Notes

CONSTITUTIONAL LAW — DUE PROCESS — RIGHT OF INDIGENT APPELLANT TO FREE TRANSCRIPT OF SUPERIOR COURT PROCEEDINGS. — The defendant's application for a free stenographic transcript of the record[1] of the trial in which he was convicted was denied by the superior court. The State contended that the burden is upon the party demanding the free transcript and he must make an affirmative showing not only of his own inability to pay but also the inability of his friends and relatives. On appeal, *held,* reversed. The right of an indigent, convicted defendant to a free transcript shall not be denied for his failure to show the inability of his friends and relatives to pay the costs. *State v. Vallejos,* 87 Ariz. 119, 348 P.2d 554 (1960), *rev'd in part on other grounds,* 358 P.2d 178 (Ariz. 1960).

State supreme courts which have been confronted with this problem of a transcript for an indigent defendant have reached various decisions. The strictest view taken is that of Oklahoma[2] where, if the defendant has not engaged the services of counsel at his trial, he must show that not only he, but also his relatives and friends are unable to

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[1] ARIZ. REV. STAT. ANN. § 13-1714 (1956) provides that:

> . . . when [the] appellant files an affidavit that he is without means or wholly unable to pay for such copies, and such affidavit is found true, the cost of the transcript shall be a charge upon the county in which the appellant was convicted.

ARIZ. R. CRIM. P. 361(B) (1956) provides:

> If the court is satisfied that appellant is unable to pay for the record or the reporter's transcript, or both, it shall enter an order directing that the record or transcript, or both, be furnished at the expense of the county as provided by A.R.S. § 13-1714.

Compare FED. R. CRIM. P. 39 (1946), which provides:

> A citizen of the United States who is unable to obtain funds may proceed in *forma pauperis* by making an affidavit that he is unable to pay the costs in which case the court will direct that the expenses of the stenographic transcript and printing the record if required by the appellate court, be paid by the United States.

See also 28 U.S.C. § 753 (1948).

[2] Brogdon v. State, 38 Okla. Cr. 269, 260 Pac. 784 (1927). In Oklahoma if an appellant employs the services of counsel at his trial, he can not receive a free transcript for appeal purposes, for it is his lawyers' duty to use their best exertions to make up a case from memory and if they do not do so, the defendant will be held responsible for the neglect of duty on their part. Harris v. State, 10 Okla. Cr. 417, 137 Pac. 365 (1914); Jeffries v. State, 9 Okla. Cr. 573, 132 Pac. 823 (1913).

pay for the transcript.[3] Slightly more liberal is the Kentucky position[4] which asserts also that the defendant must show the impossibility of aid coming from relatives and friends. However, payment for a transcript is more in the form of a loan in Kentucky for the county is able to collect for free fees at any time in the future.[5] In contrast to these restrictive views, Iowa holds that if a defendant has no way to secure funds from relatives and friends and is indigent, he shall receive a free transcript from the county for his appeal.[6] The most liberal attitude on the subject, besides the instant case, is found in Florida, where it is held that the question in such matters is whether the defendant has *himself, personally* the financial or property ability to pay the cost of a transcript or is individually insolvent.[7]

The Supreme Court of the United States has also been confronted with cases concerning appeals of indigent appellants. In a leading case, *Griffin v. People,*[8] the Illinois Supreme Court required the purchase of a transcript for appeal and refused to provide a free transcript unless a federal or state constitutional question was raised or the death sentence imposed. The majority of the Supreme Court held that once a state establishes appellate channels, they shall be open to all and the handicaps flowing from economic differences should be lifted.[9] In a closely related case, *Burns v. State,*[10] a similar opinion[11] was handed down where the clerk of a state supreme court refused to file an appeal because of non-payment of a docket fee in spite of the fact the defendant had properly submitted a pauper's affidavit.

In Arizona, in 1937, the court ruled in *Riley v. State,*[12] that the defendant must affirmatively show no possibility of outside aid exists. However, the court in the instant case approached the subject by stating that once a defendant has shown he is indigent, he comes

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[3] Application of Mennelli, 332 P.2d 38 (Okla. 1958); Scroggins v. State, 73 Okla. Cr. 388, 121 P.2d 621 (1942). See also 20 OKLA. STAT. ANN. § 111 (1941).

[4] Braden v. Commonwealth, 277 S.W.2d 7 (Ky. 1955) (cost of a transcript here was $4000).

[5] KY. REV. STAT. § 28.440(1) (1955).

[6] State v. Van Gorder, 192 Iowa 353, 184 N.W. 638 (1921); State v. Tonn, 190 Iowa 381, 180 N.W. 164 (1920). See also IOWA CODE ANN. § 793.18 (1950).

[7] Swilley v. State, 76 Fla. 173, 79 So. 715 (1918); *reaffirmed,* Gaston v. State, 106 So. 2d 622 (Fla. 1958). *But see* Higginbotham v. State, 155 Fla. 274, 19 So. 2d 829 (1944), which holds that the county is not required to pay for transcripts of speeches made by attorneys of the defendant to the jury. See also FLA. STAT. § 924.17 (1959).

[8] 351 U.S. 12 (1956).

[9] Comment, 55 MICH. L. REV. 413 (1957).

[10] 360 U.S. 252 (1959).

[11] The United States Supreme Court held that the imposition by the state of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of equal justice under law. *Ibid.*

[12] 49 Ariz. 123, 65 P.2d 32 (1937). See also ARIZ. REV. CODE § 5141 (1928).

within the terms and extent of the indigent appeal statutes,[13] and the ability of his relatives and friends who are not legally responsible to pay such costs shall have no bearing on the defendant's right to the transcript. The court felt to do otherwise would not be in accord with the holdings in the *Griffin* and *Burns* cases.[14]

The Arizona court in *State v. Vallejos* would have had authority exactly in point had it relied on the Florida and Iowa decisions. Instead the court relied on U.S. Supreme Court cases which are not involved with the identical problem. In the *Griffin* and *Burns* cases, the defendants were denied appellate review solely because they were too poor to pay the fees required by the courts.[15] The resulting Supreme Court holding, which the Arizona court must follow, is that all before a court of justice must be given an equal opportunity to have their cases reviewed. The statutes in Arizona,[16] both during the time of the *Riley* and *Vallejos* cases provided such an equal opportunity. The court in the *Riley* case by demanding that the defendant show the inability of his friends and relatives to provide the cost of the transcript, did not absolutely deny availability of appellate review to the poverty stricken. The 1939 Arizona court, however, differed from the 1960 court on the elements of indigency and the methods of proving it. The court in the *Vallejos* case reduced the requirements as to what one has to show to qualify for a free transcript in Arizona.

Norman Rosenblum

COURTS AND PROCEDURE — VENUE — ESTABLISHED UNDER TRESPASS EXCEPTION BY ALLEGATION OF NEGLIGENCE. — Petitioners, injured as a result of an automobile accident within Cochise County, alleging affirmative acts of negligence, brought an action for damages against a resident of Cochise County and served process on him in Pima County. The defendant obtained an order transferring the action from Pima County to Cochise County. Petitioners brought this original proceeding by certiorari to set aside the order. On certiorari, *held*, order null and void. Acts of affirmative negligence constitute a "trespass" and fall within the statutory exception to the rule which provides that no person shall be sued out of the county in which he resides.[1] The court

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[13] ARIZ. REV. STAT. ANN. § 13-1714 (1956); ARIZ. R. CRIM P. 361(B) (1956).
[14] 348 P.2d 554, 557 (Ariz. 1960).
[15] Comment, 14 WASH. & LEE L. REV. 57 (1957). The sole issue was:
Whether a refusal to grant an indigent convicted defendant full appellate review of a state criminal conviction, solely because he was too poor to pay for a transcript of the trial proceedings, violates the equal protection and due process clauses of the 14th amendment.
[16] ARIZ. REV. STAT. ANN. § 13-1714 (1956); ARIZ. R. CRIM. P. 361(B) (1956).

[1] ARIZ. REV. STAT. ANN. § 12-401 (1956). "No person shall be sued out of the

properly looks to the complaint to determine venue and construes it in favor of the pleader. *Pride v. Superior Court,* 87 Ariz. 157, 348 P.2d 924 (1960).

Historically, the place of trial has been a question of some prominence in English and American jurisprudence.[2] In early common law the venue of an action was the place where the cause of action arose;[3] consequently every action was local. The difficulties occurring when the defendant could not be found in the county were overcome by the device of a fictitious averment that the fact had occurred at any place in the country wherein the defendant could be found.[4] The English courts finally settled on the rule that the cause of action is transitory and may be brought wherever the defendant can be found when the transaction on which it is founded might have taken place anywhere; but the action is local when the transaction itself is local in character.[5] Under this common law rule the defendant could have the venue changed as a matter of course by making a positive affidavit that the plaintiff's cause of action, if any, arose in another county.[6]

In many American jurisdictions statutes require actions which are local in character to be brought in a certain locality, such as the defendant's domicile or the place where the cause of action arose. These statutes make provisions or exceptions which either permit or require certain transitory actions to be brought elsewhere.[7] A change of venue is no longer a matter of course, but the defendant's right generally has been retained[8] to this extent: the venue is determined from the allegations[9] and the allegations are construed in his favor.[10]

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county in which he resides, except: . . . 10. When the foundation of the action is a crime, offense or trespass . . . ."

[2] Threats to drag the colonists from their homes to stand trial in England formed one of the reasons for the separation of the colonies. Blume, *Place of Trial of Criminal Cases,* 43 MICH. L. REV. 59, 63-66 (1944).

[3] Nonce v. Richmond & D. R.R., 33 Fed. 429, 432 (C.C.W.D.N.C. 1887); Little v. Chicago, St. P., M. & O. Ry., 65 Minn. 48, 67 N.W. 846 (1896); McCoubrey v. Pure Oil Co., 179 Okla. 344, 66 P.2d 57, 60 (1937).

[4] McKenna v. Fisk, 42 U.S. (1 How.) 241 (1845). For a general outline of the history of the development of transitory actions, see Little v. Chicago, *supra* note 3.

[5] *Ibid.*

[6] Blume, *Place of Trial of Civil Cases,* 48 MICH. L. REV. 1, 28 (1949).

[7] *E.g.,* KY. REV. STAT. ANN. §§ 452.400-.495 (1955); MINN. STAT. ANN. §§ 542.01-.095 (1941); MO. REV. STAT. §§ 508.010-.070 (1949); OKLA. STAT. ANN. tit. 12, §§ 131-139 (1941); TEX. REV. CIV. STAT. art. 1995 (1948). See generally 92 C.J.S. *Venue* § 6 (1955).

[8] See, *e.g.,* Lyons v. Brunswick-Balke-Collender Co., 20 Cal. 2d 579, 127 P.2d 924 (1942); Stocks v. Stocks, 64 Nev. 431, 183 P.2d 617 (1947).

[9] Bloom v. Carpenter, 74 Cal. App. 2d 790, 169 P.2d 388, 390 (1946); Stuckey v. Stuckey, 143 Neb. 610, 10 N.W.2d 458, 460 (1943); Cartwright v. Harry R. Drake & Sons, 122 N.Y.S.2d 737, 738 (Sup. Ct. 1953). *But see,* World Co. v. Dow, 116 Tex. 146, 287 S.W. 241 (1926), where exception must be shown by allegations and proof; and Peters v. Double Cola Bottling Co., 224 S.C. 437, 79 S.E.2d 710 (1954), where judge may go beyond the pleadings to determine venue.

[10] *E.g.,* Rench v. Harris, 76 Cal. App. 2d 113, 172 P.2d 576, 578 (1946); Bybee

One example of an exception in a venue statute is "trespass" which is included in the statute adopted by Arizona.[11] To establish proper venue under this exception, the common law forms of action control in substance, if not in form; for "trespass" in the statute has been interpreted to include those actions for which the action of trespass could have been brought under common law.[12] Trespass is a proper remedy for negligence attributable to an affirmative act, that is misfeasance rather than nonfeasance.[13] If the plaintiff in an action for negligence wishes to resist the defendant's request for change of venue, he must allege, and in some cases prove,[14] such negligence that it could not be construed to be passive.[15] The distinction between active and passive negligence and the construction in favor of the defendant make an uncertainty as to the transitory nature of the action and this has caused considerable litigation.[16]

When faced with this uncertainty, the Arizona court in the principal case followed the general rule in so far as venue is determined from the allegations,[17] but has departed therefrom by construing for the plaintiff upon the defendant's motion.[18] This shifts the burden to

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v. Fairchild, 75 Cal. App. 2d 35, 170 P.2d 54 (1946). *Cf.* Meredith v. McClendon, 131 Tex. 56, 111 S.W.2d 1062, 1065 (1938), which holds that the defendant has a prima facie right to change upon request.

[11] ARIZ. REV. STAT. ANN. § 12-401 (1956), was adopted from Texas and follows the Texas interpretation of the "trespass" exception. Miles v. Wright, 22 Ariz. 73, 79, 194 Pac. 88 (1920).

[12] Crespi v. Wigley, 18 S.W.2d 716 (Tex. Civ. App. 1929).

[13] Trespass on the case is the remedy for negligence. See, *e.g.*, Leathers v. Blessing, 105 U.S. 626 (1882). Plaintiff has an election between trespass and case when there is a direct injury attributable to affirmative negligence. See SHIPMAN, COMMON LAW PLEADINGS § 36 (3d ed. Ballantine 1923).

In Crespi v. Wigley, 18 S.W.2d 716 (Tex. Civ. App. 1929), the court ruled that trespass on the case when the injury is willful and intentional or negligent, is within the "trespass" exception. Crawford v. Pennell, 235 S.W.2d 531, 533 (Tex. Civ. App. 1950), uses the old illustration:

> [I]f a man throw a log on the road and it does damage before it settles down and becomes still, the common law action is for trespass, or for active negligence. If it results in damage after it becomes still the action is trespass on the case, or for passive negligence.

[14] *E.g.*, Meridith v. McClendon, 131 Tex. 56, 111 S.W.2d 1062, 1065 (1938).

This places the plaintiff in an anomalous position. To establish venue he must prove misfeasance, or affirmative negligence, but in the trial on the merits he might recover upon proving nonfeasance.

[15] Negligently driving at a high rate of speed is "trespass," but to drive in a negligent manner and failure to stop is not "trespass." Comment, 29 TEXAS L. REV. 513, 520 (1951).

It would seem that the plaintiff in Arizona could control the venue by the pleadings merely by alleging negligent acts rather than failure to do a duty.

[16] See, *e.g.*, *ibid.*; Langley, *A Suggested Revision of the Texas Venue Statute*, 30 TEXAS L. REV. 547 (1952).

[17] Miles v. Wright, 22 Ariz. 73, 194 Pac. 88 (1920).

[18] Tribolet v. Fowler, 77 Ariz. 59, 266 P.2d 1088 (1954), *citing* Weygandt v. Larson, 130 Cal. App. 304, 19 P.2d 852 (1933).

It is interesting to note that Arizona cites California courts for authority to determine venue from the pleadings and that California construes in favor of the defendant while Arizona construes for the plaintiff. *E.g.*, Bybee v. Fairchild, 75 Cal. App. 2d 35, 170 P.2d 54 (1946).

the defendant to show that the alleged negligent acts do not constitute a "trespass" and that therefore the venue is improper.

By the construction in this case the court recognizes that the reasons for the defendant's right to change venue to the domicile or the place the cause of action arose to a large extent have ceased to exist. The jury need not be drawn from the locality where the action arose.[19] Travel is not the problem it once was. Ease in selection and establishment of the proper venue should be[20] and has been recognized. An uncertainty still exists as to whether or not the negligent act comes under the "trespass" exception, but the litigation caused by this ambiguity is minimized under the Arizona rule.[21] The privilege once available to the defendant as a delaying measure[22] is now limited while his essential protection is retained.[23]

Irval LaFaun Mortensen

CRIMINAL LAW — INSANITY AS A DEFENSE — PROPOSAL FOR SUBSTITUTION OF THE MODEL PENAL CODE STANDARD FOR THE "RIGHT-AND-WRONG" TEST. — After the defendant had been apprehended and incarcerated on a murder charge, he became convulsive and hysterical and was given medical care. Upon trial he pleaded not guilty and not guilty by reason of insanity. He was convicted of first degree murder. On appeal, *held,* reversed and remanded. When insanity is a defense the jury must be instructed to find the accused not guilty if it finds he was unable at the time of the crime to distinguish right from wrong. *Kwosek v. State,* 8 Wis. 2d 640, 100 N.W.2d 339 (1960) (4-3 decision). A concurring opinion urged adoption of the *Model Penal Code* standard for legal insanity. *Id.* at 656, 100 N.W.2d at 343.

Four tests are used in the United States to measure legal insanity. In the chronological order of their creation, and also in the general order of their relationship to modern psychiatric thinking, they are: (1) the *M'Naghten* or "right-and-wrong" test,[1] (2) the "irresistible im-

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[19] Blume, *op. cit. supra* note 6, at 16.
[20] Langley, *op. cit. supra* note 16, at 548.
[21] An examination of the digests and encyclopedias reveals that Arizona has few cases reaching the appellate court on this point, whereas Texas and California, who favor the defendant, have very many such cases. See Langley, *op. cit. supra* note 16, at 548 n.4.
[22] Langley, *op. cit. supra* note 16, at 551.
[23] ARIZ. REV. STAT. ANN. § 12-404 (1956) allows transfer when the action is brought in the wrong county; ARIZ. REV. STAT. ANN. § 12-406 (1956) provides for change of venue for grounds or cause.

[1] M'Naghten's Case, 10 C. & F. 200, 8 Eng. Rep. 718, 721 (H.L. 1843).
The accused is not legally responsible if he was laboring under such a defective

pulse" test,[2] (3) the *Durham* or "product" test[3] and (4) the criteria advanced by the American Law Institute in the *Model Penal Code*.[4]

Courts in thirty-two states, of which Arizona is one,[5] have adopted the *M'Naghten* rule.[6] Under this test, the simplest of the four, a defense of insanity is effective only if the defendant could not at the time of the crime distinguish between right and wrong.[7] Criticism of its limitation to consideration of only cognitive capacity[8] has led to its modification in some jurisdictions with the adoption of the "irresistible impulse" rule.[9] The latter rule does not stop with the mere inquiry as to whether the defendant can distinguish between right and wrong, but questions his ability to choose between them.[10] The test of insanity is predicated basically upon his emotional stability, instead of his cognitive capacity.[11] Objection to this rule is similar to that of the *M'Nagh-*

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reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

People v. Berry, 44 Cal. 2d 426, 282 P.2d 861 (1955); State v. Behler, 65 Idaho 464, 146 P.2d 338 (1944); State v. Skaug, 63 Nev. 59, 163 P.2d 130 (1945); State v. Garver 190 Ore. 291, 225 P.2d 771 (1950).

[2] Commonwealth v. Chester, 337 Mass. 702, 711-712, 150 N.E.2d 914, 919 (1958). A person may be able to discriminate between right and wrong yet his mind may be in such a diseased condition that his reason, conscience and judgment are overwhelmed by the disease to such an extent that he "acted from an irresistible impulse." In such a case "the act . . . is not the act of the voluntary agent" and the person committing it is not criminally responsible.

For examples of cases in which the rule is used, see Arridy v. People, 103 Colo. 29, 82 P.2d 757 (1938); State v. Narich, 92 Mont. 17, 9 P.2d 477 (1932); State v. Green 86 Utah 192, 40 P.2d 961 (1935).

[3] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

This case has been noted many times. See, *e.g.*, De Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339 (1955); *Roche, Criminality and Mental Illness — Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320 (1955); Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336 (1955); Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325 (1955).

[4] MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

[5] Burgunder v. State, 55 Ariz. 411, 103 P.2d 256 (1940); see also State v. Eisenstein 72 Ariz. 320, 235 P.2d 1011 (1951).

[6] They are: Arizona, California, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia and Wisconsin. Annot., 45 A.L.R.2d 1452 (1956).

[7] Kwosek v. State, 8 Wis. 2d 640, 100 N.W.2d 339 (1960).

[8] Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793 (1955).

[9] They are: Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Indiana, Kentucky, Massachusetts, Michigan, Montana, New Mexico, Utah, Virginia and Wyoming. Annot., 45 A.L.R.2d 1453 (1956).

[10] HALL, PRINCIPLES OF CRIMINAL LAW 507 (1947).

[11] *Ibid.*

ten rule; its scope is unduly restricted by its failure to recognize other than total lack of capacity.[12] The "irresistible impulse" rule has been specifically rejected in Arizona.[13]

The *Durham*, or "product" test, states that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[14] Criticism is directed at the lack of standard upon which to test legal insanity since there may be great disparity of opinion among the expert witnesses, and the jury has thrust upon it the duty of choosing which one of the witnesses is correct in his diagnosis.[15]

The final of the four tests, the American Law Institute rule of insanity, is said to be in line with modern psychiatric thinking while satisfactory for application in courts of law.[16] It proposes as tests for determination of legal insanity: (1) substantial impairment of cognitive capacity instead of complete impairment as required for exculpation under the "right-and-wrong" test;[17] or (2) substantial impairment of the capacity of self-control, instead of complete impairment as required in the "irresistible impulse" test.[18] The American Law Institute rule also provides an extended time limit during which the defendant may become emotionally incapacitated as opposed to allowing exoneration only for sudden, spontaneous acts under the "irresistible impulse" test.[19] The vagueness of the *Durham* rule is also eliminated under the American Law Institute test, in that the jury is allowed to consider not only the testimony of psychiatrists, but all other evidence pertaining to causitive factors which might lead the defendant to commit the act.[20] Also the jury is provided with the standard of "substantial impairment," rather than the nebulous term "product" to apply to the facts ascertained.

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[12] Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793 (1955).

[13] State v. Macias, 60 Ariz. 93, 131 P.2d 810 (1942).

However, Arizona has passed laws on detention of defendant during insanity, ARIZ. REV. STAT. ANN. § 13-1622 (1956); restoration to sanity, ARIZ. REV. STAT. ANN. § 13-622 (1956); procedure upon discovery that prisoner under sentence of death may be insane, ARIZ. REV. STAT. ANN. § 13-1691 (1956); county attorney's duty on inquiry into insanity of prisoner, ARIZ. REV. STAT. ANN. § 13-1692 (1956); order of commitment to state hospital, ARIZ. REV. STAT. ANN. § 13-1693 (1956); suspension of sentence upon verdict of insanity, ARIZ. REV. STAT. ANN. § 13-1694 (1956); ARIZ. R. CRIM P., 192, 250.

[14] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[15] Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793, 795 (1955).

[16] Guttmacher, *Principal Differences with the Present Criteria of Responsibility and Possible Alternatives*, MODEL PENAL CODE, § 4.01 (Tent. Draft No. 4, 1955).

[17] MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*

While the test concedes the inexactness of psychiatry, nevertheless it recognizes that psychiatry as a science has advanced sufficiently to enable the ascertainment of the mental defects, if any, which have been substantial causes of the perpetrator's act.[21] The *Institute's* rule is thus an attempt to distinguish between those defendants who should be incarcerated in a punitive-correctional institution and those who should be placed in a medical-custodial institution.[22] It would appear that the American Law Institute test is the only one of the accepted rules adequate to accomplish this distinction with any degree of accuracy.

In the instant case, the defendant's request that the insanity test be changed moved three members of the Wisconsin Supreme Court to concur in a separate opinion in which they urged a change from the primitive "right-and-wrong" test to the modern American Law Institute rule,[23] thus overthrowing the *M'Naghten* rule, firmly entrenched in Wisconsin law and applied in the instant case by the majority.[24]

Although Arizona has long accepted the *M'Naghten* view, and has rejected the "irresistible impulse" rule, the court apparently has had no occasion to consider the Institute's recommendation. It would appear that by continued increase of knowledge in the field of psychiatry eventual change will find its way into the courts, and there is strong indication of a trend in this direction, as indicated by the willingness of the Wisconsin concurrers to move from the least (from the scientific standpoint) to the most-advanced position. Arizona, too, would be well advised to recognize and remedy the shortcomings of the presently used insanity test.[25]

James E. Rogers

REAL PROPERTY — EMINENT DOMAIN — IMPAIRMENT OF ABUTTING PROPERTY OWNER'S ACCESS TO PUBLIC HIGHWAY COMPENSABLE. — The State of Arizona brought suit against the owner of land abutting a conventional highway to condemn a certain portion of the defendant's

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[21] Guttmacher, *Principal Difficulties with the Present Criteria of Responsibility and Possible Alternatives*, MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).

[22] MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).

[23] Kwosek v. State, 8 Wis. 2d 640, 656, 100 N.W.2d 339, 346 (1960) (concurring opinion).

[24] Oborn v. State, 143 Wis. 249, 126 N.W. 737 (1910).

[25] Whether such a major change should be adopted by the courts or by the legislature is a difficult problem with which to reckon and not within the purview of this note.

In Vermont the MODEL PENAL CODE has been adopted by the legislature. Vt. Laws, No. 228, 4 (1957).

land for controlled-access highway purposes. The trial court awarded compensation for the property taken and also damages for impairment of the defendant's right of ingress and egress to the remaining property. On the plaintiff's appeal as to the amount awarded for impairment of the easement, *held,* reversed.[1] But, on rehearing, *held,* affirmed. When a controlled-access highway is constructed upon the right of way of a conventional highway and the owner's ingress and egress to abutting property has been materially impaired, he may recover damages therefor. *State ex rel. Morrison v. Thelberg,* 87 Ariz. 318, 350 P.2d 988 (1960).

It is generally recognized that owners of abutting property have certain rights in existing streets and highways, the deprivation of which, even for public use, must be compensated for under the "just compensation" clauses of our federal[2] and state constitutions.[3] These rights include the right of access, that is, the right of ingress to and egress from property which abuts upon an existing street or highway.[4] However, it has been held that compensation is not allowable for the conversion of a two-way street to a one-way street,[5] the prohibition of left turns and "U" turns on the adjacent highway,[6] the regulation of parking immediately adjacent to abutting property,[7] and the diversion of traffic leaving the abutting property owner's business on a lightly-traveled former highway.[8]

Early cases ruled that abutting property owners' rights are subordinate to any reasonable use of the street made by public authorities to facilitate general travel.[9] However, the current trend of decisions is that the right of access cannot be denied nor unreasonably restricted, nor can an owner be deprived of such right, except by due process of law and upon the payment of compensation.[10] This right is considered by the courts to be an easement in the street that is appurtenant

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[1] State *ex rel.* Morrison v. Thelberg, 86 Ariz. 263, 344 P.2d 1015 (1959).
[2] U. S. CONST. amend. V.
[3] ARIZ. CONST. art. 2, § 17.
[4] See Sauer v. City of New York, 206 U.S. 536 (1907); Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 92 Pac. 70 (1907); Annot., 49 A.L.R. 330 (1927); Annot., 93 A.L.R. 639 (1934); 18 AM. JUR. *Eminent Domain* §§ 181-185 (1938).
[5] Cavanagh v. Gerk, 313 Mo. 375, 280 S.W. 51 (1926).
[6] Jones Beach Blvd. Estate v. Moses, 268 N.Y. 362, 197 N.E. 313 (1935) (even though detour was five miles in length).
[7] Hickey v. Riley, 177 Ore. 321, 162 P.2d 371 (1945).
[8] City of Los Angeles v. Geiger, 94 Cal. App. 2d 180, 210 P.2d 717 (1949).
[9] See Muhlker v. New York & H. R.R., 197 U.S. 544 (1905); Barrett v. Union Bridge Co., 117 Ore. 220, 243 Pac. 93 (1926); 3 NICHOLS, EMINENT DOMAIN § 10.221 (3d ed. 1950).
[10] See *Rights of Landowner in the Abutting Highway,* 77 U. PA. L. REV. 793 (1929); see generally Duhaime, *Limiting Access to Highways,* 33 ORE. L. REV. 16 (1953); Clarke, *The Limited-Access Highway,* 27 WASH. L. REV. 111 (1952); *Freeways and the Rights of Abutting Owners,* 3 STAN. L. REV. 298 (1951).

to abutting property and to be a private right as distinguished from rights of the public.[11]

Today, one of the most troublesome areas in the law of eminent domain is the claim of an abutting property owner to damages for the limitation of his access by means of a frontage road.[12] Decisions in other western states have been as varied as the following: California first held that when the abutting owner's access is limited by means of a frontage road, his damage is compensable.[13] This decision was limited by later cases as having been too broad and general in its terms.[14] Colorado has indicated that damages for such deprivation of access depend upon how far the abutting owner must drive on the frontage road before reaching an access point to the highway.[15] At the other extreme, the State of Washington has considered the construction of a frontage road as mitigating the amount otherwise recoverable for severance damages.[16]

The decision in the instant case expressly overrules the principles laid down in a leading Arizona case, *In re Forsstrom*,[17] which denied compensation to the abutting property owner. The court held that when the highway is first laid out, the abutting owner is compensated for future as well as present damages, including subsequent changes in the grade of the highway which limit his access thereto.[18] The court did not deny in that decision that the invasion of the abutting owner's right of access is a "taking" of property within the constitutional prohibition of such taking without compensation,[19] nor did

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[11] See, *e.g.*, State *ex rel.* Merritt v. Linzell, 163 Ohio St. 97, 126 N.E.2d 53, 54 (1955) (dictum), wherein the court states that an owner of property abutting on a public highway possesses, as a matter of law, not only the right to the use of the highway in common with other members of the public, but also a private right of easement for the purpose of ingress and egrees to and from his property, which latter right may not be taken away or destroyed or substantially impaired without compensation therefor.

[12] *Compare* Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957), *with* Carney v. Mississippi State Highway Comm'n, 233 Miss. 598, 103 So. 2d 413 (1958). See Annot., 43 A.L.R.2d 1072 (1955).

[13] People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943).

[14] People v. Schultz Co., 123 Cal. App. 2d 925, 268 P.2d 117 (1954), held that compensation was properly denied for loss of access where a new access right by way of a proposed outer highway would be as good or better than the pre-existing one. People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (1951), held that mere diversion of traffic or circuity of travel were not compensable. The court distinguished People v. Ricciardi, *supra* note 13, by saying the degree of impairment there presented was greater and its nature different. People v. Sayig, *supra* at 710.

[15] Boxberger v. State Highway Comm'n, 126 Colo. 526, 251 P.2d 920 (1952).

[16] State v. Ward, 41 Wash. 2d 794, 252 P.2d 279 (1953).

[17] 44 Ariz. 472, 38 P.2d 878 (1934); see also Grande v. Casson, 50 Ariz. 397, 72 P.2d 676 (1937).

[18] *In re* Forsstrom, *supra* note 17, at 492, 38 P.2d at 886.

[19] ARIZ. CONST. art. 2, § 17. "No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner . . ."

it claim that the public has the right to deal with the street as its own, regardless of any rights in the abutting owner.[20]

In an earlier Arizona case, the court stated:

> . . . Our Constitution provides that property shall not be "taken or damaged" without just compensation therefor. Article 2, § 17. Under provisions like this, it is generally held that a change in the established grade of a street, which injuriously affects the value of adjoining property, is "damage." . . . The damage is to the easement of ingress and egress.[21]

However, the court in *In re Forsstrom*[22] refused to follow this statement on the grounds that the question of what constitutes a taking of property was not presented and argued to the court at that time.[23]

The reason given by the court for the instant decision is that ". . . the weight of authority in the United States is to the effect that either the destruction or the material impairment of the access easement of an abutting property owner to such highway is compensable."[24] In a more recent decision upholding the instant case,[25] the court quotes at length a treatise on the law of eminent domain[26] as the basis of its holding.[27] In neither case did the court question that there had been an impairment of access, nor did it require that said impairment be "material." As a result of these broad, general holdings, the State of Arizona has been left wide open to claims based upon any alleged impairment of access.[28] The increased cost of condemnation of the abutting property owner's land, as well as the cost of litigating endless claims as to the amount of damages to be awarded, may well place a severe obstacle in the way of controlled-access highway construction in this state. Proper balancing of the rights of abutting property owners with the safety and welfare of the travelling public demands that the court define those rights and limit their extent so that the cost of controlled-access highways will not be unduly enhanced.

Susan T. Payne

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[20] *In re* Forsstrom, 44 Ariz. 472, 492, 38 P.2d 878, 886 (1934).
[21] Mosher v. City of Phoenix, 39 Ariz. 470, 482, 7 P.2d 622, 627 (1932).
[22] 44 Ariz. 472, 38 P.2d 878 (1934).
[23] *Id.* at 493, 38 P.2d at 887.
[24] State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988, 991 (1960).
[25] Pima County v. Bilby, 87 Ariz. 366, 351 P.2d 647 (1960).
[26] 2 NICHOLS, EMINENT DOMAIN §§ 6.4441(9), 6.4442 (3d ed. 1950).
[27] "As set forth in 2 Nichols on Eminent Domain § 6.4441 (3d ed.), where the constitution of a particular state provides for compensation only where private property is 'taken,' a land owner does not have a right of action for a change in the grade of an abutting highway or for a deprivation of access to such highway; but where the constitution, as in Arizona, prescribes compensation for the 'taking' or 'damaging' of private property, the land owner is entitled to recover damages resulting from such change of grade or deprivation of access." *Supra* note 25, at 650.
[28] State *ex rel.* Morrison v. Jay Six Cattle Co., 353 P.2d 185 (Ariz. 1960) (damages awarded on evidence of property value if it were subdivided and sold); Pima County v. Bilby, 87 Ariz. 366, 351 P.2d 647 (1960); State *ex rel.* Morrison v. Wall, 87 Ariz. 327, 350 P.2d 993 (1960) (fixing damages at the highest possible use of the property).

WATER RIGHTS — GROUND WATER — USE ALLOWED ON LANDS NOT UNDER CULTIVATION PRIOR TO THE LAND BEING DECLARED "CRITICAL." — The defendant diverted water from a well on land declared to be within a "critical water area" to other land in the area which did not have a well and was not under cultivation prior to such declaration. The trial court found such use lawful. On appeal, *held,* affirmed. A landowner, under the doctrine of reasonable use, may shift use of underground percolating water from his previously cultivated land to his adjoining acreage, even though such lands were not under cultivation before the area was designated "critical." *State v. Anway,* 87 Ariz. 206, 349 P.2d 774 (1960).

The English common law rule regarding underground percolating water unqualifiedly gave the water to the owner of the land under which it was found.[1] Although this view is still recognized in some jurisdictions, it was abandoned in Arizona in 1953[3] and is definitely waning elsewhere.[4] Instead of the common law rule, at least two allied but distinct doctrines are now recognized[5] — "reasonable use"[6] and "correlative rights."[7] With a few variations, the latter doctrine allows each landowner his proportionate share of all the water available, even though taking that amount would completely exhaust the water supply.[8] The "reasonable use" rule limits the taking of ground waters for purposes incident to beneficial use and enjoyment of the land.[9]

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[1] Fourzan v. Curtis, 43 Ariz. 140, 147, 29 P.2d 722, 725 (1934) (dictum).

[2] "Absolute ownership by the overlying owner is most widely recognized . . . and has general application in England and the East." Martz, *Law of Underground Water* 11 OKLA. L. REV. 26, 29 (1958).

[3] Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953).

For cases holding that Arizona followed the common law rule prior to 1953, see Campbell v. Willard, 45 Ariz. 221, 42 P.2d 403 (1935); Fourzan v. Curtis, 43 Ariz. 140, 29 P.2d 722 (1934); Maricopa County Municipal Water Conservation Dist. No. 1 v. S. W. Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931); Howard v. Perrin, 8 Ariz. 347, 76 Pac. 460 (1904).

[4] Evans v. City of Seattle, 182 Wash. 450, 47 P.2d 984 (1935). In Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87, 90 (1940), the court stated:

> . . . but the marked tendency in American jurisdictions in later years has been away from the doctrine that the owners rights to sub surface waters is unqualified; on the contrary there has been an ever increasing acceptance of the viewpoint that their use must be limited to purposes incident to the beneficial enjoyment of the land from which they are obtained.

[5] The distinction is brought out in Canada v. City of Shawnee, 179 Okla. 53, 64 P.2d 694 (1936); Evans v. City of Seattle, *supra* note 4.

A third doctrine is that of prior appropriation. For information see Scott v. United States, 316 U.S. 691 (1942); Will v. Morris, 100 Mont. 415, 50 P.2d 862 (1935).

[6] This doctrine was adopted in Arizona in 1953 by Bristor v. Cheatham, *supra* note 3.

[7] The doctrine of correlative rights finds extensive expression in California. Hutchins, *Ground Water Legislation,* 30 ROCKY MT. L. REV. 416 (1958).

[8] "Correlative rights would allow use until the supply dwindled to nothing." Wathrall v. Johnson, 86 Utah 50, 40 P.2d 755, 768 (1935).

[9] Bristor v. Cheatham, *supra* note 3.

Much of the change in ground water law has come, at least in part, through legislative action. As early as 1866 the problems concerning preservation and utilization of such waters motivated the Dakota legislature to enact a statutory rule,[10] and in other jurisdictions underground waters have continued down to recent times as the subject of legislation.[11] To combat arid conditions Arizona, beginning in 1948, has enacted legislation governing the use and disposition of underground percolating water.[12] However, the Arizona Ground Water Code applies only to percolating water.[13] This has been a legal distinction throughout the history of ground water.[14] Arizona, following this reasoning, proclaimed that the doctrine of "reasonable use" obtains to percolating water as opposed to underground stream water.[15]

Focusing attention on the doctrine of "reasonable use," the Arizona Supreme Court, in the leading case of *Bristor v. Cheatham* stated: "We think the better rule is that of reasonable use as distinguished from the doctrine of correlative rights."[16] The United States Supreme Court has also accepted this doctrine as applicable to the arid western states.[17] The main difficulties encountered in its application are the implication that the water shall be used only on the "overlying" land[18] and the nebulous meaning of "reasonable" use.

The Arizona Ground Water Code[19] and the doctrine of reasonable use both apply solely to percolating waters. How then does the reasonable use theory affect this Code? The Code specifically provides that no well used prior to its enactment shall be affected[20] and in at least two places, requires both a description of the land to be used and the amount of water to be withdrawn.[21] The principal case permitting use on adjoining, but previously unirrigated lands labeled this practice as reasonable and not in violation of the Code.[22]

The dissent in the instant case[23] maintained that restricting use is

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[10] DAKOTA TERR. CIV. CODE § 255 (1866).
[11] For a list of states following modern trend of enactment of ground water codes, see Hutchins, *supra* note 7 at 419.
[12] Set out in the present code at, ARIZ. REV. STAT. ANN. §§ 45-301 to -324 (1956).
[13] Hutchins, *supra* note 7.
[14] HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 146-265 (1942).
[15] Bristor v. Cheatham, *supra* note 3.
[16] Id. at 236, 255 P.2d at 178. See also Canada v. City of Shawnee, *supra* note 5.
[17] Washington v. Oregon, 297 U.S. 517 (1936).
[18] 29 NEB. L. REV. 645 (1950); Bristor v. Cheatham, *supra* note 3.
[19] ARIZ. REV. STAT. ANN. §§ 45-301 to -324 (1956).
[20] ARIZ. REV. STAT. ANN. § 45-322 (1956) states in part: "Nothing in this article shall be construed to affect the right of any person to continue the use of water from existing wells."
[21] ARIZ. REV. STAT. ANN. §§ 45-304 (B) (4), (5) and 45-313 (B) (5), (7) (1956).
[22] State v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960).
[23] *Id.* at 213, 349 P.2d at 779 (dissent).

necessary as a conservation measure, but failed to draw a clear line of distinction as to whether the rule should apply strictly to overlying land, or merely to land not under prior cultivation. In refuting this conservation argument, the majority cited the *Restatement of Torts*[24] on reasonable use. Yet no definition of overlying land is set out in the case, leaving this to speculation. Also left unclear is the question whether the main case contradicts *Bristor v. Cheatham.*

Concededly, the statute regulating ground water in critical areas is susceptible of varied interpretations, but in condoning use of water on new lands, the court has rejected the argument that the legislature intended to confine the use of water to land under cultivation prior to the enactment. Indeed, restricting use to overlying land often leaves urgent needs unsatisfied, such as domestic consumption in a city, or irrigation of more fertile land.[25] Nevertheless, in all fairness to the argument disfavoring the court's broad interpretation of the statute, it is submitted that the decision rendered was proper.

Ralph Hunsaker

[24] RESTATEMENT, TORTS § 852, comment *b, c* (1939).
[25] McHendrie, *The Law of Underground Water,* 13 ROCKY MT. L. REV. 1 (1940).