NOTES

ATTORNEY AND CLIENT—TERMINATION OF RELATION—CLIENTS' FAILURE TO COMPENSATE MAY NOT BE SUFFICIENT CAUSE.—Two Alaskan attorneys who had represented certain Indian villages in litigation in the District Court for the District (Territory) of Alaska, entered an appearance as counsel for the appellant villages in the Supreme Court of Alaska in order that appeals might be taken by outside counsel not authorized to practice law in that state. When it became necessary to take further steps to perfect the appeals the Alaskan attorneys filed a motion to withdraw on the grounds that they had not been paid for past services. On the motion, *held*, denied. Since counsel had entered their appearance as attorneys for the appellants, they would not be permitted to withdraw in the absence of substitution of other qualified counsel, regardless of whether they had been unfairly denied compensation for past services and might be unable to recover for future services. *Organized Village of Kake v. Eagan*, 354 P.2d 1108 (Alaska 1960).

When an attorney accepts employment this involves the assumption of an entire contract obligating him to conduct the particular litigation through to termination.[1] Once an attorney has made a formal appearance upon the record, the express permission of the court is required to release the attorney from his obligation.[2] Ordinarily consent of the client will be the only approval required for an attorney to withdraw from the case.[3] In the absence of consent, an attorney can withdraw only for sufficient cause after giving reasonable notice and obtaining permission from the court.[4] Even if there exists an adequate cause, withdrawal is not a matter of right, but rather rests within the discretion of the court.[5] There is no set standard to determine what is a justifiable cause for withdrawal.[6] Sufficient justifica-

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[1] Louvorn v. Johnston, 118 F.2d 704 (9th Cir. 1941); Henderson v. Henderson, 232 N. C. 1, 59 S.E.2d 227 (1950); McLaughlin v. Nittleton, 47 Okla. 407, 148 Pac. 987 (1915).

CANNONS OF PROFESSIONAL ETHICS, No. 44 "The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause."

[2] People v. Massey, 137 Cal. App. 2d 623, 290 P.2d 906 (1955); *In re* O'Brien, 93 Vt. 194, 107 Atl. 487 (1919).

[3] Thompson v. Dickinson, 159 Mass. 210, 34 N.E. 262 (1893).

[4] Fever v. Fever, 156 Fla. 117, 22 So. 2d 641 (1945); People v. Franklin, 415 Ill. 514, 114 N.E.2d 661 (1953); Powers v. Manning, 154 Mass. 370, 28 N.E. 290 (1891).

[5] Linn v. Superior Court, 79 Cal. App. 721, 250 Pac. 880 (1926).

[6] For a statement to that effect, see Genrow v. Flynn, 166 Mich. 564, 568, 131 N.W. 1115, 1116 (1911) (dictum).

tion has been found where the client abused and humiliated the attorney,[7] refused to pay necessary expenses of litigation,[8] refused to make agreement as to fees,[9] refused to make advancements to apply to attorney's fees during prolonged litigation,[10] and for non-payment for past services.[11] However, there may be circumstances in which the non-payment of expenses of litigation or the value of services thus far performed will not justify the attorney in withdrawing.[12] The right of withdrawal may properly be denied where the motion is made in the course of a trial[13] or immediately prior to the final disposition of the case[14] if this would result in an injustice to the client,[15] for no lawyer may abandon a cause at a critical stage and leave his client helpless in an emergency.[16]

Since Alaska only recently became a state,[17] its judicial decisions are limited. The rules of the Supreme Court of Alaska provide that only attorneys admitted to practice law in the state of Alaska will be qualified to practice before the court.[18] It is also required that all documents presented to the court, other than records, must bear the signature of and be presented by a member of the state bar of Alaska.[19] Here the court relied on the appearance of Alaskan counsel in allowing the motion for appeal, and in holding further proceedings in abeyance pending disposition of certain appeals to the United States Supreme Court, in the expectation that Alaskan counsel would be available to further process the appeal in the state supreme court. In addition, this case was extremely important in that the final decision would affect the Alaskan fishing industry, one of the major sources of income for the state.

CANNONS OF PROFESSIONAL ETHICS, No. 44, points out that: "The lawyer should not throw up the unfinished task to the detriment of his client except for the reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement . . . as to fees . . . the lawyer may be warranted in withdrawing. . . ."

[7] Mutter v. Burgess, 87 Colo. 580, 290 Pac. 269 (1930) (attorney accused by client of dishonesty).

[8] Eliot v. Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683 (1863) (dictum).

[9] *In re* Coffin's Estate, 189 Iowa 862, 179 N.W. 123 (1920) (attorney hired only for collection but trial found necessary); Gosnell v. Hilliard, 205 N.C. 297, 171 S.E. 52 (1933).

[10] Young v. Lanznar, 133 Mo. App. 130, 112 S.W. 17 (1908); Tenney v. Berger, 93 N.Y. 524, 45 Am. Rep. 263 (1883).

[11] Silver Peak Gold Mining Co. v. Harris, 116 Fed. 439 (D. Nev. 1902).

[12] Cassel v. Gregori, 28 Cal. App. 2d 769, 70 P.2d 721 (1937); Pickard v. Pickard, 83 Hun 338, 31 N.Y.S. 987 (Sup. Ct. 1894).

[13] Finch v. Wallberg Dredging Co., 76 Idaho 246, 281 P.2d 136 (1955) (dictum).

[14] *Id.* at 247, 281 P.2d at 138.

[15] McInnes v. Sutton, 35 Wash. 384, 77 Pac. 736 (1904) (dictum).

[16] *Id.* at 386, 77 Pac. at 737.

[17] The election was authorized by 72 Stat. 339 (1958); and upon favorable vote and Presidential Proclamation issued January 6, 1959, Alaska was admitted to statehood. Exec. Order No. 3269, 24 Fed. Reg. 81.

[18] ALASKA SUP. CT. R. 4.

[19] ALASKA SUP. CT. R. 46(f).

Counsel waited six months before deciding to withdraw just before additional steps in the appeal were required. The court, in attempting to determine whether the failure to pay counsel for past services justified granting the withdrawal request,[20] looked to the factors pointed out previously to justify denying the motion to withdraw and to exercise the right to grant or reject counsel's request.[21]

Arizona through its court rules[22] and judicial interpretation[23] seems to concur with the decision of the Alaska supreme court. The attorney's right to withdraw from his employment, once assumed, exists only with the approval of the court.[24] The question of whether failure to compensate is sufficient "good cause," for an attorney's withdrawal is still to be settled in Arizona; but decisions from other jurisdictions,[25] as pointed out previously, grant or deny the motion to withdraw depending on the particular circumstances of the case.

The Alaska court in rendering its decision in the *Kake Village* case was on sound ground. In denying or granting a motion to withdraw the court must be guided by considerations additional to those concerned with the obligation of the client to pay his attorney what is due. An attorney is an officer of the court,[26] as well as an agent of his client, and as such he is liable to both for the faithful performance of his duties.

Donald J. Kenney

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[20] Silver Peak Gold Mining Co. v. Harris, 116 Fed. 439 (D. Nev. 1902). This Nevada case deciding the issue of failure of compensation as adequate cause for withdrawal is distinguishable from the principal case in that the promise to pay was made by the clients themselves, while here the Department of Interior, not the clients, was responsible for the contract and, as the Alaskan court stated, for treating the counsel unfairly. *Organized Village of Kake v. Eagan,* 354 P.2d 1108 (Alaska 1960).

[21] Daggett v. Deauville Corp., 148 F.2d 881 (5th Cir. 1945); Louvorn v. Johnston, 118 F.2d 704 (9th Cir. 1941).

[22] ARIZ. R. CIV. P. 80(E): "When the appearance of counsel has been entered for a party in any action or proceeding, he will be held responsible by the court for the conduct of the action until formal notice of withdrawal approved by the court and entered upon the minutes."

[23] State v. Graninger, 87 Ariz. 152, 348 P.2d 921 (1960). Here the Arizona Supreme Court refused to find error in the lower court's denial of a motion to withdraw by an attorney who had become the attorney of record for the defendant, when the plaintiff has been informed of the attorney's withdrawal from the case

[24] Louvorn v. Johnston, 118 F.2d 704 (9th Cir. 1941).

[25] For a list of cases and circumstances see: WOOD, FEE CONTRACTS FOR LAWYERS § 72 (1936); 11 MINN. L. REV. 552 (1927); 18 N.C.L. REV. 338 (1940); 39 YALE L.J. 276 (1930).

For a discussion of the effect of the service of process on the attorney of record, when the plaintiff has been informed of the attorney's withdrawal from the case see, 2 ARIZ. L. REV. 137 (1960), a note commenting on, Schatt v. O. S. Stapely Co., 84 Ariz. 58, 323 P.2d 953 (1958).

[26] People v. Franklin, 415 Ill. 514, 114 N.E.2d 661 (1953).

CONSTITUTIONAL LAW — AUTOMOBILES — FINANCIAL RESPONSIBILITY LAW.—The defendant was tried and convicted before a Justice of the Peace for driving a motor vehicle while under a license suspension order issued by the State Motor Vehicle Department. The County Court reversed and entered judgment of acquittal. On appeal, *held*, affirmed. The requirement of the Safety Responsibility Law[1] that the Director of Revenue suspend the license of each operator and all registrations of each owner of a motor vehicle involved in an accident in which there is personal injury or $50 or more property damage, unless such persons deposit security sufficient in the director's judgment to satisfy any judgments for damages resulting from the accident, is unconstitutional. *People v. Nothaus*, 363 P.2d 180 (Colo. 1961).

Three major proposals have been suggested for the alleviation of the national social problem of uncompensated motor vehicle accident victims:[2] a system analagous to workmen's compensation acts,[3] compulsory motor vehicle liability insurance laws,[4] and financial and safety responsibility laws.[5] The last proposal, having been adopted by legis-

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[1] COLO. REV. STAT. ANN. § 13-7-7(1) (1953).

> The director, within sixty days after the receipt of a report of a motor-vehicle accident within this state which has resulted in bodily injury or death or damage to the property of any one person in excess of fifty dollars, shall suspend the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident. If such operator is a non-resident the privilege of operating a motor vehicle within this state shall be suspended, and if such owner is a non-resident the privilege of the use within this state of any motor vehicle owned by him shall be suspended, unless such operator or owner or both shall deposit security in a sum which shall be sufficient in the judgment of the director to satisfy any judgments for damages resulting from such accident as may be recovered against such operator or owner. Notice of such suspension shall state the amount required as security, which in no event shall exceed the sum of eleven thousand dollars.

[2] See generally 3 LAW & CONTEMP. PROB. 465, 466 (1936); 11 ROCKY MT. L. REV. 12 (1938).

[3] No American state has enacted such a proposal. See generally 3 LAW & CONTEMP. PROB. 579, 583, 598 (1936); 27 TUL. L. REV. 341 (1953).

[4] Massachusetts is the only state to accept such a plan. The law was adopted in 1925 to take effect on January 1, 1927. Mass. Acts 1925, c. 346, MASS. GEN. LAWS ch. 90 (1932). See generally 19 BROOKLYN L. REV. 11 (1953); 33 IOWA L. REV. 522 (1948); 3 LAW & CONTEMP. PROB. 537, 554, 565, 571 (1936); 27 TUL. L. REV. 341 (1953).

[5] The first financial responsibility law was enacted in Connecticut in 1925. CONN. PUB. ACTS 1925, c. 183. In general, these laws are all designed to achieve the following objectives: (1) to compel or encourage motorists to make themselves financially responsible. This, under the usual financial responsibility law, would be accomplished by inducing motorists to carry liability insurance; (2) to keep off the highways those who are not financially responsible (this being implemented principally by operation of the provisions for suspension of the license and registration); (3) to promote safety on the highways. To the extent that financially irresponsible motorists are also careless in their driving habits, safety responsibility laws promote safety on the highways by depriving those who are not financially responsible of their vehicle operating and registration privileges. 40 ILL. L. REV. 237 (1945). On the success of these laws in reaching their objectives, see generally 19 BROOKLYN L. REV. 11 (1953); 33 IOWA L. REV. 522 (1948); 3 LAW & CONTEMP. PROB. 519, 531 (1936).

lation in every state except Massachusetts, has taken different forms in the statutes.[6] With only a very few exceptions,[7] the courts have upheld the validity of the various state motor vehicle financial responsibility acts against objections of all varieties.[8]

The Supreme Court of Colorado, in holding their state's financial responsibility law unconstitutional, relied primarily on two grounds: first that Nothaus was denied due process of law by the revocation of his operator's license without a hearing or trial; and second that the statute in question has nothing whatever to do with the protection of the public safety, health, morals or welfare, and is therefore an unreasonable restraint upon the freedom of the individual to make use of the public highways which cannot be sustained as a proper exercise of the police power of the state.

As to the first ground, the court in the principal case stated:

> Such action [depriving Nothaus of the right to drive a motor vehicle on the highways] cannot be taken without notice to the party affected and without an opportunity for him to be heard on the question of whether sufficient grounds exist to warrant a revocation of his right to drive a motor vehicle upon the highways of the state.[9]

It has been generally held by other courts that suspension of the license prior to a hearing but subject to judicial review does not violate due process.[10] It is reasoned that the operation of a motor

[6] Annot., 35 A.L.R.2d 1011 (1954) (Validity of motor vehicle financial responsibility act).

[7] *Ex parte* Lindley, 108 Cal. App. 258, 291 Pac. 638 (1930) (Apparently discredited in Watson v. State Div. of Motor Vehicles, 212 Cal. 279, 298 Pac. 481 (1931); Rosenblum v. Griffin, 89 N.H. 314, 197 Atl. 701 (1938) in which a provision to the effect that if there was a mortgage or lien on the motor vehicle or any sum due on the purchase price, the owner must furnish proof of financial responsibility before the vehicle might be registered, was held unconstitutional as an arbitrary discrimination.

[8] Annot., 35 A.L.R.2d 1011 (1954).

[9] People v. Nothaus, 363 P.2d 180, 182 (Colo. 1961).

[10] Escobedo v. State Dep't of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950); Doyle v. Kahl, 242 Iowa 153, 46 N.W.2d 52 (1951); Ballow v. Reeves, 238 S.W.2d 141 (Ky. 1951); Sharp v. Department of Pub. Safety, 114 So. 2d 121 (La. 1959); Hadden v. Aitkin, 156 Neb. 215, 55 N.W.2d 620 (1952); Heart v. Fletcher, 184 Misc. 659, 53 N.Y.S.2d 369 (Sup. Ct. 1945); Commonwealth v. Koczwara, 78 Pa. D. & C. 6 (Dist. Ct. 1951); Gillaspie v. Department of Pub. Safety, 152 Tex. 459, 259 S.W.2d 177 (1953); Nulter v. State Rd. Comm'n, 119 W. Va. 312, 193 S.E. 549, 194 S.E. 270 (1937); State v. Stehlek, 262 Wis. 642, 56 N.W.2d 514 (1953). In Escobedo v. State Dep't of Motor Vehicles, *supra*, 222 P.2d at 5, the court said:

> Suspension of the license without prior hearing but subject to subsequent judicial review did not violate due process if reasonably justified by a compelling public interest . . . The compelling public interest here appears from the obvious carelessness and financial irresponsibility of a substantial number of drivers and from the following allegations of the petition: There are 3,879,931 motor vehicles registered in California. During the first four months after the effective date of the law now under consideration, 19,808 persons were ordered by the department to establish that they were adequately insured or deposit security. More than 6,567 operators' licenses were suspended under the applicable law, and more than 1,300 "citations per month for suspension of license" were issued by the department. In these circumstances it is apparent that to require a hearing in every case before suspension of a license would have substantially burdened and delayed if not defeated the operation of the law.

vehicle on the public highways is not a natural right, nor is license to do so a contract, or property right, in a constitutional sense. It is merely a conditional privilege which may be suspended or revoked under the police power, even without a notice or an opportunity to be heard.[11] In accepting a license from the state, one must also accept all reasonable conditions imposed by the state in granting the license.[12] Thus, suspending the privilege for failure to comply with reasonable regulations is not a denial of due process.[13] Also, since a driver's license and registration represent privileges and not property rights, regulation of them, their issuance, suspension, or cancellation may be committed to an administrative body or agency.[14] There is no denial of due process under such an agency where notice and hearing are dispensed with in connection with purely preliminary matters, and the right to judicial review, where reserved, may cure any lack of due process in the original administrative proceedings.[15]

As to the second ground relied on by the Colorado court, it has generally been recognized that financial responsibility laws constitute both reasonable regulations of the public highways and proper measures to protect the public safety.[16] Enactments such as the one involved here have been sustained under the police power and the compelling public interest of the states to provide some remedy for the uncompensated victims of auto accidents and thereby to protect the users of the highways and the general public affected by the extensive use of motor vehicles in this motorized age.[17]

The Colorado court distinguished their statute from those requiring public liability insurance as a condition to be met *before* a driver's

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[11] Nulter v. State Rd. Comm'n, *supra* note 10. In Doyle v. Kahl, *supra* note 10, 46 N.W.2d at 55, the court said in considering a contention that the suspension of the license without a hearing is depriving a person of his property without due process of law:

> The fallacy of this claim is that his so-called property right is not such in the ordinary sense. It is a privilege granted to him under certain specific conditions, subject to all laws pertaining thereto at the time the same is issued or may be later enacted, if otherwise valid.

[12] People v. Thompson, 259 Mich. 109, 242 N.W. 857 (1932).

[13] Ballow v. Reeves, 238 S.W.2d 141 (Ky. 1951).

[14] Gillaspie v. Department of Pub. Safety, 152 Tex. 459, 259 S.W.2d 177 (1953).

[15] Doyle v. Kahl, 242 Iowa 153, 46 N.W.2d 52, 55 (1951); 16A C.J.S. *Constitutional Law* § 628 (1956).

[16] Ballow v. Reeves, 238 S.W.2d 141 (Ky. 1951). In Rosenblum v. Griffin, 89 N.H. 314, 197 Atl. 701, 704 (1938), the court said:

> But protection in securing redress for injured highway travelers is a proper subject of police regulation, as well as protection from being injured. It is a reasonable incident of the general welfare that financially irresponsible persons be denied the use of the highway with their cars, regardless of the competency of themselves or others as the drivers.

[17] Sharp v. Department of Pub. Safety, 114 So. 2d 121, 123 (La. 1959). See generally Annot., 35 A.L.R.2d 1011, 1013 & n. 9 (1954).

license will issue, and said that the latter type protects the public.[18] However, if legislation requiring insurance or other security as a condition precedent to the right to operate a motor vehicle on the highway be valid, it would seem to follow that such compulsion may be limited to depend on contingencies such as involvement in an accident.[19]

Arizona has the Uniform Motor Vehicle Safety Responsibility Act[20] which contains a provision substantially similar to the Colorado statute herein involved.[21] Within the act are other provisions for hearings upon request of persons aggrieved by orders or acts of the superintendent and for a trial de novo in the superior court to determine whether the order or act is lawful and reasonable.[22] A further provision provides for the suspension of the license and registration of a person against whom a judgment was rendered if unpaid within sixty days except as provided by the statute.[23] This statute has been held constitutional in *State ex rel. Sullivan v. Price*.[24]

Unquestionably there is a need to protect the public from losses caused by financially irresponsible motorists by means within constitutional limitations. The widespread public acceptance of laws of the safety or financial responsibility type, as opposed to enactment of compulsory insurance requirements or statutes similar to workmen's com-

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[18] As to the Colorado statute, the court stated, "It is a device designated and intended to bring about the posting of security for the payment of a private obligation without the slightest indication that any legal obligation exists on the part of any person. The public gets no protection whatever from the deposit of such security." People v. Nothaus, 363 P.2d 180, 183 (Colo. 1961). Generally however, there is no violation of due process even though there is a failure in the statute to require a showing of negligence prior to suspension of the license. In Ballow v. Reeves, 238 S.W.2d 141, 142 (Ky. 1951), the court said:

> The question of negligence has nothing to do with the matter. The requirement of financial responsibility does not in any sense pre-determine the question of liability, which could only be decided in a judicial proceeding. It simply furnishes an added protection to the public and better assures the safety of our highways and is not dependent upon the operator's skill or lack of it.

[19] People v. Nothaus, *supra* note 18 (dissenting opinion). See Ballow v. Reeves, *supra* note 18.

[20] The act is based on the Uniform Motor Vehicle Safety Responsibility Act, promulgated by the National Conference on Street and Highway Safety.

[21] ARIZ. REV. STAT. ANN. § 28-1142(A) (1956).

> The superintendent shall, within sixty days after the receipt of a report of a motor vehicle accident within this state which resulted in bodily injury or death or damage to the property of any one person in excess of one hundred dollars, suspend the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident, . . . unless such operator or owner or both shall deposit security in a sum which is sufficient in the judgment of the superintendent to satisfy any judgment or judgments for damages resulting from the accident as may be recovered against the operator or owner. . . .

[22] ARIZ. REV. STAT. ANN. § 28-1122 (1956).

[23] ARIZ. REV. STAT. ANN. § 28-1162 (1956).

[24] 49 Ariz. 19, 63 P.2d 653 (1937) held that ARIZ. CODE 1928, § 1664, depriving a motorist of the right to operate an automobile for nonpayment of a personal injury or property damage judgment, was not unconstitutional, and it was held not so vague, indefinite, and uncertain as to be unenforceable.

pensation laws, seems to evidence a public policy to the effect that it is socially desirable for motorists to be financially responsible, but a legislative reluctance to impose a positive requirement that all motorists show their ability to respond in damages before being permitted to drive on a public highway.[25] While the safety responsibility type of measure theoretically is a less perfect solution to the problem than the other proposed methods, practically, under effective administration, there may be an increase in the number of financially responsible motorists and a reduction of instances of hardship occasioned by irresponsible motorists.[26]

In view of the uniformity of the courts in upholding various types of financial responsibility laws, the majority of the Colorado court, with no citation of authority, took a bold step in finding their statute unconstitutional, requiring a return of the licenses to all those financially irresponsible individuals who already have had their licenses suspended under the statute.[27] It is significant that the court found itself dealing with a right, rather than a mere privilege, around which should be placed the same safeguards given to other constitutionally guaranteed rights and which cannot be withdrawn summarily, but only by due process of law.[28]

Jerry L. Jacobs

CONSTITUTIONAL LAW—DOUBLE JEOPARDY—FIRST DEGREE MURDER TRIAL AFTER REVERSAL OF MANSLAUGHTER CONVICTION.—The defendant was charged with first degree murder and convicted of manslaughter; on appeal the conviction was reversed and a new trial ordered. On trial de novo, the defendant moved to quash the first degree charge claiming double jeopardy. The trial court certified the question to determine if the defendant was placed twice in jeopardy. On certification,[1] *held,* no. Where the defendant has been convicted of manslaughter under an information charging first degree murder and the conviction has been reversed on appeal, a new trial for first degree murder would not place the defendant twice in jeopardy. *State v. Thomas,* 88 Ariz. 269, 356 P.2d 20 (1960).

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[25] 19 BROOKLYN L. REV. 11 (1953).
[26] *Ibid.* See generally 1953 INS. L.J. 758.
[27] Nothaus v. Theobald, 363 P.2d 184 (Colo. 1961).
[28] See generally 30 N.C.L. REV. 27 (1951). *But see* 46 IOWA L. REV. 862 (1961).

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[1] For the text of the certified question, see State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960).

The courts that have considered the question raised by the *Thomas* case present conflicting views. At present, the numerical majority of the jurisdictions hold that the second trial for the greater offense, after the reversal of the conviction of the lesser included offense, places the defendant twice in jeopardy.[2] They reason that the verdict finding the defendant guilty of the lesser offense carries an implied acquittal of the greater offense and that this acquittal acts as a bar to a retrial for the greater offense.[3] The defendant's appeal is only from the conviction[4] and a reversal of the conviction does not affect the acquittal.[5] Slightly fewer jurisdictions hold that the second trial for the greater offense does not place the defendant twice in jeopardy, reasoning that when the defendant appeals from the conviction he waives his right to assert the plea of former jeopardy.[6] The verdict, it is held, is a unit and not severable,[7] and when reversed any implication based on it must fall.[8] Therefore, the case may be tried anew as if there

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[2] Green v. United States, 355 U.S. 184 (1957); Brewington v. State, 19 Ala. App. 409, 97 So. 763 (1923); United States v. Owens, 2 Alaska 480 (1905); Hearn v. State, 212 Ark. 360, 205 S.W.2d 477 (1947); Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976 (1958); State v. Naylor, 28 Del. 99, 90 Atl. 880 (1913); West v. State, 55 Fla. 200, 46 So. 93 (1908); People v. Carrico, 310 Ill. 543, 142 N.E. 164 (1923); State v. Smith, 132 Iowa 645, 109 N.W. 115 (1906); State v. Elmore, 179 La. 1057, 155 So. 896 (1934); People v. Farrell, 146 Mich. 264, 109 N.W. 440 (1906); State v. Williams, 30 N.J. 105, 152 A.2d 9 (1959); State v. White, 61 N.M. 109, 295 P.2d 1019 (1956); State v. Steeves, 29 Ore. 85, 43 Pac. 947 (1896); Commonwealth v. Alessio, 313 Pa. 537, 169 Atl. 764 (1934); Reagan v. State, 155 Tenn. 397, 293 S.W. 755 (1927); Bateman v. Commonwealth, 183 Va. 253, 32 S.E.2d 134 (1944); State v. Schoel, 54 Wash. 2d 388, 341 P.2d 481 (1959); State v. Vineyard, 85 W. Va. 293, 101 S.E. 440 (1919); Montgomery v. State, 136 Wis. 119, 116 N.W. 876 (1908).

[3] *E.g.*, Green v. United States, 355 U.S. 184, 190 (1957); Johnson v. State, 27 Fla. 245, 9 So. 208, 210 (1891); Commonwealth v. Deitrick, 221 Pa. 7, 70 Atl. 275 (1908); State v. Schoel, 54 Wash. 2d 388, 341 P.2d 481, 484 (1959).

[4] *E.g.*, Johnson v. State, *supra* note 3; Barnett v. People, 54 Ill. 325, 331 (1870); People v. Dowling, 84 N.Y. 478, 483 (1881).

[5] *E.g.*, State v. Harville, 171 La. 256, 130 So. 348, 350 (1930); State v. Norvell, 10 Tenn. 24, 27 (1820); see 6 U.C.L.A.L. REV. 321 (1959).

[6] United States v. Frank, 8 Alaska 436 (1933) (This case might not be valid authority in Alaska today as it was decided in reliance on Trono v. United States, 199 U.S. 521 (1905) which was overruled by Green v. United States, 355 U.S. 184 (1957)); State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960); Young v. People, 54 Colo. 293, 130 Pac. 1011 (1913); Perdue v. State, 134 Ga. 300, 67 S.E. 810 (1910); State *ex rel.* Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931); State v. Morrison, 67 Kan. 144, 72 Pac. 554 (1903); Hoskins v. Commonwealth, 152 Ky. 805, 154 S.W. 919 (1913); Jones v. State, 144 Miss. 52, 109 So. 265 (1926); State v. Stallings, 334 Mo. 1, 64 S.W.2d 643 (1933); State v. Hutter, 145 Neb. 798, 18 N.W.2d 203 (1945); Gibson v. Somers, 31 Nev. 531, 103 Pac. 1073 (1909); People v. McGrath, 202 N.Y. 445, 96 N.E. 92 (1911); State v. Correll, 229 N.C. 640, 50 S.E.2d 717 (1948); State v. Robinson, 100 Ohio App. 466, 137 N.E.2d 141 (1956); Hamit v. State, 42 Okla. Crim. 168, 275 Pac. 361 (1929); State v. Gillis, 73 S.C. 318, 53 S.E. 487 (1906); State v. Kessler, 15 Utah 142, 49 Pac. 293 (1897); State v. Bradley, 67 Vt. 465, 32 Atl. 238 (1895).

[7] *E.g.*, Brantley v. State, 132 Ga. 573, 64 S.E. 676, 677 (1909); State v. Kessler, 15 Utah 142, 49 Pac. 293, 294 (1897).

[8] *E.g.*, Young v. People, 54 Colo. 293, 130 Pac. 1011, 1014 (1913); State v. Kessler, *supra* note 7, at 294, 295.

had been no former trial.[9]

The leading case supporting the numerical majority view is a 1957 United States Supreme Court decision, *Green v. United States*,[10] in which the defendant was convicted of first degree murder on a second trial after a previous conviction of second degree murder had been reversed on his appeal. The Court held that the second trial for first degree murder placed the defendant twice in jeopardy within the meaning of the fifth amendment of the Federal Constitution, reasoning that the conviction of the lesser offense on the first trial carried an implicit acquittal as to the greater offense. When the defendant appealed, he did not waive his right to assert the formar acquittal as a bar to a second trial for the greater offense.[11]

The basic conflict presented by these authorities involves two points; first, the interpretation to be given to the term "double jeopardy" and second, the balancing of the interests of the state against the rights of the accused.[12] Jurisdictions not allowing the second trial for the greater offense after the conviction of the lesser included offense is reversed interpret the term strictly and emphasize the rights of the defendant, in not having his life placed twice in jeopardy, over the interests of the state.[13] While the jurisdictions allowing the second trial interpret the term liberally and emphasize the interests of the state, in securing adequate punishment of criminals, over the rights of the defendant.[14]

In its decision, in the instant case, to allow the second trial for murder after the conviction of manslaughter had been reversed, the Arizona Supreme Court placed great weight on Rule 314 of the Rules of Criminal Procedure[15] which provides for the new trial to be in all respects as if no former trial had been had. This rule has been in effect in Arizona since 1864,[16] but the *Thomas* case is the first instance in which it has been given judicial construction in this situation.[17] The court also relied heavily on its decision in *Territory v. Dor-*

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[9] *E.g.*, State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960); Young v. People, *supra* note 8; People v. McGrath, 202 N.Y. 445, 96 N.E. 92, 94 (1911).

[10] 355 U.S. 184 (1957).

[11] *Ibid.*; see 32 TUL. L. REV. 488 (1958).

[12] See 6 U.C.L.A.L. REV. 321 (1959).

[13] See Green v. United States, 355 U.S. 184, 189 (1957); 56 MICH. L. REV. 1192, 1193 (1958).

[14] See People v. Palmer, 109 N.Y. 413, 17 N.E. 213 (1888).

[15] ARIZ. R. CRIM. P. 314 provides:

When a new trial is granted, the new trial shall proceed in add respects as if no former trial had been had. On the new trial the defendant may be convicted of any offense charged in the indictment or information regardless of the verdict or finding on the former trial. The former verdict or finding shall not be used or referred to in evidence or argument on the new trial.

[16] Comp. Laws of Ariz., ch. XI, §§ 408, 414 (1864).

[17] This rule was adopted verbatim from California and has been consistently construed by the courts of that state, both before and after its adoption by Ari-

man,[18] a case concerning the fifth amendment of the Federal Constitution, in which it was held that a defendant was not twice placed in jeopardy by a new trial for the same offense after his former conviction for that offense had been reversed on his appeal.[19] The court, in light of the *Dorman* decision and the long standing existence of Rule 314, held the rule to be constitutional and approved its decision in the *Dorman* case.[20]

In a first degree murder trial in Arizona, the jury is instructed as to both degrees of murder and as to manslaughter[21] and a verdict finding the defendant guilty of manslaughter necessarily involves an implied acquittal of both degrees of murder.[22] But this acquittal will be of no avail to the defendant in Arizona, under the doctrine of the *Thomas* case, if he exercises his constitutional right of appeal[23] from the verdict convicting him of the lesser offense of manslaughter. Under Rule 314, if his appeal is successful, he will once again be subject to the possibility of being convicted of that offense of which he has been acquitted. Hence, by his exercise of one constitutional right, he is denied the benefit of another constitutional right.[24]

Even though, as the Arizona court noted,[25] it was not bound by the interpretation of the double jeopardy provision of the fifth amendment to the Federal Constitution, as stated by the United States Supreme Court in the *Green* case,[26] the trend in the state courts since that decision has been to hold that the second trial for the greater offense places the defendant twice in jeopardy.[27]

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zona, as not allowing the defendant to be twice tried for the greater offense. *E.g.*, Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976 (1958); People v. McFarlane, 138 Cal. 481, 71 Pac. 568 (1903); People v. Gordon, 99 Cal. 227, 33 Pac. 901 (1893).

[18] 1 Ariz. 56, 25 Pac. 516 (1872).

[19] *Ibid.*

[20] State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960).

[21] *Accord*, Antone v. State, 49 Ariz. 168, 65 P.2d 646 (1937); Miranda v. State, 42 Ariz. 358, 26 P.2d 241 (1933).

[22] See 56 MICH. L. REV. 1192 (1958).

[23] ARIZ. CONST. art. 2, § 24.

[24] Defendants claim of double jeopardy, in the instant case, was based on ARIZ. REV. STAT. ANN. § 13-145 (1956), which has its constitutional basis in ARIZ. CONST. art. 2, § 10. See 19 OHIO ST. L. J. 511 (1958).

[25] State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960).

[26] *Supra* note 11.

[27] In light of the *Freen* decision, California and Washington have overruled previous precedent and now hold the second trial to constitute double jeopardy. Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976 (1958); State v. Schoel, 54 Wash. 2d 388, 341 P.2d 481 (1959). New Jersey, with no previous precedent, held in accord with the *Green* decision. State v. Williams, 30 N.J. 105, 152 A.2d 9 (1959). Kentucky and New York, following previous decisions, continue to hold contrary to *Green*. Blanton v. Commonwealth, 320 S.W.2d 626 (Ky. 1959); People *ex rel.* Hetenyi v. Johnson, 10 App. Div. 2d 121, 198 N.Y.S.2d 18 (1960). Arizona is the only jurisdiction, with no previous precedent, to decide contrary to the *Green* case since that decision was announced. State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960).

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — ADMISSIBILITY IN STATE COURTS OF EVIDENCE OBTAINED THROUGH UNCONSTITUTIONAL SEARCH AND SEIZURE.—The defendant was found guilty of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures and photographs in violation of an Ohio Statute.[1] The conviction was based primarily upon evidence seized during an unlawful search of the defendant's home. The Ohio Supreme Court affirmed the conviction.[2] On appeal, *held,* reversed. Evidence obtained through an unconstitutional search and seizure by state and local police is inadmissible in a state court. *Mapp v. Ohio,* 367 U.S. 643 (1961).

The path leading toward the principle enunciated above has been a rather slow and painstaking one. The common-law rule was that the illegality of the means by which evidence was procured was not a ground of objection to its admission, for such an issue was collateral to those on trial.[3] Although the earliest federal case promulgating the exclusionary rule was based on the self-incrimination provisions of the fifth amendment of the United States Constitution,[4] the leading case adopting the federal exclusionary rule was *Weeks v. United States,*[5] which found the rule a logical sanction of the fourth amendment.[6] In 1949, the Court was asked in *Wolf v. Colorado,*[7] to extend the exclusionary rule to state courts. The Court[8] found that the guarantee of the fourth amendment — security of one's privacy against arbitrary intrusion by the police — is a basic right in a free society, implicit in the "concept of ordered liberty,"[9] and therefore enforceable against the states through the Due Process Clause of the fourteenth amendment. However the majority of the Court found that the exclusionary rule was not an essential ingredient of this fourth amendment right, but a judicially created rule to enforce it, and therefore the states should be allowed to protect that right under the fourteenth amendment by remedies of their choice.

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[1] OHIO REV. CODE § 2905.34 (Anderson 1953).
[2] 170 Ohio St. 427, 166 N.E.2d 387 (1960).
[3] MCCORMICK, EVIDENCE 291 (1954).
[4] Boyd v. United States, 116 U.S. 616 (1886).
[5] 232 U.S. 383 (1914).
[6] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." U. S. CONST., amend. IV.
[7] 338 U.S. 25 (1949).
[8] All of the nine justices agreed with this reasoning although Justice Rutledge in his dissent also referred to the interaction of the fourth and fifth amendments as justifying the conclusion.
[9] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

In overruling *Wolf*, the Court stated that it was led by "Wolf's constitutional documentation of the right of privacy free from unreasonable state intrusion, . . . to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right. . . ."[10] Four of the majority judges[11] found the exclusionary rule announced in *Weeks* to be an essential ingredient of the right of the fourth amendment, reasoning that otherwise the assurance against unreasonable federal seizure would be a "form of words,"[12] without means of enforcement. Having drawn this conclusion which the Court in *Wolf* had refused to do, the Court then went on to use the constitutional reasoning in *Wolf* in finding it logically necessary that the *Weeks* exclusionary rule be enforced against the states.

The minority[13] in their reasoning assumed, without agreeing with the majority, that the exclusionary rule was a constitutional requirement of the fourth amendment. They argued that what was recognized in *Wolf* was not that the fourth amendment *as such* is enforceable against the states as a facet of due process but the principal of privacy, which is at the core of the fourth amendment,[14] and that

[10] Mapp v. Ohio, 367 U.S. 643 (1961). The exclusionary rule in *Weeks* was limited to evidence gained unconstitutionally by federal officers to be used in the federal courts. This limitation was responsible for the "silver platter" doctrine which allowed the use in the federal courts of evidence gained illegally through the actions of state or local officers exclusively and then turned over to federal officials. See, *e.g.*, Byars v. United States, 273 U.S. 28 (1927), and the naming of the doctrine in Lustig v. United States, 338 U.S. 74 (1949). The "silver platter" doctrine was overruled in Elkins v. United States, 364 U.S. 206 (1960).

The exclusionary rule was further extended in Rea v. United States, 350 U.S. 214 (1956), which formulated a method whereby a federal agent could be enjoined from testifying in a state case. *But see* Wilson v. Schnettler, 365 U.S. 381 (1961).

[11] The majority opinion was written by Justice Clark joined by Justices Brennan, Douglas and Warren. Justice Black concurred with the majority but rejected the idea, as he had done in *Wolf*, that the fourth amendment, of itself, constitutionally justifies the exclusionary rule. However he argued that "[T]he Fourth Amendment's ban against unreasonable searches and seizures . . . considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." Mapp v. Ohio, *supra* note 10. Therefore, as the minority pointed out, the case was in fact an opinion only for the judgment overruling *Wolf* and not for the basic rationale.

[12] Silverthone Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[13] The minority opinion was written by Justice Harlan joined by Justice Frankfurter (who had written the *Wolf* majority opinion), and by Justice Whitaker. Justice Stewart wrote a memorandum in which he chose not to express any views on the constitutional issues decided but he agreed with the minority judges that the Court had "reached out" to overrule *Wolf*, for the question of the constitutionality of the Ohio Statute upon which the conviction was based was an easier and more pivotal issue upon which the reversal could have been justified.

[14] "It would not be proper to expect or impose any precise equivalence, either as regards the scope of the right or the means of its implementation, between the requirements of the Fourth and Fourteenth Amendments. For the Fourth, unlike what was said in Wolf of the Fourteenth, does not state a general principle only; it is a particular command, having its setting in a pre-existing legal context on which both interpreting decisions and enabling statutes must at least build." Mapp v. Ohio, 367 U.S. 643 (1961) (dissent).

violations of the fourth amendment are not necessarily violations of the fourteenth.[15] They concluded that the majority was not only forcing the federal standards of search and seizure upon the states but also the basic federal remedy for violation of those standards.

Aside from the strict constitutional issues, the arguments surrounding the exclusionary rule mark a clash between individual privacy and public security. Those against the rule argue that there are other methods to enforce fourth amendment rights such as the traditional civil action for trespass or a criminal prosecution,[16] and since problems of criminal law enforcement vary widely from state to state, adamant national rules in this area are undesirable.[17]

The proponents of the exclusionary rule contend that the alternative remedies have been ineffective to afford proper protection to the rights of the private citizen, as the incentive to disregard the right is still present.[18] It is argued that the new rule eliminates a double standard in the federal and state courts which has caused conflict between them and it promotes judicial integrity although on occasion the criminal does go free.[19] They reject the argument that the rule fetters law enforcement, citing the experience of the Federal Bureau of Investigation which has operated within the exclusionary rule since 1914, and instead show the efficacy of the rule in promoting fair police methods in the states adopting the rule.[20]

Because of the restriction of the exclusionary rule in the *Weeks* and *Wolf* cases to the federal courts, the states have been allowed to devise their own remedies to enforce the right of privacy, usually a requirement of the state constitution[21] as well as that of the federal. When *Wolf* was considered, approximately two-thirds of the states had adopted the common-law rule,[22] but that number had been reduced to approximately one-half when the *Mapp* case was decided.[23] The *Mapp* case changes the rule in Arizona which had followed the

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[15] See Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959), rejecting this reasoning as the basis for the *Wolf* decision.

[16] In State v. Frye, 58 Ariz. 409, 120 P.2d 793 (1942), another remedy suggested was that if the violation was intentional and the court had jurisdiction over the officer, they could hold him in contempt.

[17] Mapp v. Ohio, 367 U.S. 643 (1961) (dissent). The argument against the rule is embodied in Justice (then Judge) Cardozo's words: "The criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 150 N.E. 585, 587 (1926).

[18] Wolf v. Colorado, 338 U.S. 25, 42 (1949) (dissent); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

[19] Mapp v. Ohio, 367 U.S. 643 (1961).

[20] Wolf v. Colorado, 338 U.S. 25, 44 (1949) (dissent).

[21] See, *e.g.*, ARIZ. CONST. art. 2, § 8.

[22] Wolf v. Colorado, 338 U.S. 25, 29, 33-39 (1949).

[23] See 8 WIGMORE, EVIDENCE § 2183 n.1 (McNaughton rev. 1961).

common-law. In *State v. Frye*,[24] the court considered the question one of first impression[25] and in a well documented opinion rejected the exclusionary rule.[26]

Now that the Arizona law on the subject has been changed, one of the immediate concerns of defense lawyers is the procedure to use in order to take advantage of the exclusion privilege. The Federal courts,[27] and the state courts, with a few exceptions,[28] require the accused to make timely motion before the trial to have the evidence excluded, as the court cannot stop to try collateral issues.[29] However, if the accused has no notice of such illegally obtained evidence until it is offered at his trial, justice requires it to be excluded upon proper motion.[30] Until the Arizona Supreme Court rules on this matter, it would seem that the wisest approach for the defense lawyer, in order to avoid waiving this newly won privilege, would be to raise the issue in a pretrial motion.[31]

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CRIMINAL LAW—HOMICIDE—YEAR AND A DAY RULE ABANDONED.—The defendant was indicted for criminal homicide and manslaughter. His motions to quash the indictments on the basis of the common law year and a day rule were denied. On appeal, *held,* affirmed.—The common law rule, that no one is responsible for a homicide when death ensues beyond a year and a day after the assault, is not part of the definition of murder, but only a rule of evidence which may be abrogated. *Commonwealth v. Ladd,* 402 Pa. 164, 166 A.2d 501 (1960).

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[24] 58 Ariz. 409, 120 P.2d 793 (1942).

[25] The issue had been raised but not answered in Thompson v. State, 41 Ariz. 167, 16 P.2d 727 (1932), and Malmin v. State, 30 Ariz. 258, 246 Pac. 548 (1926). See, also, Argetakis v. State, 24 Ariz. 599, 212 Pac. 372 (1923) (dictum).

[26] The rule has been followed in Jaroshuk v. United States. 201 F.2d 52 (1953); State v. Thomas, 78 Ariz. 52, 275 P.2d 408 (1954); Adams v. Bolin, 74 Ariz. 269, 247 P.2d 617 (1952); State v. Pelosi, 68 Ariz. 51, 199 P.2d 125 (1948).

[27] Cogen v. United States, 278 U.S. 221 (1929); FED. R. CRIM. P. 41(e).

[28] See Annot., 50 A.L.R.2d 531 § 11 (1956).

[29] This procedure was suggested as the proper method to follow in the dictum of the following Arizona cases: State v. Pelosi, 68 Ariz. 51, 199 P.2d 125 (1948), and Thompson v. State, 41 Ariz. 167, 16 P.2d 727 (1932).

[30] Gouled v. United States, 255 U.S. 298 (1921).

[31] In People v. Du Bois (N.Y. County Ct. 1961), the court was faced with the same problem; the *Mapp* case had changed the state law and the procedure to take advantage of the change had not yet been established. The court expressed a belief that it would be ". . . better to assimilate our practice to that employed in the Federal Courts and have the question determined in advance of trial."

The year and a day rule originated 700 years ago in the *Statutes* of *Gloucester*,[1] and has become well established in the common law.[2] The rule is prevalent throughout the United States in the absence of statute abrogating the common law.[3] Some states have incorporated the year and a day rule into their statutory definition of murder,[4] while others retain the common law rule as a supplement to their statutory definition.[5]

Assuming the rule to be one of evidence, testimony should be refused that the victim died of the injury received if death did not occur within a year and a day from the assault.[6] The courts reason that there would be a conclusive presumption that the victim died of some other cause.[7] This conclusive presumption is sometimes criticized, because of the absurdity of saying that a malicious murder should be deemed a guilty or harmless act according to the length of time a victim survives after receiving a mortal wound.[8] On the other hand, two principle reasons have been advanced in support of the rule. (1) There exists a problem of proof because of limited scientific and medical knowledge;[9] (2) There should be a time limit on the persecution of the person committing the injury.[10]

Every state which has considered the year and a day rule has upheld it with the exception of New York[11] and Pennsylvania.[12] New

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[1] *Statute* of *Gloucester*, 1278, 6 Edw. 1, c. 9 (repealed).

[2] Elliott v. Mills, 335 P.2d 1104, 1108 (Okla. 1959) (dictum); 4 BLACKSTONE, *Commentaries* 195, 197 (1769); 9 HALSBURY, LAWS OF ENGLAND 428, § 734 (Hailsham ed. 1933); 1 HAWKINS, PLEAS OF THE CROWN 93, Ch. 13, § 9 (Curwood ed. 1824); PERKINS, CRIMINAL LAW 605 (1957).

[3] Louisville E. & St. L. R.R. v. Clarke, 152 U.S. 230 (1894); People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934); People v. Legeri, 266 N.Y. Supp. 86 (App. Div. 1933); Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960).

[4] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960). They are: Arizona, Arkansas, California, Colorado, Delaware, Idaho, Illinois, Missouri, Nevada, North Dakota and Utah.

[5] Hardin v. State, 4 Tex. Ct. App. R. 355 (1878).

[6] People v. Clark, 106 Cal. App. 2d 271, 236 P.2d 56 (1951).

[7] State v. Orrel, 12 N.C. 120, 17 Am. Dec. 563 (1826).

[8] State v. Huff, 11 Nev. 17 (1876).

[9] Louisville E. & St. L. R.R. v. Clarke, 152 U.S. 230, 239 (1894) (dictum), citing 3 COKE, INSTITUTES 53 (2d ed. 1648):

"The reason assigned for that rule was that if the person alleged to have been murdered dies after that time, it cannot be discerned, as the law presumes, whether he died of a stroke or poison, etc., or a natural death, and in case of life, a rule of law ought to be certain." *Contra*, People v. Legeri, 266 N.Y. Supp. 86, 88 (App. Div. 1933): "Great advances have been made in medicine and surgery, and the doubt that the blow was the cause of death, when the latter ensued a year and a day after the former, has, in a large measure, been removed."

[10] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501, 519 (1960) (dissenting opinion): "The majority is content to open a Pandora's box of interrogation and let it remain unclosed, to the torment and possible persecution of every person who may at one time or another injure another."

[11] People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934); People v. Legeri, 266 N.Y. Supp. 86 (App. Div. 1933).

[12] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960).

York has taken the view that when the legislature adopted a statutory definition of murder, this showed an intent to abrogate the common law rule.[13] Pennsylvania not having New York's statutory definition of murder, adopted Blackstone's definition,[14] which according to the court in *Commonwealth v. Ladd,* lacks the year and a day rule.[15] Thus, since the rule was not part of the substantive law of Pennsylvania, but merely a rule of evidence, it could be abolished.[16]

A concurring opinion in *Commonwealth v. Ladd* took the view that the rule at English common law was substantive, and not a rule of evidence, but that it was never adopted as part of the common law of Pennsylvania. "[O]n the contrary numerous decisions of this court by their definitions of 'murder' clearly negate the existence of any such rule."[17]

A vigorous dissent[18] reasoned that since Pennsylvania adopted the common law of England by statute,[19] and has never abrogated the common law by appropriate legislation, the year and a day rule should still have effect in Pennsylvania.[20] In support of this reasoning it has been suggested that if the rule is to be abolished, it must be done by the legislature.[21]

Arizona has solved the problem of the year and a day rule by including it in their statutory definition of murder.[22] This does not take into consideration the modern lack of necessity for the rule, although it does stop possible litigation.[23] In most cases scientific and medical knowledge is now capable of determining the cause of death,[24] and the defendant is always protected by the requirement that the prosecution must establish beyond a reasonable doubt that the act of the defendant proximately caused the death of the victim.[25] It is submitted that Arizona should re-evaluate the reasons for the rule with a view toward abolishing it by legislation.

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[13] People v. Legeri, 266 N.Y. Supp. 86 (App. Div. 1933).
[14] BLACKSTONE, *supra* note 2, at 195.
[15] Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).
[16] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960). *Contra* 10 WIS. L. REV. 112, 114 (1934): "It would seem that the shadowy cloak of a legislative intention used by the New York court could not be used in any state without a similarly exclusive penal code."
[17] Commonwealth v. Ladd, 166 A.2d 501, 507 (Pa. 1961) (concurring opinion).
[18] *Id.* at 512 (dissenting opinion).
[19] 46 P.S. § 152 (1777).
[20] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960) (dissenting opinion).
[21] Head v. State, 68 Ga. App. 759, 24 S.E. 2d 145 (1943); Elliot v. Mills, 335 P.2d 1104 (Okla. 1959); 46 IOWA L. REV. 883, 888 (1961).
[22] ARIZ. REV. STAT. § 13-458 (1956): "For the killing of a human being to constitute either murder or manslaughter, it is requisite that the party dies within a year and a day after the stroke received, or the cause of death administered."
[23] People v. Legeri, 266 N.Y. Supp. 86 (App. Div. 1933).
[24] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960).
[25] People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934).

MUNICIPAL CORPORATIONS—BUILDING CODES—NOT APPLICABLE TO STATE UNIVERSITY BUILDINGS.—The Board of Regents failed to comply with municipal building regulations in the construction of university buildings located within the city. Faced with a stop order served by the city, the board sought injunctive relief which was denied by the superior court. On appeal, *held*, reversed. Municipal building codes are not applicable to the construction and maintenance of state university buildings located within the municipality. *Board of Regents of Universities and State College v. City of Tempe*, 88 Ariz. 299, 356 P.2d 399 (1960).

The general rule seems to be that state buildings are not subject to municipal building regulations.[1] The state may waive the right to regulate its own property, but the waiver will not be presumed.[2] The applicability of municipal building codes to a state university has not previously been reported;[3] but the question has been decided in the analagous cases of a state Institution for Education of the Blind,[4] the Board of Regents of a state normal school,[5] and local school boards.[6] In all of the preceding cases, the public buildings were held immune from municipal building regulations. Contrariwise, other courts have held such regulations applicable to a couny jail[7] and local school

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[1] Davidson County v. Harmon, 200 Tenn. 575, 292 S.W.2d 777 (1956); City of Charleston v. Southeastern Const. Co., 134 W. Va. 666, 64 S.E.2d 676 (1951); City of Milwaukee v. McGregor, 140 Wis. 35, 121 N.W. 642 (1909); RHYNE, MUNICIPAL LAW 306 (1957); YOKLEY, MUNICIPAL CORPORATIONS § 136 (1956); 49 AM. JUR. *States, Territories and Dependencies* § 56 (1943).

[2] Kentucky Institution for Educ. of Blind v. City of Louisville, 123 Ky. 767, 97 S.W. 402 (1906); 62 C.J.S. *Municipal Corporations* § 157 (1949). At least this is the formal, majority view. But see Kansas City v. School Dist. of Kansas City, 356 Mo. 364, 201 S.W.2d 930, 934 (1947), in which the court came close to presuming a waiver:

> Since the State itself has taken no precautionary measures, and City has been vested with the regulatory and supervisory responsibilities of the exercise of the police power, and School District (having no police power) has not been expressly and specifically given full duty to attend to these responsibilities, we think the Legislature is content in the thought the measures to be taken are within the police power vested in the City.

[3] Municipal regulation of state university buildings has no doubt been at issue before, but no previous case has apparently been adjudicated by the highest tribunal of a state, or other court covered by the reporter systems. A search of the various law indexes reveals none, and neither appellant nor appellee produced such a citation. See Brief for Appellant, Reply Brief for Appellant, and Brief for Appellee, Board of Regents v. City of Tempe, 88 Ariz. 299, 356 P.2d 399 (1960).

[4] Kentucky Institution for Educ. of Blind v. City of Louisville, 123 Ky. 767, 97 S.W. 402 (1906).

[5] City of Milwaukee v. McGregor, 140 Wis. 35, 121 N.W. 642 (1909).

[6] Hall v. City of Taft, 47 Cal. 2d 177, 302 P.2d 574 (1956); Board of Educ. of the City of St. Louis v. City of St. Louis, 267 Mo. 356, 184 S.W. 975 (1916); Kaveny v. Board of Comm'rs, 173 A.2d 536 (N.J. 1961), decided subsequent to, and cites, principal case; Salt Lake City v. Board of Educ., 52 Utah 540, 175 P. 654 (1918).

[7] Cook County v. City of Chicago, 311 Ill. 234, 142 N.E. 512 (1924).

construction.[8] The Arizona court has not previously considered the status of municipal building codes with respect to state buildings, although it has held that a state university is an agency of the state.[9]

Interpretation of existing statutes has been an element in all of the building code decisions, in both majority and minority courts; and no consistent rule governing the kind of statutory authorization necessary to uphold municipal regulation of state buildings has been followed. Some courts have expressly taken the far-reaching position that municipal building codes are not applicable in the absence of specific legislative authorization.[10] Other decisions rest on the assumption that the courts are free to uphold reasonable and beneficial regulation in the absence of legislative expression on the issue.[11] McQuillan takes the latter to be the general view with respect to public schools, unless regulation is precluded by specific legislative delegation of the authority to the local school board.[12] Yokley assumes a similar position.[13] So broad a generalization does not appear to be warranted by the precedents, however. In a number of decisions denying municipalities the right to regulate state buildings, the issue does not emerge clearly because the relevant statutes were explicit.[14]

In the instant case neither party claimed that the state legislature had expressly settled the matter of jurisdiction.[15] If the absence of express authority to regulate state buildings were determinative, as the court seemed to feel in *Hall v. City of Taft*,[16] the city had no case. The Arizona court did not explicity adopt this position, although

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[8] Lavender v. City of Rogers, 339 S.W.2d 598 (Ark. 1960); Pasadena School Dist. v. City of Pasadena, 166 Cal. 7, 134 Pac. 985 (1913); Cedar Rapids Community School Dist. v. City of Cedar Rapids, 106 N.W.2d 655 (Iowa 1960); Kansas City v. School Dist. of Kansas City, 356 Mo. 364, 201 S.W.2d 930 (1947).

[9] State v. Miser, 50 Ariz. 244, 70 P.2d 408 (1937) (Applicability of minimum wage law). *Cf.* Board of Regents v. Sullivan, 45 Ariz. 245, 42 P.2d 619 (1935) (Limitation upon power of state to contract debts).

[10] See, *e.g.*, Hall v. Taft, 47 Cal. 2d 177, 302 P.2d 574 (1956); Kentucky Institution for Educ. of Blind v. City of Louisville, 123 Ky. 767, 97 S.W. 402 (1906); Davidson County v. Harmon, 200 Tenn. 575, 292 S.W.2d 777 (1956).

[11] Lavender v. City of Rogers, 389 S.W.2d 598 (Ark. 1960); Pasadena School Dist. v. City of Pasadena, 166 Cal. 7, 134 Pac. 985 (1913); Cook County v. City of Chicago, 311 Ill. 234, 142 N.E. 512 (1924); Kansas City v. School Dist. of Kansas City, 356 Mo. 364, 201 S.W.2d 930 (1947).

[12] 7 MCQUILLAN, MUNICIPAL CORPORATIONS § 24.519 (3d ed. 1949).

[13] 2 YOKLEY, MUNICIPAL CORPORATIONS § 391 (1956).

[14] Board of Educ. of the City of St. Louis v. City of St. Louis, 267 Mo. 356, 184 S.W. 975 (1916); Kaveny v. Board of Comm'rs, 173 A.2d 536 (N.J. 1961), decided subsequent to, and cites, principal case; Salt Lake City v. Board of Educ., 52 Utah 540, 175 Pac. 654 (1918); City of Milwaukee v. McGregor, 140 Wis. 35, 121 N.W. 642 (1909).

[15] Board of Regents v. City of Tempe, 88 Ariz. 299, 305, 356 P.2d 399, 403 (1960).

[16] 47 Cal. 2d 177, 302 P.2d 574 (1956).

quoting it with approval.[17] Instead the court simply reviewed the precedents and ruled in harmony with the majority that "the powers, duties and responsibilities assigned and delegated to a state agency performing a governmental function must be exercised free of control or supervision by a municipality within whose corporate limits the state agency must act."[18] At the same time the court pursued a second line of reasoning, based on an examination of relevant constitutional and statutory provisions.[19] They revealed, to the mind of the court, a "manifest Constitutional and legislative purpose" which was inconsistent with municipal control over the board's school construction functions.[20] The sense of these two conclusions, taken together, is that municipal building codes are not generally applicable to state buildings, but this rule is subject to the court's determination of legislative intent with respect to regulation of particular buildings.

The position adopted by the supreme court, as gleaned from its two principal lines of argument, seems eminently sensible. It follows the majority rule in proscribing municipal regulation of the construction of school buildings. By basing its decision also upon the interpretation of particular statutes, it leaves desirable flexibility for future decisions. The question is settled as to university construction in Arizona. But it may still be possible, with respect to other public buildings and other statutes, for a court to find legislative intent and public policy upholding the building codes even in the absence of express provisions. The reasoning which the trial court found so persuasive may yet persuade another court.[21]

Robert E. Riggs

TAXATION—TRANSACTION PRIVILEGE TAX—DEDUCTION OF TRADING STAMP COSTS FROM GROSS RECEIPTS.—A retail drug store that gave trading stamps to its customers who paid cash for merchandise or paid their bills promptly at the end of the month, deducted the cost of the stamps from its gross sales as cash discounts allowed and

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[17] Board of Regents v. City of Tempe, 88 Ariz. 299, 308, 356 P.2d 399, 405 (1960).

[18] *Id.* at 406.

[19] ARIZ. CONST. art. 11, § 1; ARIZ. REV. STAT. ANN. §§ 15-724, 15-725, 15-729 and 17-721 (1956) deal with grants of power to Board of Regents. ARIZ. REV. STAT. ANN. §§ 9-276 and 9-461 (1956) relate to powers of the city.

[20] Board of Regents v. City of Tempe, 88 Ariz. 299, 311, 356 P.2d 399, 407 (1960).

[21] Board of Regents v. City of Tempe, Memorandum and Order Denying Permanent Injunction, No. 109441, Ariz. Super. Ct., Maricopa County (1959).

taken on sales within the meaning of the Transaction Privilege Tax.[1] The Arizona State Tax Commission, contending that the trading stamp transaction was not a true cash discount, assessed and collected a 2% tax.[2] In this action, brought to recover the taxes paid under protest, the trial court entered judgment for the drug company. On appeal, *held,* reversed. Trading stamps given by a retailer to his customers in order to stimulate sales volume do not represent a "cash discount" within the purview of the Transaction Privilege Taxes Act, and the cost of the stamps can not be deducted from "gross receipts" in computing the amount of the tax owed to the state. *State Tax Comm'n v. Ryan-Evans Drug Stores,* 89 Ariz. 18, 357 P.2d 607 (1960).

The trading stamp industry, having played a small and insignificant part in our nation's economy since its inception in the late 19th century,[3] has, in the last decade,[4] witnessed a fantastic growth in the use of the stamps.[5] It is not surprising that there has been litigation

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[1] ARIZ. REV. STAT. ANN. § 42-1301(6) (1956) provides:
"Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of property sold, expense of any kind, or losses, but cash discounts allowed and taken on sales shall not be included as gross income.

[2] During the period from September 1, 1952, to June 30, 1955, Ryan-Evans paid the Sperry & Hutchinson Company the sum of $173,730 for the stamps at the rate of 2½ cents for each ten stamps, or $3.00 for 1200 stamps. All of the stamps were turned over by Ryan-Evans to its customers during the period. Ryan-Evans deducted this total cost of the stamps from its gross receipts. An audit having been made, the State Tax Commission refused to allow the deduction, and, under the authority of the Transaction Privilege Tax statutes, ARIZ. REV. STAT. ANN. §§ 42-1301 to -1347 (1956), assessed an additional tax of 2% on the cost of the stamps which amounted to $3,474.60, and demanded payment thereof from Ryan-Evans on August 31, 1955. Ryan-Evans then filed a petition for redetermination of the assessment and a request for a hearing. The hearing was held before the commission on or about October 26, 1955, and on November 14, 1955, the commission made and entered an order denying the petition of Ryan-Evans. Within thirty days after the order became final, Ryan-Evans brought this suit after paying the full amount of the assessment under protest. Abstract of Record, State Tax Comm'n v. Ryan-Evans Drug Stores, 89 Ariz. 18, 357 P.2d 607 (1960).

[3] The Sperry and Hutchinson Company, the oldest and largest of the trading stamp companies, was founded in 1896 in Jackson, Michigan. By 1914, stamps were given out with about 6% of all retail sales in the United States; by 1921 they were given out with about only 0.5%. Trading stamps were largely forgotten during the 1920s. There was some interest in the 1930s, but this never developed into a boom, and the stamp companies remained small and insignificant until after World War II. Fortune, Aug. 1960, p. 213.

[4] The first retailers to widely use trading stamps were the independent supermarkets, which adopted them early in the 1950s in an effort to compete against the big chains. Around 1956 the big chains themselves began to use stamps extensively. *Id.* at 117.

[5] The industry's volume in 1953 was $123 million, as compared to approximately $700 million in 1960, of which the Sperry and Hutchinson Company did about 40%. In 1959, trading stamps were tied to almost 15% of all sales in retail stores. According to one recent survey, approximately 75% of American families now save trading stamps, and almost half the savers are saving more than one kind. In 1959, 275 billion stamps were passed on to these consumers by some 200,000 retailers. There are about 250 stamp plan companies, operating 1,600 redemption centers distributing merchandise that, if it were bought at department stores, would cost perhaps $675 million. *Id.* at 116.

concerning the effect of the trading stamp plan[6] upon the price of an article.[7]

A variety of results have been reached by courts in deciding whether trading stamps, when given with fair-traded articles sold at the minimum price, constituted a violation of the Fair Trade Laws.[8] Courts have concluded that stamps represent a discount for the payment of cash, but not a reduction in price;[9] that stamps are merely a trade promotional device;[10] that stamps come within the meaning of the maxim *de minimis non curat lex;*[11] or that they represent a quantity discount.[12] Still another conclusion has been reached on the ground that since the stamps may be redeemed for merchandise, they have a value in themselves, and constitute a reduction to that extent in the price of the article purchased.[13] Other courts, in dealing with sales-below-cost statutes, have had to determine whether the statute is violated when, the sale being made at the lowest price permitted by the statute, the buyer is also given trading stamps.[14] Those jurisdictions that have been called upon to answer this question have answered in the negative.[15]

These decisions necessarily involved the determination of what each legislature did in fact intend in relation to the purpose of each act. Different conclusions might reasonably be reached as to the effect of trading stamps where different purposes are intended.[16] The legislative purpose of the Fair Trade Laws was to protect the manufacturer's good will in branded products,[17] while the sales-below-cost

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[6] In a typical stamp plan, a stamp company furnishes stamps to a retailer, for an agreed sum. The retailer then distributes the stamps to his customers, usually at the rate of one for each ten-cents worth of merchandise purchased by them. Finally the customer redeems the stamps at a redemption center operated by the stamp company. See generally 87 C.J.S. *Trading Stamps and Coupons* §§ 1-10 (1954); 24 TENN. L. REV. 557 (1956).

[7] For litigation other than the effect of the trading stamp upon the price of an article, see generally 52 AM. JUR. *Trading Stamps* §§ 1-16 (1944).

[8] Annot., 22 A.L.R.2d 1212 (1952).

[9] Weco Products Co. v. Mid-City Cut Rate Drug Stores, 55 Cal. App. 2d 684, 131 P.2d 856 (1942); Benjamin v. Palan Drug Co., 144 Misc. 879, 88 N.Y.S.2d 291 (Sup. Ct. 1948), *aff'd,* 275 App. Div. 1036, 92 N.Y.S.2d 413 (1st Dep't 1949); Nechamkin v. Picker, 67 N.Y.S.2d 60 (Sup. Ct. 1946); Gever v. American Stores Co., 387 Pa. 206, 127 A.2d 694 (1956); Note, 45 CALIF. L. REV. 378, 380 & n.11 (1957).

[10] Bristol-Myers Co. v. Lit Bros., Inc., 336 Pa. 81, 6 A.2d 843 (1939).

[11] The law is not concerned with trifles. Bristol-Myers v. Lit Bros., Inc., *supra,* note 10.

[12] Colgate-Palmolive Co. v. Max Dichter & Sons, Inc., 142 F. Supp. 545 (D.C. Mass. 1956).

[13] Colgate-Palmolive Co. v. Elm Farm Foods Co., 337 Mass. 221, 148 N.E.2d 861 (1958); Bristol-Myers Co. v. Picker, 302 N.Y. 61, 96 N.E.2d 177 (1950).

[14] Annot., 70 A.L.R.2d 1080 (1960); Note, 15 N.Y.U. INTRA. L. REV. 1 (1959).

[15] *Ibid.*

[16] *Trading Stamps: A Challenge to Regulation of Price Competition,* 105 U. PA. L. REV. 242 (1956).

[17] Old Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936).

statutes were enacted to curtail destructive price competition.[18] Since trading stamps have been called cash discounts in relation to these laws,[19] the question arises whether trading stamps should be called cash discounts within the purpose of the Transaction Privilege Tax as enacted by the Arizona legislature.[20]

This tax is imposed upon the privilege of entering business[21] for the purpose of raising public money[22] and in no sense for regulation.[23] The tax is measured by the gross income from sales,[24] but cash discounts allowed and taken on sales are not to be included as gross income.[25]

A cash discount is, by definition, a deduction from the billed price which the seller allows for payment within a certain time.[26] In the conventional cash discount, there is an actual reduction in the amount the retailer pays to the wholesaler, so long as payment is made within a specified time.[27] If the legislature, for the purpose of the tax, had in mind this wholesaler's cash discount (a reduction in the actual amount of cash the buyer pays) as the only type of discount which could be a deduction from gross income, then trading stamps do not amount to a cash discount within this interpretation.[28] In the stamp transaction, the actual amount of cash paid by the consumer to the retailer is not reduced, for the retailer receives the full listed price of the article whether or not stamps are issued with a purchase; whether or not the consumer takes the stamps, if issued; and whether or not the consumer redeems the stamps.[29]

It is argued that the conventional wholesaler's cash discount is not capable of practical application to the retail field (how can a customer be given a 2% discount on a 30c sale without using a

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[18] GRETHER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION 32-33 (1939).
[19] Authorities cited note 9 *supra*.
[20] It is to be borne in mind that the principal case involves the interpretation of an Arizona statute only.
[21] State Tax Comm'n v. Consumers Markets, Inc., 87 Ariz. 376, 351 P.2d 654 (1960).
[22] ARIZ. REV. STAT. ANN. § 42-1309 (1956).
[23] O'Neil v. United Producers & Consumers Co-op., 57 Ariz. 295, 113 P.2d 645 (1941).
[24] ARIZ. REV. STAT. ANN. § 42-1309 (1956).
[25] ARIZ. REV. STAT. ANN. § 42-1301(6) (1956); now ARIZ. REV. STAT. ANN. § 42-1301(8) (Supp. 1960).
[26] BLACK, LAW DICTIONARY 272 (4th ed. 1951).
[27] Standard Oil Co. v. State, 283 Mich. 85, 276 N.W. 908 (1937).
[28] Safeway Stores v. Oklahoma Retail Grocers Ass'n, 322 P.2d 179 (Okla. 1957) (concurring in part and dissenting in part opinion); Note, 45 CALIF. L. REV. 378 (1957).
[29] 105 U. PA. L. REV. 242, 248 (1956).

stamp, token or other discount memorandum[30]) and that the legislature must have intended that the cost of discount effectuated by the trading stamp should be deductible from gross income.[31] However, though trading stamps, cash register receipts, bags of fruit, flowers, or other tokens when given to consumers may, in effect, operate as a type of discount[32] for the payment of cash or prompt payment of credit sales, and consequently tend to increase sales volume, it does not necessarily follow that these discounts are cash discounts within the purview of the tax considered here.[33] The focal point of the tax is the amount of income received by the retailer, and the conventional cash discount operates to decrease this amount, while the trading stamp does not directly affect gross income.

As the decision stands,[34] neither the purpose of the tax, nor the other Arizona decisions[35] on the statute are thwarted. Had the court reached the opposite conclusion,[36] few stores would refrain from giving stamps, for the money spent on the stamps would not only tend to promote an increase in sales, but would also be deductible from the taxable gross income, thereby decreasing the retailer's taxes. This in turn might lead to the giving of an excessive amount of stamps, the result of which is highly undesirable.[37]

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[30] Note, 15 N.Y.U. INTRA. L. REV. 1, 4 (1959).

[31] This argument makes the intent of the legislature of prime importance, which is obviously the difficult problem for the court.

[32] From the buyer's viewpoint, when he receives stamps redeemable for two cents worth of merchandise on a purchase of an item priced at one dollar, his net purchase price may justifiably be considered ninety-eight cents. 105 U. PA. L. REV. 242, 248 (1956). While this may be in effect a discount to the buyer, from the standpoint of the seller, who receives his full listed price, the transaction may not amount to a "cash discount" in the conventional usage of the term.

[33] The proper distinction to be made is between the true cash discount which decreases the amount of cash received by the one giving the discount, and any other type of discount wherein the one giving the discount receives the full listed price of an article.

[34] The court stated that by using the words "cash discount" the legislature limited discount exclusions to those of cash only, and that a cash discount simply means an actual reduction in price for prompt payment. State Tax Comm'n v. Ryan-Evans Drug Stores, 89 Ariz. 18, 357 P.2d 607 (1960).

[35] The issue in the present case was specifically excluded in the case of State Tax Comm'n v. Consumers Markets, Inc., 87 Ariz. 376, 351 P.2d 654 (1960).

[36] The opposite conclusion was reached in the case of Eisenberg's White House, Inc., v. State Bd. of Equalization, 72 Cal. App. 2d 8, 164 P.2d 57 (1946). The Arizona court chose not to follow this decision, though the applicable part of the California statute was identical with the Arizona statute. The only other case directly in point, decided after the Arizona decision, is Brenner Tea Co. v. Iowa State Tax Comm'n, 109 N.W.2d 39 (Iowa 1961), in which the court quoted approvingly from the principal case and held that in computing a sales tax upon gross receipts under a statute which provided that discounts for any purpose allowed and taken on sales shall not be included in gross receipts, the retailer was not entitled to deduct from gross receipts, as discounts, the cost to it of trading stamps given to customers.

[37] The giving of an excessive amount of trading stamps in the Denver area (quadruple stamps for each ten-cents worth of merchandise purchased) resulted in the stamp companies having to prohibit this practice so as to avoid serious losses in profits to the retailers. Fortune, Aug. 1960, p. 216.

Furthermore, if trading stamps are cash discounts deductible from gross income, then logically the cost of anything the retailer gives to the consumer for sales promotion, such as the extension of interest free credit,[38] delivery service, free parking, or free samples, could be claimed deductible as a cash discount. It is doubtful that the legislature, without expressly considering the various promotional schemes, could have meant that they be valid deductions.[39]

Jerry L. Jacobs

TORTS—NEGLIGENCE—CHARITABLE IMMUNITY.—The plaintiff paid an admission price to engage in a bingo game which was being held on the premises of, and being operated by a church. The proceeds were going to be used solely for charitable purposes. The plaintiff suffered serious injuries when a chair, furnished by the church, collapsed and plaintiff was thrown to the floor. The court of appeals affirmed judgment for the plaintiff and certified record to the Ohio Supreme Court for review and determination. On certification, *held,* affirmed. A charitable institution conducting commercial activities had removed itself from protection it might have claimed as an eleemosynary institution and therefore was liable for torts arising out of the conduct of such enterprises. *Blankenship v. Alter,* 171 Ohio St. 65, 167 N.E.2d 922 (1960).

There has been considerable change in tort liability of charitable institutions since the beginning of the twentieth century.[1] Among the fifty states plus the District of Columbia and Puerto Rico, at the latest count, only seven jurisdictions still grant complete immunity,[2]

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[38] The purchaser who takes immediate delivery of the goods yet defers payment for ninety days has the value of the legal rate of interest on the purchase price for that period. 105 U. PA. L. REV. 242, 249 (1956). Thus, if a trading stamp is a cash discount, there is good reason for this economic advantage gained by the customer to be called a cash discount.

[39] For further information on trading stamps in Arizona, see the Report on Trading Stamps, prepared by the research staff of the Arizona Legislative Council, June, 1957.

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[1] HARPER & JAMES, TORTS § 29.17 (1956).

[2] These jurisdictions are: Maine, Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910); Massachusetts, Carpenter v. YMCA, 324 Mass. 365, 86 N.E.2d 634 (1949); Missouri, Dille v. St. Luke's Hosp., 355 Mo. 436, 196 S.W.2d 615 (1946); Oregon, Landgraver v. Emmanuel Lutheran Charity Bd., 203 Ore. 489, 280 P.2d 301 (1955); Pennsylvania, Michael v. Hahnemann Medical College & Hosp. of Philadelphia, Inc., 404 Pa. 424, 172 A.2d 769 (1961); South Carolina, Caughman v. Columbia YMCA, 212 S.C. 337, 47 S.E.2d 788 (1948); Wyoming, Bishop Randall Hosp. v. Hartley, 24 Wyo. 408, 160 Pac. 385 (1916).

twenty-three impose liability,[3] eighteen have qualified immunity[4] and four seem to have no case on the subject.[5] In the last twenty years many of the jurisdictions which used to grant immunity have reversed their earlier decisions[6] and now hold modern day charities liable for personal injuries.[7] In fact it has been noted that:

> The immunity of charities is clearly in full retreat; and it may be predicted with some confidence that the end of another decade will find a majority of the American jurisdictions holding that it does not exist.[8]

In some states the charitable institution is not liable for negligence in the course of activities within its corporate powers carried on to accomplish directly its charitable purposes,[9] even though such activities incidentally yield revenue.[10] Most courts which have considered the question hold, even in the absence of statutory provision,[11]

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[3] These jurisdictions are: Alaska, Iuengel v. City of Sitka, 118 F. Supp. 399 (D. Alaska 1954); Arizona, Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); California, Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951); Colorado, St. Luke's Hosp. v. Long, 125 Colo. 25, 240 P.2d 917 (1952); Delaware, Durnay v. St. Francis Hosp., Inc., 46 Del. 350, 83 A.2d 753 (1951); Florida, Nicholson v. Good Samaritan Hosp., 145 Fla. 360, 199 So. 344 (1940); Idaho, Wheat v. Idaho Falls Latter Day Saints Hosp., 78 Idaho 60, 297 P.2d 1041 (1956); Iowa, Haynes v. Presbyterian Hosp. Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950); Kansas, Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954); Kentucky, Mullikin v. Jewish Hosp. Ass'n, 348 S.W.2d 930 (Ky. 1961); Minnesota, Swigerd v. City of Ortonville, 246 Minn. 339, 75 N.W.2d 217 (1956); Mississippi, Mississippi Baptist Hosp. v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951); New Hampshire, Nickerson v. Laconia Hosp. Ass'n, 96 N.H. 482, 79 A.2d 5 (1951); New Jersey, Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958); New York, Dunham v. Village of Canisteo, 303 N.Y. 498, 104 N.E.2d 872 (1952); North Dakota, Rickbeil v. Grafton Deaconess Hosp., 74 N.D. 525, 23 N.W.2d 247 (1946); Ohio, Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956); Oklahoma, Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940); Puerto Rico, Tavarez v. San Juan Lodge No. 972, B.P.O.E., 68 P.R. 681 (1948); Utah, Brigham Young Univ. v. Lillywhite, 118 F.2d 836 (10th cir. 1941); Vermont, Foster v. Roman Catholic Diocese of Vt., 116 Vt. 124, 70 A.2d 230 (1950); Wisconsin, Kojis v. Doctors Hosp., 12 Wis. 2d 367, 107 N.W.2d 292 (1961).

[4] Rodkey, *Charitable Immunity—A Tale of a Law in Flux*, 48 ILL. B.J. 644, 646 (1960). These states are: Ala., Ark., Conn., Ga., Ill., Ind., La., Md., Mich., Neb., Nev., N.C., R.I., Tenn., Tex., Va., Wash., W.Va.

[5] Rodkey, *supra* note 4, at 646. These states are: Hawaii, Mont., N.M., and S.D.

[6] RESTATEMENT (SECOND), TRUSTS § 402 (b). Comment *d*, 1959. The comment on subsection (2) of section 402 reads:

> The trend of judicial opinion favors the denying of immunity, putting a charitable organization in the same position as that of non-charitable organizations subjecting them to liability in tort not only for the negligence of the governing board but also for the negligence of employees, subjecting them to liability to recipients of benefits as well as to other persons.

[7] See *supra* note 2 and cases cited for Ariz., Calif., Del., Iowa, Kan., Miss, N.J., Ohio, Okla., and Vt.

[8] PROSSER, TORTS § 109 at 788 (2d ed. 1955).

[9] Conklin v. John Howard Industrial Home, 224 Mass. 222, 112 N.E. 606 (1916).

[10] Carpenter v. YMCA, 324 Mass. 365, 86 N.E.2d 634 (1949).

[11] For a case where liability was rested upon a statute, see McMillen v. Summunduwot Lodge, 143 Kan. 502, 54 P.2d 985 (1936).

that there is liability for negligence in the course of activities incidental to the corporate powers but primarily commercial in character, although carried on to obtain revenue to be used solely for the charitable purposes of the institution.[12]

Those who advocate the retention of the doctrine of charitable immunity often argue that the courts should not overrule their earlier decisions for such is a violation of the doctrine of stare decisis.[13] The late Justice Oliver Wendell Holmes answered this argument in an often quoted phrase that there ought to be a far better basis for a rule than the simple fact "that so it was laid down in the time of Henry IV."[14] Others state that if there is to be any change made in the law, it should be made by the legislature.[15] To require an injured individual to forego compensation he otherwise is entitled to, because the injury was committed by a servant of the charity, imposes such a burden as cannot be regarded as socially desirable nor consistent with sound policy.[16]

Prior to the decision laid down in *Ray v. Tucson Medical Center*,[17] Arizona had held that charitable institutions were not liable for the torts of their servants, where due care had been exercised in the selection of the employee.[18] The Arizona Supreme Court in overruling this doctrine of limited liability expressed doubt that any valid reasons had ever existed for holding charitable institutions immune and stated that, if such reasons existed in the past, they are today outweighed by such considerations as the size of the charities, the injustice to the insured, insurance programs, and obvious legal inconsisentcy underlying the reasons in limiting liability. This same court declared, ". . . if public policy ever required that charitable institutions should be immune from liability for the torts of their servants, that public policy no longer exists."[19]

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[12] Rhodes v. Millsaps College, 179 Miss. 596, 176 So. 253 (1937); see also Blatt v. Nettleton Home for Aged Women, 365 Mo. 30, 275 S.W.2d 344 (1955); Siidekum v. Animal Rescue League of Pittsburgh, 353 Pa. 408, 45 A.2d 59 (1946).

[13] Joachim, *Why Abandon the Doctrine of Stare Decisis?*, 45 A.B.A.J. 822 (1959).

[14] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[15] Joachim, *op. cit. supra* note 12. *Contra*, Michael v. Hahnemann Medical College & Hosp. of Philadelphia Inc., 404 Pa. 424, 172 A.2d 769, 774 (1961):

> A rule of *non-liability*, even though judge-made, that has become as firmly fixed in the law of this State as has the charitable immunity from tort liability, should not be abrogated otherwise than by a statute made to operate prospectively. Whether, in this day of traffic hazards from automotive vehicles of charities as well as of all others, the rule as to charitable immunity should be rescinded poses a question of public policy which falls peculiarly within the competence of the legislature. [Emphasis added]

[16] HARPER, TORTS § 294 (1933).

[17] 72 Ariz. 22, 230 P.2d 220 (1951).

[18] Southern Methodist Hosp. & Sanatorium v. Wilson, 45 Ariz. 507, 46 P.2d 118 (1935).

[19] Ray v. Tucson Medical Center, 72 Ariz. 22, 36, 230 P.2d 220, 229-30 (1951).

The Ohio Supreme Court in the principle case has taken a step in the right direction, just as the Arizona Supreme Court did in *Ray v. Tucson Medical Center*,[20] when it held that charitable institutions were liable for torts of their servants which caused injury to third persons. The greatest objection to taking away the immunity granted to charitable institutions is that public policy is highly opposed to the depletion of trust funds. However, public policy also favors a redress for every wrong committed. It is not unreasonable to assume that the trust fund and the recipients of charitable services could both be protected through liability insurance. Perhaps the legislature should require the institution itself to carry liability insurance. This procedure would place the responsibility directly or indirectly upon the ones who could prevent future wrongs.[21] A charitable institution should not be exempt on the ground of public policy where state constitutions and statutes do not create such an exemption and the constitution provides that every person for an injury done him shall have remedy by due course of law. More courts should realize the truth in the following philosophy:

> It is a trite saying that charity begins at home. It may reasonably be said that charitable institutions must first fairly compensate those who are injured and damaged by the negligence of their officers and servants in the conduct of the affairs of such institutions before going farther afield to dispense charity to do good. Men and corporations alike are required to be just before being charitable.[22]

Carl E. Hazlett

TORTS—PRENATAL INJURIES—RIGHT OF AN INFANT TO RECOVER FOR PREPARTUM INJURIES.—The plaintiff was allegedly born mongoloid as a result of injuries sustained when her mother was in an auto collision when the child was a fetus of one month. In the plaintiff's action for damages, the lower court entered an order sustaining preliminary objections to the complaint, denying that the plaintiff had a right of action. On appeal, *held*, reversed. An infant has a right to bring action for prepartum injuries, even though the alleged injuries were sustained before the infant was viable. *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960).

As recently as 1940, the majority of jurisdictions, in the absence

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[20] *Ibid.*

[21] McDonald, *Torts—Liability of Charitable Institutions*, 5 BAYLOR L. REV. 199, 202-03 (1953).

[22] Geiger v. Simpson Methodist-Episcopal Church, 174 Minn. 389, 219 N.W. 463, 465 (1928).

of statute, denied an infant the right to recover from prenatal injuries.[1] The *Restatement of Torts*[2] still reflects this point of view. The courts relied on decisions[3] made in the light of the medical knowledge of yesteryear which recognized the fetus as merely a part of the mother.[4] In the last two decades, the courts began to reexamine their prior decisions and to allow a right of recovery[5] to infants injured en ventre sa mere, if the injuries were sustained after viability.[6] Legal thinking acknowledged the fetus as a separate, independent being:[7] an entity dependent on its mother for sustenance, but otherwise a life apart.[8] This entity had a right to start life unimpaired, a right to freedom from injury,[9] and "to grow into the ordinary activities of life."[10] A violation of these rights has generally come to be considered actionable.[11]

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[1] 27 AM. JUR. *Infants* § 3 (1940).

[2] RESTATEMENT, TORTS § 869 (1939) states: "A person who negligently causes harm to an unborn child is not liable to such child for harm."

[3] Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

[4] It might be noted that the criminal law long distinguished between the life and existence of the unborn child and that of its mother. IV BLACKSTONE *198 states:

> To kill a child in its mother's womb is now no murder, but is a great misprision, but if the child be born alive and dieth by reason of the potion or bruises it received in the womb, it seems by the better opinion, to be murder in such as administered or gave them . . . the killing must be committed with malice aforethought to make it the crime of murder.

[5] Damasiewicz v. Gorusch, 197 Md. 417, 79 A.2d 550 (1951); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Williams v. Marion Transit Co., 152 Ohio St. 114, 87 N.E.2d 334 (1949). See also 10 A.L.R.2d 634 (1949).

[6] BLACK, LAW DICTIONARY 1737 (4th ed. 1951) in defining viability says: "A term used to denote the power a new-born child possesses of continuing its independent existence."

[7] HARPER & JAMES, TORTS, § 18.3, 1028-31 (1956).

[8] Before the case law granted the separate existence of the unborn baby, two states, California (CAL. CIV. CODE § 29) and Louisiana (REV. CIV. CODE §§ 29, 252, 954, 956, 1482) gave to unborn children a cause of action accruing at birth.

[9] Keyes v. Construction Sev. Inc., 340 Mass. 633, 165 N.E.2d 912 (1960).

[10] Williams v. Marion Rapid Transit Inc., 152 Ohio, 114, 87 N.E.2d 334 (1949).

[11] Wendt v. Lillo, 182 F. Supp. 56 (N.D. Iowa 1960), (relying on Iowa law); Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939); Tursi v. New England Windsor Co., 19 Conn. Supp. 242, 111 A.2d 14 (1955); Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956), *appeal denied*, 94 Ga. App. 328, 94 S.E.2d 523 (1956); Rodriquez v. Patti, 415 Ill. 496, 114 N.E.2d 721 (1953); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Cooper v. Blanck, 39 So. 2d 352 (La. 1923) (case unreported until 1949); Damasiewicz v. Gorusch, 197 Md. 417, 79 A.2d 550 (1951); Keyes v. Construction Serv. Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Verkennes v. Corniea, 229 Minn. 365, N.W.2d 838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954); Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Williams v. Marion Transit Co., 152 Ohio St. 114, 87 N.E.2d 334 (1949); Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955); Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960).

Today, there is a trend of the courts to extend this protection of the right of unborn children from the time the child is conceived, whether viable or not.[12] The courts and the exponents of this doctrine appreciate the inherent problems and difficulties of its administration. Foremost, proof is difficult. The determination of the proximate cause of many prenatal injuries and the etiology of some congenital diseases and disorders may be speculative at best.[13] But, difficulty of proof is no reason to preclude a cause of action or deny to the infant the right to protection of his interests.[14] Then, too, because the statute of limitations governs most tort actions, it may be essential to determine whether the cause of action accrues at the time of injury or the time of birth.[15] If it accrues at the time of injury, the child who is born dead because of injuries prenatally received might have a cause of action.[16] There is also worry about the threatened flood of litigation which so far has failed to materialize.[17]

In view of the medical knowledge that certain diseases (such as rubella, commonly known as German measles) can cause predictable harm to a child even before the age of viability,[18] the legal recognition of the rights of the unborn infant to protection of his interests from the moment of conception has more than mere speculative basis. Arizona has recognized certain legal rights of an infant, accruing before birth, both in statute,[19] and in case law.[20] Whether it

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[12] Besides the principal case, see Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960), and Kelly v. Gregory, 282 App. Div. Rep. 542, 125 N.Y.S.2d 696 (1953).

[13] CECIL & LOEB, TEXTBOOK OF MEDICINE 1470 (10th ed. 1959) says this about mongolism:

> The etiological factors responsible for the disease are little understood. . . [Mongolism] appears as a . . . consequence of a variety of maternal disorders, including advanced age, toxic conditions, endocrine disorders, and pathological lesions of the sexual organs . . . but no conclusive evidence has been offered in favor of any of these factors.

9 CYCLOPEDIA OF MEDICINE, SURGERY, SPECIALTIES 7 (1959) states:

> [Mongolism] incidence is 2 per 1000 births . . . etiology unknown . . . [there are] clues that genetic factor is significant . . . age of mother . . . biochemical abnormality.

[14] Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

[15] White, *The Right of Recovery for Prenatal Injuries,* 12 LA. L. REV. 383 (1952).

[16] In Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178, 180 (1954), the court admits the separate existence of the fetus from the time of conception, but denies a cause of action to the child because it was born dead, allegedly of injuries sustained before birth. The court allowed recovery to the parents.

[17] Puhl v. Milwaukee Auto Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959). See also Muse & Spinella, *Right of Infant to Recover for Prenatal Injury,* 36. VA. L. REV. 611 (1950).

[18] 12CYCLOPEDIA OF MEDICINE, SURGERY, SPECIALTIES 518 (1961) states:

> [C]ongenital anomalies occur in 100 per cent of the cases if mother has rubella in the first two months of pregnancy. . . .

[19] ARIZ. REV. STAT. ANN. § 14-131 (1956).

[20] Long v. Long, 39 Ariz. 271, 5 P.2d 1047 (1931) (awarded child support to an infant conceived before but born subsequent to a divorce decree.

would follow the national trend in allowing recovery for prenatal injuries is questionable. The Arizona Supreme Court has gone on record as saying it would follow the Restatement in the absence of statute and prior ruling.[21] However, the fact that the Restatement is undergoing extensive revision to reflect recent trends, the advances of medical science and knowledge, legal writings and the decisions of neighbor jurisdictions, might influence our court to reach a result in line with modern judicial thought.

Thus the last twenty years have seen almost a complete transition from the complete denial of the right of the infant to recover for any prenatal injuries, to the granting a right of action and recovery to infants injured after viability, to the present case which grants a right of action to an infant whose alleged injuries were received when an embryo of one month, long before viability. To some extent, this decision reflects the general direction of tort law, which serves to protect an ever widening range of interests.[22]

Lillian S. Fisher

TORTS—PROCURING BREACH OF CONTRACT—INTENTIONAL INTERFERENCE WITH ATTORNEY'S CONTINGENT FEE CONTRACT.—Defendant, an insurance company, intentionally induced the clients of the plaintiff attorneys to breach their contingent fee contract with the plaintiff, for which the plaintiff brought this suit. Demurrer by the defendant was sustained. On appeal, *held,* reversed. Intentional and unjustifiable interference with an attorney's contingent fee contract by a third party is actionable and an allegation by the defendant of the issuance of a public liability policy to the persons who caused injury to the plaintiff's clients does not constitute justification. *Herron v. State Farm Mut. Ins. Co.*, 14 Cal. Rptr. 294, 363 P.2d 310 (1961).

An action ex delicto against a third party for intentionally inducing the breach of a contract is a relatively new concept in the law,[1]

[21] MacNeil v. Perkins, 84 Ariz. 74, 324 P.2d 211 (1958); Rodriquez v. Terry, 79 Ariz. 348, 290 P.2d 248 (1955); Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953); Western Coal & Mining Co. v. Hilvert, 63 Ariz. 171, 160 P.2d 331 (1945). However, in Reed v. Real Detective Publishing Co., 63 Ariz. 294, 303, 162 P.2d 133, 138 (1945) the court noted that it would be unwise to follow the Restatement blindly, and reserved the right to judge the case on its merits. For a detailed discussion of the adherence of the Arizona courts to the Restatement, see Ehrenzweig, *The Restatement as a Source of Conflicts Laws in Arizona,* 2 ARIZ. L. REV. 177 (1960).

[22] PROSSER, TORTS, 3 (2d ed. 1955).

[1] The first reported case to allow the action ex delicto was Lumley v. Gye, 2 El. & Bl. 216 (1853). For a complete historical background see generally PROSSER, TORTS § 106 (2d ed. 1955); Sayre, *Inducing Breach of Contract,* 36 HARV. L. REV. 663-69 (1923).

but it has developed into a general principle in the years since its inception.[2] The theory upon which the principle is based is that a person has a right[3] to be secure in his contractual relations and free from outside interference, unless such interference is justified or privileged. Even though the contract is at the will of one or both of the parties, the general principle remains that the right will be protected from such intentional inference by a stranger to the contract.[4] It is generally held that the defendant's conduct will be justified if he is acting to protect his own contractual right[5] or a right equal or superior to that of the plaintiff.[6]

This general principle has only recently been applied to the action by an attorney against a third party for intentionally interfering with his contingent fee contract.[7] On principle and in fact, the action by the attorney does not differ from that invoked against interference with any other contract.[8] The right of a client to justifiably discharge his attorney is upheld as a universal rule,[9] but an attorney's contract with his client is a legal and valid contract which should and does merit the protection of the courts against intentional and unjustifiable third party interference.[10] By allowing the attor-

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[2] RESTATEMENT, TORTS § 766 (1939); PROSSER, TORTS § 106 (2d ed. 1955). For an extensive collection of cases prior to 1928 applying the principle see Appendix A, 41 HARV. L. REV. 764 (1928). For later cases see any key number digest under Torts 12.

[3] This right to receive the promised performance is generally held to be a property right. *E.g.*, R an W Hat Shop v. Sculley, 98 Conn. 1, 118 Atl. 55 (1922); Shannon v. Gaar, 233 Iowa 38, 6 N.W.2d 304 (1942); Johnson v. Gustafson, 201 Minn. 629, 277 N.W. 252 (1938); Meltzer v. Kaminer, 131 Misc. 813, 227 N.Y.S. 459 (1927).

[4] "The fact that the employment is at the will of the parties, respectively, does not make it at the will of others." Truax v. Raich, 239 U.S. 33, 38 (1915). *E.g.*, Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 172 P.2d 867 (1946); Childress v. Abeles, 240 N.C. 667, 84 S.E.2d 176 (1954). *Contra*, Harris v. Home Indem. Co., 16 Misc. 2d 702, 185 N.Y.S.2d 287 (1959).

[5] *E.g.*, Farrell Publishing Corp. v. W. J. Smith Publishing Co., 165 F. Supp. 40 (S.D.N.Y. 1958); Lake v. Angelo, 163 A.2d 611, (D.C. Mun. App. 1960); Meason v. Ralston Purina Co., 56 Ariz. 291, 107 P.2d 224 (1940); National Life & Acc. Ins. Co. v. Wallace, 162 Okla. 174, 21 P.2d 492 (1933).

[6] R an W Hat Shop v. Sculley, 98 Conn. 1, 118 Atl. 55 (1922); Conway v. O'Brien, 269 Mass. 425, 169 N.E. 491 (1929); Mutual Benefit Health & Acc. Ass'n., 240 Mo. App. 236, 207 S.W.2d 511 (1947) (dictum); National Life & Acc. Ins. Co. v. Wallace, *supra* note 5.

[7] The first reported case was Gordon v. Mankoff, 146 Misc. 258, 261 N.Y.S. 888 (1931) (citing no previous precedent).

[8] *E.g.*, Employers Liab. Assur. Corp. v. Freeman, 229 F.2d 547 (10th Cir. 1955); State Farm Fire Ins. Co. v. Gregory, 184 F.2d 447 (4th Cir. 1950); Lurie v. New Amsterdam Cas. Co., 270 N.Y. 379, 1 N.E.2d 472 (1936); Klauder v. Creeger, 327 Pa. 1, 192 Atl. 667 (1937); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945).

[9] *E.g.*, Hoult v. Beam, 178 Cal. App. 2d 766, 3 Cal. Rptr. 191 (1960); Cole v. Meyers, 128 Conn. 223, 21 A.2d 396 (1941); People v. Franklin, 415 Ill. 514, 114 N.E.2d 661 (1953).

[10] See note 8 *supra*.

ney this action, the courts have given him one more remedy in his inadequate arsenal for seeking redress when his contract of employment has been unjustly terminated.[11]

The Supreme Court of Arizona has not yet been called upon to directly consider the question raised by the instant case. With reference to third party interference with other types of contracts, the court has consistently held that the action will lie.[12] Mention was made of an attorney's contingent fee contract and the *ex delicto* action for its breach in *Employers Cas. Co. v. Moore*[13] in which the Arizona Court, by way of dictum, stated that the conduct of the defendant insurer in negotiating and culminating a settlement with the plaintiff's client was lawful and gave the plaintiff attorneys no right against the defendant.[14]

The Supreme Court of California in deciding the instant case has made a distinction between a breach of an attorney's contract caused by settling with the attorney's client, the resulting breach of contract being merely a by-product of the settlement, and a breach caused by the active inducement of the insurer, the resulting breach being the direct objective in order to facilitate a more advantageous settlement with the client.[15] In the former situation, the breach of contract gives no action against the third party,[16] while in the latter, the added element of active inducement to breach the contract opens the door to the *ex delicto* remedy against the third party.[17] This distinction is basically sound as furthering the policy of the law to encourage good faith compromise and settlement of litigation,[18] while at the same time protecting the interest of the attorney in his employment contract from unjustifiable interference by strangers to the contract.[19]

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[11] Covert v. Allen, 61 Ariz. 19, 143 P.2d 341 (1943); Cole v. Meyers, 128 Conn. 223, 21 A.2d 396 (1940). See Schwartz v. Schwerin, 85 Ariz. 242, 336 P.2d 144 (1959); Covert v. Randles, 53 Ariz. 225, 87 P.2d 488 (1939); Walker v. Wright, 28 Ariz. 235, 236 Pac. 710 (1925); Dey v. Hill, 20 Ariz. 466, 181 Pac. 462 (1919). See generally 4 WILLISTON, CONTRACTS § 1029 (rev. ed. 1936); 34 TEXAS L. REV. 1082 (1956); 1960 WIS. L. REV. 156.

[12] McNutt Oil & Refining Co. v. D'Ascoli, 79 Ariz. 28, 281 P.2d 966 (1955); Tipton v. Burson, 73 Ariz. 144, 238 P.2d 1098 (1951); Meason v. Ralston Purina Co., 56 Ariz. 291, 107 P.2d 224 (1940).

[13] 60 Ariz. 544, 142 P.2d 414 (1943).

[14] *Id.* at 550, 142 P.2d at 416.

[15] Herron v. State Farm Mut. Ins. Co., 14 Cal. Rept. 294, 363 P.2d 310 (1961).

[16] *Ibid.*

[17] *Ibid.* See generally note 8 *supra.*

[18] Millsap v. Sparks, 21 Ariz. 317, 321, 188 Pac. 135, 136 (1920) (dictum).

[19] The court denied the contention of the defendant insurer that its contract of insurance with the person who caused injury to the plaintiff's client was sufficient to justify the interference. Herron v. State Farm Mut. Ins. Co., 14 Cal. Rptr. 294, 297, 363 P.2d 310, 313 (1961).

Even though the attorney may, in some instances, proceed against a person who causes his client to breach the contingent fee contract, his remedy is at best inadequate.[20] To improve this situation, a statute might be enacted, as at least one state has done,[21] that would provide the attorney with a lien, in addition to his present common law and statutory liens, on the cause of action of his client against the defendant.[22] Such a lien could be enforced against the defendant, in the event of a settlement, whether or not the suit has been initiated.[23]

Timothy W. Barton

TORTS—STRICT LIABILITY—DAMAGE DUE TO BLASTING.—The plaintiff brought an action for damages to his home caused by concussion and vibration resulting from the defendant's blasting operation in the excavation of a sewer line ditch 200 feet from the plaintiff's residence. The defendant demurred to the complaint, one of the grounds being that it did not allege a cause of action in that the plaintiff failed to plead negligence. The demurrer was overruled. On appeal, *held*, affirmed. Strict liability is attached to damages caused by the use of explosives in blasting. *Wallace v. A. H. Guion & Co.*, 237 S.C. 349, 117 S.E.2d 359 (1960).

The view taken by the majority of the jurisdictions that have been faced with the question,[1] as well as the one adopted by the *Restatement of Torts*[2] is that a person who introduces an ultrahazardous activity, such as blasting, into the community, should be held as an insurer for damages caused by such activity.[3] Other states, in-

[20] See, Stevens, *Our Inadequate Attorney's Lien Statutes—A Suggestion*, 31 WASH. L. REV. 1-3 (1956).

[21] ILL. REV. STAT., ch. 13, § 14 (1959).

[22] *Ibid.* See suggested attorney's lien statute in 31 WASH. L. REV. 1, 20 (1956). Arizona at present has no statutory provision concerning attorney's liens, but does recognize the common law liens. Linder v. Lewis, Roca, Scoville, Beauchamp, 85 Ariz. 118, 333 P.2d 286 (1955); Richfield Oil Co. v. LaPrade, 56 Ariz. 100, 105 P.2d 1115 (1940); Barnes v. Shattuck, 13 Ariz. 338, 114 Pac. 952 (1911).

[23] Standidge v. Chicago Ry. Co., 254 Ill. 524, 98 N.E. 963 (1912); Bennett v. Chicago & E.I.R.R. Co., 327 Ill. App. 76, 63 N.E.2d 527 (1945).

[1] See Annot., 20 A.L.R.2d 1372 (1951, Supp. 1960), listing approximately 27 states which allow recovery without negligence.

[2] RESTATEMENT, TORTS §§ 519-24 (1938).

[3] However, the liability normally is not extended to all possible damage covered by blasting. "Expressly or tacitly there seems to be a recognition of the risk area principle in the blasting cases, i.e., that liability attaches only for harm to person or property within the area of foreseeable danger." 2 HARPER & JAMES, TORTS 816 (1956).

For application of this rule, see Gronn v. Rogers Constr., Inc., 221 Ore. 226, 350 P.2d 1086 (1960) (blasting frightened minks and adversely affected their reproduction); Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991 (1892) (rock thrown 900-1200 feet killing person).

cluding Maine, Massachusetts, and New York,[4] assert that fault is a prerequisite to liability in the blasting cases, frequently allowing the use of *res ipsa loquitur* to aid the plaintiff.[5] However, the jurisdictions requiring negligence distinguish between damages caused by the entry of tangible substance upon plaintiff's land[6] or coming in contact with his person,[7] and damage resulting from vibration or concussion, agreeing with the majority that the defendant is strictly liable in the former situations.[8] This distinction had its origin in the common law forms of action of trespass and case,[9] for when damages were caused by vibration or concussion they were considered consequential and liability resulted only if the defendant was negligent. However this archaic distinction has come in for severe criticism[10] and is no longer tenable on either a procedural or substantive law basis. Also in some of those jurisdictions which require negligence, the courts have occasionally approved indirect methods of holding the defendant strictly liable in the blasting cases.[11]

The principal case was one of first impression in South Carolina and the decision is of interest in Arizona which has not ruled on the specific question of whether the defendant will be strictly liable for

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[4] Reynolds v. W. H. Hinman Co., 145 Me. 343, 75 A.2d 802 (1950); O'Regan v. Verrochi, 325 Mass. 391, 90 N.E.2d 671 (1950); Booth v. Rome, W. & O. T.R.R., 140 N.Y. 267, 35 N.E. 592 (1893). Other courts listed in Annot., *supra* note 1, as holding this minority view are: Ala., Kan., Ky., Md., N.H., N.J., Tex., and Vt.

[5] Vattilana v. George & Lynch, Inc., 154 A.2d 565 (Del. 1959); Marlowe Constr. Co. v. Jacobs, 302 S.W.2d 612 (Ky. 1957); Cratty v. Samuel Aceto & Co., 151 Me. 126, 116 A.2d 623 (1955); Smith, *Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future*, 33 HARV. L. REV. 542 (1920). *Contra*, Caramagno v. United States, 37 F. Supp. 741 (D.C. Mass. 1941) (apparently applying the law of Mass.); Crocker v. W. W. Wyman, Inc., 99 N.H. 330, 110 A.2d 271 (1954).

[6] Marlowe Constr. Co. v. Jacobs, *supra* note 5; Adams & Sullivan v. Sengel, 177 Ky. 535, 197 S.W. 974 (1917); Hay v. Cohoes Co., 2 N.Y. 159 (1849); Smith, *supra* note 5, at 553.

[7] Louisville & N.R.R. v. Smith's Adm'r, 203 Ky. 513, 263 S.W. 29 (1923); St. Peter v. Denison, 58 N.Y. 416 (1874).

[8] PROSSER, *The Principle of Rylands v. Fletcher*, in SELECTED TOPICS OF THE LAW OF TORTS 135, 160 (1953), citing Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991 (1892), as the only exception noted to that date.

[9] PROSSER, TORTS 336 (2d ed. 1955).

[10] "[I]t can hardly be supposed that a man's responsibility for the consequences of his acts varies as the remedy happens to fall on one side or the other of the penumbra which separates trespass from the action on the case." HOLMES, THE COMMON LAW 80 (1881). See also 2 HARPER & JAMES, *op. cit. supra* note 3, at 818.

[11] See, *e.g.*, Coly v. Cohen, 289 N.Y. 365, 45 N.E.2d 913 (1942), where a member of the public was held to be a third party beneficiary to a contract with the City of Buffalo; and City of Dallas v. Newberg, 116 S.W.2d 476 (Tex. Civ. App. 1938) which was decided on the basis of a nuisance theory. Also see Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951). Gregory feels that the theories of unintended trespass and *res ipsa loquitur* have been used to camouflage the fact that the courts were imposing absolute liability.

damage caused by his blasting operations.[12] Careful research has uncovered only one blasting case that has been considered by the supreme court of Arizona, *Drumm v. Simer*,[13] in which the plaintiff alleged two specific acts of negligence in the defendant's blasting operations causing damage to her residence at least one and one-quarter miles away. It was held that the plaintiff had failed to prove their allegations; therefore the defendant was not liable. One may draw the inference from this case that negligence would be required in Arizona, but the court did not even discuss the alternative remedy of strict liability, apparently because the plaintiff failed to raise it.

The doctrine of strict liability as applied today is relatively new and is a break from the modern tort concept of liability based upon fault,[14] or more specifically, on conduct which falls below the standard required by society of its members.[15] The courts and state legislatures of our country have generally adopted strict liability in certain areas of the law, such as implied warranties and workmen's compensation, fully recognizing, at the time of such adoption, their departure from the normal requirement of fault as a basis of liability.[16]

The earliest and leading case in the area of unusual and dangerous activity as a basis of strict liability was *Rylands v. Fletcher*.[17] This case is not strictly analogous to the blasting cases for the plaintiff's land was flooded unintentionally by the breaking of the defendant's reservoir barriers, whereas in the blasting cases the concern is with intentional discharges of explosive. However the result reached is defensible on much the same considerations of policy as discussed below.[18] Although *Rylands* was not embraced with open arms when it was first discussed in the American courts[19] it has since been approved by the majority of our jurisdictions either by name or a statement of principle clearly derived from it.[20]

The decision of the courts in the blasting cases is complicated by the economic justification for such activity in a highly industrialized society balanced against the obvious dangers involved even when

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[12] In Annot., *supra* note 1, at 1406, Arizona is considered in the doubtful category as to their views on this question.

[13] 68 Ariz. 319, 205 P.2d 592 (1949).

[14] PROSSER, *op. cit.* supra note 9, at 317. *Contra*, Smith, *Tort and Absolute Liability—Suggested Changes in Classification*, 30 HARV. L. REV. 409, 413 (1917). Smith says that the exceptional situations today where a man is acting at his peril are survivals of the time when all man's acts were done at his peril.

[15] 2 HARPER & JAMES, *op. cit. supra* note 3, at 816.

[16] Gregory, *supra* note 11.

[17] L.R. 3 H.L. 330 (1868).

[18] 2 HARPER & JAMES, *op. cit. supra* note 3, at 815.

[19] See, *e.g.*, Brown v. Collins, 53 N.H. 442 (1873); Losee v. Buchanan, 51 N.Y. 476 (1873).

[20] PROSSER, *op. cit. supra* note 9, at 332.

the highest degree of care is exercised. The problem basically may be regarded as one of allocating a probable or inevitable loss in such a manner as to entail the least hardship upon any individual and thus to preserve the social and economic resources of the community.[21] Confronted with the choice of leaving the burden where it falls on probably innocent victims or shifting it to those responsible for the blasting, the result of the principal case in placing the liability on the shoulders of industrial and commercial enterprises seems to be more just. This latter group is in a better position to predict the risk of loss involved in their conduct and absorb it through insurance and higher prices,[22] ultimately spreading the loss more equitably to the community at large.

Neal Kurn

WORKMEN'S COMPENSATION — ACCIDENT — PNEUMONIA INDUCED BY INHALATION OF FUMES.—Petitioner contracted pneumonia from inhalation of fumes while operating a tractor with a defective exhaust and cracked cylinder block. The Industrial Commission denied compensation on the ground that the pneumonia did not result from an injury by accident. On certiorari, *held,* reversed. Pneumonia, contracted by a workman as a result of defects in a tractor which he was employed to operate, is compensable as an injury by accident within the meaning of the Workmen's Compensation Act. *Dunlap v. Industrial Comm'n,* 90 Ariz. 3, 363 P.2d 600 (1961).

Pneumonia is considered a disease for purposes of compensation,[1] and as such the statute does not authorize recovery unless it follows as a direct result of an injury which qualifies independently as an accident.[2] In order to determine whether there has been an accidental injury from which the disease has followed, the court must search for an unexpected event either in the cause of the injury (the circumstances immediately preceding it), or in the result (the injury itself).[3] Under the latter theory the accidental injury may occur under the usual circumstances of the employment when the injury

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[21] 2 HARPER & JAMES, *op. cit. supra* note 3, at 787.
[22] Morris, *Hazardous Enterprises & Risk Bearing Capacity,* 61 YALE L.J. 1172 (1952); Gregory, *supra* note 11.

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[1] 1 LARSON, WORKMEN'S COMPENSATION LAW § 38 (1952) [hereinafter cited as LARSON]; 5 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 1430 (3d ed. 1946) [hereinafter cited as SCHNEIDER].
[2] ARIZ. REV. STAT. ANN. § 23-901(8) (1956): "'Personal injury by accident arising out of, and in the course of employment' . . . does not include a disease unless resulting from the injury"; 1 LARSON § 37.30.
[3] 1 LARSON § 38; 4 SCHNEIDER § 1240.

itself is unexpected.[4] If the injury is indefinite in either its time of origin or its effect, or both (as, for example, in the inhalation of fumes), most courts hold that it must have resulted from unusual circumstances surrounding the employment before the injury will be considered compensable.[5] In other words, the accident must be found in the cause of the injury.

Arizona first adopted the view that an accidental injury occurred only where the unexpected event, happening suddenly and producing objective symptoms, was found in the cause rather than in the injury itself.[6] From this it necessarily followed that an accidental injury could arise only where there were unusual circumstances surrounding the employment.[7] This view was ultimately overruled.[8] The court has since stated that the accident may be found either in the cause or the result of the injury,[9] that the accidental injury may occur when the circumstances surrounding the employment are usual,[10] and that an injury may be accidental even though it occurs gradually,[11] if its origin is traceable to a certain time and place.[12]

[4] See Jones v. Industrial Comm'n, 81 Ariz. 352, 306 P.2d 277 (1957) (award for routine exertion causing coronary occlusion); Phelps Dodge Corp v. DeWitt, 63 Ariz. 379, 162 P.2d 605 (1945) (award for "breakage" from routine exertion); *cf.* Vukovich v. Industrial Comm'n, 76 Ariz. 187, 261 P.2d 1000 (1953) (award for routine exposure causing heat stroke. *But see*, Jones v. Industrial Comm'n, 70 Ariz. 145, 217 P.2d 589 (1950) (award denied for amputation required by blood clot resulting from routine exposure to cold); 1 LARSON § 38.

[5] See, *e.g.*, Hartford Acc. & Indem. Co. v. Industrial Comm'n, 66 Ariz. 259, 186 P.2d 959 (1947) (kidney fell during period claimant was employed as store clerk); Dauber v. City of Phoenix, 59 Ariz. 489, 130 P.2d 56 (1942) (unexpected quantity of sewer gas where only small amount was expected); 1 LARSON § 39.

[6] Pierce v. Phelps Dodge Corp., 42 Ariz. 436, 26 P.2d 1017 (1933). Arizona adopted a portion of the Utah Workmen's Compensation Act in ARIZ. REV. STAT. ANN. § 23-1021 (1956), under which an injury had been held in Tintic Milling Co. v. Industrial Comm'n, 60 Utah 14, 206 Pac. 278 (1922), to be accidental when the unexpected event was found either in the cause or the result. In construing its own "injury by accident" clause the Arizona court reasoned that whereas "injury" always denotes a result and "accident" may denote either a cause or result, the use of the preposition "by" fixes the meaning of "accident" as the cause of the injury. See generally Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328 (1912).

[7] Rowe v. Goldberg Film Delivery Lines, Inc., 50 Ariz. 349, 72 P.2d 432 (1937).

[8] Phelps Dodge Corp. v. Cabarga, 79 Ariz. 148, 285 P.2d 605 (1955). Prior to this case the court had appeared to retreat from its earlier position, Mitchell v. Industrial Comm'n, 61 Ariz. 436, 150 P.2d 355 (1944), but it had subsequently reaffirmed its adherence to the accident-cause theory, Jones v. Industrial Comm'n, 70 Ariz. 145, 217 P.2d 589 (1950).

[9] Jones v. Industrial Comm'n, 81 Ariz. 352, 306 P.2d 277 (1957).

[10] Phelps Dodge Corp. v. Cabarga, 79 Ariz. 148, 285 P.2d 605 (1955). The court said that usual or unusual conditions were important only to convince the fact-finding body of the causal connection between the employment and the injury.

[11] Mitchell v. Industrial Comm'n, 61 Ariz. 436, 150 P.2d 355 (1944).

[12] Treadway v. Industrial Comm'n, 69 Ariz. 301, 213 P.2d 373 (1950). The court denied compensation for valley fever because it was not satisfied with the proof of the causal connection between the disease and the employment. Certainty of time of origin has also been found to be of importance in distinguishing the injury from an occupational disease. Mitchell v. Industrial Comm'n, *supra* note 11. See generally Bohlen, *supra* note 6.

In the instant case the court stated that there were three criteria which must be met to allow compensation. First, there must be an accident arising out of and in the course of employment; second, the petitioner must be injured thereby; and third, the injury or disease must be caused by conditions of the employment.[13]

It was then found that an accident had occurred because the abnormal volume of fumes emitted by the tractor constituted unusual and unexpected circumstances causing injury; that there was a causal connection between the fact of employment and the fact of injury; and that pneumonia was compensable because it was the accidental result of a combination of unusual circumstances.[14]

The court said also, without reference to the statute,[15] that any disease is compensable when traceable to a definite time and following as a natural consequence of an injury which has qualified as accidental.[16] Although the court thus acknowledged the requirement for an injury independent of the disease, it did not indicate what it considered to be the injury. Furthermore, much of the court's language suggests that "disease" and "injury" are treated as interchangeable terms.[17] If this is true, a disease is compensable if it is caused by unusual or unexpected circumstances or if it is the unexpected result of usual employment. According to this reasoning contraction of pneumonia in the instant case was the injury which was accidental by virtue of the unexpected circumstances in its cause. However, pneumonia might also be held to be compensable in a situation where there was only a usual volume of fumes accompanying the employment, assuming the pneumonia did, in fact, result from it.[18] This conclusion would necessarily follow because the pneumonia (the injury), would be the unexpected, and therefore accidental, result of the

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[13] Dunlap v. Industrial Comm'n, 90 Ariz. 3, 363 P.2d 600 (1961).

[14] Dunlap v. Industrial Comm'n, *supra* note 13.

[15] ARIZ. REV. STAT. ANN. § 23-901(8) (1956).

[16] Dunlap v. Industrial Comm'n, 90 Ariz. 3, 363 P.2d 600, 603-04 1961): "Any disease is compensable under our statute which follows as a natural consequence of any injury which has qualified independently as accidental."

[17] (a) It must be proved "that the injury or disease was caused by conditions of employment." Dunlap v. Industrial Comm'n, 90 Ariz. 3, 363 P.2d 600, 602; (b)"[P]neumonia [is the] . . . accidental result of a combination of unusual circumstances. . . ." Dunlap v. Industrial Comm'n, *Id.* at 604; (c) "[P]neumonia . . . flow[ed] directly from the unusual and unexpected conditions surrounding his employment, i.e., the defective tractor." Dunlap v. Industrial Comm'n, *Id.* at 604.

[18] Compare Dauber v. City of Phoenix, 59 Ariz. 489, 130 P.2d 56 (1942). In this case, decided before the overthrow of the doctrine of the *Pierce* case, claimant recovered compensation for ruptured stomach ulcer resulting from inhalation of sewer gas. The court said that although claimant could have reasonably expected such gas in small quantities, the appearance of the great cloud of gas which overcame him was sudden and wholly unexpected.

employment. Such a determination would be contrary to the statute[19] and to the rule stated by the court itself.[20]

Perhaps the case would have provided a stronger precedent for future claims involving pneumonia or other diseases if the inhalation of fumes had been held to constitute the injury[21] which, although not an accidental result because not unexpected, was accidentally caused by reason of the unusual and unexpected conditions surrounding the employment (that is, the defective tractor). Thus, there would be established uncontrovertibly an accidental injury from which pneumonia followed.[22]

Fred E. Ferguson Jr.

WORKMEN'S COMPENSATION — CAUSATION — MEDICAL VIEW VERSUS LEGAL VIEW.—Medical testimony, differing only as to weight, indicated that the condition under which the claimant performed his work was one factor in causing the claimant's illness. The Industrial Commission of Arizona based its finding of no causal relationship largely on the testimony of one physician who indicated that the working conditions were a "very minor" factor in producing the illness. Other doctors stated that the claimant's condition was precipitated or aggravated by the working conditions. There was an award holding the claim non-compensable. On certiorari, *held,* award set aside. The evidence of medical witnesses regarding causal factors of the illness was not conflicting, although the weight assigned to these causal factors did differ. *Mead v. American Smelting and Refining Co.,* 90 Ariz. 32, 363 P.2d 930 (Ariz. 1961).

The importance of the instant case lies in the clear distinction drawn between the legal and medical views as to causation. It is well settled that when the medical conclusion as to causation conflicts with the legal conclusion, the legal conclusion will control.[1]

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[19] ARIZ. REV. STAT. ANN. § 23-901(8) (1956).

[20] Dunlap v. Industrial Comm'n, 90 Ariz. 3, 363 P.2d 600 (1961) (quoted above at note 16).

[21] Compare Andreason v. Industrial Comm'n, 98 Utah 551, 100 P.2d 202 (1940) (award granted butcher contracting bacillus enteriditis by inhaling germs through routine handling of diseased meat); Milwaukee County v. Industrial Comm'n, 224 Wis. 302, 272 N.W. 46 (1937) (award granted nurse contracting tuberculosis in tuberculosis sanitarium).

[22] See generally 32 N.C.L. REV. 255 (1954). The author makes a plea to eliminate the accident requirement by legislation to avoid inhibition of the Acts' sociological purpose and eliminate dangerous legal rationalization.

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[1] 2 LARSON, WORKMEN'S COMPENSATION § 79.51 (1952).

Despite this general consensus among the courts in favoring this rule, the lack of a clear explanation as to the difference between the legal and medical views on causation has presented a frequent source of confusion in workmen's compensation cases, as well as personal injury litigation.[2] It has been stated that, "If one researched for a single medico-legal problem that gave the most difficulty to the doctors and lawyers alike, the doctrine of reasonable certainty is that problem."[3] Most authorities agrees that this conflict results from the doctor attempting to find the precise etiological cause and the lawyers attempt to prove an inference of reasonable certainty.[4] The extreme to which this controversy has proceeded is in the field of trauma causing injury,[5] especially cancer.[6] As a consequence of this misunderstanding by doctors as to what constitutes legal cause, some fantastic medical testimony as to causation has resulted,[7] thus sending lawyers in quest of proper examination techniques in this field.[8]

The application of the doctrine of legal cause controlling over medical opinion as to causation, in the instant case, follows the general law as well as the law in this jurisdiction.[9] As was previously stated, the highlight of this case is the forthright distinction drawn between the legal and medical views as to causation. As the court pointed out, the law endeavors to reach an inference of reasonable medical certainty from a given event or sequence of events, and recognizes *more than one cause* for a particular injurious result.[10] This is clearly distinguishable from the medical view of causation which, as has been shown, frequently leads only to the precise etiological cause.

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[2] Averbach, *Causatiton: A Medico-Legal Battlefield,* 6 CLEV.-MAR. L. REV. 209 (1957); Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation,* 31 TEXAS L. REV. 630 (1953).

[3] Koskoff, *A Primer for Medical Evidence,* MED. TRIAL TECH. Q. 89 (Dec. 1955).

[4] Averbach, *Causation: A Medico-Legal Battlefield,* 6 CLEV.-MAR. L. REV. 209, 216 (1957): "We find that the doctors, because of their training, are thinking in terms of the *exact, precise, and one and only cause* of a particular condition, while the lawyers, because of their training, are thinking not of an exact knowledge, but of the reaching of an inference of reasonable medical certainty from a sequence of facts from which that particular inference can be derived." See also: Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation,* 31 TEXAS L. REV. 630 (1953).

[5] General Motors Corp. v. Freeman, 164 A.2d 686 (Del. 1960) (Loss of eye caused by trauma); Stella v. Mancuso, 7 App. Div. 2d 657, 179 N.Y.S.2d 169 (1960) (Multiple schlerosis precipitated by trauma).

[6] Lefkowitz v. Silverstein, 11 App. Div. 2d 841, 203 N.Y.S.2d 122 (1960); For a recent list of cancer cases involving this problem as to causation, see 26-27 NAACA L.J. 265 (1960-1961).

[7] Miami Coal Co. v. Luce, 76 Ind. App. 245, 131 N.E. 824 (1921). A miner suffered severe shock, severe lacerations of the scalp, burns and two broken legs from a mine explosion. He died after laying in bed delirious for 15 days. Doctors testified that the cause of death was blocked bowels.

[8] TRIAL AND TORT TRENDS, 566-721 (Belli ed. 1955) (Trial of a multiple schlerosis case at the NACCA Convention, August, 1955).

[9] Murray v. Industrial Comm'n, 87 Ariz. 190, 349 P.2d 627 (1960).

[10] Mead v. American Smelting & Refining Co., 90 Ariz. 32, 363 P.2d 930 (1961).

In the instant case, the court applied the legal doctrine by recognizing that one doctor's testimony that other non-employment factors were more important in causing claimant's illness was not actually in conflict with the testimony of those doctors who stated that employment factors did cause the illness.[11] In other words, the court was not looking for the most important cause but for the requisite *legal* causal relationship between the illness and the conditions under which the claimant performed his work.

Concededly, the court followed the general rule as to legal cause controlling over medical conclusions as to causation. In doing so, the court has also revealed the basic source of conflict between lawyers and doctors as to the rule of legal cause. Considering the confusion amongst lawyers, as well as doctors, as to the reasons for this conflict, the court has performed a valuable service in reaffirming by reference the excellent reasoning in the case of *Murray v. Industrial Comm'n.*[12]

Paul Robert Fannin

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[11] *Id.* at 933, 934.

[12] 87 Ariz. 190, 199, 349 P.2d 627, 633 (1960) "The difference in the medical and legal concept of cause results from the obvious differences in the basic problems and exigencies of the two professions in relation to causation. By reason of his training, the doctor is thinking in terms of a single, precise cause for a particular condition."