) (quiet title suit involving 225-acre restricted area; outside change was guest ranch in 80-acre tract and was held not radical). The *Murphey* opinion cited, *inter alia*, Annot., 4 A.L.R.2d 1111 (1949). The courts give less weight to changes outside restricted tracts, but they do not consistently apply the term "outside the tract." 4 A.L.R.2d at 1114.

[16] This had been within the contemplation of the grantor imposing the covenant. Whitaker v. Holmes, 74 Ariz. 30, 32-33, 243 P.2d 462, 463-64 (1952) (violations near each other and far from violation which plaintiffs sought to enjoin were held not sufficiently radical).

[17] Murphey v. Gray, *supra*, note 15, at 303, 327 P.2d at 753.

[18] Decker v. Hendricks, 97 Ariz. 36, 396 P.2d 609 (1964). *But see* Ainsworth v. Elder, 40 Ariz. 71, 9 P.2d 1007 (1932) (court affirmed decree granting a permanent restrictive injunction); McRae v. Lois Grunow Memorial Clinic, 40 Ariz. 496, 14 P.2d 478 (1932) (trial court's refusal of mandatory injunction affirmed).

[19] See 28 AM. JUR. *Injunctions* § 21, at 512 (1959); 43 C.J.S. *Injunctions* § 87, at 595-96 (1945).

[20] Decker v. Hendricks, *supra*, note 18, at 41-42, 296 P.2d at 612.

[21] The court also refused to bar injunctive relief on the basis of laches or estoppel by plaintiff, which is usual. See 30 C.J.S. *Equity* § 116, at 531 (1942); 31 C.J.S. *Estoppel* § 71, at 442 (1964). See generally 43 C.J.S. *Injunctions* § 87, at 589-91 (1945).

appears to be in accord with most jurisdictions.[22]

The general rule on enforcement of restrictive covenants was followed in the instant case.[23] The court's ruling that the trial court committed no reversible error in refusing to admit evidence of changes *outside* the restricted area[24] appears to place Arizona among those states which consider only those changes occurring *inside* the restricted area.[25] However, photographic evidence showing the whole area was admitted and the offer of proof of changes *outside* the restricted area did not show them to be so fundamental as to defeat the original purposes of the restriction.[26]

Several bases exist for a conclusion that the Arizona court will not entirely confine its consideration of changes to those occurring *inside* the restricted area. The instant case, two other Arizona restrictive covenant cases,[27] and nearly all the authorities relied upon by the Arizona court in the leading *Continental Oil Co. case*[28] allowed evidence of changes *outside* the restricted area. Furthermore, in an area restricted to residential use only, as in the instant case, *inside* changes can occur only by agreement among all owners to waive the restrictions,[29] or by violations of the restrictive covenants.[30] Changes both *inside and*

---

[22] *E.g.*, Todd v. North Ave. Holding Corp., 121 Misc. 301, 201 N.Y. Supp. 31 (1923), *aff'd mem.*, 209 App. Div. 834, 204 N.Y. Supp. 953 (1924); Williamson v. Needles, 191 Okla. 560, 133 P.2d 211 (1942); Ventresca v. Ventresca, 182 Pa. Super. 248, 126 A.2d 515 (1956).

[23] Decker v. Hendricks, *supra*, note 18, at 41, 396 P.2d at 612. The court cited Murphey v. Gray, *supra*, note 15 (considered change outside restricted area) and Continental Oil Co. v. Fennemore, *supra*, note 9 (relied on many authorities which considered changes outside restricted areas).

[24] The trial court excluded the testimony partly because the changes were not inside the restricted area. Decker v. Hendricks, *supra*, note 18, at 41, 396 P.2d at 612.

[25] Similar consideration of only those changes inside the restricted area was espoused in the dissenting opinion in Downs v. Kroeger, 200 Cal. App. 743, 254 Pac. 1101, 1103-05 (1927), and is probably the majority rule in the United States.

[26] The court states that this evidence, established by both litigants' aerial photographs, "clearly portray Lots Five and Six of Wilmot Desert Estates and the surrounding area." Decker v. Hendricks, *supra*, note 18, at 40, 396 P.2d at 611-12.

[27] See notes 15 and 16, *supra*, and accompanying text.

[28] 38 Ariz. 277, 299 Pac. 134 (1931). See note 12, *supra*. The majority opinion in Downs v. Kroeger, *supra*, note 25, 254 Pac. at 1103, found "such a change in the character of the locality as to warrant . . . [refusal] to enjoin a violation of the restrictive covenants . . ." and relied on many of the same authorities cited in the *Continental Oil Co.* case.

[29] This may be a burdensome process when many lot owners are involved. For an example of a provision for modification or termination of restrictions by a considerable fraction of lot owners, see Sharp v. Quinn, 214 Cal. App. 194, 4 P.2d 942 (1931).

[30] See Decker v. Hendricks, *supra*, note 18, at 42, 396 P.2d at 612-13. The court would surely not have included this last paragraph of dicta, that change which might have occurred since the trial or might arise in the future precluded the judgment from being *res judicata*, if it intended to consider future changes only *inside* the area. No cases involving mandatory injunction other than the instant case were found in which similar dictum was used. Empire Boulevard Builders v. Spohn, 235 App. Div. 497, 257 N.Y. Supp. 541 (1932), cited by

outside a restricted area are frequently worthy of equitable appraisal, and in equity "few formulas are so absolute as not to bend before the blast of extraordinary circumstances."[31]

Any conclusion regarding the defense of changing neighborhood conditions in Arizona must be considered in light of the court's statement that, with reference to restrictive covenants, "each case must depend primarily upon its own particular facts."[32] The instant case, while relatively narrow in scope,[33] is a good example of equity's protection of holders of restrictive covenants. It seems proper that the courts should protect homeowner purchasers against breach of restrictions in communities covering wide expanses of territory where builders have sold newcomers residences in "restricted areas" and interspersed non-restricted areas have been permitted to develop commercially. Certainly the instant decision is sound in not allowing one property owner to violate restrictions wilfully and then claim hardship because of his investment in the violation. It would seem, however, that similar claims of right to avoid restrictions because of changed neighborhood conditions could be tested more equitably by proceedings seeking declaratory relief[34] than by placing the burden of enjoining violations of the restrictions on innocent property owners.

Ann Bowen

---

the Arizona court (Decker v. Hendricks, *supra,* note 18, at 42, 398 P.2d at 613), was an action to cancel restrictions in effect some thirty years. For cases in which similar language was used relating to restraining injunctions, see Annot., 76 A.L.R. 1348-59 (1932). *But see* St. Lo Const. Co. v. Koenigsberger, 174 F.2d 25 (D.D.C. 1949).

[31] Justice Cardozo in Evangelical Lutheran Church of the Ascension v. Sahlem, 254 N.Y. 161, 166-67, 172 N.E. 455, 457 (1930).

[32] Palermo v. Allen, 91 Ariz. 57, 63, 369 P.2d 906, 911 (1962).

[33] The Arizona court was not asked to consider many facts which have been deemed important in the proper resolution of other restrictive covenant cases. For example, neither appellant's nor appellee's brief mentions the length of time for which the restrictions were imposed. Additional factors which might be considered are: the intent of the original covenantors and its appropriateness at the time of litigation; the possible impact of the violation in relation to the size of the restricted tract; and the location of the violation with respect to proximity to changes in the surrounding area.

[34] See Wolff v. Fallon, 44 Cal. App. 2d 695, 284 P.2d 802 (1955); *cf.* Smith v. Second Church of Christ, Scientist, Phoenix, 87 Ariz. 400, 351 P.2d 1104 (1960).

SALES — BREACH OF WARRANTY — TRANSFER OF BLOOD FOR TRANSFUSION PURPOSES IS NOT A SALE TO WHICH IMPLIED WARRANTY OF FITNESS ATTACHES — *Balkowitsch v. Minneapolis War Memorial Blood Bank* (Minn. 1965).

The plaintiff, while hospitalized, was given a blood transfusion. Payment for the blood was made directly to the defendant, a non-profit public service corporation engaged in the collection and storage of whole blood. The plaintiff contracted serum hepatitus and sought to recover on two theories, breach of implied warranty and strict liability in tort. The trial court granted the defendant's motion for summary judgment. On appeal, *held*, affirmed. The furnishing of blood is more in the nature of a service than a sale of goods under the UNIFORM SALES ACT;[1] therefore, no implied warranty attaches to the transfer of blood, and, in the absence of tests for determining the presence of hepatitus virus in blood, it would be unrealistic to hold the defendant strictly liable. *Balkowitsch v. Minneapolis War Memorial Blood Bank*, 270 Minn. 151, 132 N.W.2d 805 (1965).

Court rulings on serum hepatitus cases have been relatively rare. Various tort theories have been advanced, and, for the most part, struck down. In two separate cases, the State of New York escaped tort liability under theories of ordinary negligence because it was not the duty of the state to determine the necessity of the use of the plasma,[2] nor was it the duty of the state to tell the medical profession to control the use of the plasma.[3] In a Delaware case, the defendant was not negligent in failing to warn the plaintiff of the risk of contracting the virus, since the risk of transmission of the virus is slight as compared to the risk of dying from loss of blood.[4] Recovery was also denied in Wisconsin where the plaintiff relied on theories of res ipsa loquitur and negligence per se, because the state had not yet abrogated the doctrine of charitable immunity.[5]

However, in a federal court in Colorado the theory of negligence was held to have been sufficient to state a cause of action in a case holding that the plaintiff should be allowed to present evidence sub-

---

[1] Minnesota adopted the UNIFORM SALES ACT in 1917. The Act appears in MINN. STAT. ANN. §§ 512.01 - 512.79 (1945). However, this Act will be repealed by the UNIFORM COMMERCIAL CODE, which will be in effect in Minnesota on July 1, 1966, and appears in MINN. STAT. ANN. §§ 336.1-101 – 336.10-105 (1965).

[2] Parker v. State, 280 App. Div. 157, 112 N.Y.S.2d 695, *reargument and appeal denied*, 280 App. Div. 901, 115 N.Y.S.2d 311, *appeal denied*, 304 N.Y. 989, 109 N.E.2d 474 (1952).

[3] Hidy v. State, 207 Misc. 207, 137 N.Y.S.2d 334 (ct. cl. 1955), *aff'd*, 2 App. Div. 2d 644, 151 N.Y.S.2d 621 (1956), *aff'd*, 3 N.Y.2d 756, 163 N.Y.S.2d 985, 143 N.E.2d 528 (1957).

[4] Fischer v. Wilmington General Hospital, 51 Del. 554, 149 A.2d 749 (1959).

[5] Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

stantiating his claim that the defendant was negligent in failing to inform him of the possibility of contracting hepatitus.[6]

In a majority of the serum hepatitus cases, plaintiffs have relied on the theory of an implied warranty of fitness attaching to the sale of blood.[7] As in the instant case, the courts have relied on the rule that, where service predominates, the accompanying transfer of personal property is an incidental feature, and the transaction is not a sale within the Sales Act.[8] Consequently, these courts have held that there is no sale to which an implied warranty of fitness attaches, and recovery has been uniformly denied.[9] However, the New York Court of Appeals

---

[6] Sloneker v. St. Joseph's Hospital, 233 F. Supp. 105 (D. Colo. 1964). Another interesting theory was presented in Merck & Co. v. Kidd, 242 F.2d 592 (6th Cir. 1957), where the Court of Appeals held that a virus which cannot be seen even with a microscope and the presence of which cannot be known except for its ultimate result is not a "filthy substance" within the meaning of a "pure food and drug" statute.

[7] *E.g.*, Sloneker v. St. Joseph's Hospital, 233 F. Supp. 105 (D. Colo. 1964); Whitehurst v. American National Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965); Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954); Goelz v. J. K. & Susie L. Wadley Research Inst. & Blood Bank, 350 S.W.2d 573 (Tex. Civ. App. 1961); Dibble v. Dr. W. H. Groves Latter-Day Saints Hospital, 12 Utah 2d 241, 364 P.2d 1085 (1961); Gile v. Kennewick Public Hospital District, 48 Wash. 2d 774, 296 P.2d 662 (1956); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

[8] *E.g.*, Town of Saugus v. B. Perini & Sons, Inc., 305 Mass. 403, 26 N.E.2d 1 (1940); Racklin-Fagin Const. Corp. v. Villar, 156 Misc. 220, 281 N.Y.S. 426 (1935); Sidney Stevens Implement Co. v. Hintze, 92 Utah 264, 67 P.2d 632 (1937); Crystal Recreation, Inc., v. Seattle Ass'n of Credit Men, 34 Wash. 2d 553, 209 P.2d 358 (1949).

[9] The applicable sections of the UNIFORM SALES ACT are as follows:

> § 15. Implied warranties of quality. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
> (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.
> (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or the manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

The UNIFORM COMMERCIAL CODE, which has been adopted in many states, though not yet in Arizona, has repealed the UNIFORM SALES ACT. The applicable sections of the Code are as follows:

> § 2-314. Implied Warranty: Merchantability; Usage of Trade.
> (1) Unless excluded or modified (§ 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or or drink to be consumed either on the premises or elsewhere is a sale.
>
> § 2-315. Implied Warranty: Fitness for Particular Purpose.
> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to

has held that an allegation of *express* warranty is sufficient to state a cause of action.[10]

Many authorities have suggested that courts should not confine their interpretation of statutes to narrow limits, as has been done when interpreting the Sales Act, but should extend the statutes by analogy to situations not precisely covered.[11] It has also been suggested that there is a tendency to extend the strict liability of an implied warranty beyond cases involving the sale of goods[12] and that there should be no necessity of an actual sale before the implied warranty attaches.[13]

In the instant case, the Minnesota court adhered strictly to the established rule that the transfer of blood to a patient is not a sale, and for this reason held there was no implied warranty of fitness. The defendant was the actual supplier of the blood, rather than a middleman, distinguishing this case from those where a middleman defendant furnished the blood plasma. However, the court considered this difference in fact immaterial and quoted with approval from *Perlmutter v. Beth David Hospital* that "Concepts of purchase and sale cannot separately be attached to the healing materials — such as medicines, drugs or, indeed, blood — supplied by the hospital for a price as part of the medical services it offers."[14]

In refusing to apply strict liability, the court recognized that there are no practical tests for determining whether a blood donor is infected with the hepatitus virus and that the decision of whether or not a blood transfusion will be administered depends upon the physician's professional judgment as to whether the benefits of the transfusion outweigh the risk. In contrast to holding a commercial business liable for products which it can thoroughly inspect, the supplier of blood cannot be held responsible for the physician's judgment.

In a recent decision involving facts similar to those in the instant case, the Arizona Court of Appeals agreed with the Minnesota court's reasoning and upheld a trial court's summary judgment for the defendant.[15] The plaintiff attempted to recover on the theory of implied

---

select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

[10] Napoli v. St. Peter's Hospital of Brooklyn, 213 N.Y.S.2d 6 (1961).

[11] See, *e.g.*, Agar v. Orda, 264 N.Y. 248, 190 N.E. 479 (1934); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936).

[12] See PROSSER, TORTS § 95, at 655 (3d ed. 1964).

[13] See *e.g.*, UNIFORM COMMERCIAL CODE § 2-313, comment 2; HARPER AND JAMES, THE LAW OF TORTS § 28.19 (1956); VOLD, LAW OF SALES § 4, at 30 (2d ed. 1959).

[14] Perlmutter v. Beth David Hospital, 308 N.Y. 100, 104, 123 N.E.2d 792, 794 (1954).

[15] Whitehurst v. American National Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965).

warranty based on the Arizona Sales Act.[16] Prior to this decision, the Arizona legislature had enacted a law declaring that, as to the transmission of serum hepatitus, distribution of blood for transfusion purposes is not a sale.[17] Since this statute was not yet in effect, the court's primary reliance was on the instant case.

It is theoretically possible to establish contract liability on the basis of an implied warranty by a non-negligent defendant through liberal construction of the Sales Act, or similar statute, dealing with sales of dangerous goods. Or, it may be possible to establish tort liability under a theory of strict responsibility imposed on the seller or supplier of dangerous goods as suggested by the Restatement of Torts.[18] However, since courts have been reluctant to hold defendants liable in cases of serum hepatitus, until there is a test developed to determine whether a blood donor is a hepatitus carrier, there appears to be little possibility of a court imposing liability. If such a test is developed, the courts should consider this new fact and allow recovery either on the basis of ordinary negligence theories or the two theories suggested above.

M. Byron Lewis

---

[16] Arizona adopted the UNIFORM SALES ACT in 1907. The Act appears in ARIZ. REV. STAT. ANN. §§ 44-201 – 44-277 (1956).

[17] ARIZ. REV. STAT. ANN. § 36-1151 (1964):
The procurement, processing, distribution, or use of whole human blood, plasma, blood products and blood derivatives for the purpose of injecting or transfusing them into the human body shall be construed as to the transmission of serum hepatitus to be the rendition of a service by every person participating therein and shall not be construed to be a sale. Added Laws 1964, Ch. 83, § 1.

[18] See, *e.g.*, RESTATEMENT (SECOND), TORTS § 402A (1965).
Special Liability of Seller of Product for Physical Harm to User or Consumer.
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
For a complete discussion of all the theories relied on in blood transfusion cases see, Annot., *Liability for Injury or Death From Blood Transfusions*, 59 A.L.R.2d 768 (1958).

STATUTES—TITLES—RESTRICTED TITLE OF GUEST STATUTE PREVENTS RELEASE OF NON-OWNER DRIVER FROM LIABILITY TO PASSENGERS FOR ORDINARY NEGLIGENCE.—*Gallegos v. Wallace* (N.M. 1964).

A guest passenger was killed when the car in which he was riding overturned. His personal representative brought an action against both the owner of the car, who was also a passenger, and the driver.[1] The defendants were granted summary judgment under the New Mexico guest statute.[2] On appeal the plaintiff contended for the first time that, because of the limited title of the guest statute, a non-owner driver was not protected. *Held,* reversed and remanded. The restricted title of the guest statute as "An act releasing *owners* of motor vehicles . . ." prevents the release of *non-owner drivers* from responsibility to guest passengers for injury resulting from ordinary negligence, even though the body of the act releases such *non-owner drivers.*[3] *Gallegos v. Wallace,* 74 N.M. 760, 398 P.2d 982 (1964).

Constitutional requirements which limit each statute to a single subject that must be described in the title have resulted from early dissatisfaction with the English and American practice of enacting statutes without titles.[4] Historically, in those instances where titles were included, they were supplied by a clerk after enactment, indicating *his* understanding of the statute rather than that of the legislature.[5] Even when titles were supplied by the legislature, they were generally affixed after enactment with little attention from the members.[6]

The purposes of constitutional provisions limiting each statute to a single subject which must be described in its title are: (1) to prevent "log-rolling" legislation, fraud, or suprise in the legislature brought about by the insertion in the body of the act of provisions of which the titles give no intimation, and, (2) to apprise the public

---

[1] New Mexico Wrongful Death Act: N.M. STAT. ANN. § 22-20-1 (1953).

[2] N.M. STAT. ANN. § 64-24-1 (1953). N.M. LAWS 1935, ch. 15. The title of the guest statute is "An act releasing *owners* of motor vehicles from responsibility for injuries to passengers therein," and the body of the statute reads:

> No person transported by the *owner or operator* of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such *owner or operator* for injury, death, or loss, in case of accident, unless such accident shall have been intentional on the part of said *owner or operator* or caused by his heedlessness or his reckless disregard of the rights of others. (Emphasis supplied)

[3] N.M. CONST. art. 4, § 16, provides in part: "The subject of every bill shall be clearly expressed in its title. . . . but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void."

[4] Comment, 24 U. CHI. L. REV. 722 (1957).

[5] I COOLEY, CONSTITUTIONAL LIMITATIONS 292 (8th ed. 1927).

[6] *Ibid.*

of the subject of the legislation under consideration.[7]

If the body of an act contains two subjects and only one is expressed in the title then the one not expressed in the title is void.[8] However, a provision in the body of a statute will not be void if it has a *proper relation* to the title of the act.[9] In the instant case the court relied on a construction of *proper relation,* previously stated by the Arizona Supreme Court:

> The scope of the title is within the discretion of the legisalture; it may be made broad and comprehensive, and in this case the legislation under such title may be equally broad; or, the legislature, if it so desires, may make the title narrow and restricted.[10]

The Arizona[11] and the New Mexico[12] courts have both quoted from Justice Cooley's work wherein he observed that: "It is no answer to say that the title might have been made more comprehensive, if in fact the legislature has not seen fit to make it so."[13]

The holding in the instant case is in direct opposition to a prior Washington decision on the same point.[14] The title to the Washington guest statute mentions only *owners,* while the body of the act includes both *owners and operators.*[15] Despite this fact, the Washington court

---

[7] State v. Armstrong, 31 N.M. 220, 243 Pac. 333, 336 (1924), wherein the court quotes from 25 R.C.L. 835 (1919). It is interesting to note that the first constitutional provision requiring the subject of an act to be stated in its title was in the Georgia Constitution of 1798 (art. 1, § 17). The purpose of a provision of this nature is clearly expressed in the New Jersey Constitution of 1844, (art. 4, § 7, para. 4) in the following language: "To avoid improper influences which may result from intermixing, in one and the same act such things as have no proper relation to each other, every law should embrace but one subject and that shall be expressed in the title."

[8] See, *e.g.,* Campe v. Cermak, 330 Ill. 463, 161 N.E. 761 (1928); State v. Barlow, 107 Utah 292, 153 P.2d 647, *appeal dismissed,* 324 U.S. 829, *rehearing denied,* 324 U.S. 891 (1945). Conversly, plurality of subject in the title is not fatal to the statute since the constitutional restriction requires unity of subject only in the body of the act. People v. Solomon, 265 Ill. 28, 106 N.E. 458 (1914).

[9] Comment, 24 U. CHI. L. REV. 722, 724 (1957).

[10] Taylor v. Frohmiller, 52 Ariz. 211, 216, 79 P.2d 961, 964 (1938).

[11] *Id.* at 217, 79 P.2d at 964.

[12] Gallegos v. Wallace, 74 N.M. 760, 764, 398 P.2d 982, 985 (1964).

[13] I COOLEY, CONSTITUTIONAL LIMITATIONS 212 (7th ed. 1927).

[14] Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936). The problem faced in New Mexico and Washington has yet to be litigated in the one other state that appears to have such a defective title. The constitution of South Carolina (art. 3, § 17) provides in part: "Every act or resolution having force of law to relate to but one subject, expressed in title." The title of the South Carolina guest act (Acts of 1930, act. no. 659) provides: "An act releasing owners of motor vehicles from responsibility for injuries to passengers therein." (amended, Laws 1935, act. no. 246 but still relating to *owners* of motor vehicles.) The body of the South Carolina guest statute (S.C. CODE ANN. § 46-801 (1952)) refers to *owner or operator.* Consequently, the next time that a non-owner driver is sued by a guest passenger for ordinary negligence in South Carolina, such driver will be protected if the South Carolina court follows the Washington decision or he will not be protected, by the guest statute, if the court follows the instant decision.

[15] WASH. LAWS 1933, p. 145. (title); WASH. REV. CODE § 46.08.080 (1951) (body of act). The constitution of Washington provides: "No bill to embrace more than one subject, expressed in title." art. 2, § 19.

held that *non-owner* drivers were protected by the statute and that the statute was not unconstitutional for insufficiency of title. The court reasoned that a person reading the title of the act would have his attention sufficiently challenged to inquire wherether the body of the act contained the very provisions that it did, stating in part, "While the word *owner* does not necessarily include the word *operator* . . . there is, nevertheless, a kinship between them forming a legitimate and natural association with the subject of the title."[16] (Emphasis added) In contrast, the New Mexico court in the instant decision stated: "We think the natural conclusion to be drawn from a logical reading of this title would be that the legislation affected only the *owner* of a vehicle and that its scope was restricted to such owners."[17]

By declining to follow the reasoning of the Washington decision[18] and by applying a rule of construction as a rule of law,[19] the New Mexico court has partially defeated their previous statement of the effect of guest legislation, which was loss by the guest of a common-law right of action against the *driver or owner.*[20] In refusing protection for the *non-owner driver,* the court failed to give due weight to the rule of construction that: "the court must consider the nature of the legislation, its object and the evils to be remedied."[21] By an unnecessarily strict construction of the constitutional provision, the court has removed from the protection of the guest statute one of the two parties clearly intended to be protected by that beneficial legislation. There has been a frustration of the obvious purpose of the legislature with no concurrent furtherance of either basic purpose of the constitutional provision.[22]

Gary Lester Stuart

---

[16] Shea v. Olson, *supra* note 14, 53 P.2d at 619.

[17] Gallegos v. Wallace. *supra* note 12, at 764, 398 P.2d at 985.

[18] *Id.* at 764, 398 P.2d at 986.

[19] The New Mexico court has followed a policy of strict construction of statutes in derogation of the common law. See generally Hinds v. Valasquez, 63 N.M. 282, 317 P.2d 899 (1957); El Paso Cattle Loan Co. v. Hunt, 30 N.M. 157, 228 Pac. 888 (1924).

[20] Smith v. Meadows, 56 N.M. 242, 250, 242 P.2d 1006, 1011 (1952). The court there said: "In enacting our guest statutue . . . the legislature took away from a guest . . . the common-law right of action, which previously existed in favor of such a guest, against the driver on account of injuries suffered by the guest due to the negligence of the *driver or owner.*"

[21] State v. Miller, 33 N.M. 200, 263 Pac. 510 (1928). This case was cited to the court in the instant case by amicus curiae in support of the motion for rehearing, which was denied.

[22] There was never any contention made that the *non-owner driver* provision was inserted in the guest statute by "log-rolling" or by fraud in the legislature, nor a contention that at the time of its consideration by the legislature, the public was not fully apprised of the subject of the proposed statute.

TORTS — ASSUMPTION OF RISK — APPLICABLE ONLY WHERE EMPLOYMENT RELATIONSHIP OR EXPRESS ASSUMPTION OF THE RISK EXISTS. — *Felgner v. Anderson* (Mich. 1965).

While duck hunting with plaintiff, defendant, standing in a small flat-bottomed boat, fired his shotgun causing him to lose his balance and fall into the water. As a result, his gun discharged a second time, seriously injuring the plaintiff. The trial judge refused to instruct the jury on the doctrine of assumption of risk and rendered judgment on the verdict for plaintiff. On appeal, *held,* affirmed. The doctrine of assumption of risk is applicable only to cases in which an employment relationship exists between the parties or where there is an express knowledge of and voluntary assumption of the risk. *Felgner v. Anderson,* 375 Mich. 23, 133 N.W.2d 136 (1965).

Prior to the instant case, the application of the doctrine of assumption of risk had been consistently affirmed by the Michigan court.[1] However, upon reeaxamination of the common law origins of the doctrine, the court concluded that the application of assumption of risk to cases other than those involving the employment relationship or express knowledge of and voluntary assumption of the risk strays far afield from its proper and original use at common law.[2]

The basis for the application of the doctrine in the employment relationship at common law was the philosophy that the employer owed no more duty to the employee than to provide him with a reasonably safe place in which to work.[3] In return, the employee, by remaining on the job, impliedly assumed all risks of danger inherent in the work.[4] The basis of the application where there is an express contractual assumption of risk rests in the law of exculpatory contracts.[5]

A restriction of the application of the doctrine of assumption of risk is supported by an increasing body of authority.[6] Several authors have expresed the view that the application of the doctrine as a defense to established negligence of the defendant overlaps and coincides with contributory negligence.[7] Their conclusion is that the doctrine, when used in this context adds nothing to the law except surplus verbage and should therefore be restricted or abolished.[8]

---

[1] Waltanen v. Wiiatala, 361 Mich. 504, 105 N.W.2d 400 (1960).
[2] Felgner v. Anderson, 375 Mich. 23, 133 N.W.2d 136, 141 (1965).
[3] Bradburn v. Wabash R. Co., 134 Mich. 575, 96 N.W. 929 (1903).
[4] RESTATEMENT (SECOND), TORTS, Explanatory Notes § 893, at 73 (Ten. Draft No. 9, 1963).
[5] See RESTATEMENT, CONTRACTS, §§ 574, 575 (1932); Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation,* 37 COLUM. L. REV. 248 (1937).
[6] James, *Assumption of Risk,* 61 YALE L.J. 141, 163 (1952); 2 HARPER AND JAMES, TORTS § 21.1 (1956).
[7] For a thorough discussion of the theories of application, see generally RESTATEMENT (SECOND), TORTS, (Tent. Draft No. 9), *supra* note 4, at 70-87.
[8] James, *Assumption of Risk, supra* note 6, at 168-169.

In discussing the application of the doctrine there are four situations which must be considered.[9] The first is that in which the plaintiff expressly gives consent to relieve the defendant of a duty of care. The second, is that in which consent is implied by the conduct of the plaintiff. Both of these situations give rise to the "primary sense" of application of the doctrine where the purpose is to establish the fact that there was no duty owed by the defendant to the plaintiff.[10] The third situation is that in which the plaintiff, acting negligently knowingly and voluntarily assumed the risk presented by the negligence of the defendant. The fourth, involves the situation in which the plaintiff, though acting reasonably, did in fact assume the risk of the defendant's negligent conduct. The latter two situations, where the defendant's negligence has been established, are frequently referred to collectively as the "seconday sense" of application.[11] The crucial distinction to be made in the latter two cases is the nature of the plaintiff's conduct. If the plaintiff acted unreasonably, contributory negligence is the proper defense. If however, the plaintiff's conduct was reasonable under the circumstances, he may nevertheless have assumed the risk, and hence, assumption of risk is the proper defense.[12]

In a majority of jurisdictions the doctrine is applied as an affirmative defense to established negligence of the defendant.[13] Very few courts have restricted application of the doctrine as severely as did the Michigan court in the instant case.[14] The few decisions advocating restriction of application to cases involving express assumption of risk rationalize that the purpose of such restriction is to eliminate the confusion presented by the overlapping of the defenses of contributory negligence and assumption of risk.[15] Another small minority of courts restrict the doctrine to employment relationships, providing, however, for a smilar defense to established negligence in other cases under the guise of other names such as "incurred risk,"[16] or the maxim, *"volenti non fit injuria."*[17] The Michigan court, in the instant case, in limiting

---

[9] PROSSER, TORTS § 67 (3d ed. 1964).

[10] For a general discussion of the primary and secondary senses of application see Halepeska v. Callihan Interests Inc., 371 S.W.2d 368, 371 (Tex. 1963).

[11] *Id.* at 372.

[12] PROSSER, TORTS, *supra* note 9.

[13] 38 AM. JUR. *Negligence* § 171 (1942).

[14] See Annot., 82 A.L.R.2d 1208 (1959). This small minority has recently been diminished by a decision of the Supreme Court of New Mexico overruling its traditional strict application of the doctrine. See Rutherford v. James, 33 N.M. 440, 270 Pac. 794 (1928), *overruled by* Reed v. Stryron, 69 N.M. 262, 365 P.2d 912 (1961).

[15] Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959).

[16] See, *e.g.* Indiana Nat. Gas v. O'Brien, 160 Ind. 266, 65 N.E. 918 (1903); Dietz v. Magill, 104 S.W.2d 707 (Mo.App. 1937).

[17] See, *e.g.* Cummins v. Halliburton Oil Well Cementing Co., 319 S.W.2d 379 (Tex. 1958); Walsh v. West Coast Coal Mines, 31 Wash. 2d 396, 197 P.2d 233 (1948).

the application of the doctrine to cases involving the Master-Servant relationship and express assumption of risk, stated: "The traditional concepts of contributory negligence are more than ample to present that affirmative defense to established negligent acts."[18]

In the area of employment relationships, the application of the doctrine of assumption of risk has been restricted by Workmen's Compensation[19] and Employer's Liability Laws.[20] Therefore, the practical effect of the decision in the instant case is to restrict the application of the doctrine to those classes of employment not covered by the employment legislation, thus eliminating most practical need for its application.[21]

In Arizona, assumption of risk is generally applied in cases involving the Master-Servant relationship, although it has been applied in both the primary sense of application[22] and as a defense to established negligence of the defendant.[23] The Rules of Civil Procedure as adopted by Arizona expressly provide that assumption of risk shall be raised as an affirmative defense,[24] and the Arizona Constitution provides for the application of the doctrine.[25]

The view pronounced in the instant case restricting the application of assumption of risk to cases involving an express assumption of the risk or an employment relationship, and any other view advocating the abolishment of assumption of risk where it is established that the defendant has acted negligently, fails to distinguish between those situations in which the plaintiff's conduct is reasonable and those in which the plaintiff, in assuming the risk, acts unreasonably. Such a view allows recovery by a plaintiff who did assume the risk of the defendant's negligence but was not guilty of contributory negligence. This result

---

[18] Felgner v. Anderson, *supra* note 2, at 154.

[19] See, *e.g.* ARIZ. REV. STAT. ANN. § 23-907 (1956); MICH. STAT. ANN. REV. § 17.141 (1960); CAL. LABOR CODES § 3708.

[20] See, *e.g.* ARIZ. REV. STAT. ANN. § 23-806 (1956).

[21] Felgner v. Anderson, *supra* note 2, at 155.

[22] Mull v. Roosevelt Irr. Dist., 77 Ariz. 344, 272 P.2d 342 (1954), where the court upheld the application of the doctrine in its primary sense of application defining the duty owed to a gratuitous licensee by the owner of real property.

[23] Lunsford v. Tucson Aviation Corp., 73 Ariz. 277, 240 P.2d 545 (1952), where the doctrine was used as an affirmative defense to established negligence on the part of the defendant aviation corporation. However, the court stated that it will only be applied with regard to dangers of which the plaintiff was actually aware.

[24] ARIZ. R. CIV. P. 8(d) (1956):

> General rules of pleading; affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively . . . assumption of risk. . . .

[25] ARIZ. CONST. Art. 18, § 5:

> Contributory negligence and assumption of risk. The defense of contributory negligence or of assumption of risk, shall in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

Although this provision appears in the labor section of the Constitution, a 1922 case stated that there is no implication that the doctrine is to be invoked only in labor cases. Morenci Southern Ry. Co. v. Monsour, 24 Ariz. 49, 206 Pac. 589 (1922).

would be contrary to principles deeply engrained in our jurisprudence, evolved from the common law maxim, *volenti non fit injuria.*

The two reasons for restriction of application set forth in the instant case are the unprecedented departure from common law usage and the adequancy of contributory negligence as the sole defense to established negligence. Both are equally unfounded and short sighted. The overwhelming majority of jurisdictions recognize the vital importance of the defense of assumption of risk, unrestricted in its application. Where the objective is the abrogation of confusion arising in the application of the doctrines of assumption of risk and contributory negligence, the means of accomplishing that objective should not be the restriction or elimination of assumption of risk, but rather a more closely guarded application of both dotcrines with the courts carefully defining the scope of their applicability.

John E. Lundin

TORTS — NEGLIGENCE — LIABILITY OF OWNER FOR INJURIES CAUSED BY WILD ANIMALS. — *Hansen v. Brogan* (Mont. 1965).

The defendant owned and maintained, as a tourist attraction, several wild animals which he kept in a woven wire enclosure. One of the animals, a buffalo, charged against the fence and injured the plaintiff, a bystander, who was standing too near the enclosure. The trial court, ruling as a matter of law that the defendant was absolutely liable, directed a verdict for the plaintiff. On appeal, *held,* reversed and remanded. The law of negligence is preferable to the law of strict liability in determining liability for injuries caused by wild animals. *Hansen v. Brogan,* 400 P.2d 265 (Mont. 1965).

Generally, the owner or keeper[1] of a wild animal with known vicious propensities is absolutely liable for any injuries or damage caused by such animal.[2] He is an insurer against ordinary risks incident to the dangerous character of the animal, and within the scope of this insurance, must make good every loss without reference to any culpable or blameworthy conduct on his part.[3] This rule grew out of dictum

---

[1] 35 LAW NOTES 44 (June 1931). It is not necessary that ownership of the animal be shown. Absolute responsibility has been extended to the keeper as well.

[2] See, *e.g.,* Hays v. Miller, 150 Ala. 621, 43 So. 818 (1907); Collins v. Otto, 149 Colo. 489, 369 P.2d 564 (1962); City of Tonkawa v. Danielson, 166 Okla. 241, 27 P.2d 348 (1933); Hyde v. City of Utica, 259 App. Div. 477, 20 N.Y.S. 2d 335 (1940). See generally, 3 C.J.S. *Animals* § 143 (1936).

[3] See generally HARPER & JAMES, TORTS § 14:11, at 832 (1956), and RESTATEMENT, TORTS, §§ 507-10 (1939) for an excellent discussion of the common law liability of owners of dangerous animals.

made in an early English decision[4] from which developed two theories of absolute liability. The first theory of recovery, followed by a majority of jurisdictions, makes a person who harbors a wild animal an insurer for any resulting injury or damage.[5] A second theory of recovery, followed by a minority of jurisdictions finds absolute liability for injuries or damage by presuming negligence in the mere keeping of the animal.[6] Here, the keeping of the animal with a resulting injury establishes a prima facie case of negligence. Although contributory negligence is not a proper defense against an action brought under either the majority or minority theories of recovery, the courts have denied recovery when the plaintiff knowingly and unreasonably assumed the risk of possible injury.[7]

There are two important exceptions to the rule of absolute liability which when applicable relieve the owners of wild animals of liability. First, where the animal is not inherently dangerous and is in a class generally susceptible to being tamed, it is treated as an ordinary domestic animal with the law of negligence determining the owner's liability for injury or damage caused by the animal.[8] However, if the owner had knowledge of the animal's vicious propensities, liability is imposed as if the animal was never in fact susceptible to being domesticated.[9] Liability for injury or damage caused by animals inherently dangerous and incapable of being tamed is imposed under all circumstances,[10] even though the animal may no longer appear wild.[11]

Under the second exception, if the animals are not kept for the owner's pleasure, but are kept for the amusement of the public and

---

[4] May v. Burdett, 9 Q.B. 101, 115 Eng. Rep. 1213 (1846), where the court held the owner of a monkey liable for injuries caused by the animal without an allegation of negligence. Based on the statements in the *May* case, judicial dicta followed that the owners of animals *ferae naturae* are liable under all circumstances for injuries caused by such animals. See Vaughn v. Miller Bros., "101" Ranch Wild West Show, 109 W.Va. 170, 153 S.E. 289 (1930). But in fact the *May* case only decided a point in pleading.

[5] See, *e.g.*, Hays v. Miller, 150 Ala. 621, 43 So. 818 (1907); Heath v. Fruzia, 50 Cal. App. 2d 598, 123 P.2d 560 (1942); Briley v. Mitchell, 238 La. 551, 115 So. 2d 851 (1959); Stevens v. Hulse, 263 N.Y. 421, 189 N.E. 478 (1934).

[6] See, *e.g.*, Spring Co. v. Edgar, 99 U.S. 395 (1935); Phillips v. Garner, 106 Miss. 828, 64 So. 735 (1914). See generally 4 AM. JUR. 2d *Animals* § 80 (1962).

[7] See, *e.g.*, Anderson v. Anderson, 259 Minn. 412, 107 N.W.2d 647 (1961). See also PROSSER, TORTS § 67, at 468 (3d ed. 1964); RESTATEMENT, TORTS § 515 (1939); RESTATEMENT (SECOND), TORTS § 484 (1965).

[8] May Co. v. Drury, 160 Md. 143, 153 Atl. 61 (1931); Conner v. Princess Theater, 27 Ont. L. Rep. 466, 10 D.L.R. 143 (1912) (monkey). For a classification of animals and their characteristics, see 3 C.J.S. *Animals* § 142 (1936).

[9] Spring Co. v. Edgar, 99 U.S. 645, 653 (1879); Young v. Estep, 178 Wash. 561, 35 P.2d 80 (1934).

[10] Bottcher v. Buck, 265 Mass. 4, 163 N.E. 182 (1928). The liability does not depend on proving knowledge of previous acts showing a vicious disposition. Negligence results from keeping an animal belonging to a class which, from the experience of mankind, is dangerous.

[11] Hays v. Miller, 150 Ala. 621, 43 So. 818 (1907) (facts were admissible in reduction of damages).

sanctioned by legislative authority the law of negligence is preferable to the law of strict liability.[12]

A few recent decisions concerning liability for injuries caused by wild animals have repudiated the rule of absolute liability in favor of the law of negligence.[13] In these cases the standard of care depends on the circumstances surrounding the ownership of the animal.[14] Thus, the manner in which the animal is kept is determinative and no presumption of negligence arises through mere ownership of the animal. In one case the court said that it was an anomally that a common law ownership and possession of wild animals was protected, but at the same time such ownership and possession was consistently held to give rise to a presumption of negligence.[15]

The Arizona Supreme Court, while not having decided any case dealing with wild animals, has decided three cases involving injuries caused by domestic animals with known dangerous tendencies. Of the three only one was decided with the court expressly using negligence as the theory of recovery.[16] In the other two cases the court did not expressly state on which theory of recovery the decisions were based. However, the facts of each of the two would seem to indicate a cause of action for negligence.[17]

The inevitable inequities which result from the application of the absolute liability doctrine have given rise to different theories and exceptions,[18] the ultimate effect being to create a degree of uncertainty in this area of the law.[19] On the other hand, the use of negligence as a measure of liability for the acts of every class of animals would tend to make the law more uniform and would in part relieve the owners of

---

[12] Parker v. Cushman, 195 Fed. 715 (8th Cir. 1912); Guzzi v. New York Zoological Soc., 192 App. Div. 263, 182 N.Y.S. 257 (1920); Molloy v. Starin, 191 N.Y. 21, 83 N.E. 588 (1908). See generally 4 AM. JUR. 2d *Animals* § 80 (1962).

[13] Anderson v. Anderson, 259 Minn. 412, 107 N.W.2d 647 (1961); Sleeper v. World of Mirth Show, 100 N.H. 158, 121 A.2d 799 (1956).

[14] Panorama Resort v. Nichols, 165 Va. 289, 182 S.E. 235 (1935).

[15] Vaughn v. Miller Bros., "101" Ranch Wild West Show, 109 W.Va. 170, 153 S.E. 289 (1930), where the court stated:

> It is true that animals ferae naturae constantly try to escape confinement, and, if successful, become a menace to mankind. But the tiger unrestrained, is no more dangerous than fire, water, electricity, or gas uncontrolled. The liability of the owner of these has never been declared absolute, nor his negligence presumed from mere ownership.

[16] Ariz. livestock Co. v. Washington, 52 Ariz. 591, 84 P.2d 588 (1938).

[17] Walter v. Southern Ariz. School for Boys, 77 Ariz. 141, 267 P.2d 1076 (1954); Perazzo v. Ortega, 29 Ariz. 334, 241 Pac. 518 (1925).

[18] For an excellent discussion of the two theories drawn from *May*, see generally material cited in note 3, *supra*. For further material dealing with wild animals not inherently dangerous (generally excepted from absolute liability), see cases cited in note 7, *supra*. For a discussion of exceptions to absolute liability based on legislative sanction, see cases and material cited in note 12, *supra*.

[19] See introduction to Annot., 69 A.L.R. at 500 (1930).

the harshness of absolute liability.[20] The instant case represents a definite trend away from the general rule. Recognizing that since it is necessary and desirable in many cases to keep wild animals,[21] it would be desirable should the Arizona Supreme Court be faced with a similar fact situation that it weigh carefully the merits of this trend away from strict liability.

Karl Johnstone

WORKMEN'S COMPENSATION — INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT — COMPENSATION GRANTED FOR INJURY SUSTAINED WHILE EMPLOYEE ENGAGED IN PHYSICAL RELAXATION. — *Cavalcante v. Lockheed Electronics Co.* (N.J. 1964).

The petitioner's husband, an electronics technician employed by Lockheed Electronics Company, was sent with four other employees on a one-week temporary assignment from their regular place of employment to a United States Naval Base. After working lengthy hours for two days, and after returning to their motel, they all decided to go out for some entertainment. They went to a bar and for two hours they drank, danced, listened to music, and talked over their work. Returning to the motel, the decedent was killed in an automobile accident. The Division of Workmen's Compensation awarded the petitioner widow compensation. On appeal, *held,* affirmed. Because it is reasonable for a travelling employee to seek physical relaxation in a reasonable manner, the accident and the resultant death arose out of and in the course of the decedent's employment. *Cavalcante v. Lockheed Electronics Co.* 85 N.J. Super. 320, 204 A.2d 621 (1964).

The broad spectrum of workmen's compensation law encompasses a variety of situations: accidents happening while the employee is on duty;[1] accidents happening while the employee is off duty;[2] situations

---

[20] To escape liability the owner would have to show that under the circumstances, which would include the nature of the animal, the place where it is kept, and the amount of supervision, that he exercised reasonable care. Obviously the degree of care will be quite high in some case.

[21] See Notes on Recent Cases, 22 MINN. L. REV. 1042 (1928).

---

[1] *E.g.,* Peter Kiewit Sons' Co. v. Industrial Comm'n., 88 Ariz. 164, 354 P.2d 28 (1960); Lawrence v. Industrial Comm'n. of Arizona, 78 Ariz. 401, 281 P.2d 113 (1955); Sherrill & La Follette v. Herring, 78 Ariz. 332, 279 P.2d 907 (1955); Nicholson v. Industrial Comm'n., 76 Ariz. 105, 259 P.2d 547 (1953). These cases involving on-duty accidents are at one end of the compensability spectrum and are usually held to be compensable.

[2] *E.g.,* Coffee v. Industrial Comm'n., 91 Ariz. 290, 371 P.2d 1018 (1962); Thomas

in which the employee is injured during working hours, but is doing something other than what he was hired to do;[3] situations within the so-called going-and-coming rule;[4] and situations in which the employee suffers a trauma after working hours which may have been caused by on-the-job activity.[5] The instant case involved an injury which the New Jersey court found had occurred while the employee was on duty.[6]

The New Jersey workmen's compensation statute,[7] like that of Arizona,[8] provides that, in order to be compensable, injury or death must result from an accident "arising out of and in the course of the employment."[9] Many courts, seemingly comprising the majority view, have construed the workmen's compensation statutes of their jurisdic-

---

v. Industrial Comm'n. of Arizona, 87 Ariz. 238, 350 P.2d 392 (1960); Helton v. Industrial Comm'n., 85 Ariz. 276, 336 P.2d 852 (1959). These cases involving off-duty accidents are at the opposite end of the spectrum from the on-duty accidents and are usually held to be not compensable.

[3] *E.g.*, Goodyear Aircraft Corporation, Arizona Division v. Gilbert, 65 Ariz. 379, 181 P.2d 624 (1947). This type of accident falls within the gray area of the spectrum where the particular facts in each case determine recovery or denial of an award.

[4] *E.g.*, Serrano v. Industrial Comm'n., 75 Ariz. 326, 256 P.2d 709 (1953); Martin v. Industrial Comm'n., 73 Ariz. 401, 242 P.2d 286 (1952); McCampbell v. Benevolent & Protective Order of Elks, 71 Ariz. 244, 226 P.2d 147 (1950). The "going and coming" type of accidents fall within the gray area of the spectrum where the particular facts in each case determine recovery or denial of an award. The general statement of the law, however, is that injuries sustained while going or coming from work are generally not compensable. A well recognized exception to this rule is the "special mission" exception. See, *E.g.*, Hancock v. Industrial Comm'n., 82 Ariz. 107, 309 P.2d 242 (1957); Cavness v. Industrial Comm'n., 74 Ariz. 27, 243 P.2d 459 (1952); Schreiffer v. Industrial Accident Comm'n., 38 Cal. Rptr. 352, 391 P.2d 832 (1964).

[5] *E.g.*, Wheeler v. Industrial Comm'n., 94 Ariz. 199, 382 P.2d 675 (1963); Dunlap v. Industrial Comm'n., 90 Ariz. 3, 363 P.2d 600 (1961); Jones v. Industrial Comm'n., 81 Ariz. 352, 306 P.2d 277 (1957). The "after-hour" type of accident falls within the gray area of the spectrum where the particular facts in each case determine recovery or denial of an award.

[6] The scope of this case note is confined to situations in which the injury or death of the employee occurred under circumstances of substantial departure from the normal employment duties.

[7] N.J. STAT. ANN. § 34:15-7 (1965): ". . . by accident arising out of and in the course of his employment . . . in all other cases except where the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury. . . ."

[8] ARIZ. REV. STAT. ANN. § 23-1021A (1956):

> Every employee coming within the provisions of this chapter who is injured, and the dependents of every such employee who is killed by accident arising out of and in the course of his employment, wherever the injury occurred, unless the injury was purposely self inflicted, shall be entitled to receive and shall be paid such compensation for loss sustained in account of the injury or death . . . .

[9] See 1 LARSON, WORKMEN'S COMPENSATION LAW § 6.10, at 42 (1964), where the author states:

> To make the task of construction easier, the phrase (arising out of and in the course of employment) was broken in half with the "arising out of" portion being construed to refer to causal origin, and the "course of employment" portion to the time, place and circumstances of the accident in relation to the employment.

tions very narrowly,[10] and allow recovery only where the employee is doing something which is closely related to his employment. Others have accorded their statutes a very liberal construction,[11] awarding compensation in nearly any kind of situation, provided some type of occupational tie was shown.

The Supreme Court of the United States, in its most recent decision in point, appears to have substantially enlarged the area of compensability by holding an apparent off-duty accident to have occurred while the employee was on duty.[12] The value of the decision as precedent may be dubious, since the majority of the Court could not find sufficient basis upon which to overturn the findings of a deputy commissioner[13] made upon stipulated facts.[14]

The Arizona Supreme Court, in *Edwards v. Industrial Comm'n.*,[15] its latest decision in point, held that the accident must be incidental to the employment, or at least in some way connected with it, in order to come within the purview of the statute.[16] That holding is

---

[10] *E.g.*, Pacific Indemnity Co. v. Industrial Accident Comm'n., 26 Cal. 2d 509, 159 P.2d 625 (1945); Mazursky v. Industrial Comm'n., 364 Ill. 445, 4 N.E.2d 823 (1936); Pattee v. Fullerton Lumber Co., 220 Iowa 1181, 263 N.W. 839 (1935); Cowles v. United States Rubber Products, 279 N.Y. 589, 17 N.E.2d 451 (1938).

[11] *E.g.*, Western Greyhound Lines v. Industrial Accident Comm'n., 37 Cal. Rptr. 580, 225 Cal. App. 2d 517 (1964); Jackson v. Euclid-Pine Inv. Co., 223 Mo. App. 805, 22 S.W.2d 849 (1930); Lief v. A. Walzer & Son, 272 N.Y. 542, 4 N.E.2d 727 (1936); Tappato v. Teplick & Eisenberg Co., 133 Pa. Super. 231, 2 A.2d 545 (1938).

[12] O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965), wherein an employee of a government contractor, who drowned while boating on a lake 30 miles from the South Korean job-site, though on a weekend vacation, was held to have died in an accident arising out of and in the course of employment, since he was on 24-hour call, 365 days a year. The *O'Keeffe* case followed the trend set in O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951), where the government contractor maintained for its employees on Guam a recreation center near the shoreline of a very dangerous channel. Decedent drowned while trying to rescue two fellow employees. The Court held that the death arose out of and in the course of the employment. The deputy commissioner had found as a fact that decedent was using the recreational facilities, and that this was an incident of his employment (creating a "zone of special danger").

[13] Rather than basing its decision on the extremely uncommon fact situation presented, the majority found an absence of substantial circumstances which could have shown a departure from the employment, and could not, therefore, overcome the findings of the deputy commissioner.

[14] The dissenting opinion noted that the decedent worked only 44 hours per week, was accustomed to travelling far from the job-site for recreational purposes on the weekends, and was in fact on just such a trip at the time of the accident. The dissenting Justices concluded, with what the writer submits was ample justification in the record, that the death *did not* arise out of *or* in the course of the decendent's employment.

[15] 94 Ariz. 342, 385 P.2d 219 (1963), wherein the decedent's employment assignment for the state highway department made it necessary for him to find overnight lodging, but did not render his death from drowning while swimming in the motel swimming pool compensable, as his swimming was in no way associated with his work, and thus did not arise out of or in the course of his employment. *Compare*, Johnson v. Arizona Highway Department, 78 Ariz. 415, 281 P.2d 123 (1955).

[16] ARIZ. REV. STAT. ANN. § 23-1021A (1956).

consistent with several earlier Arizona decisions denying recovery to an employee for injuries sustained while performing a function not closely related to his employment.[17] Those decisions involved so-called off-duty accidents.

A comparison of the circumstances of *Cavalcante* with those of *Edwards* discloses that the extent of the employee's departure from the regular employment duties was substantially the same in both instances (drinking after working hours in *Cavalcante,* and swimming after work in *Edwards*); yêt the New Jersey court saw fit to award compensation while the Arizona court did not. The reason for this difference is not immediately apparent, but may be found in the varying approaches of the two courts to the construction and application of workmen's compensation legislation. Based upon the instant decision, it would seem that New Jersey is quite liberal in allowing recovery of compensation, while Arizona allows recovery only in cases where the employee's acts are directly related to his employment. The Arizona court has stated that the test to be applied in determining whether the accident arises out of the employment is whether the accident was caused by or contributed to by a necessary risk of danger *inherent* in the employment, not merely whether the employment had increased the danger.[18]

Although workmen's compensation legislation is to be construed most liberally in favor of claimants, some limits must be established beyond which accidental injuries and deaths of workmen should not be compensable. Those limits, it would seem, have been set by the legislatures in their use of the phrase *arising out of and in the course of employment.* The fact remains that this phrase has been construed so differently in many jurisdictions that some of the decisions seem hopelessly irreconcilable.

Under facts similar to those of the instant case, however, the limits set by the general phrase dictate the result that reasonable physical relaxation must be incidental to the employment, because if not, claims which arise from circumstances having doubtful relation to the actual employment will become compensable. The soundest construction of the statutory limits, it is believed, is found in those

---

[17] *E.g.,* Gaumer v. Industrial Comm'n., 94 Ariz. 195, 382 P.2d 673 (1963), decided only a few months prior to Edwards v. Industrial Comm'n., holding that, where the seller of an airplane arranged with decedent pilot to deliver it to the buyer in Mexico, and the pilot was killed while on a test flight on his own time and initiative, his death did not occur in the course of his regular employment with an airline, even though the seller was a potential customer of the airline and the pilot had the permission of his employer to make the test flight. See also, Application of Barrett, 78 Ariz. 219, 278 P.2d 409 (1954); McCampbell v. Benevolent & Protective Order of Elks, 71 Ariz. 244, 266 P.2d 147 (1950); Hartford Accident & Indemnity Co. v. Industrial Comm'n., 66 Ariz. 259, 186 P.2d 511 (1945).

[18] Goodyear Aircraft Corp. v. Industrial Comm'n., 62 Ariz. 398, 409, 158 P.2d 511, 516 (1945).

jurisdictions, including Arizona,[19] requiring a closer nexus between the employment function and accidental injury or death than that sanctioned by the New Jersey court in *Cavalcante.*

The instant case and the decisions in the United States Supreme Court may presage a trend toward compensating accidental injuries and deaths of workmen occurring under circumstances characterized by substantial departure from the workmen's regular employment functions and duties.[20] If such decisions are generally followed, the area of compensable injuries will be enlarged to what would seem to be an unwarranted extent to the end that almost any kind of activity by workmen would be held to be reasonable physical relaxation and, accordingly, incidental to the employment. As yet, the Arizona court has refused to go this far, and has restricted the area of reasonable physical relaxation to activities reasonably closely related to the employment and, thus, fairly incidental thereto. The extreme result reached in the instant case illustrates why the construction given by the Arizona court to its workmen's compensation statute should be retained.

J. William Brammer, Jr.

---

[19] Edwards v. Industrial Comm'n., 94 Ariz. 342, 385 P.2d 219 (1963).

[20] *But see* Rosenberg v. Biboni, 25 N.J. Misc. 397, 54 A.2d 659 (1947), a decision of the Court of Common Pleas of Essex County, a court of similar stature to that which decided *Cavalcante.* It seems either that New Jersey law has changed in the period since 1947, or that the court in *Cavalcante* ignored the view taken in *Rosenberg,* at 660, that:

> Where an act is done by the employee for his personal comfort and convenience, which is not reasonably essential for his health and conducive to the proper conduct of his work, but is merely for his own accommodation or advantage, without any connection with his work, same is not incidental to his employment and an injury arising therefrom is not compensable.