Case Sequence:

Intoxicating Liquors/ Drunk Driving

Fleckner v. Dionne, 74 Cal. App. 2d 246, 210 P.2d 530 (Cal. Dist. Ct. App. 1949).

Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (Cal. 1955).

Vesely v. Sager, 95 Cal. Rptr. 623, 486 P.2d 151 (Cal. 1971).

Coulter v. Superior Court of San Mateo County, Schwartz & Reynolds & Co., 145 Cal. Rptr. 534, 577 P.2d 669 (Cal. 1978).

Bass v. Pratt, 177 Cal. App. 3d 129, 222 Cal. Rptr. 793 (Cal. Ct. App. 1986).

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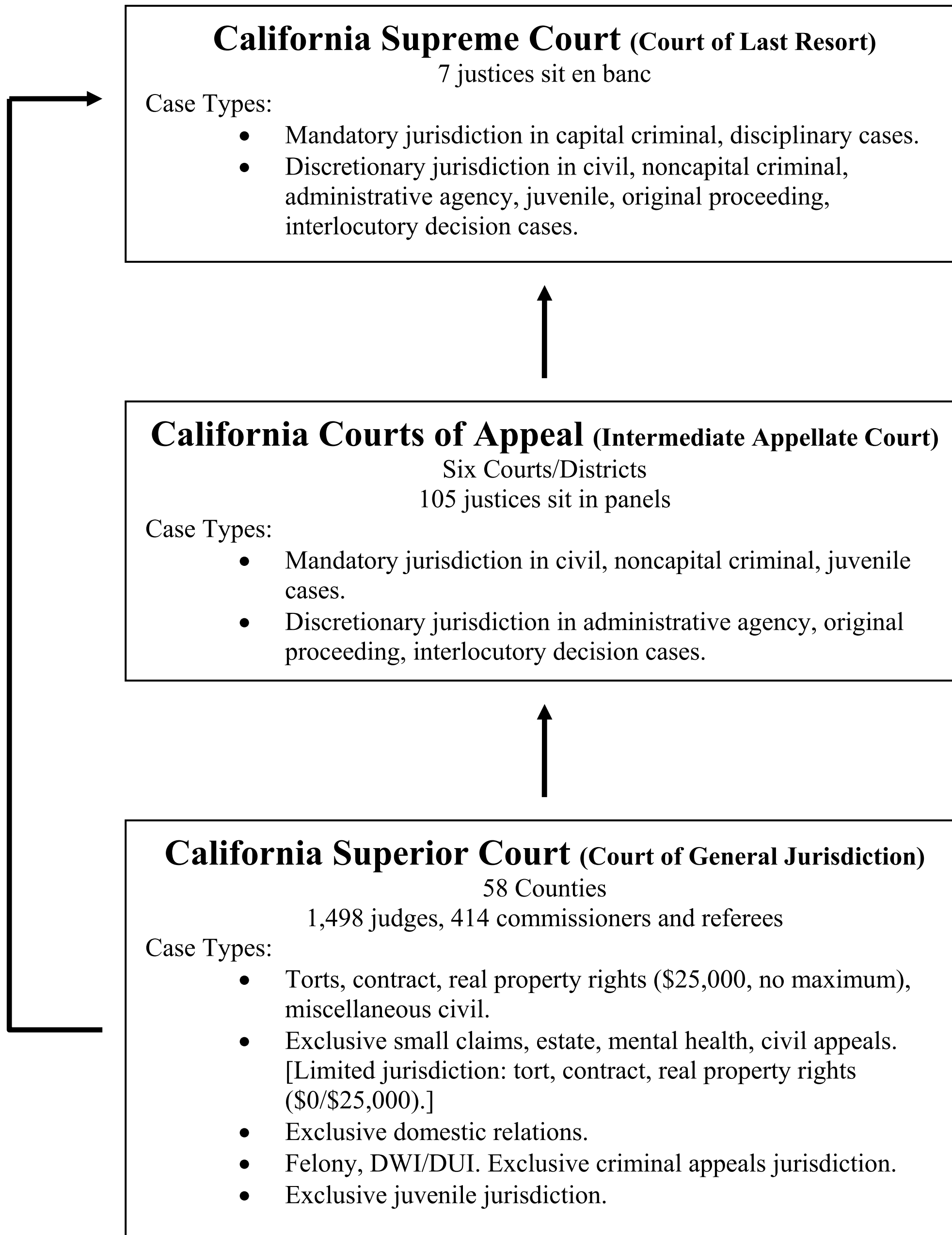
California State Court Chart



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Fleckner v. Dionne

Court of Appeal of California, First Appellate District, Division Two

October 20, 1949

Civ. No. 14142

Reporter
94 Cal. App. 2d 246 *; 210 P.2d 530 **; 1949 Cal. App. LEXIS 1518 ***

Judges: Goodell, Acting P. J. Runnells, J. pro tem., concurred. Dooling, J., dissents.

Opinion by: GOODELL

Opinion

[*246] [**531] The demurrer of respondent Pangracs, sued as Richard Roe, was sustained with leave to amend. Plaintiffs declined to amend, and judgment was entered that plaintiffs take nothing as against Pangracs, from which this appeal was taken.

The complaint is in three counts. It alleges that the defendants so negligently operated their Ford sedan [***2] on El Camino Real as to cause it to collide with the automobile driven by Wilbur G. Fleckner. The first count is based on bodily injuries [*247] sustained by the latter and the second on injuries to Mrs. Fleckner.

The third count is the one by which respondent Pangracs was brought into the case. It incorporates paragraph I of the first and second counts, which simply contains the usual allegations respecting fictitious defendants. It then alleges on information and belief that the five fictitious defendants owned, maintained, conducted and operated a tavern in Sunnyvale and that on the evening in question between 9 and 10 p.m. defendant Edward G. Dionne, a minor, was a patron of the tavern and purchased and was sold and given intoxicating liquors and was allowed to consume the same therein; that the fictitious defendants knew that he was a minor, and sold the intoxicating liquors to him while he was already under the severe influence of intoxicating liquors; that they knew also that he had upon or near the premises an automobile and would thereafter drive and propel it; that defendants and their servants, agents and employees knew and should have known and foreseen that the [***3] driving of the automobile by him in his then intoxicated condition could and would result in harm and damage to others upon the highway. That the sale and serving of intoxicating liquor to him, was and did constitute a negligent disregard of the rights of plaintiffs, to their damage.

It alleges that thereafter defendant Edward G. Dionne "did in the said intoxicated condition and under a severe influence of liquor drive upon the said highway, unlawfully, negligently and recklessly and that he did propel his automobile in such a manner so as to cause the same to collide violently with the automobile in which plaintiffs above named were riding, all to their injuries and damage as hereinabove set forth."

It alleges further, "That all the said damage was a proximate and direct result of the unlawfulness, negligence, recklessness of the defendants, John Doe, Jane Doe, Richard Roe, First Doe Company, a co-partnership and Second Doe Company, a corporation, as herein above set forth, which said negligence joined and co-operated with the unlawfulness, carelessness, [**532] negligence and recklessness of the defendant, Edward G. Dionne, and produced the injuries and damages hereinabove [***4] alleged."

In his demurrer to the third count respondent specifies that no cause of action is stated in that it is too remote and cannot be determined in what manner any actions of defendants were the proximate cause of the alleged injuries.

[*248] **(1)** The question presented for decision sufficiently appears from the allegations of the third count and the ground of remoteness raised by the demurrer.

Appellants are not able to supply any authority in this state supporting their position. On the other hand whenever our courts have had occasion to say anything at all touching the question, the court's language has indicated a view such as that expressed in the decisions of other states where the question has arisen.

In *Lammers* v. *Pacific Electric Ry. Co.*, 186 Cal. 379 [199 P. 523], the court held that the expulsion of the plaintiff from the train was not the proximate cause of the injuries which he received some six hours later and three-quarters of a mile away. However, in that case the court did say:

"The only connection between the ejection and the injury would be the fact that if there had been no ejection there would have been no injury. The sale of the whisky to [***5] the plaintiff would come nearer being a proximate cause of the injury than the ejection from the railway train. The peril arising from the ejection ceased the moment the

passenger left the position where he could be struck by defendant's trains, while the peril arising from the use of the intoxicating liquor continued in operation up to the time of the injury and contributed thereto, and yet *it has been uniformly held in the absence of statute to the contrary that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication*. (Joyce on Intoxicating Liquors, sec. 421; *Cruse* v. *Aden*, 127 Ill. 231, 234 [3 L.R.A. 327, 20 N.E. 73].)" (Emphasis added.)

In *Hitson* v. *Dwyer*, 61 Cal.App.2d 803 [143 P.2d 952], plaintiff sued a tavern owner for injuries sustained while within the defendant's tavern, where he had been sold intoxicating liquor while obviously intoxicated. He alleged that he fell from a stool to the floor and was then dragged by the defendant and an employee. The court said, at page 809, ". . . in the absence of a showing to the contrary, the proximate cause is not the wrongful [***6] sale of the liquor but the drinking of the liquor so purchased. (30 Am.Jur., sec. 611.) If our view be correct it becomes apparent that plaintiff has alleged both an actionable and nonactionable wrong, and the defendants' special demurrer was properly sustained." The nonactionable wrong was the sale of the liquor, while the actionable wrong was the dragging of plaintiff across the floor.

[*249] In neither of these two cases was the language which we have quoted necessary to the decision. However, what the court says in each of them is in accord with the holdings in other jurisdictions on the question, Whether or not the *sale* of the liquor is a proximate cause.

The opinion in the Lammers case qualifies its statement respecting "uniform" holding by saying "in the absence of statute to the contrary." In this connection many of the states have enacted civil damage acts which greatly extend and enlarge the liability of saloonkeepers and tavern owners. Such legislation is discussed in Joyce on Intoxicating Liquors, sections 420-497. Illinois, for instance, has had a dramshop act for many years, which repeatedly has come before its courts. A case involving that act was [***7] *Hyba* v. *C. A. Horneman, Inc*., 302 Ill. App. 143 [23 N.E.2d 564], (cited in *Hitson* v. *Dwyer, supra*) where the court said: "The common law gave no remedy for the sale of liquor either on the theory that it was a direct wrong or on the ground that it was negligence, which would impose a legal liability on the seller for damages resulting from intoxication." Numerous cases say the same thing and it is needless to cite them.

California has no civil damage act.

In *Seibel* v. *Leach*, 233 Wis. 66 [288 N.W. 774], the action was for property [**533] damage and personal injuries. One of the defendants, Landerman, was a tavern owner who sold intoxicants to Leach. The latter while intoxicated drove his car into plaintiff's car. Landerman's demurrer to the complaint was sustained, and in affirming the judgment the court said: "The common law rule holds the man who drank the liquor liable and considers the act of selling it as too remote to be a proximate cause of an injury caused by the negligent act of the purchaser of the drink. The decision in *Demge* v. *Feierstein, supra*, [222 Wis. 199, 268 N.W. 210] sets forth the law controlling in the case at bar." [***8]

The facts of that case and of this are substantially the same.

Seibel v. *Leach* was, as this is, an action on behalf of a third person. *Demge* v. *Feierstein*, 222 Wis. 199 [268 N.W. 210], *supra*, was not such a case but was brought by a widow whose husband had been sold intoxicating liquor by the Feiersteins, tavern owners, after she had given them oral notice not to let her husband have any more liquor. After leaving the tavern he lost control of his car and was fatally injured. The general demurrers of the tavern owners (and their bondsman) were sustained, and in affirming the judgment the court said: "The [*250] cases are overwhelmingly to the effect that there is no cause of action at common law against a vendor of liquor in favor of those injured by the intoxication of the vendee. Black, Law of Intoxicating Liquors, c. 13, sec. 281; *Buntin* v. *Hutton*, 206 Ill.App. 194; *Healey* v. *Cady*, 104 Vt. 463, 161 A. 151; *Coy* v. *Cutting*, 138 Kan. 109, 23 P.2d 458; *State* v. *Johnson*, 23 S.D. 293, 121 N.W. 785, 22 L.R.A. (N.S.) 1007; *Kraus* v. *Schroeder et al*., 105 Neb. 809, 182 N.W. 364, 365."

Appellants argue that the Alcoholic [***9] Beverage Control Act [Stats. 1935, p. 1123; 2 Deering's Gen. Laws, Act 3796] makes it unlawful to sell intoxicating liquor to a minor or to a person already intoxicated. It is alleged in appellants' complaint herein that defendant Dionne was both. In *Waller's Adm'r*. v. *Collinsworth* (1911), 144 Ky. 3 [137 S.W. 766, Ann.Cas. 1913A 510, 44 L.R.A.N.S. 299], the sale of liquor upon which the action was based was illegal because (a) made in local option territory (b) to a minor. The action was brought by the administrator of a decedent who had been shot by a companion after both men had become intoxicated in Collinsworth's store on liquor which he had sold them. The constitutional and statutory provisions under which the action was prosecuted fixed liability only if the wrongful act was the proximate cause of the injury or death. The court held that the illegal sale of the liquor was not the proximate cause of Waller's death.

Further, on the question of the illegality of the sale, appellants rely on *Dunlap* v. *Wagner*, 85 Ind. 529 [44 Am.Rep. 42], which was likewise relied on in *Seibel* v. *Leach, supra*. In distinguishing it, the court in the latter case said [***10] (288 N.W. 774-5): "Our attention is called to many cases in jurisdictions where statutes have been enacted making provision for such liability where one has become intoxicated by illegal sale of liquor. The case of *Dunlap* v. *Wagner* . . . is illustrative of the basis of

appellant's contention. There a liquor dealer, unlicensed to sell liquor at retail, sold to a customer who consumed the liquor on the premises and became helpless. Because he was too helpless to drive the team which became frightened, a runaway occurred, and a horse he had borrowed was killed. The liquor seller was held liable for the value of that horse. In its decision the supreme court of Indiana did say that a dealer under such circumstances 'may well be deemed guilty of an actionable wrong independently of any statute.' However, this statement is immediately followed by the ruling 'but we have a statute which provides that every [*251] person shall have a right of action for an injury resulting to person or property against one who shall, by selling intoxicating liquors to another, have caused the intoxication of the person by, or through whom, the injury is done.' The inapplicability of cases [***11] of that character to the facts here presented readily appears because we have no similar statute, and because 'in view of the common-law rule, it has been necessary, where opinion favored the creation of such a cause of action, to enact civil damage laws.'"

[**534] In *Tarwater* v. *Atlantic Co., Inc.* (1940), 176 Tenn. 510 [144 S.W.2d 746] plaintiff was an employee of a contractor engaged in painting defendant's property. Defendant distributed a large quantity of free beer to the contractor's employees on the job, who became "highly intoxicated." One of plaintiff's fellow employees while intoxicated dropped a large plank on him, injuring him, and he sued the owner who had donated the beer.

The question whether the furnishing of the free beer was the proximate cause of plaintiff's injuries was raised by demurrer, and the court in affirming the judgment for defendant said: "The defendant's act in furnishing the beer created a situation which afforded an opportunity to plaintiff's fellow employee to intoxicate himself voluntarily, and the voluntary act of the fellow employee was the proximate cause of the injury."

In the absence of civil damage legislation in this state, [***12] and with such views as have been expressed by our courts on the subject (Lammers and Hitson cases, *supra*) coinciding with the holdings in other jurisdictions where the questions have been directly passed upon, we are satisfied that the sustaining of the demurrer of respondent Pangracs was correct.

The judgment is affirmed.

Dissent by: DOOLING

Dissent

DOOLING, J. I dissent. I frankly admit that the cases from other judisdictions are all to the effect that in the absence of statute no remedy exists against the dispenser of liquor for injuries resulting to third persons from the acts of intoxicated persons. However, considered as questions of the law of negligence and proximate cause, I cannot bow to the reasoning of those decisions when carried to the full extreme of holding that under no circumstances can one who dispenses liquor to another knowing that he is becoming intoxicated [*252] be liable to a third person later injured by the intoxicated person's conduct; and I can see no reason for perpetuating in the law of this state the error of the courts of other jurisdictions.

Negligence is measured by what a person of ordinary prudence would or would not do under the same or similar [***13] circumstances and it is thoroughly settled that negligence may be the proximate cause of an injury to another even though the act of a third person intervenes, if a person of ordinary prudence could reasonably anticipate the probability of the third person's intervening conduct. (*McEvoy* v. *American Pool Corp*., 32 Cal.2d 295, 299 et seq. [195 P.2d 783]; *Mosley* v. *Arden Farms Co*., 26 Cal.2d 213, 218 et seq. [157 P.2d 372, 158 A.L.R. 872]; *Katz* v. *Helbing*, 215 Cal. 449 [10 P.2d 1001].)

The complaint in this action alleges in effect that the defendant Pangracs (sued as Richard Roe) sold to the defendant Edward G. Dionne, a minor, intoxicating liquor knowing that he was already intoxicated, knowing that he had an automobile on or near the premises and knowing that he would thereafter drive the automobile. It is further alleged that defendant Pangracs knew or should have known that the driving of the automobile by Dionne in an intoxicated condition could and would result in damage to others on the highway, that the injuries to plaintiffs resulted from a collision with the car driven by Dionne while in an intoxicated condition and that the damage to plaintiffs [***14] was a proximate result of Pangracs' negligence in selling the liquor to Dionne.

Despite the unanimity of decision in other jurisdictions to the contrary these allegations in my opinion are sufficient to state a cause of action. We have conduct alleged on the part of the defendant Pangracs which would increase the intoxication of Dionne and the allegations that Pangracs knew that Dionne would drive his automobile when he left the premises and knew or should have known that his driving in an intoxicated condition would imperil the safety of others on the highway. This is sufficient to establish negligence in the sale of the liquor. We have the further allegations that the foreseeable happened and plaintiffs were injured by Dionne driving his automobile while intoxicated. Under the cases above cited this establishes proximate cause.

The cases are legion that the owner of an automobile entrusting it to an intoxicated [**535] driver or to one

known to be addicted to intoxication may be liable for damages resulting to third persons from the intoxicated person's driving. (*Knight* v. [*253] *Gosselin*, 124 Cal.App. 290, 294 [12 P.2d 454]; *Department of Water & Power* [***15] v. *Anderson*, 95 F.2d 577; *R. J. Reynolds Tobacco Co*. v. *Newby*, 153 F.2d 819; *Tolbert* v. *Jackson*, 99 F.2d 513; *Powell* v. *Langford*, 58 Ariz. 281 [119 P.2d 230]; *Mitchell* v. *Churches*, 119 Wash., 547 [206 P. 6, 36 A.L.R. 1132]; *Krausnick* v. *Haegg Roofing Co*., 236 Iowa 985 [20 N.W. 2d 432, 163 A.L.R. 1413]; *Chaney* v. *Duncan*, 194 Ark. 1076 [110 S.W.2d 21]; *V. L. Nicholson Const. Co*. v. *Lane*, 177 Tenn. 440 [150 S.W.2d 1069]; *Levy* v. *McMullen*, 169 Miss. 659 [152 So. 899]; *Crowell* v. *Duncan*, 145 Va. 489 [134 S.E. 576, 50 A.L.R. 1425]; *Brady* v. *B. & B. Ice Co*., 242 Ky. 138 [45 S.W.2d 1051]; *Worsham-Buick Co*. v. *Isaacs*, (Tex.Civ.App.) 56 S.W.2d 288; *Baader* v. *Driverless Cars*, 10 La.App. 310 [120 So. 515]; *Crisp* v. *Wright*, 56 Ga.App. 338 [192 S.E. 390]; *Owensboro Undertaking & Livery Assn*. v. *Henderson*, 273 Ky. 112 [115 S.W.2d 563].)

I confess to an inability to distinguish these cases in principle from the case before us. If it is negligence to entrust an automobile to an intoxicated person or one addicted to intoxication why is it not negligence to furnish [***16] liquor to a person to the point of intoxication knowing that he is going to drive an automobile while in that condition? The reasoning of the cases that it is the drinking of the liquor and not the selling of it which causes the injury does not impress me. As well say in the cases last cited that it is the driving of the automobile which causes the injury and not the entrusting it to the intoxicated person. In either case if his intervening act is reasonably foreseeable the chain of causation is not broken by the act of the person intoxicated.

Hitson v. *Dwyer*, 61 Cal.App.2d 803 [143 P.2d 952] is distinguishable. There the drunken man sued for injuries to himself. Under settled rules of contributory fault I concede that he could not recover.

I would reverse the judgment.

End of Document

Cole v. Rush

Supreme Court of California

October 28, 1955

L. A. No. 22864

Reporter

45 Cal. 2d 345 *; 289 P.2d 450 **; 1955 Cal. LEXIS 325 ***; 54 A.L.R.2d 1137

Judges: In Bank. Schauer, J. Gibson, C. J., Edmonds, J., and Traynor, J., concurred. Spence, J., concurs. Carter, J., dissents.

Opinion by: SCHAUER

Opinion

[*347] [**451] In this wrongful death action plaintiffs, who are the surviving widow and minor children of James Bernard Cole, deceased, seek to recover damages for the allegedly negligent furnishing of intoxicating liquor to the deceased, which plaintiffs claim proximately caused his death. They appeal from an adverse judgment entered upon the sustaining of a demurrer to their amended complaint, without leave to amend. We have concluded that the trial court correctly held that the complaint [***2] does not state facts sufficient to constitute a cause of action, and that the judgment should be affirmed.

The material allegations of the amended complaint are that defendants own and operate an establishment known as the Tropic Isle in which "intoxicating liquors are sold and furnished to the public for consumption on the premises"; on October 13, 1950, James Bernard Cole was a patron of the Tropic Isle and defendants "did sell, furnish, give, and cause to be sold, furnished and given" to him alcoholic beverages which he drank; immediately before he came "to the premises of the defendants . . . Cole was not intoxicated by reason of the use of alcoholic beverages," but he "did drink said alcoholic beverages so sold, furnished and given until and after . . . [he] became intoxicated." Cole had patronized the Tropic Isle on numerous occasions and was well known to defendants, who also knew that he was "normally of quiet demeanor but that when . . . intoxicated he became belligerent, pugnacious and quarrelsome"; on numerous prior occasions plaintiff widow had requested defendants "not to sell or furnish intoxicating beverages to said James Bernard Cole *sufficient* [1] *to allow* [***3] *him to become intoxicated thereon*" (italics added), but defendants refused [*348] to comply with such requests; "by reason of said intoxication, and by reason of said alcoholic beverages so unlawfully sold, furnished or given . . . and as a proximate result thereof, . . . Cole became belligerent, pugnacious and quarrelsome; . . . Cole did thereafter on said date quarrel with one Franklin Leonard; . . . Cole and . . . Leonard did engage in fisticuffs; . . . Cole was struck by . . . Leonard and did fall to the pavement, striking his head against the concrete, by reason of which . . . Cole suffered a subarachnoid hemorrhage, traumatic, and died immediately from the effects of said blow"; at the time of his death Cole "was an able bodied man of the age of 39 years," earning approximately $ 4,000 a year.

[**452] Defendant Frank Van Stone, alleged to be one of the owners [***4] of the Tropic Isle, demurred to the amended complaint on the ground that it fails to state facts sufficient to constitute a cause of action. By way of particularizing its insufficiency he specifies, among other things, that the complaint shows on its face that decedent's injuries were caused or contributed to by fault and negligence on decedent's part and that it cannot be determined in what manner any acts of the defendant were the proximate cause of the alleged injuries. Following the hearing upon the demurrer and the statement of counsel for plaintiffs that "he cannot further amend," the court sustained the demurrer without leave to amend, and judgment was entered accordingly.

(1) The general rule of the common law as to tort liability arising out of the sale of intoxicating beverages is stated in 30 American Jurisprudence 573, section 607: "The common law gives no remedy for injury or death following the mere sale of liquor to the ordinary man, either on the theory that it is a direct wrong or on the ground that it is negligence, which imposes a legal liability on the seller for damages resulting from the intoxication." (For examples of cases following the rule see: *Hitson* [***5] v. *Dwyer* (1943), 61 Cal.App.2d 803, 808 [143 P.2d 952]; *Fleckner* v. *Dionne* (1949), 94 Cal.App.2d 246 [210 P.2d 530]; *Lammers* v. *Pacific Elec. Ry. Co.* (1921), 186 Cal. 379, 384 [199 P. 523]; *Howlett* v. *Doglio* (1949), 402 Ill. 311 [83 N.E.2d 708, 712]; *Tarwater* v. *Atlanta Co., Inc.* (1940), 176 Tenn. 510 [144 S.W.2d 746]; 48 C.J.S. 716-718; see also anno. 44

[1] By what standards or tests the defendants on any occasion might determine the amount which properly could be furnished is not disclosed.

L.R.A.N.S. 299; 130 A.L.R. 357-369.) A number of jurisdictions have adopted statutes creating a right of action, under specified conditions, [*349] against persons furnishing intoxicants. [2] California, however, has enacted no such statute notwithstanding the fact that, as hereinafter shown, its Legislature has repeatedly dealt with problems concerning alcoholic beverages and concerning tort liability.

[***6] **(2a)** Plaintiffs with commendable frankness state in their opening brief (p. 3) that they "recognize that it is the general rule of law that it is the consumption of the intoxicating liquor which is the proximate cause of any subsequent injury by reason of such intoxication rather than the sale of intoxicating liquor" (citing *Hitson* v. *Dwyer* (1943), *supra*, and *Fleckner* v. *Dionne* (1949), *supra*; see also *Collier* v. *Stamatis* (1945), 63 Ariz. 285 [162 P.2d 125, 127]: "The principle is epitomized in the truism that there may be sales without intoxication, but no intoxication without drinking"), but urge that "knowledge on the part of the defendants of the propensities of Cole to seek a quarrel when intoxicated, and . . . their wilful refusal to heed the pleas of the wife, and their wilful insistence in selling intoxicating liquor to Cole and allowing him to be intoxicated" are distinguishing factors which support the charge of negligence here and establish the sale of the liquor as the proximate cause of the injury. Such a view, we conclude in the light of the common law, cannot be sustained in this state in the absence of legislative action.

(3) In the first [***7] place, it appears that in *Lammers* v. *Pacific Elec. Ry. Co.* (1921), *supra*, 186 Cal. 379, 384, this court stated and relied on the general rule that "the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication." In that case the plaintiff, while intoxicated, was ejected from defendant's passenger train; he left the place of immediate peril where he was ejected but later returned to the tracks at a point about three-quarters of a mile away [**453] and was seriously injured. The court said: "The only connection between the ejection and the injury would be the fact that if there had been no ejection there would have [*350] been no injury. The sale of the whiskey to the plaintiff would come nearer being a proximate cause of the injury than the ejection from the railway train. The peril arising from the ejection ceased the moment the passenger left the position where he could be struck by defendant's trains, while the peril arising from the use of the intoxicating liquor continued in operation up to the time of the injury and contributed thereto, and yet it has been uniformly held in the [***8] absence of statute to the contrary that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication (Joyce on Intoxicating Liquors, § 421; *Cruse* v. *Aden*, 127 Ill. 231, 234 [20 N.E. 73, 3 L.R.A. 327].) . . . That the injury was not the proximate result of the ejection is demonstrated by the fact that the plaintiff was able to, and did in fact, leave the place of danger and subsequently of his own volition returned to a position of danger on defendant's tracks, and that but for plaintiff's action in so returning to a position of danger the accident would not have occurred."

(2b) In the second place, it is to be observed that in *Fleckner* v. *Dionne* (1949), *supra*, 94 Cal.App.2d 246, knowledge on the part of the tavernkeeper was, as here, expressly averred. The allegations of the complaint there were that on the evening in question defendant Dionne, a minor, was a patron of the tavern and was sold and given intoxicating liquors and allowed to consume them in the tavern; that the defendant tavernkeeper *knew* that Dionne was a minor and sold the liquors to him while he was already under the [***9] "severe influence of intoxicating liquors"; that he knew also that Dionne had upon or near the premises an automobile and would thereafter drive it; that defendant *knew* and should have known and foreseen that the driving of the automobile by him in his then intoxicated condition could and would result in harm and damage to others upon the highway; that Dionne while so intoxicated negligently drove his automobile into an automobile in which plaintiffs were riding and injured them; that the sale and serving of the liquor to Dionne by defendant constituted a "negligent disregard of the rights of plaintiffs" which joined with Dionne's negligence in proximately injuring plaintiffs. Defendant's general demurrer was sustained with leave to amend and on plaintiffs' failure to amend judgment was entered in defendant's favor. **(4)** The District Court of Appeal affirmed the judgment, relying upon the Hitson and Lammers cases, *supra*, [*351] as well as upon various out-of-state decisions, and this court denied a hearing. [3] Its

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[2] It appears that such a statute has been adopted in Arkansas, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin. (See 48 C.J.S. 717-718, § 431; 30 Am.Jur. 576, § 612; Ann.Cas. 1917B, p. 534; Black on Intoxicating Liquors, § 277, pp. 326-331; see also 6 A.L.R.2d 798-807.)

[3] Denial of a hearing is not the equivalent of express approval by this court but it has been said that "The order of this court denying a petition for a transfer . . . after . . . decision of the district court of appeal may be taken as an approval of the conclusion there reached, but not necessarily of all of the reasoning contained in that opinion." *Eisenberg* v. *Superior Court* (1924), 193 Cal. 575, 578 [226 P. 617]; see also *People* v. *Rowland* (1937), 19 Cal.App.2d 540, 542 [55 P.2d 1333].) The significance of a denial in any particular case is also to be understood as further qualified by the fact that under the Rules on Appeal a denial may mean no more than that a ground which we deem

judgment stands, therefore, as a decision of a court of last resort in this state, until and unless disapproved by this court or until change of the law by legislative [***10] action. It is to be noted that the knowledge alleged in the Fleckner case was more specific and extensive than that in the instant case. Here it is only alleged that defendant knew of the belligerent disposition of the deceased when he was intoxicated.

[***11] In the next place, it is to be observed that in *Hitson* v. *Dwyer* (1943), *supra*, 61 Cal.App.2d 803, it was held that one who suffers injuries by reason of his own intoxication may not recover from the tavernkeeper by reason of the sale of the liquor to the plaintiff. In [**454] that case plaintiff alleged that while obviously intoxicated and sitting on a movable stool at defendants' bar he wrongfully was served intoxicating liquor, and as a result he fell from the stool to the floor, and was thereafter dragged by defendants from his position on the floor; that as a result of the fall or the dragging or both, plaintiff was injured. It was held that so far as concerned the fall and any injuries suffered therefrom, the proximate cause was the drinking of the liquor rather than the wrongful (i.e., in violation of the alcoholic beverage control act) sale thereof to an obviously intoxicated person, and any wrong in the sale was non-actionable. This court denied a hearing. **(5)** If the man who is injured by reason of his intoxicated state may not himself recover from the one who provided the liquor, then it follows that under the established law governing wrongful death actions, [***12] his survivors may not recover in this, which is such an action. (*Buckley* v. *Chadwick* (1955), *ante*, pp. 183, 201 [288 P.2d 12, 289 P.2d 242]; see also *Demge* v. *Feierstein* (1936), 222 Wis. 199 [268 N.W. 210, 212] [liquor sale]; *Scott* v. *Greenville* [*352] *Pharmacy* (1948), 212 S.C. 485 [48 S.E.2d 324, 326] [barbiturate sale]; 30 Am.Jur. 575, § 610.)

Other cases, from other jurisdictions, relied upon by plaintiffs are clearly distinguishable on their facts, even if it be assumed that upon similar facts action would lie in California. For example, *Cherbonnier* v. *Rafalovich* (1950), 88 F.Supp. 900, was an action against saloonkeepers by one of their patrons who, while he was eating in the saloon and cafe, was attacked by another patron, one Hobson, who was drunk. Although dismissing the complaint for failure to state a cause of action in that it was not alleged that defendants knew Hobson was of a violent disposition or had threatened harm to plaintiff before he was served the last of the intoxicating drinks, the court did observe (p. 903) that "The present trend is apparently toward holding the defendant saloonkeeper liable for lawless [***13] acts occurring in the saloon," and quoted from 30 American Jurisprudence 574, section 609, the statement that "The better reason appears to favor placing on the proprietor the duty of seeing to it that the patron is not injured either by those in his employ or by drunken or vicious men whom he may choose to harbor Further, a guest or patron of such a place has a right to rely on the belief that he is in an orderly house and that its operator . . . is exercising reasonable care to the end that the doings in the house shall be orderly." Here, if Leonard had been injured by Cole (who was the attacker) and if the former or his next of kin were the plaintiffs, and if it were further alleged that Leonard had been within the defendants' premises and was there attacked by Cole, we would then have a case to which the Cherbonnier decision might be pertinent. Obviously it is not in point on the facts which are alleged.

Rommel v. *Schambacher* (1887), 120 Pa. 579 [11 A. 779, 6 Am.St.Rep. 732]; *Curran* v. *Olson* (1903), 88 Minn. 307 [92 N.W. 1124, 97 Am.St.Rep. 517, 60 L.R.A. 733]; and *Peck* v. *Gerber* (1936), 154 Ore. 126 [59 P.2d 675, 106 A.L.R. 996], additionally relied [***14] upon by plaintiffs, also involve the liability of the saloonkeeper as a proprietor for not using reasonable care in maintaining order for the safety of his guests. However, as is indicated in the opinions in the cited cases as well as in the annotation in 106 American Law Reports 1003, following the report of *Peck* v. *Gerber* (1936), *supra*, and as recognized by the court in the Cherbonnier case, the liability of a saloonkeeper in this line of cases appears to be related to that of innkeepers and restaurateurs for [*353] injuries to guests or patrons by other guests or persons not connected with the management, and is an exception to the general common law rule of nonliability of the vendor of intoxicating liquor, and furnishes no precedent for imposing liability on the saloonkeeper under the circumstances alleged in the complaint in this case.

In *Pratt* v. *Daly* (1940), 55 Ariz. 535 [104 P.2d 147, 130 A.L.R. 341], plaintiff wife was permitted to recover damages resulting from defendants' sale of intoxicating liquor to her husband with knowledge of the fact that the husband was an *habitual drunkard*. Arizona had no civil damage statute. The court there, [***15] after discussing the rule as [**455] stated in Restatement of the Law of Torts, volume 3, section 696, that "One who, without a physician's direction, sells or otherwise supplies to a married woman a habit-forming drug with knowledge that it will be used in a way which will cause harm to any of the legally protected marital interests of the husband is liable for harm caused by such drug to those interests unless the husband consents to the wife's acquisition or use of the drug" and that the same rule applies to a sale to the husband in an action by the wife under similar circumstances (see also 130 A.L.R. 352-365), then goes on to observe (p. 347 of 130 A.L.R.): "Of course, since there is not the same presumption that the use of liquor will eventually cause the loss of volition that there is with a habit-forming drug, it is incumbent upon plaintiff to prove that to the knowledge of

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adequate or implement for ordering a hearing has not been brought to our attention. (See rule 29, Rules on Appeal.)

defendant such a stage has been reached by the consumer, but if this fact is once established, in all reason and logic the right of action should be the same in one case as in the other . . . [P. 348.] The allegation of the complaint is that the husband of plaintiff was an 'habitual drunkard,' and [***16] that the fact was well known to defendants. The term 'habitual drunkard' has been defined repeatedly, and in almost all of the definitions the principal element emphasized is that such a person has lost the will power to resist the temptation when the liquor is offered him." In *Collier* v. *Stamatis* (1945), *supra*, 162 P.2d 125, 126-127, the Arizona court held that no cause of action for loss of services lies against a tavernkeeper who unlawfully sold intoxicating liquor to a child of the age of 15, upon which she became intoxicated, because "It cannot be said as a matter of law that a child of fifteen has neither will nor choice nor discretion whatever"; the court further confirmed that its opinion in the [*354] *Pratt* v. *Daly* case rested upon the showing by plaintiff wife that her husband was "incapable of voluntary action." (See also *Cavin* v. *Smith* (1949), 228 Minn. 322 [37 N.W.2d 368, 369].) By contrast, the plaintiffs in the case now before us allege no such lack of volition on the part of the decedent, but, rather, that he was an "able-bodied man" who was not intoxicated immediately before he entered defendant's establishment on the day in question. [***17] Other cases indicating the court's awareness of the materiality of the element of volition or of competency, and, hence, of at least contributing responsibility of the voluntary drinker or user, are *Seibel* v. *Leach* (1939), 233 Wis. 66 [288 N.W. 774], in which the court remarked that "Under the common law it is not an actionable wrong to sell or to give intoxicating liquors to an able-bodied man," and affirmed a judgment dismissing the complaint; and *Scott* v. *Greenville Pharmacy* (1948, S.C.), *supra*, 48 S.E.2d 324, 327, in which it was pointed out that the complaint failed to describe plaintiff's deceased husband "as being without mind or lacking in volition," in buying and consuming barbiturate capsules during a period of about a year, at the end of which time he committed suicide by hanging himself, and judgment for defendant, who sold the barbiturates, following the sustaining of his demurrer was affirmed. (See also 30 Am.Jur. 575-576, § 611.)

(6) **(7)** For this court to hold that plaintiffs have here stated a cause of action by averring facts which establish that no cause of action arose either by statute or by common law as the same existed at the time of the events [***18] relied upon would at the least constitute a departure from its constitutional function and an encroachment upon that of the Legislature. As declared by the court in *State* v. *Hatfield* (1951), 197 Md. 249 [78 A.2d 754, 757], in affirming the judgment on demurrer in defendants' favor in a wrongful death action in which plaintiff widow whose husband was killed by an intoxicated driver sought damages from tavern owners who had sold the liquor, "It would be worse than futile for us to attempt to convince plaintiff by reason, where all other courts have failed and the accumulated mass of authority carries no weight at all. In the circumstances of this case . . . we should virtually usurp legislative power if we should declare plaintiff's contentions to be the law of Maryland. In the course of the last hundred years there probably has [**456] seldom, if ever (except during prohibition), been a regular session of the General Assembly at which no liquor laws were passed. [*355] On few subjects are legislators kept better informed of legislation in other states. In the face of the flood of civil damage laws enacted, amended and repealed in other states and the Volstead [***19] Act -- and of the total absence of authority for such liability, apart from statute -- the fact that there is now no such law in Maryland expresses the legislative intent as clearly and compellingly as affirmative legislation would." (See also *Henry Grady Hotel Co.* v. *Sturgis* (1943), 70 Ga.App. 379 [28 S.E.2d 329, 333].)

The significance of legislative action in the light of established law and of pertinent judicial decisions has been repeatedly recognized in this state. **(8)** As we have so recently said in *Buckley* v. *Chadwick* (1955), *supra, ante*, pp. 183, 200 [288 P.2d 12, 289 P.2d 242], "It is a generally accepted principle that in adopting legislation the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." **(9)** The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended. In this connection it should be noted that section 22.2 of the Civil Code of this [***20] state specifically declares that "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." (See also *Philpott* v. *Superior Court* (1934), 1 Cal.2d 512, 515 [36 P.2d 635, 95 A.L.R. 990]; *Gin S. Chow* v. *City of Santa Barbara* (1933), 217 Cal. 673, 695 [22 P.2d 5]; *Munchiando* v. *Bach* (1928), 203 Cal. 457 [264 P. 762]; *Peters* v. *Peters* (1909), 156 Cal. 32, 34 [103 P. 219, 23 L.R.A.N.S. 699]; 10 Cal.Jur.2d 651-652, § 2, and cases there cited; 23 Cal.Jur. 603.)

(10) Accordingly, it is to be noted that notwithstanding the holding of this court in *Lammers* v. *Pacific Elec. Ry. Co.* (1921), *supra*, 186 Cal. 379, 384; and of the District Court of Appeal in *Hitson* v. *Dwyer* (1943), *supra*, 61 Cal.App.2d 803, 808, and in *Fleckner* v. *Dionne* (1949), *supra*, 94 Cal.App.2d 246, the Legislature of California has at no time seen fit to adopt a statute inconsistent with the common law so far as concerns a remedy for injury or death following the furnishing of liquor to the ordinary [***21] man. Demonstrating awareness by the Legislature of problems relating to the furnishing [*356] and consumption of intoxicating liquors, and a similar awareness in respect to

problems of tort liability, it is pointed out (without attempting to go back as far as the Lammers case, in 1921) that in the 10 years immediately following the decision in the Hitson case (1943) the Legislature made numerous changes in statutes governing the sale, use, and furnishing of intoxicating liquors (see e.g., Stats. 1945, pp. 1023, 2295, 2615: Stats. 1947, pp. 2003, 2051, 2490, 2791, 2936, 3019, 3025; Stats. 1949, pp. 492, 1546, 1582, 1884, 2060, 2349, 2735; Stats. 1951, pp. 1897, 2814, 3051; Stats. 1953, pp. 646, 918, 954, 1949, 2084, 3345) and also in statutes having to do with various aspects of tort liability (see e.g., Civ. Code, §§ 43, 43.5(a), 45a, 46, 47, 48, 48a, 48.5, 171(c), 956, 1714.5, 1714.6, 3341, 3342; Code Civ. Proc., § 377), but there was no adoption of a statute imposing liability in such a case as is now before us. Under such circumstances not only does the legislative intent appear to be to maintain, rather than to depart from, the pertinent common law, but in the further light [***22] of the express enactment (Civ. Code, § 22.2) that "The common law . . . so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all courts of this State," it becomes manifest that the common law is the controlling law in this case. (*Estate of Apple* (1885), 66 Cal. 432, 434 [6 P. 7] ["where the code is silent, the common law governs"]; *Estate of Wickes* (1900), 128 Cal. 270, 274 [60 P. 867, 49 L.R.A. 138] ["The common law is the rule of decision in this state, where no positive law, state [**457] or national, controls"]; *Peters* v. *Peters* (1909), *supra*, 156 Cal. 32, 34 ["The common law of England is declared to be the rule of decision in all courts of this state, so far as it is not repugnant to or inconsistent with our constitution and statutes"]; see also *Gray* v. *Sutherland* (1954), 124 Cal.App.2d 280, 290 [268 P.2d 754]; 10 Cal.Jur.2d 652, § 2.)

(11) Since it is established both by the common law and by the decisional law in this state (1) that as to a competent person it is the voluntary consumption, not the sale or gift, of intoxicating [***23] liquor which is the proximate cause of injury from its use; (2) that the competent person voluntarily consuming intoxicating liquor contributes directly to any injury caused thereby; and (3) that contributory negligence of the decedent bars recovery by his heirs or next of kin in a wrongful death action, the judgment must be, and it is, affirmed.

Concur by: SPENCE

Concur

[*357] SPENCE, J. I concur.

Further consideration of this case upon rehearing convinces me that the governing law, as heretofore enunciated by the courts of this state as well as by the courts of practically all other jurisdictions; precludes plaintiff's recovery. I am further in agreement with the view expressed in the main opinion that the established rules should be followed until such time as these rules may be changed by legislative action. I therefore conclude that the trial court properly sustained the demurrer, and that the judgment should be affirmed.

Dissent by: CARTER

Dissent

CARTER, J. I dissent.

I do not agree with the statement of the majority opinion that the common law so clearly forbids recovery in a case such as the one under consideration, or that under the circumstances here presented the consumption [***24] of the liquor, rather than its sale, should be considered the proximate cause of the death. For the reasons stated by me in my dissenting opinion in the case of *Buckley* v. *Chadwick, ante*, p. 183 [288 P.2d 12, 289 P.2d 242], I also disagree with the holding that any contributory negligence on the part of a decedent is, or should be, a bar to recovery by his heirs or next of kin. It further appears to me that the holding that plaintiffs' decedent was a "competent" person because of plaintiffs' use of the phrase "able bodied" in describing him is outside any of the issues here presented. Plaintiffs alleged that defendants knew of the decedent's propensities when intoxicated -- that he was dangerous to himself and to others -- and that they, with such full knowledge, sold alcoholic beverages to him.

Under the holding of the majority here, a tavern owner may escape liability for the death or serious injury of innocent third persons by an intoxicated patron when he has furnished intoxicating liquor to such patron after warning by both relatives and police that such person should not be furnished any intoxicating liquor whatsoever because of his vicious propensities when intoxicated. [***25] I cannot subscribe to such a holding.

It is true that California has no civil damage, or Dramshop Act. (*Fleckner* v. *Dionne*, 94 Cal.App.2d 246, 249 [210 P.2d 530].) The question is, therefore, whether, at common law, the surviving spouse and children of a decedent had a cause of action against one who, with notice, sold intoxicating beverages to a patron, and whether the selling, or the drinking, [*358] of the liquor was the proximate cause of the subsequent injuries.

I am of the opinion that the California cases dealing with this problem are distinguishable from the case at bar.

In the case of *Hitson* v. *Dwyer*, 61 Cal.App.2d 803 [143 P.2d 952], plaintiff alleged that while a patron of the bar, and in an obviously intoxicated condition, he was served

intoxicating liquor as a result of which he fell from the movable stool on which he was sitting; that he was dragged from his position on the floor by the defendants, and as a result of which, he suffered a fracture and other injuries of the [**458] shoulder and body. He contended that the defendants, knowing his condition, negligently failed to take precautions to protect him. Plaintiff relied in part [***26] upon the Alcoholic Beverage Act (Deering's Gen. Laws, 1937, Act 3796, § 62, Stats. 1935, p. 1123) which makes it a misdemeanor to sell alcoholic beverages to an "obviously intoxicated person." The court held that it could not be said that the purpose of the act was to protect an obviously intoxicated person, as the act itself declared (§ 1) that the purpose was to promote ". . . in the highest degree the economic, social and moral well-being and the safety of the State and of all its people." It was also held that "The principle that a violation of a statute or ordinance is negligence *per se*, is subject to the limitation that the act or omission must proximately cause or contribute to the injury. (*Burtt* v. *Bank of California National Association*, 211 Cal. 548 [296 P. 68]; *Lawrence* v. *Southern Pac. Co*., 189 Cal. 434 [208 P. 966].) Unless the alleged violation of the Beverage Act by defendants constituted the proximate cause of plaintiff's injuries such violation is wholly immaterial to a disposition of this appeal." The court continued to state the "general rule" as follows: "Rather we find the general rule to be as stated in the case of *Hyba* v. *C. A.* [***27] *Horneman, Inc*., 302 Ill.App. 143 [23 N.E.2d 564]: 'The common law gave no remedy for the sale of liquor either on the theory that it was a direct wrong or on the ground that it was negligence, which would impose a legal liability on the seller for damages resulting from intoxication,'" and that the rule found support in the case of *Lammers* v. *Pacific Elec. Ry. Co*., 186 Cal. 379 [199 P. 523], wherein the court held that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication. "Therefore, in the absence of a showing to the contrary, the proximate cause [*359] is not the wrongful sale of the liquor but the drinking of the liquor so purchased."

The case of *Fleckner* v. *Dionne*, 94 Cal.App.2d 246 [210 P.2d 530], was an action brought, in part, against the owners of a tavern. It was alleged that these defendants had sold intoxicating liquors to one Dionne, a minor, knowing that he was already intoxicated and knowing that he would drive his car in an intoxicated condition which could, and would, result in harm to others using the highway; that Dionne, in an intoxicated condition, [***28] did drive his car so negligently and recklessly that he caused it to collide with the car in which plaintiffs were riding to their injury and damage; that all of said injury and damage was the direct and proximate result of the "unlawfulness, negligence, recklessness of the defendants" in selling the intoxicating liquor to the obviously intoxicated minor, Dionne.

The court cited both the Lammers and Hitson cases and held that in both of them the language *in re* proximate cause was not necessary to the decision since in the Lammers case the statement "it has been uniformly held *in the absence of statute to the contrary* that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication" was qualified by the words "in the absence of statute to the contrary" and in the Hitson case the actionable wrong was the dragging of plaintiff across the floor. (Emphasis added.)

The court cited *Seibel* v. *Leach*, 233 Wis. 66 [288 N.W. 774] where the action was for property damage and personal injuries brought by a third person against the defendant tavern owner for selling intoxicants to one Leach who drove [***29] his car in such a manner as to cause plaintiff's injuries and damage. In the Wisconsin case, the court relied upon *Demge* v. *Feierstein*, 222 Wis. 199 [268 N.W. 210] which was an action brought by a widow whose husband had been sold intoxicants by tavern owners after she had given them notice not to let her husband have any more liquor. After leaving the tavern, her husband lost control of his car and was fatally injured. The court there held that there was no cause of action at common law against a vendor of liquor in favor of those injured by the intoxication of the vendee (Black, Law of Intoxicating Liquors, ch. 13, § 281; *Buntin* v. *Hutton*, 206 Ill.App. 194; *Healey* v. *Cady*, 104 Vt. 463 [161 A. 151]; [**459] *Coy* v. *Cutting*, 138 Kan. 109 [23 P.2d 458]; *State* v. *Johnson*, 23 S.D. 293 [121 N.W. 785, 22 L.R.A.N.S. 1007]; *Kraus* [*360] v. *Schroeder*, 105 Neb. 809 [182 N.W. 364, 365]). The California court concluded that in the absence of civil damage legislation in this state, and with such views as have been expressed by our courts on the subject (Lammers and Hitson cases) coinciding with the holdings in other jurisdictions [***30] where the questions have been passed upon, "we are satisfied that the sustaining of the demurrer of respondent Pangracs was correct."

Mr. Justice Dooling dissented. He admitted frankly that cases from some other jurisdictions were to the effect that in the absence of statute no remedy existed against the dispenser of liquor for injuries resulting to third persons from the acts of intoxicated persons. "However, considered as questions of the law of negligence and proximate cause, I cannot bow to the reasoning of those decisions when carried to the full extreme of holding that under no circumstances can one who dispenses liquor to another knowing that he is becoming intoxicated be liable to a third person later injured by the intoxicated person's conduct; and I can see no reason for perpetuating in the law of this state the error of the courts of other jurisdictions.

"Negligence is measured by what a person of ordinary prudence would or would not do under the same or similar circumstances and *it is thoroughly settled that negligence may be the proximate cause of an injury to another even though the act of a third person intervenes, if a person of*

ordinary prudence could reasonably [***31] *anticipate the probability of the third person's intervening conduct*. (*McEvoy* v. *American Pool Corp*., 32 Cal.2d 295, 299 et seq. [195 P.2d 783]; *Mosley* v. *Arden Farms Co*., 26 Cal.2d 213, 218 et seq. [157 P.2d 372, 158 A.L.R. 872]; *Katz* v. *Helbing*, 215 Cal. 449 [10 P.2d 1001].)" (Emphasis added.)

Both the Fleckner and Hitson cases alleged no more than negligence in serving liquors; in the present case, plaintiff wife alleges that "on occasions too numerous to name [she] requested defendants and each of them not to give, sell or furnish intoxicating beverages to James Bernard Cole sufficient to allow him to become intoxicated" but that defendants refused to desist from selling Cole intoxicating beverages; and that defendants had *specific knowledge* that when Cole became intoxicated he was invariably belligerent and quarrelsome. In the Hitson case, the plaintiff was suing for his own injuries received while *he* was intoxicated, in the Fleckner case, a third person was suing for injuries received by reason [*361] of the driving of an automobile by an intoxicated person. In neither case were the surviving spouse and dependent children suing [***32] for loss of consortium and support; and in neither case did the defendant tavern owner have prior specific notice and knowledge of the effect of liquor on the patron to whom the intoxicants were sold.

In Woollen and Thornton "Law of Intoxicating Liquors" (vol. II, § 1029, p. 1837) it is said: "The right of persons injuriously affected by the sale of intoxicating liquors to recover damages *is not entirely restricted to the right given them by statute*. In several jurisdictions it has been held that when, by the continued sale of intoxicating liquors, a person has been unable to perform the duties owing by him to another, under the common law, the seller was liable in damages to persons to whom the duty was owing for any loss that he thereby sustained (*Holleman* v. *Harward*, 119 N.C. 150 [25 S.E. 972, 56 Am.St.Rep. 672, 34 L.R.A. 803]: "It is lawful to sell laudanum as a medicine. It is also lawful to sell spirituous liquors as a beverage upon the dealers complying with the license laws, except in the cases prohibited by statute. Certainly no fair inference can be drawn from this that damages may not be recovered from one who knowingly and willfully sells or gives laudanum [***33] or intoxicating liquors to a wife, in such quantities as to be attended by such consequences to the wife as are set out in the complaint in this action") However, *it may be stated as a general rule, that unless the rights of persons having peculiar interests in the buyers of intoxicating liquors such as a wife in her husband, or parent in the child, are invaded by the sales of intoxicating* [**460] *liquors and the seller of such liquors has notice of the injurious effects of the liquors so sold upon the buyer* (*Holleman* v. *Harward, supra*; *Hoard* v. *Peck*, 56 Barb. (N.Y.) 201 [opium], *Struble* v. *Nodwift*, 11 Ind. 64), the right to recover damages for injuries resulting from the sales of intoxicating liquors is purely statutory, and the action is governed entirely by the provisions of the statute." (Emphasis added.)

In *Peck* v. *Gerber* (1936), 154 Ore. 126 [59 P.2d 675, 106 A.L.R. 996], in which it appears that the plaintiff was assaulted in the saloon by another customer, the latter being a regular customer who was *known* to the saloonkeeper to be a trouble-maker, the court held the saloonkeeper liable, because he was negligent, and expressed [***34] the view that he did not use the care required of the ordinarily prudent man [*362] in maintaining order for the safety of his guests. The court stated that the standard of care does not vary, but that the ordinarily prudent man exercises care commensurate with the dangers to be avoided and the likelihood of danger to others. There is, apparently, no statute in Oregon on which recovery could have been predicated. Other cases in which the saloonkeeper was held liable under somewhat similar circumstances are *Mastad* v. *Swedish Brethren*, 83 Minn. 40 [85 N.W. 913, 85 Am.St.Rep. 446, 53 L.R.A. 803] and *Molloy* v. *Coletti*, 114 Misc. 177 [186 N.Y.S. 730]. In *Curran* v. *Olson*, 88 Minn. 307 [92 N.W. 1124, 97 Am.St.Rep. 517, 60 L.R.A. 733], where the factual situation was different, the court said: ". . . the bartender knew, or might have known by the exercise of the slightest care, what the alcohol was to be used for, and could have prevented the injury to the plaintiff."

In *Cherbonnier* v. *Rafalovich* (Alaska), 88 F.Supp. 900, the court granted leave to plaintiff to plead over to allege, if he could, that the saloonkeeper had knowledge of the patron's [***35] violent disposition while under the influence of intoxicating beverages Here, the court pointed out (p. 903) that: "The present trend is apparently toward holding the defendant saloonkeeper liable for lawless acts occurring in the saloon. It is said in 30 Am.Jur. 574 that: 'The better reason appears to favor placing on the proprietor the duty of seeing to it that the patron is not injured either by those in the employ or by drunken or vicious men whom he may choose to harbor. Further, a guest or patron of such a place has a right to rely on the belief that he is in an orderly house and that the operator, personally or by his delegated representative, is exercising reasonable care to the end that the doings of the house shall be orderly.'"

It would seem from the foregoing that the rule of the common law with respect to intoxicating beverages is not quite so clearly defined in favor of nonliability as would appear from statements found in other cases, and textbooks, as well as in the majority opinion.

Plaintiffs next contend that the rule of the common law with respect to habit forming drugs should be controlling here. At common law, it was held that a wife could bring an action [***36] against one who sold habit forming drugs to a husband with knowledge that the drug was intended to satisfy a craving induced by habitual use (*Hoard* v. *Peck*, 56 Barb. (N.Y.) 202; *Holleman* v. *Harward*, 119 N.C. 150

[25 S.E. 972, 56 Am.St.Rep. 672, 34 L.R.A. 803]; *Flandermeyer* [*363] v. *Cooper*, 85 Ohio St. 327 [98 N.E. 102, Ann.Cas. 1913A 983, 40 L.R.A.N.S. 360] [morphine]; *Moberg* v. *Scott*, 38 S.D. 422 [161 N.W. 998, L.R.A. 1917D 732] [opium]; *Tidd* v. *Skinner*, 225 N.Y. 422 [122 N.E. 447, 3 A.L.R. 1145] [morphine])

In *Pratt* v. *Daly*, 55 Ariz. 535 [104 P.2d 147, 130 A.L.R. 341] (in Arizona there is no civil damage act) it was held that defendant vendor of intoxicating liquors was liable to the plaintiff wife after selling such liquors over her protest and with knowledge that the plaintiff's husband was an habitual drunkard and had reached such a state that his power to drink or not as he chose had been destroyed. The court concluded that the defendants had breached a duty owing to the plaintiff for which the plaintiff should be compensated in damages.

A note in Southern California Law Review (14:91) points out that at [***37] common law, a vendor was liable to one spouse for a sale to the other spouse, or to a parent [**461] for a sale to a minor child of habit-forming drugs to the extent of the damages suffered by the loss of consortium or the services of the victim of the drugs, if the vendor knew or had reason to know that the drugs were to be used for a purpose harmful to the purchaser. The doctrine stems from the husband's common law cause of action against one who injures the husband's wife and thereby causes the husband expense and loss of consortium (21 A.L.R. 1517) and from the wife's similar cause of action (5 A.L.R. 1049; 59 A.L.R. 680) recognized subsequent to her right to sue in her own name as created by the various Married Women's Acts (see Cal Code Civ. Proc., § 370). The doctrine would now seem to have acquired the dignity of a status distinct from its parent action (Rest. Torts, §§ 696, 697, 705; 17 Am.Jur., Drugs & Druggists, 864, § 34), especially in view of its application to parent and child.

The author of the article points out that there should be no reason to distinguish between habit-forming drugs and intoxicating liquors since both have two important characteristics in [***38] common: (1) Their use in substantial quantities causes injury to the mind and body; and (2) after reaching a certain point in their use, a person can no longer control his appetite for them. (As to the general pharmacological problem, see The Action of Alcohol on Man [1923], Ernest H. Starling; The Opium Problem [1928], Charles E. Terry and Mildred Pellens; U. S. Treasury Department, Bureau of [*364] Narcotics, Traffic in Opium and Other Dangerous Drugs [1938].)

In the Pratt case, *supra*, the court said: "A careful study of the cases following the principle laid down in *Hoard* v. *Peck, supra*, will show that the reasoning upon which they were based is that there are certain substances which, if used habitually, destroy the volition of the user to such an extent that he has no power to aught but consume them when they are placed before him; that the consumption and the sale of such substances are, therefore, merged and become the act of the vendor; the sale is, therefore, the proximate cause of the loss of consortium, and the consumer cannot, having lost his volition to act, be guilty of contributory negligence. The best known of these substances is opium and [***39] its various derivatives, but it is a well-known scientific fact that many other things, under certain circumstances, will produce the same result. Cocaine is an instance among the drugs, and it is equally well established that the excessive use of intoxicating liquor may, and frequently does, have the same effect. We think it would be a narrow and illogical limitation of the rule to hold that because one habit-forming substance is a 'drug' in the technical sense of the term, and another is a 'liquor,' different rules should be applied to the sale and use thereof. In fact, there is no specific holding applying such limitation in any of the recorded cases, and in *Holleman* v. *Harward, supra*, the court intimated strongly that under certain circumstances intoxicating liquor might fall within the same rule as laudanum as a habit-forming substance. Of course, since there is not the same presumption that the use of liquor will eventually cause the loss of volition that there is with a habit-forming drug, it is incumbent upon plaintiff to prove that to the knowledge of defendant such a stage has been reached by the consumer, but if this fact is once established, in all reason and [***40] logic the right of action should be the same in one case as in the other. We are satisfied from our examination of the cases that the language of the Restatement, *supra* (Torts, vol. 3, p. 696) 'c. The expression "habit-forming drugs" as used in this section does not include intoxicating liquor,' was not meant as a declaration that the decided cases *exclude* liquors from the rule, for no such cases have been cited to us, but rather is merely a recognition of the fact that the precise issue had not yet been presented to and determined by any court." The court frankly admitted that: "Every requested [*365] application of the principles of the common law to a new set of circumstances is originally without precedent, and some court [**462] must be the first one to make the proper application.

"In answer to the second contention (judicial legislation), we are not asked to make a law. We are asked to declare what the common law is and always has been, and a declaration by us that it has always *permitted* such an action, even though none has ever actually been brought, is no more legislation than would be a declaration that it does not.

"So far as the bringing of unwarranted [***41] actions is concerned, if the facts do not show the action is justified, we must assume that the trial court and jury will properly apply the law, and we may not refuse to declare it correctly merely because there are some who may attempt to apply it to cases where the facts do not sustain it.

"On a careful review of all the authorities and a

consideration of well-known scientific facts, we think that under the rationale of the rule laid down in *Hoard* v. *Peck, supra*, and the cases following it, the sale of intoxicating liquors under the circumstances indicated above is subject to the same rule as the sale of what is, in the strict sense of the word, a habit-forming 'drug,' and that under such circumstances an action for the sale of the former should be upheld as allowed by the common law as well as the latter."

In *Swanson* v. *Ball*, 67 S.D. 161 [290 N.W. 482, 483], there was no dramshop act involved. The court there was concerned with facts substantially the same as the ones here under consideration. Plaintiff's husband was alleged to have died after drinking liquor sold to him by defendants who admitted receiving both oral and written notice from plaintiff to refrain [***42] from doing so. Defendants appealed from an order overruling their demurrer to plaintiff's complaint. The court, in affirming, said: "We are not impressed with the argument presented in which the appellant has attempted to differentiate between the opium drug in the case of *Moberg* v. *Scott, supra* [161 N.W. 998], and the intoxicating liquor in the instant case. This court through its former decisions, which we have just referred to, has quite conclusively established that a complaint such as we are considering states a cause of action. The right of the wife to the consortium of the husband is one of her personal rights and we believe that the allegations of the complaint are sufficient in both statements, as to facts and form, to permit a trial upon the [*366] merits." The court also held that the wife had a cause of action "independent of any specific statute."

So far as the rationale of the decided cases is concerned -- that the consumption and not the sale of the liquor is the proximate cause of the injury received by the third person -- it appears clear that under the circumstances of this case, the sale and consumption were so merged as to become one act and [***43] under the rule that individuals must be held to have contemplated the natural and probable result of their own acts purposely and intentionally committed it is unrealistic to say that the act of the deceased in drinking the liquor and thereafter becoming belligerent and pugilistic was not a foreseeable consequence of the sale by defendant. (See 23 So.Cal.L.Rev. 420, 421.) This court has held many times that negligence may be the proximate cause of an injury even though the act of a third person intervenes, if a person of ordinary prudence could reasonably anticipate the probability of the third person's intervening conduct (*Richardson* v. *Ham*, 44 Cal.2d 772 [285 P.2d 269]; *Austin* v. *Riverside Portland Cement Co*., 44 Cal.2d 225 [282 P.2d 69]; *McEvoy* v. *American Pool Corp*., 32 Cal.2d 295, 299 [195 P.2d 783]; *Mosley* v. *Arden Farms Co*., 26 Cal.2d 213, 218 [157 P.2d 372, 158 A.L.R. 872]; *Katz* v. *Helbing*, 215 Cal. 449 [10 P.2d 1001], and others).

It appears to me that under the facts alleged by plaintiffs it was an abuse of discretion for the trial court to sustain the defendants' demurrer without leave to amend.

I would, therefore, reverse [***44] the judgment.

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Vesely v. Sager

Supreme Court of California

June 24, 1971

L.A. No. 29836

Reporter

5 Cal. 3d 153 *; 486 P.2d 151 **; 95 Cal. Rptr. 623 ***; 1971 Cal. LEXIS 243 ****

Judges: In Bank. Opinion by Wright, C. J., expressing the unanimous view of the court. McComb, J., Peters, J., Tobriner, J., Mosk, J., Burke, J., and Sullivan, J., concurred.

Opinion by: WRIGHT

Opinion

[*157] [**153] [***625] In this case we are called upon to decide whether civil liability may be imposed upon a vendor of alcoholic beverages for providing alcoholic drinks to a customer who, as a result of intoxication, injures a third person. The traditional common law rule would deny recovery on the ground that the furnishing of alcoholic beverages is not the proximate cause of the injuries suffered by the third person. We have determined that this rule is patently unsound and that civil liability results when a vendor furnishes alcoholic beverages to a customer in violation of Business and Professions Code section 25602 and each of the conditions set [****2] forth in Evidence Code section 669, subdivision (a), is established.

Since neither issue is presented in the instant case, we do not decide whether a noncommercial furnisher of alcoholic beverages may be subject to civil liability under section 25602 or whether a person who is served alcoholic beverages in violation of the statute may recover for injuries suffered as a result of that violation. Additionally, we reaffirm our decision in *Pianka* v. *State of California* (1956) 46 Cal.2d 208 [293 P.2d 458], and hold that a nonstatutory speaking motion to strike or dismiss a complaint should be treated as a motion for summary judgment. (Code Civ. Proc., § 437c.)

[**154] [***626] Plaintiff Miles Vesely brought this action to recover for personal injuries and property damage sustained in an automobile accident. The only defendant involved on this appeal is William A. Sager, individually and doing business as the Buckhorn Lodge. Other defendants are James G. O'Connell, the driver of the vehicle which collided with plaintiff's automobile, and Earl Dirks, the owner of the car driven by O'Connell. The facts [****3] which are alleged in the complaint and which we must accept for the purposes of this appeal [1] are as follows:

Defendant Sager owned and operated the Buckhorn Lodge, a roadhouse located near the top of Mount Baldy in San Bernardino County, and was engaged in the business of selling alcoholic beverages to the general public. Beginning about 10 p.m. on April 8, 1968, Sager served or permitted defendant O'Connell to be served large quantities of alcoholic beverages. At the time the beverages were served, Sager knew that O'Connell was becoming excessively intoxicated and that O'Connell was "incapable [****4] of exercising the same degree of volitional control over his consumption [*158] of intoxicants as the average reasonable person." Sager also knew that the only route leaving the Buckhorn Lodge was a very steep, winding, and narrow mountain road and that O'Connell was going to drive down that road. Nevertheless, Sager continued to serve O'Connell alcoholic drinks past the normal closing time of 2 a.m. until 5:15 a.m. on April 9. After leaving the lodge, O'Connell drove down the road, veered into the opposite lane, and struck plaintiff's vehicle. The complaint also alleges that O'Connell drove the automobile with the consent, permission, and knowledge of the remaining defendants, that each defendant was the employee and agent of the other defendants, and that each of the defendants "was at all times acting within the purpose and scope of said agency and employment."

Defendant Sager demurred to the complaint on the ground that a "seller of intoxicating liquors is not liable for injuries resulting from intoxication" of a buyer thereof, and he moved to strike as sham those allegations of the complaint which alleged that O'Connell drove the automobile with the permission of the [****5] other defendants and that each defendant was the employee and agent of the remaining defendants. In support of the motion to strike, Sager submitted his declaration in which he stated that O'Connell and Dirk "were not in [his] employment on the date of the

[1] *Endler* v. *Schutzbank* (1968) 68 Cal.2d 162, 165 [65 Cal.Rptr. 297, 436 P.2d 297]; *Rosenfield* v. *Malcolm* (1967) 65 Cal.2d 559, 563 [55 Cal.Rptr. 505, 421 P.2d 697]; *Stanton* v. *Dumke* (1966) 64 Cal.2d 199, 201 [49 Cal.Rptr. 380, 411 P.2d 108]; *Stigall* v. *City of Taft* (1962) 58 Cal.2d 565, 567-568 [27 Cal.Rptr. 441, 375 P.2d 289].

accident" and that he never had any ownership interest or any other interest in the automobile driven by O'Connell.

The trial court sustained the demurrer without leave to amend, granted the motion to strike, and dismissed the complaint as to defendant Sager. Plaintiff appeals. [2]

[****6] [**155] [***627] Until fairly recently, it was uniformly held that an action could not be maintained at common law against the vendor of alcoholic beverages for furnishing such beverages to a customer who, as a result of being [*159] intoxicated, injured himself or a third person. [3] (*Collier* v. *Stamatis* (1945) 63 Ariz. 285 [162 P.2d 125]; *Howlett* v. *Doglio* (1949) 402 Ill. 311 [83 N.E.2d 708, 6 A.L.R.2d 790]; *State* ex rel. *Joyce* v. *Hatfield* (1951) 197 Md. 249 [78 A.2d 754]; *Seibel* v. *Leach* (1939) 233 Wis. 66 [288 N.W. 774]; see 45 Am.Jur.2d, Intoxicating Liquors, § 553; 48 C.J.S., Intoxicating Liquors, § 430; Joyce on Intoxicating Liquors, § 421; Comment, *Dramshop Liability -- A Judicial Response* (1969) 57 Cal.L.Rev. 995, 1000-1001; Annot. 130 A.L.R. 357.) The rationale for the common law rule was that the consumption and not the sale of liquor was the proximate cause of injuries sustained as a result of intoxication. (See, *Pratt* v. *Daly* (1940) 55 Ariz. 535, 538 [104 P.2d 147, 130 A.L.R. 341]; 45 Am.Jur.2d, Intoxicating [****7] Liquors, § 553.) "The rule was based on the obvious fact that one cannot be intoxicated by reason of liquor furnished him if he does not drink it." (*Nolan* v. *Morelli* (1967) 154 Conn. 432 [226 A.2d 383]; 45 Am.Jur.2d, Intoxicating Liquors, *supra*, at p. 853; see *King* v. *Henkie* (1886) 80 Ala. 505, 511; *Pratt* v. *Daly, supra*, 55 Ariz. 535, at p. 538.) The common law rule has been substantially abrogated in many states by statutes which specifically impose civil liability upon a furnisher of intoxicating liquor under specified circumstances. (See Comment, 57 Cal.L.Rev. 995, 996, fn. 6, listing the 20 states that have such statutes.) California, however, has not enacted similar legislation.

[****8] The common law doctrine that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication was first mentioned in this state in *Lammers* v. *Pacific Electric Ry. Co.* (1921) 186 Cal. 379 [199 P. 523]. In that case the defendant railroad ejected the plaintiff, a passenger who was unable to find his fare, from one of its trains while the plaintiff was quite helpless from intoxication and mental deficiency. The plaintiff, who apparently had been struck by a train, was discovered more than six hours later, lying badly maimed on another set of railroad tracks some three quarters of a mile from the point where he had been ejected from the defendant's train. The court held that the [*160] defendant's action in ejecting the plaintiff from its train was not the proximate cause of the injuries sustained thereafter. In dictum the court stated that "the sale of the whiskey to the plaintiff would come nearer being a proximate cause of the injury than the ejection from the railway train. . . . [Yet] it has been uniformly held in the absence of statute to the contrary that the sale of intoxicating liquor is not the proximate [****9] cause of injuries subsequently received by the purchaser because of his intoxication. (Joyce on Intoxicating Liquors, sec. [**156] [***628] 421; *Cruse* v. *Aden*, 127 Ill. 231, 234 [3 L. R. A. 327, 20 N. E. 73].)" (186 Cal. at p. 384.)

The dictum in *Lammers* was relied upon in *Hitson* v. *Dwyer* (1943) 61 Cal.App.2d 803 [143 P.2d 952]. There the plaintiff alleged that while obviously intoxicated and sitting on a movable stool at the defendant's bar, he was served alcoholic beverages in violation of section 62 of the Alcoholic Beverage Control Act. (Now Bus. & Prof. Code, § 25602.) The plaintiff claimed that as a result of the wrongful sale of intoxicants, he fell from the stool; that the defendants negligently dragged him from his position on the floor; and that the fall or the dragging or both, caused him

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[2] Plaintiff's notice of appeal states that the appeal is from the order sustaining the demurrer without leave to amend and from the order granting the motion to strike, both of which are nonappealable orders. (*Daar* v. *Yellow Cab Co.* (1967) 67 Cal.2d 695, 699 [63 Cal.Rptr. 724, 433 P.2d 732]; *Lavine* v. *Jessup* (1957) 48 Cal.2d 611, 614 [311 P.2d 8]; *Henry* v. *Law Firm of Hillyer, Crake, & Irwin* (1960) 183 Cal.App.2d 798, 799 [6 Cal.Rptr. 877]; 3 Witkin, Cal. Procedure (1954) Appeal, § 19.) After the notice of appeal was filed, the trial court entered an order dismissing the action as to defendant Sager. Since no prejudice would accrue to defendant Sager, we treat the notice of appeal as applying to the order dismissing the action. (See *Vibert* v. *Berger* (1966) 64 Cal.2d 65, 68-69 [48 Cal.Rptr. 886, 410 P.2d 390]; *Evola* v. *Wendt Construction Co.* (1958) 158 Cal.App.2d 658, 660-661 [323 P.2d 158].) In addition we treat the notice as having been filed after the entry of the order of dismissal in accordance with rule 2(c) of the California Rules of Court. (See *Windsor Mills* v. *Richard B. Smith, Inc.* (1969) 272 Cal.App.2d 336, 339 [77 Cal.Rptr. 300]; *Levy* v. *Bellmar Enterprises* (1966) 241 Cal.App.2d 686, 688, fn. 1 [50 Cal.Rptr. 842]; *Evola* v. *Wendt Construction Co., supra*, 158 Cal.App.2d at pp. 660-661.)

[3] Several exceptions have been created to this general rule. Thus, it has been held that a spouse can maintain an action for loss of consortium against a distributor of alcoholic beverages who sells intoxicants to his or her spouse, knowing that the latter lacks control over his or her consumption of intoxicants (*Pratt* v. *Daly* (1940) 55 Ariz. 535 [104 P.2d 147, 130 A.L.R. 341]), or after repeated warnings not to furnish alcoholic beverages to such spouse (*Swanson* v. *Ball* (1940) 67 S.D. 161 [290 N.W. 482]). It has also been held that an action can be maintained for death or injuries sustained by a customer who has been induced to drink alcoholic beverages when his "mental faculties [were] suspended by intoxication." (*McCue* v. *Klein* (1883) 60 Tex. 168; *Ibach* v. *Jackson* (1934) 148 Ore. 92 [35 P.2d 672].) In addition it was held that a master could bring an action against a person who sold liquor to a slave without the master's consent. (*Skinner* v. *Hughes* (1850) 13 Mo. 440; *Harrison* v. *Berkley* (1847) 32 S.C.L. (1 Strobh) 525.)

to suffer various bodily injuries. The court rejected the plaintiff's contention that the defendants' violation of the Alcoholic Beverage Control Act constituted negligence per se. The court reasoned that the statute was not enacted for the purpose of protecting an obviously intoxicated [****10] person who had been served alcoholic beverages in violation of its provisions. Moreover, the court stated that violation of the act could not result in liability since "the proximate cause [of injury resulting from intoxication] is not the wrongful sale of the liquor but the drinking of the liquor so purchased." (61 Cal.App.2d at p. 809.)

Thereafter, in *Fleckner* v. *Dionne* (1949) 94 Cal.App.2d 246 [210 P.2d 530], the court affirmed a judgment for the defendant tavern keeper in an action by a person who had been injured in an automobile accident caused by a minor who had purchased alcoholic beverages in the defendant's establishment. The complaint alleged that the defendant knew that the purchaser was a minor; that the defendant sold liquor to the minor "while he was already under the severe influence of intoxicating liquors"; that the defendant knew that the minor had an automobile on the premises which he was going to drive; and that defendant knew that the driving of the car by the minor while intoxicated would result in harm to others on the highway. The trial court sustained a demurrer and entered judgment for the defendant. In affirming [****11] the judgment, the court relied upon the dictum in *Lammers*, the decision in *Hitson*, and various out-of-state decisions.

Finally, in *Cole* v. *Rush* (1955) 45 Cal.2d 345 [289 P.2d 450, 54 [*161] A.L.R.2d 1137], this court held that the wife and children of a customer who died as the result of injuries sustained in a barroom brawl could not maintain a wrongful death action against the owners of a tavern for furnishing intoxicating liquor to the decedent. The complaint alleged that the decedent had patronized the defendants' tavern on numerous occasions; that the decedent was well-known to the defendants; and that the defendants knew that the decedent was "normally of quiet demeanor but that when . . . intoxicated he became belligerent, pugnacious, and quarrelsome." The complaint further alleged that the plaintiff widow on numerous occasions had requested that the defendants not sell the decedent sufficient liquor to allow him to become intoxicated; that the defendants furnished the decedent with liquor until and after he became intoxicated; and that as a result of being intoxicated, the decedent became belligerent, engaged in a brawl, and died from injuries [****12] sustained in a fall during the fight. In ruling that the complaint failed to state a cause of action, the court noted the existing common law rule and discussed the decisions in *Lammers, Hitson*, and *Fleckner*. It concluded that "as to a competent person it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use." (*Cole* v. *Rush, supra*, 45 Cal.2d at p. 356.) The court also held that the plaintiffs were barred from recovery under the wrongful death act by the decedent's contributory negligence in voluntarily consuming the liquor furnished by the defendants, and stated that any change in the common law rule concerning a tavern keeper's liability under such circumstances should be made by the Legislature.

[**157] [***629] Since *Cole*, various courts in other jurisdictions have reevaluated the common law rule that the vendor of intoxicating liquor cannot be held liable for injuries resulting from intoxication, and in particular the rule that the seller cannot be held liable for furnishing alcoholic beverages to a customer who injures a third person. A substantial number, if not [****13] a majority, have decided that the sale of alcoholic beverages may be the proximate cause of such injuries and that liability may be imposed upon the vendor in favor of the injured third person. (*Waynick* v. *Chicago's Last Department Store* (7th Cir. 1959) 269 F.2d 322, cert. den. 362 U.S. 903 [4 L.Ed.2d 554, 80 S.Ct. 611]; *Deeds* v. *United States* (D. Mont. 1969) 306 F.Supp. 348; *Prevatt* v. *McClennan* (Fla.App. 1967) 201 So.2d 780; *Colligan* v. *Cousar* (1963) 38 Ill.App.2d 392 [187 N.E.2d 292]; *Elder* v. *Fisher* (1966) 247 Ind. 598 [217 N.E.2d 847]; *Pike* v. *George* (Ky.App. 1968) 434 S.W.2d 626; *Adamian* v. *Three Sons, Inc*. (1968) 353 Mass. 498 [233 N.E.2d 18]; *Rappaport* v. *Nichols* (1959) 31 N.J. 188 [156 A.2d 1]; *Berkeley* v. *Park* (1965) 47 Misc.2d 381 [262 N.Y.S.2d 290]; *Jardine* v. *Upper Darby Lodge No. 1973, Inc*. (1964) 413 Pa. 626 [*162] [198 A.2d 550]; *Mitchell* v. *Ketner* (1965) 54 Tenn.App. 656 [393 S.W.2d 755]; cf. *Davis* v. *Shiappacossee* (Fla. 1963) 155 So.2d 365; [****14] *Ramsey* v. *Anctil* (1965) 106 N.H. 375 [211 A.2d 900]. Contra, *Carr* v. *Turner* (1965) 238 Ark. 889 [385 S.W.2d 656]; *Hull* v. *Rund* (1962) 150 Colo. 425 [374 P.2d 351]; *Cowman* v. *Hansen* (1958) 250 Ia. 358 [92 N.W.2d 682]; *Meade* v. *Freeman* (1969) 93 Idaho 389 [462 P.2d 54]; *Lee* v. *Peerless Ins. Co*. (1966) 248 La. 982 [183 So.2d 328]; *Hall* v. *Budagher* (1966) 76 N.M. 591 [417 P.2d 71]; *Hamm* v. *Carson City Nugget, Inc*. (1969) 85 Nev. 99 [450 P.2d 358]; *Garcia* v. *Hargrove* (1966) 46 Wis.2d 724 [176 N.W.2d 566]; *Parsons* v. *Jow* (Wyo. 1971) 480 P.2d 396; cf. *Nolan* v. *Morelli* (1967) 154 Conn. 432 [226 A.2d 383].)

The two leading cases abrogating or modifying the common law rule are *Waynick* v. *Chicago's Last Department Store, supra*, 269 F.2d 322, and *Rappaport* v. *Nichols, supra*, 31 N.J. 188. In *Waynick* the plaintiffs, residents of Michigan, brought an action for personal injuries against three [****15] Illinois tavern keepers for selling liquor to two Illinois residents who drove an automobile into Michigan and there collided with a vehicle in which the plaintiffs were riding. The sale by each defendant was alleged to have been made in violation of an Illinois criminal statute prohibiting the sale of liquor to an intoxicated person. Although both Michigan and Illinois had dram shop acts expressly providing for civil liability, the court concluded that neither applied to the case before it because

the state courts had decided that the statutes did not apply extraterritorially. Nevertheless, the court held that the complaint stated a cause of action under the common law of Michigan. The court determined that the Illinois statute prohibiting the sale of liquor to an intoxicated person was enacted "for the protection of any member of the public who might be injured or damaged as a result of the drunkenness to which the particular sale contributes" and that the statute imposed a duty upon the sellers of alcoholic beverages in favor of those who might be injured as a result of a violation of the statute. Without analyzing at length the question of proximate cause, the court held that [****16] "under the facts appearing in the complaint, the tavern keepers are liable in tort for the damages and injuries sustained by plaintiffs, as a proximate result of the unlawful acts of the former." (269 F.2d at p. 326.)

Rappaport involved a wrongful death action by a widow against the operators of four taverns for selling liquor to an intoxicated minor who negligently killed her husband in an automobile accident. Although New Jersey had repealed its dram shop act, the New Jersey Supreme Court held that the action was permissible under common law negligence principles. The court stated that "Where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or a person [**158] [***630] he knows or should know [*163] from the circumstances to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others through action of the intoxicated person or the minor." (31 N.J. at p. 201.) The court determined that a criminal statute and administrative regulations forbidding the sale of alcoholic beverages to a minor or an intoxicated person were intended to protect members of the general public and concluded [****17] that "If the patron is a minor or is intoxicated when served, . . . and if the circumstances are such that the tavern keeper knows or should know that the patron is a minor or is intoxicated, his service to him may . . . constitute common law negligence." (*Id.* at p. 202.) Finally, the court rejected the defendants' contention that their conduct, if negligent, was not the proximate cause of the injuries suffered. It stated: "But a tortfeasor is generally held answerable for the injuries which result in the ordinary course of events from his negligence and it is generally sufficient if his negligent conduct was a substantial factor in bringing about the injuries. [Citations.] The fact that there were also intervening causes which were foreseeable or were normal incidents of the risk created would not relieve the tortfeasor of liability. [Citations.] Ordinarily these questions of proximate cause are left to the jury for its factual determination." (*Id.* at p. 203.) It was concluded that under the facts alleged in the complaint, a jury could reasonably find that the defendants' negligence was a substantial factor in bringing about the decedent's [****18] fatal injuries and that the minor's negligent operation of his automobile was a normal incident of the risk created by the defendants, or an event which they could reasonably have foreseen.

To the extent that the common law rule of nonliability is based on concepts of proximate cause, we are persuaded by the reasoning of the cases that have abandoned that rule. The decisions in those jurisdictions which have abandoned the common law rule invoke principles of proximate cause similar to those established in this state by cases dealing with matters other than the furnishing of alcoholic beverages. (See *Schwartz* v. *Helms Bakery Limited* (1967) 67 Cal.2d 232 [60 Cal.Rptr. 510, 430 P.2d 68]; *Stewart* v. *Cox* (1961) 55 Cal.2d 857, 863-864 [13 Cal.Rptr. 521, 362 P.2d 345]; *Richardson* v. *Ham* (1955) 44 Cal.2d 772, 777 [285 P.2d 269]; *McEvoy* v. *American Pool Corp.* (1948) 32 Cal.2d 295, 298-299 [195 P.2d 783]; *Mosley* v. *Arden Farms Co.* (1945) 26 Cal.2d 213, 218 [157 P.2d 372, 158 A.L.R. 872]; *Stasulat* v. *Pacific Gas & Elec. Co.* (1937) 8 Cal.2d 631, 637 [67 P.2d 678]; [****19] Prosser, *Proximate Cause in California* (1950) 38 Cal.L.Rev. 369.) **(1)** **(2)** Under these principles an actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct. (*Stewart* v. *Cox, supra*, 55 Cal.2d at pp. 863-864; [*164] *Richardson* v. *Ham, supra*, 44 Cal.2d at p. 777; *Eads* v. *Marks* (1952) 39 Cal.2d 807, 812 [249 P.2d 257]; *Benton* v. *Sloss* (1952) 38 Cal.2d 399, 405 [240 P.2d 575]; *Mosley* v. *Arden Farms Co., supra*, 26 Cal.2d at p. 218; *Fuller* v. *Standard Stations, Inc.* (1967) 250 Cal.App.2d 687, 691 [58 Cal.Rptr. 792]; *Ewert* v. *Southern Cal. Gas Co.* (1965) 237 Cal.App.2d 163, 169-173 [46 Cal.Rptr. 631]; Rest.2d Torts, §§ 302, 302A, 431, 447.) **(3)** Moreover, "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether [****20] innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." (Rest.2d Torts, § 449; *Schwartz* v. *Helms Bakery Limited, supra*, 67 Cal.2d at pp. 241-242; *Richardson* v. *Ham, supra*, 44 Cal.2d 772, at p. 777; *McEvoy* v. *American Pool Corp., supra*, 32 Cal.2d 295, at p. 299.)

[**159] [***631] Insofar as proximate cause is concerned, we find no basis for a distinction founded solely on the fact that the consumption of an alcoholic beverage is a voluntary act of the consumer and is a link in the chain of causation from the furnishing of the beverage to the injury resulting from intoxication. **(4)** Under the above principles of proximate cause, it is clear that the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third person. If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least the injury-producing conduct is one of the hazards [****21] which makes such furnishing negligent.

The central question in this case, therefore, is not one of

proximate cause, but rather one of duty: Did defendant Sager owe a duty of care to plaintiff or to a class of persons of which he is a member?

(5) A duty of care, and the attendant standard of conduct required of a reasonable man, may of course be found in a legislative enactment which does not provide for civil liability. (See *Richards* v. *Stanley* (1954) 43 Cal.2d 60, 63 [271 P.2d 23]; *Routh* v. *Quinn* (1942) 20 Cal.2d 488, 492 [127 P.2d 1, 149 A.L.R. 215]; 2 Witkin, Summary of Cal. Law (1960) Torts, § 234.) **(6)** In this state a presumption of negligence arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm which the plaintiff suffered as a result of the violation of the statute. (*Alarid* v. *Vanier* (1958) 50 Cal.2d 617 [327 P.2d 897]; *Satterlee* v. *Orange Glenn School Dist*. (1947) 29 Cal.2d 581 [177 P.2d 279].) The Legislature has recently codified this presumption with the adoption of Evidence Code section 669 [****22] : [*165] "The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (Subd. (a).)

(7) In the instant case a duty of care is imposed upon defendant Sager by Business and Professions Code section 25602, which provides: "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor." **(8)** This provision was enacted as part of the Alcoholic Beverage Control Act of 1935 (Stats. 1935, ch. 330, § 62, at p. 1151) and was adopted for the purpose of protecting members of the general public from injuries to person and damage to property resulting from the excessive [****23] use of intoxicating liquor.

Our conclusion concerning the legislative purpose in adopting section 25602 is compelled by Business and Professions Code section 23001, which states that one of the purposes of the Alcoholic Beverage Control Act is to protect the safety of the people of this state. Moreover, our interpretation of section 25602 finds support in the decisions of those jurisdictions in which similar statutes, and statutes prohibiting the sale of alcoholic beverages to minors, have been found to have been enacted for the purpose of protecting members of the general public against injuries resulting from intoxication. (See *Waynick* v. *Chicago's Last Department Store, supra*, 269 F.2d 322, at p. 325; *Deeds* v. *United States, supra*, 306 F.Supp. 348, at p. 359; *Davis* v. *Shiappacossee, supra*, 155 So.2d 365, at p. 367; *Elder* v. *Fisher, supra*, 247 Ind. 598, at p. 603; *Rappaport* v. *Nichols, supra*, 31 N.J. 188, at p. 202.)

(9a) From the facts alleged in the complaint it appears that plaintiff is within [**160] [***632] the class of persons for [****24] whose protection section 25602 was enacted and that the injuries he suffered resulted from an occurrence that the statute was designed to prevent. Accordingly, if these two elements are proved at trial, and if it is established that Sager violated section 25602 and that the violation proximately caused plaintiff's injuries, a presumption will arise that Sager was negligent in furnishing alcoholic beverages to O'Connell. (See Evid. Code, § 669.)

Defendant Sager maintains, however, that a change in the common law rule governing the liability of a tavern keeper to an injured third person is [*166] unwarranted and that if there is to be a change in the rule, it should be made by the Legislature, not by the courts. As to the first part of his argument, defendant contends that imposition of civil liability upon tavern keepers would not alter the extent to which the consumption of intoxicants contributes to automobile accidents and that such liability would not be an adequate deterrent to the unlawful sale of alcoholic beverages. Moreover, defendant asserts that the injured third person is already assured of compensation for his injuries by Vehicle Code sections 16000 [****25] - 16053 and Insurance Code section 11580.2. Concerning the second part of his argument, defendant maintains the Legislature is better equipped to determine whether civil liability should be imposed for furnishing alcoholic beverages to an individual who injures himself or third persons. Defendant contends that the decision to impose liability presents various questions as to the scope of such liability, e.g., whether an intoxicated patron ought to recover for injuries sustained as a result of his intoxication and whether liability should be imposed upon a package liquor store or a noncommercial furnisher of intoxicating liquor. Because of the existence of these and other questions, defendant argues that the entire matter of civil liability for furnishing alcoholic beverages should be left to the Legislature.

Defendant's arguments that the question of civil liability for tavern keepers should be left to future legislative action is faulty in two respects. First, liability has been denied in cases such as the one before us solely because of the judicially created rule that the furnishing of alcoholic beverages is not the proximate [****26] cause of injuries resulting from intoxication. As demonstrated, *supra*, this rule is patently unsound and totally inconsistent with the principles of proximate cause established in other areas of negligence law. Other common law tort rules which were determined to be lacking in validity have been abrogated by this court (see *Gibson* v. *Gibson* (1971) 3 Cal.3d 914 [92 Cal.Rptr. 288, 479 P.2d 648]; *Muskopf* v. *Corning Hospital Dist*. (1961) 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457]), and there is no sound reason for retaining the common law

rule presented in this case. Second, the Legislature has expressed its intention in this area with the adoption of Evidence Code section 669, and Business and Professions Code section 25602. The California Law Revision Commission's recommendation relating to Evidence Code section 669 states that the presumption contained in the section "should be classified as a presumption affecting the burden of proof *in order to further the public policies expressed in the various statutes, ordinances, and regulations to which* [****27] *it applies*." (Italics added; Cal.Law Revision Com. Rep. p. 109; see, Evid. Code, § 605.) **(10)** **(11)** It is clear that Business and Professions Code section 25602 is a statute to which this presumption applies and that the policy expressed in the statute is to promote the safety of the people of California (see Bus. & [*167] Prof. Code, § 23001). To accept defendant's contentions and hold that plaintiff's complaint does not state a cause of action would be to thwart the legislative policies expressed in both statutes.

(9b) For the reasons discussed herein, we overrule *Cole* v. *Rush* (1955) 45 Cal.2d 345 [289 P.2d 450, 54 A.L.R.2d 1137] and *Lammers* v. *Pacific Railway Company* (1921) 186 Cal. 379 [***633] [**161] [199 P. 523] to the extent that they are inconsistent with this decision. To the same extent we disapprove of *Fleckner* v. *Dionne* (1949) 94 Cal.App.2d 246 [210 P.2d 530] and *Hitson* v. *Dwyer* (1943) 61 Cal.App.2d 803 [143 P.2d 952].

Motion to Strike

Plaintiff contends that the trial court erred in granting [****28] defendant Sager's motion to strike as sham that portion of the complaint which alleges that O'Connell was driving the automobile with the consent, permission, and knowledge of the other defendants, that each of the defendants was the agent and employee of the others, and that each defendant was acting within the scope of his agency and employment. As mentioned previously, in support of the motion to strike, defendant Sager submitted his declaration in which he stated that Earl Dirks, the owner of the car driven by O'Connell, and O'Connell were not in his employment on the date of the accident and that he had no ownership interest or any other interest in the car driven by O'Connell. Plaintiff argues that the declaration was insufficient to support the trial court's ruling because it contained only conclusions of law. In addition, he maintains that the allegations in his verified complaint are sufficient to controvert the factual allegations in Sager's declaration.

From an examination of the points and authorities in support of the motion to strike, it is clear that the motion was not one for summary judgment (Code Civ. Proc., § 437c), but rather was [****29] a "speaking motion," [4] [****30] addressed to the "inherent right of a court to strike or dismiss a complaint when it is made to appear by extraneous evidence that it is sham and based upon false allegations." (*Lincoln* v. *Didak* (1958) 162 Cal.App.2d 625, 631 [328 P.2d 498].) **(12)** In *Pianka* v. *State of California* (1956) 46 Cal.2d 208, 211 [293 P.2d 458], we stated that such "nonstatutory speaking motions have . . . been superseded by the procedure governing motions for summary judgment contained in section 437c of the Code of Civil Procedure." [*168] Thereafter, in *Lavine* v. *Jessup* (1957) 48 Cal.2d 611, 614, footnote 2 [311 P.2d 8], we voiced our adherence to the ruling in *Pianka*. [5]

Defendant relies upon *Lincoln* v. *Didak, supra*, 162 Cal.App.2d 625, in which the court held that the Legislature, through the adoption of Code of Civil Procedure section 435, [6] had reaffirmed the inherent right of a court to strike or dismiss a complaint through the use of nonstatutory "speaking motions." In so holding, the court placed particular emphasis upon the fact that the cause of action in *Pianka* arose prior to the enactment of section 435.

[****31] [**162] [***634] The conclusions reached by the court in *Lincoln* lack support. [7] [****32] The court's

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[4] A speaking motion to dismiss or strike is one which is supported by facts outside the pleadings (*Lerner* v. *Ehrlich* (1963) 222 Cal.App.2d 168, 171 [35 Cal.Rptr. 106].) Such facts ordinarily are set forth in an affidavit or declaration. (See *Lincoln* v. *Didak, supra*, 162 Cal.App.2d 625 at p. 630; *Cunha* v. *Anglo California Nat. Bank* (1939) 34 Cal.App.2d 383, 388-389 [93 P.2d 572].)

[5] *Lavine* v. *Jessup, supra*, 48 Cal.2d 611, did not involve a "speaking motion" to strike. In that case the trial court granted a motion to strike the plaintiff's complaint as sham because it had sustained demurrers to four identical complaints by the plaintiff.

[6] Section 435 provides: "The defendant, within the time required in the summons to answer, either at the time he demurs to the complaint, or without demurring, may serve and file a notice of motion to strike the whole or any part of the complaint. The notice of motion to strike shall specify a hearing date not more than 15 days from the filing of said notice, plus any additional time that the defendant, as moving party, is otherwise required to give the plaintiff. If defendant serves and files such a notice of motion without demurring, his time to answer the complaint shall be extended and no default may be entered against him, except as provided in Sections 585 and 586, but the filing of such a notice of motion shall not extend the time within which to demur."

[7] The court's reasoning has been criticized as being of "doubtful validity" (2 Chadbourn, Grossman & van Alstyne, Cal. Pleading, § 1463 at p. 551; cf. 3 Witkin, Cal. Procedure (2d ed. 1971) § 856 at p. 2459 (debatable reasoning).) The overwhelming majority of the reported Court of Appeal decisions follow our decision in *Pianka* and treat a speaking motion to dismiss or strike a complaint as a motion for summary judgment. (See *Hosking* v. *Spartan Properties, Inc.*

reliance upon the fact that the cause of action in *Pianka* arose prior to the enactment of section 435 is misplaced. As mentioned previously, in *Lavine, supra*, 48 Cal.2d 611, decided nearly two years after the enactment of section 435, [8] we emphasized the continuing validity of our decision in [*169] *Pianka*. More importantly, the substantive effect ascribed to section 435 by the *Lincoln* decision is inconsistent with the section's legislative history, which indicates that the section was added to the Code of Civil Procedure merely to make the motion to strike a pleading and to establish procedures governing its use. [9] [****33] We therefore disapprove of the decision in *Lincoln* and treat the motion to strike in the instant case as a motion for summary judgment. [10]

(13) Tested by the principles governing summary judgments, plaintiff's arguments prove to be without merit. We do not find Sager's statements that his codefendants were "not in his employment on the date of the accident" and that he had no "ownership interest" or "any other interest" in the vehicle involved to be mere conclusions of law. **(14)** In addition, plaintiff cannot rely upon the allegations of his verified complaint to controvert the statements in defendant's declaration. (See *Coyne* v. *Krempels* (1950) 36 Cal.2d 257, 263 [223 P.2d 244]; 2 Witkin, Cal. Procedure (1954), § 78, p. 1715.)

Nevertheless, defendant's declaration is insufficient to warrant summary judgment. **(15)** The standards for determining when summary judgment should be granted were reiterated by this court in *Stationers* [****34] *Corp.* v. *Dun & Bradstreet, Inc* . [**163] [***635] (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785]: "Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor and his opponent does not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue." **(16)** In the instant case plaintiff did not file a counteraffidavit or declaration. Nevertheless, the failure of an opposing party to file such documents does not relieve the moving party of the burden of establishing the evidentiary facts of every element necessary to entitle him to a judgment. (*Brewer* v. *Reliable Automotive Co*. (1966) 240 Cal.App.2d 173, 175 [49 Cal. [*170] Rptr. 498]; *American Society of Composers, Authors & Publishers* v. *Superior Court* (1962) 207 Cal.App.2d 676, 687 [24 Cal.Rptr. 772]; *House* v. *Lala* (1960) 180 Cal.App.2d 412, 416 [4 Cal.Rptr. 366]; see, *de Echeguren* v. *de Echeguren* (1962) 210 Cal.App.2d 141, 148-149 [26 Cal.Rptr. 562]; 2 Witkin, Cal. Procedure [****35] (1967 Supp.) § 78, p. 626.) Defendant, through the filing of his declaration, has failed to discharge this burden.

(17) Plaintiff's allegations that O'Connell was Sager's agent and employee at the time of the accident and that O'Connell was driving the automobile with the consent, permission, and knowledge of Sager sought to impose liability upon Sager under the doctrine of *respondeat superior* and under the imputed negligence provisions of the Vehicle Code. (Veh. Code, § 17150 et seq.) Defendant's declaration is insufficient to warrant the granting of summary judgment as to a cause of action based on the former theory since O'Connell might have been acting within the scope of an agency relationship at the time of the accident even though he was not in Sager's employment. (Cf. *Flores* v. *Brown* (1952) 39 Cal.2d 622 [248 P.2d 922]; *Souza* v. *Corti* (1943) 22 Cal.2d 454 [139 P.2d 645, 147 A.L.R. 861].) Nor is the declaration sufficient to warrant summary judgment under the imputed negligence provisions of the Vehicle Code since a person may be subject to liability under those provisions even though he has no proprietary [****36] interest in a vehicle (see Veh. Code, § 17154 (negligence of operator imputed to bailee);

(1969) 275 Cal.App.2d 152, 154-156 [79 Cal.Rptr. 893]; *Triodyne, Inc*. v. *Superior Court* (1966) 240 Cal.App.2d 536, 542-543 [49 Cal.Rptr. 717]; *Auberry Union School Dist*. v. *Rafferty* (1964) 226 Cal.App.2d 599, 603 [38 Cal.Rptr. 223]; *Lerner* v. *Ehrlich, supra*, 222 Cal.App.2d 168, 171-172; *Vallejo* v. *Montebello Sewer Co., Inc*. (1962) 209 Cal.App.2d 721, 729-730 [26 Cal.Rptr. 447]; *Callahan* v. *Chatsworth Park, Inc*. (1962) 204 Cal.App.2d 597 [22 Cal.Rptr. 606]; but see, *Estate of Emery* (1962) 199 Cal.App.2d 22 [18 Cal.Rptr. 86]; *Lincoln* v. *Didak, supra*.) Despite our ruling in *Pianka*, our reiteration of the ruling in *Lavine, supra*, 48 Cal.2d at page 614, footnote 2, and the various decisions of the Courts of Appeal following those two cases, Witkin reports that the use of non-statutory speaking motions persists. (3 Witkin, *op. cit. supra*, § 856, at p. 2459.)

[8] Legislation enacting section 435 was signed by the Governor on June 29, 1955, and took effect September 7, 1955. (Stats. 1955, ch. 1452, at p. 2639.) *Lavine, supra*, 48 Cal.2d 611, was decided May 28, 1957. Although there is nothing to indicate when the cause of action arose, the order granting the motion to strike was entered in the court's minutes November 10, 1955. (48 Cal.2d 611, at p. 613.)

[9] The Senate Interim Judiciary Committee Report dealing with section 435 states: "A second change by the measure [S.B. 815] is to make a motion to strike sufficient as a pleading and an appearance, to prevent default. Such a motion, however, must be noticed for prompt hearing. (See § 585, in particular.) Often a complaint or cross-complaint alleges scandalous or other irrelevant matter which should be eliminated before the litigant is compelled to answer. At present, it is necessary to file a demurrer with the motion to strike, even though the demurrer is not pressed. The changes, however, do not extend the time to demur. (§ 585.) Only the time to answer would be extended. Thus, a litigant could not first file a motion to strike, and then, if that be denied, file a demurrer." (3d Prog. Rep. at p. 60.)

[10] Since our decision in *Pianka*, section 437c of the Code of Civil Procedure has been amended to provide for partial summary judgment where it is shown that a good cause of action does not exist as to part of a plaintiff's claim. (Stats. 1965, ch. 162, p. 1126.)

Friedenthal, *Imputed Contributory Negligence* (1964) 17 40 Stan.L.Rev. 55, 56.) Accordingly, defendant's declaration is insufficient to support the granting of summary judgment as to a cause of action based upon either of these theories of liability.

The judgment of dismissal is reversed.

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Coulter v. Superior Court of San Mateo County

Supreme Court of California

April 26, 1978

S.F. No. 23667

Reporter

21 Cal. 3d 144 *; 577 P.2d 669 **; 145 Cal. Rptr. 534 ***; 1978 Cal. LEXIS 218 ****

Judges: Opinion by Richardson, J., with Tobriner and Manuel, JJ., concurring. Separate concurring opinion by Mosk, J., with Bird, C. J., concurring. Separate concurring and dissenting opinion by Newman, J. Separate dissenting opinion by Clark, J.

Opinion by: RICHARDSON

Opinion

[*147] [**670] [***535] We consider whether the noncommercial suppliers of alcoholic beverages may be liable to third persons injured by reason of the intoxication of the consumer of those beverages. We will conclude that a social host who furnishes alcoholic beverages to an obviously intoxicated person, under circumstances which create a reasonably foreseeable risk of harm to others, may be held legally accountable to those third persons who are injured when that harm occurs. We examine the pleading posture of the case, trace the evolution of civil liability [****2] imposed on those who furnish intoxicating liquors, and discuss the reasons for our adoption of the foregoing principle.

[**671] In the first cause of action of his complaint, plaintiff James Coulter alleged that [***536] he was injured when the car in which he was riding as a passenger collided with roadway abutments in San Mateo County. James' wife, plaintiff Deborah Coulter, joined in the action with her husband, claiming, as damages, the loss of consortium with James, and the value of nursing services furnished to him. It is alleged that at the [*148] time of the accident, the car was being driven by Janice Williams, whose intoxication caused both the accident and James' injuries.

Plaintiffs further alleged that before the accident defendant Schwartz & Reynolds & Co., the owner and operator of an apartment complex in Foster City, San Mateo County, and defendant Monte Montgomery, the apartment manager, negligently and carelessly served to Williams, in a recreation room in the complex, "extremely large quantities" of alcoholic beverages; that defendants knew or should have known that Williams was becoming "excessively intoxicated"; that defendants knew or should have [****3] known that Williams "customarily drank to excess" and was "incapable of exercising the same degree of volitional control over her consumption of alcoholic beverages as the average reasonable person"; that defendants knew that Williams intended to drive a motor vehicle following her consumption of the alcoholic beverages furnished by defendants; and that defendants knew or should have known that their conduct would expose third persons such as plaintiffs to "foreseeable serious risk of harm."

The second cause of action, substantially identical to the first, omitted the allegation that the defendants actually "furnished" Williams with alcoholic beverages, but charged that defendant Schwartz & Reynolds & Co. "permitted" Williams to be served alcoholic beverages on their premises, and that defendant Montgomery had "aided, abetted, participated [in] and encouraged" Williams to drink to excess. The third and fourth causes of action are not at issue herein.

Defendants' demurrers to the first and second causes of action were sustained without leave to amend. **(1)** Plaintiffs seek mandate from us to compel the trial court to overrule the demurrers and proceed to trial on all causes of action. [****4] While we have generally been reluctant to extend extraordinary relief at the pleading stage (*Babb* v. *Superior Court* (1971) 3 Cal.3d 841, 851 [92 Cal.Rptr. 179, 479 P.2d 379]; *Oceanside Union School Dist*. v. *Superior Court* (1962) 58 Cal.2d 180, 185, fn. 4 [23 Cal.Rptr. 375, 373 P.2d 439]), we have said that mandamus will lie when it appears that the trial court has deprived a party of an opportunity to plead his cause of action or defense, and when that extraordinary relief may prevent a needless and expensive trial and reversal (*Holtz* v. *Superior Court* (1970) 3 Cal.3d 296, 301, fn. 4 [90 Cal.Rptr. 345, 475 P.2d 441]). In the matter before us mandamus is available as a remedy and we inquire into the propriety of the trial court's ruling.

[*149] Before 1971, California case law had uniformly held that one who furnished alcoholic beverages to another person was not liable for damages resulting from the latter's intoxication. (E.g., *Cole* v. *Rush* (1955) 45 Cal.2d 345 [289 P.2d 450, 54 A.L.R.2d 1137].) Our courts reasoned that "it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury [****5] from its use . . . ." (*Id*., at p. 356.) In *Vesely*

v. *Sager* (1971) 5 Cal.3d 153 [95 Cal.Rptr. 623, 486 P.2d 151], however, we reconsidered our earlier position and concluded that, as to *commercial* vendors, liability would be imposed in appropriate cases for injuries occasioned to third parties by the consumer of liquor. Examining more closely the proximate cause issue, we concluded in *Vesely* that "[It] is clear that the furnishing of an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual upon a third person. If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least [**672] the injury-producing conduct is one of the hazards which makes such furnishing negligent." [***537] (*Id*., at p. 164.)

(2a) Moreover, in *Vesely* we declared that the tavern-owner defendant owed a duty of reasonable care to members of the public by reason of a provision of the Business and Professions Code (all statutory references are to that code unless otherwise cited). We explained that because section [****6] 25602 was enacted to protect members of the general public from injuries to person and damage to property resulting from the excessive use of intoxicating liquor, a presumption of negligence arises whenever its provisions are violated. (5 Cal.3d at pp. 164-165; see Evid. Code, § 669.)

In *Vesely*, we further expressly reserved the question "whether a noncommercial furnisher of alcoholic beverages may be subject to civil liability under section 25602 . . . ." (5 Cal.3d at p. 157.) That question is now before us and, although defendants herein urge us to confine application of the *Vesely* rule to commercial vendors, we see no reasonable or logical basis for doing so. As will appear, section 25602 is not limited by its terms to persons who furnish liquor to others for profit. Furthermore, well established general negligence principles lead us to conclude, independently of statute, that a social host or other noncommercial provider of alcoholic beverages owes to the general public a duty to refuse to furnish such beverages to an obviously intoxicated person if, under the circumstances, such person thereby constitutes a reasonably [*150] foreseeable danger or risk of injury [****7] to third persons. We examine more closely the statutory and common law bases for our conclusion.

1. *Business and Professions Code Section 25602*

Section 25602 provides, that "*Every person* who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to . . . any obviously intoxicated person is guilty of a misdemeanor." (Italics added.) Referring as it does to "every person," the section on its face appears to apply to both commercial and noncommercial suppliers of alcoholic beverages. Although it might be urged that the placement of section 25602 in the Business and Professions Code suggests a legislative intent to confine the section's application to the commercial sellers of liquor only, thus excluding social hosts, other sections of the same code belie any such intent. For example, unlike section 25602, the immediately preceding section, 25601, contains specified restrictions imposed upon activities of a "licensee" as opposed to any "person." Section 23008 defines "person" as including "*any individual*, firm, copartnership, [etc.] . . ." whereas section 23009 defines "licensee" as "*any person holding a license* issued by [****8] the department." (Italics added.) Since all commercial vendors of alcoholic beverages in this state must be licensed (see § 23300 et seq.), the use of the broader term "person" in section 25602 strongly suggests that the latter section must have been intended to apply whether or not the supplier of such beverages was engaged in commercial, and therefore licensed, activities.

The foregoing conclusion is further confirmed by other immediately succeeding sections of the code which, for example, make it unlawful for every or any "person" (1) to bring alcoholic beverages onto prison grounds (§ 25603), (2) to maintain unlicensed premises (§ 25604), (3) to transport alcoholic beverages subject to seizure (§ 25606), or (4) to possess, consume, sell, give away or deliver any such beverages on public school grounds (§ 25608). It seems very clear that the Legislature did not intend that application of these companion sections be restricted to commercial vendors or suppliers. We hold, accordingly, that the term "person" within the meaning of section 25602 is not limited to those who are commercial suppliers, but includes those who are social hosts as well.

Recent appellate interpretation [****9] of similar statutory language supports the foregoing [**673] conclusion. Construing section 25602, the appellate court in *Coffman* v. *Kennedy* [***538] (1977) 74 Cal.App.3d 28, 36-37 [141 Cal.Rptr. 267], reached a parallel result. The *Coffman* court reviewed cases from [*151] other jurisdictions and stated, in dictum, that a social host would be properly subjected to civil liability under either section 25602 or general negligence principles, on allegations that intoxicating beverages were "furnished . . . to an obviously intoxicated person with knowledge that the intoxicated person was going to be driving a vehicle on the public highways." (P. 37.)

Likewise, in *Brockett* v. *Kitchen Boyd Motor Co*. (1972) 24 Cal.App.3d 87, 93 [100 Cal.Rptr. 752], the appellate court held that the comparable language of section 25658 ("every person" who gives alcoholic beverages to a minor is guilty of a misdemeanor) applies to *all* persons whether or not they are in the business of dispensing alcoholic beverages. (See also, *Ross* v. *Ross* (1972) 294 Minn. 115 [200 N.W.2d 149, 151-153]; *Williams* v. *Klemesrud* (Iowa 1972) 197 N.W.2d 614, 615-616 [64 [****10] A.L.R.3d 843]; but see *Edgar* v. *Kajet* (Sup.Ct. 1975) 84 Misc.2d 100 [375 N.Y.S.2d 548, 551-552], affd. 55 App.Div.2d 597 [389 N.Y.S.2d 631].)

Additionally, *Brockett* held that violation of section 25658 could form the basis for a cause of action by a person injured as a proximate result of the minor's intoxication.

(3) Nonetheless, defendants insist that the Legislature, by enacting section 25602, could not have intended to impose civil liability upon social hosts, given the long line of earlier cases which had denied liability even against commercial vendors. Such an argument, however, underestimates the historic force of our *Vesely* holding. As we have explained, in 1971 the Legislature was put on notice by *Vesely* that (1) section 25602 could form the basis for imposition of civil liability upon social hosts because, identifying the object of the statute, we recognized that it was "adopted for the purpose of protecting members of the general public from injuries to person and damage to property resulting from the excessive use of intoxicating liquor" (5 Cal.3d at p. 165); and (2) the noncommercial supplier's civil liability for a violation of section 25602 remained [****11] an open question (*id*., at p. 157). We think it of some, but not controlling, significance that, following *Vesely*, the Legislature has failed to amend section 25602 to exclude such liability.

(4) We further note that the Legislature has clearly expressed its desire that the Alcoholic Beverage Control Act shall be liberally construed to accomplish its stated purposes of "protection of the *safety, welfare*, health, peace, and morals of the people of the State, . . . and to promote temperance . . . ." (§ 23001, italics added.) Further, "It is hereby declared that the subject matter of this division [which includes [*152] § 25602] involves *in the highest degree* the economic, social, and moral well-being *and the safety* of the State and of all its people." (*Ibid*., italics added.) Our interpretation of section 25602 in authorizing imposition of civil liability is entirely consistent with these broad legislative policies, and may well further induce social hosts to take those reasonable preventive measures calculated to reduce the risk of alcohol-related accidents. (See also, *Vesely* v. *Sager, supra*, at p. 165.)

(2b) For all of the foregoing reasons, we conclude [****12] that section 25602 affords a sufficient statutory basis upon which civil liability may be imposed upon a noncommercial supplier who provides alcoholic beverages to an obviously intoxicated person, thereby creating a reasonably foreseeable risk of harm to third persons.

2. *Common Law Principles*

(5a) Wholly apart from the provisions of section 25602, imposition of civil liability in the present case is fully compatible with general negligence principles. It is true that in *Vesely* we based the requisite *duty* to the plaintiff upon the provisions of section 25602 alone. (5 Cal.3d at pp. 164-165.) However, as [**674] we recently explained in *Bernhard* v. *Harrah's Club* (1976) 16 Cal.3d 313 [128 Cal. [***539] Rptr. 215, 546 P.2d 719], "Although we chose to impose liability on the *Vesely* defendant on the basis of his violating the applicable statute, the clear import of our decision was that there was no bar to civil liability *under modern negligence law*." (P. 325, italics added.)

It has long been a fundamental principle of California law that a person is liable for the foreseeable injuries caused by his failure to exercise reasonable care. (*Rowland* [****13] v. *Christian* (1968) 69 Cal.2d 108, 112 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496]; *Dillon* v. *Legg* (1968) 68 Cal.2d 728, 739 [69 Cal.Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316]; see Civ. Code, § 1714.) Although we have, on occasion, described the foregoing rule as having civil rather than common law origins (*Rowland, supra*, at p. 112), the principle has most frequently been expressed in the negligence formulation that the defendant owes the plaintiff a "duty" of reasonable care. **(6a)** The existence of a duty is primarily a question of law, and dependent upon a variety of relevant factors, of which "foreseeability of the risk is a primary consideration . . . ." (*Weirum* v. *RKO General, Inc*. (1975) 15 Cal.3d 40, 46 [123 Cal.Rptr. 468, 539 P.2d 36].) **(5b)** We think it evident that the service of alcoholic beverages to an obviously intoxicated person by one who knows that such intoxicated [*153] person intends to drive a motor vehicle creates a *reasonably foreseeable* risk of injury to those on the highway. (See *Vesely*, at p. 164.) Simply put, one who serves alcoholic beverages under such circumstances fails to exercise reasonable care.

(6b) We have previously [****14] identified certain factors other than foreseeability in determining the ultimate existence of a "duty" to third persons. These factors include: ". . . the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland* v. *Christian, supra*, at p. 113.)

(5c) Application of several of the *Rowland* elements to the circumstances herein alleged fully supports a rule establishing a duty of care and imposing civil liability. Plaintiffs' injuries are asserted to be substantial, a fact we must presume as a "certainty" for purposes of reviewing the sufficiency of the complaint under well established pleading rules. (E. g., *Alcorn* v. *Anbro Engineering, Inc*. (1970) 2 Cal.3d 493, 496 [86 Cal.Rptr. 88, 468 P.2d 216].) Where such circumstances exist, as are herein alleged, it [****15] is not difficult to discern a close connection between defendant's conduct and the injury suffered by plaintiffs. Unquestionably, as we amplify below, there exists a strong public policy to prevent future injuries of this nature, and we may assume that insurance coverage

(doubtless increasingly costly) will be made available to protect the social host from civil liability in this situation. While, traditionally, no moral blame attaches to the social host who entertains his guests by serving cocktails to them, it is not unfair to ascribe such blame to anyone who increases the obvious intoxication of a guest under conditions involving a reasonably foreseeable risk of harm to others. In this connection, we further note that it is small comfort to the widow whose husband has been killed in an accident involving an intoxicated driver to learn that the driver received his drinks from a hospitable social host rather than by purchase at a bar. The danger of ultimate harm is as equally foreseeable to the reasonably perceptive host as to the bartender. The danger and risk to the potential victim on the highway is equally as great, regardless of the source of the liquor.

[*154] Finally, [****16] we do not conclude that the burden upon the noncommercial suppliers of [**675] intoxicating beverages and the consequences to the community of imposing civil [***540] liability are so serious as to justify a contrary holding. Doubtless, the spectre of civil liability may temper the spirit of conviviality at some social occasions, especially when reasonably observant hosts decline to serve further alcoholic beverages to those guests who are obviously intoxicated and perhaps becoming hostile. Nonetheless, in this context, we must surely balance any resulting moderation of hospitality with the serious hazard to the lives, limbs, and property of the public at large, and the great potential for human suffering which attends the presence on the highways of intoxicated drivers. In doing so we need not ignore the appalling, perhaps incalculable, cost of torn and broken lives incident to alcohol abuse, in the area of automobile accidents alone.

The dimensions of this cost and its catastrophic personal and economic impact in terms of vehicular accidents, are profoundly disturbing social phenomena of our time. In the year 1976 there were *257,846* adult misdemeanor arrests for drunk [****17] driving reported in California. (Cal. Dept. of Justice, Crim. Justice Profile -- 1976 (1976) p. 25.) Considering the fact that this number, large as it is, represents *arrests only*, and does not include the marginal or undetected drivers who have imbibed, the figure may well represent only the tip of a statistical iceberg. For the year 1976, alcohol was described as the *primary* collision factor in 28.3 percent of all *fatal* motor vehicle accidents, and in 11 percent of *injury* accidents. (Dept. of Cal. Highway Patrol (1976) Ann. Rep. of Fatal and Injury Motor Vehicle Traffic Accidents, p. 68.) Nationally, "alcohol has been associated with over half the deaths and major injuries suffered in automobile accidents each year." (Coleman, Abnormal Psychology and Modern Life (5th ed. 1976) p. 414.) Children are not excluded from this numerical avalanche of intoxicated drivers. "F.B.I. statistics show that more than 17,000 young people under 18, including 51 children, aged 10 or younger, were arrested for driving under the influence in 1975. The increase over 1970 is estimated at about 160 percent." (U.S. News and World Report (July 11, 1977) at p. 33.) In the light of the [****18] foregoing statistics, it seems readily apparent that, drained of all humor, the host's well intentioned offer of "one more for the road" may frequently bear ominous and deadly overtones. We think, in short, that the policy of preventing future harm identified by us in *Rowland* is served by requiring the exercise of reasonable restraint by the social host under the circumstances herein presented.

[*155] **(7)** Defendants have argued that the term "obviously intoxicated" is too broad and subjective to serve as a satisfactory measure for imposition of civil liability. However, the phrase is contained in section 25602, a *criminal* statute, and the courts have experienced no discernible difficulty in applying it. (See *Samaras* v. *Dept. Alcoholic Bev. Control* (1960) 180 Cal.App.2d 842, 844 [4 Cal.Rptr. 857]; *People* v. *Smith* (1949) 94 Cal.App.2d Supp. 975 [210 P.2d 98]; *People* v. *Johnson* (1947) 81 Cal.App.2d Supp. 973, 975-976 [185 P.2d 105].) As described in *Johnson*, "The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are 'plain' and 'easily [****19] seen or discovered.' If such outward manifestations exist and the seller still serves the customer so affected he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent." (Pp. 975-976, italics in original.) We think the *Johnson* observations made in the context of a sale of liquor have equal application when the liquor is served by a noncommercial social host.

We conclude that defendants' demurrer was improperly sustained as to plaintiffs' first cause of action. **(8)** The second cause of action, however, fails to survive a demurrer for that cause alleged only that (1) defendant Schwartz & Reynolds & Co. (the apartment owners) "permitted" Williams to drink on their premises, and that [**676] (2) defendant Montgomery (the apartment manager), in some unspecified manner, [***541] "aided, abetted, participated and encouraged" Williams to drink to excess. Since neither of these allegations asserted that defendants or their agents actually furnished liquor to Williams, no liability is imposed under the principles hereinabove set forth. (See *Bennett* v. *Letterly* [****20] (1977) 74 Cal.App.3d 901, 904-905 [141 Cal.Rptr. 682] ["furnish" within the meaning of § 25658, subd. (a), implies some *affirmative* action]; *Weiner* v. *Gamma Phi Chap. of Alpha Tau Omega Frat.* (1971) 258 Ore. 632 [485 P.2d 18, 22] [no liability for merely providing a room where alcoholic beverages are served].)

(9) Moreover, we find misplaced plaintiffs' reliance upon section 315 of the Restatement of Torts to uphold the second cause of action. That section imposes upon a defendant a duty to control the conduct of another party only if the

defendant bears some *special relationship* either to the party alleged to be "dangerous" or to the potential victim. (See *Nipper* v. *California Auto. Assigned Risk Plan* (1977) 19 Cal.3d 35, 46-47 [136 Cal.Rptr. 854, 560 P.2d 743].) Plaintiffs have alleged no facts which [*156] would support a finding that defendants stood in any special relationship with either Williams or plaintiffs.

Let a peremptory writ of mandate issue directing respondent court to overrule defendants' demurrers to the first cause of action of plaintiffs' complaint.

Concur by: MOSK; NEWMAN (In Part)

Concur

MOSK, J. I concur.

While I agree [****21] with the underlying theme of the majority opinion -- i.e., that under some circumstances a social host, as well as a commercial supplier of alcoholic beverages, may be held legally accountable to those injured by the excessively indulged guest -- I have some problems with that portion of the opinion which approves a rigid application of Business and Professions Code section 25602.

The code section provides, in relevant part, that "Every person who . . . furnishes, gives . . . any alcoholic beverage to . . . any *obviously intoxicated person* is guilty of a misdemeanor." (Italics added.) The prohibition is against providing alcoholic beverages to one who is *already intoxicated*. The law frowns upon adding a straw to a camel's back previously broken.

When the inebriate thereafter causes injury to a third person, it can be argued that the negligence which proximately caused the injury resulted from his original intoxication, not from the additional liquor served after he had already become "obviously intoxicated." Thus I suggest that in order to hold liable the social provider of liquor, it is not enough to rely upon the provisions of section 25602. The plaintiff should be compelled [****22] to prove either (1) that the social host furnished the liquor knowing that it was likely to, and that it did, produce the *original* intoxication, or (2) that the additional liquor served to one already "obviously intoxicated" *increased* or *prolonged* the existing state of intoxication and to that extent was a proximate cause of the injury.

Other than the foregoing limitation on the application of section 25602, I subscribe to the majority opinion.

Dissent by: NEWMAN (In Part); CLARK

Dissent

[*157] **NEWMAN, J.** I concur as to the first cause of action, but dissent as to the holding that the second cause of action fails to survive a demurrer. Business and Professions Code section 25602 protects people from "Every person who . . . furnishes . . . or causes to be . . . furnished . . . any alcoholic beverage . . . to any obviously intoxicated person . . . ." I agree with the majority that the words "furnishes" and "furnished" imply an affirmative act and could include the serving of alcohol to Williams, as alleged in the first cause of action. I do not agree that the encouraging of Williams' drinking, as alleged in the [**677] second cause, should never be included or [****23] that individuals who allegedly "participated [***542] and encouraged" an obviously intoxicated person's drinking should never be counted among those who caused the alcoholic beverage "to be . . . furnished."

Thus I believe that the second cause of action is sufficient to withstand demurrer.

CLARK, J. I am unable to join my colleagues in charging the host for the behavior of his guest. For the reasons so clearly written in *Borer* v. *American Airlines, Inc*. (1977) 19 Cal.3d 441, 446-447 [138 Cal.Rptr. 302, 563 P.2d 858], *Cole* v. *Rush* (1955) 45 Cal.2d 345 [289 P.2d 450, 54 A.L.R.2d 1137], and *Ewing* v. *Cloverleaf Bowl* (1978) 20 Cal.3d 389, 408-412 [143 Cal.Rptr. 13, 572 P.2d 1155] (dis.opn.), the majority is incorrect in creating its new cause of action. [1]

End of Document

[1] Yes, Virginia, our bag may truly have no bottom. (Church, *Is There A Santa Claus*?, Editorial, The New York Sun (21 Sept. 1897).)

Bass v. Pratt

Court of Appeal of California, First Appellate District, Division Three

February 3, 1986

No. A026509

Reporter
177 Cal. App. 3d 129 *; 222 Cal. Rptr. 723 **; 1986 Cal. App. LEXIS 2533 ***

Judges: Opinion by Barry-Deal, J., with White, P. J., and Merrill, J., concurring.

Opinion by: BARRY-DEAL

Opinion

[*130] [**724] Hamilton and Cecelia Bass appeal from a judgment of dismissal after order granting motion for summary judgment in favor of respondents Linda, Sandra, and James Pratt. Appellants argue that triable issues of fact exist and that therefore the motion for summary judgment was wrongfully granted. We conclude that the motion was properly granted and affirm the judgment.

Facts

On October 31, 1981, respondent Linda Pratt, then age 17, invited friends, both adults and minors, to her home in San Jose for a Halloween party. Respondents Sandra and James Pratt, [***2] Linda's parents, were at home during the party. The Pratts provided beer and wine despite knowing that some guests were under the age of 21.

At approximately 8 p.m. that evening, Peter Panetta and Gregory Dodgin, [1] both eighteen years old, purchased two or three 6-packs of beer at a [*131] local 7-Eleven store. They drove away and began drinking the beer. They picked up two friends and arrived at the Pratt home about 8:30. Panetta and Dodgin may have had as many as three beers each by the time they arrived at the party. Dodgin drank one 10-ounce glass of beer at the party and took two sips from a second glass.

Dodgin and his two friends left the party in Panetta's car, while Panetta remained at the party. At 9:50 p.m. Dodgin, driving 70 miles per hour in a residential area, crossed over a center line and collided head-on with a vehicle driven by Randall Bass, Jr., age 20. Denise Edmonson, Randall's fiancee, was a passenger in Randall's car. Randall [***3] sustained fatal injuries, and Denise suffered serious injuries. The accident also caused Randall's vehicle to collide with another, in which a passenger was injured. A blood alcohol test performed on Dodgin one and one-half hours after the accident showed a level of 0.166.

Statement of the Case

On September 29, 1982, appellants filed a first amended complaint for wrongful death against respondents and others, alleging that respondents' liability was based on providing alcoholic beverages to [**725] intoxicated minors. Appellants allege that Dodgin was suffering from an exceptional physical or mental condition within the meaning of *Cantor* v. *Anderson* (1981) 126 Cal.App.3d 124 [178 Cal.Rptr. 540], and that respondents knew or should have known of the condition.

On October 26, 1982, respondents answered the first amended complaint and on December 13, 1983, filed a motion for summary judgment on the ground that the Legislature had specifically declared social hosts to be immune from any liability arising out of the furnishing of alcoholic beverages to any person. Respondents argued that as a matter of law, the facts did not fall within the narrow rule of *Cantor* [***4] . [2] The court determined that *Cantor* was distinguishable from the instant case and granted summary judgment based on the statutory immunities provided to social hosts in Civil Code section 1714 and Business and Professions Code section 25602. Judgment was entered against appellants, and this appeal followed.

Discussion

(1) We first note that summary judgment is proper if the evidence in support of the moving party would be sufficient to sustain a judgment in his [*132] or her favor, and the

[1] Panetta and Dodgin are not parties to this appeal.

[2] As will be discussed more fully *infra, Cantor* v. *Anderson, supra*, 126 Cal.App.3d 124, 132, held that "where a social host knows his [or her] guest is one who *because of* some exceptional physical or mental condition should not be served alcoholic beverages and is or should be aware of the risks included in providing such person with alcohol, the host is not protected by the provisions of [Civ. Code] section 1714, subdivisions (b) and (c)."

opposing party has not presented any facts which give rise [***5] to a triable issue of material fact. (*Kallen* v. *Delug* (1984) 157 Cal.App.3d 940, 948 [203 Cal.Rptr. 879].) Where the only question before the court is one of law, it is the duty of the court on a motion for summary judgment to hear and determine the issue of law. (*Burke Concrete Accessories, Inc*. v. *Superior Court* (1970) 8 Cal.App.3d 773, 775 [87 Cal.Rptr. 619].)

Appellants insist that an issue of fact did exist as to whether Dodgin was suffering from an exceptional mental or physical condition within the meaning of *Cantor* v. *Anderson, supra*, 126 Cal.App.3d 124, as a result of youth, inexperience, his degree of alcohol impairment, and the degree to which he was capable of voluntary action. The trial court determined, however, that *Cantor* was inapplicable to the instant case, thereby precluding any question of fact as to Dodgin's mental or physical condition. In order to determine the propriety of the court's ruling on the motion for summary judgment, we must consider the applicability of *Cantor* to the present facts.

In 1978 the Legislature amended Civil Code section 1714 and Business and Professions Code section 25602 in order to create a broad [***6] statutory immunity against civil liability for social hosts who furnish alcoholic beverages to any person. [3] The [**726] amendments effectively reinstated the prior common law as expressed in *Cole* v. *Rush* (1955) 45 Cal.2d 345, 356 [289 P.2d 450, 54 A.L.R.2d 1137], "that as to a competent person it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use . . . ."

[***7] [*133] Prior to 1978, *Vesely* v. *Sager* (1971) 5 Cal.3d 153 [95 Cal.Rptr. 623, 486 P.2d 151], *Bernhard* v. *Harrah's Club* (1976) 16 Cal.3d 313 [128 Cal.Rptr. 215, 546 P.2d 719], and *Coulter* v. *Superior Court* (1978) 21 Cal.3d 144 [145 Cal.Rptr. 534, 577 P.2d 669] had sought to abrogate the holding of *Cole* v. *Rush, supra*, 45 Cal.2d 345. "Departing from the then existing common law rule, *Vesely* held that a commercial vendor of alcoholic beverages was subject to liability for injuries to third persons resulting from the vendor's sale of alcohol to an obviously intoxicated person in violation of section 25602. (*Supra*, 5 Cal.3d 153.) The *Vesely* court reasoned that the injured third party was among the class of persons for whose protection the statute was adopted and concluded a presumption of negligence would arise if the plaintiff could establish that the statutory violation proximately caused his [or her] injuries. (P. 165; see also Evid. Code, § 669.) While *Vesely* relied upon a statutory violation to make out a breach of duty of care, the *Bernhard* court clarified that 'there was no bar to civil liability under modern negligence [***8] law' against a defendant commercially providing alcohol in Nevada to an obviously intoxicated person. (*Bernhard* v. *Harrah's Club, supra*, 16 Cal.3d at p. 325; see also *Cantor* v. *Anderson* (1981) 126 Cal.App.3d at p. 127 . . . .) Finally, in *Coulter* v. *Superior Court, supra*, 21 Cal.3d 144, the *Vesely* holding was extended 'to noncommercial providers, such as "social hosts," relying upon both section 25602 and traditional common law negligence principles.' (*Cory* v. *Shierloh* (1981) 29 Cal.3d 430, 434-435 . . .; see also *Cantor* v. *Anderson, supra*, at p. 127.) Said the *Coulter* court: 'We think it evident that the service of alcoholic beverages to an obviously intoxicated person by one who knows that such intoxicated person intends to drive a motor vehicle creates a *reasonably foreseeable* risk of injury to those on the highway . . . . Simply put, one who serves alcoholic beverages under such circumstances fails to exercise reasonable care.' (Italics in original; *Coulter*, at pp. 152-153; see also *Cory* v. *Shierloh, supra*, at p. 435.)" (*Strang* v. *Cabrol* (1984) 37 Cal.3d 720, 724 [209 Cal.Rptr. 347, 691 P.2d 1013].) [4] [***9]

In *Cory* v. *Shierloh, supra*, 29 Cal.3d 430, the plaintiff, a minor, was injured after he became intoxicated at a party

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[3] The 1978 amendments added subdivisions (b) and (c) to Civil Code section 1714: "(b) It is the intent of the Legislature to abrogate the holdings in cases such as Vesely v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313), and Coulter v. Superior Court (21 Cal.3d 144) and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

"(c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages."

The 1978 amendments also added subdivisions (b) and (c) to Business and Professions Code section 25602: "(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

"(c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as Vesely v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313) and Coulter v. Superior Court (21 Cal.3d 144) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person."

[4] The constitutionality of the 1978 amendments was upheld in *Cory* v. *Shierloh* (1981) 29 Cal.3d 430, 433 [174 Cal.Rptr. 500, 629 P.2d 8].

and lost control of his vehicle while attempting to drive home. He sought damages from defendant Shierloh, also a minor, who hosted and supervised the party. Cory alleged that Shierloh permitted the unlicensed and unlawful sale and furnishing of alcoholic beverages to minors, that Shierloh negligently furnished Cory with such beverages knowing that Cory was obviously intoxicated and would be driving a car, and that the furnishing of alcoholic beverages proximately caused Cory's intoxication and subsequent injuries. (*Id*., at p. 434-435.)

[*134] The Supreme Court held that the 1978 amendments barred an action by an intoxicated [**727] minor, as well as by third persons injured by him [or her]: "Although the 1978 amendments [***10] are hardly models of draftmanship, we must conclude that section 25602, subdivision (b), reasonably construed, bars a suit by the intoxicated consumer as well as by third persons injured by him [or her]." (*Cory* v. *Shierloh, supra*, 29 Cal.3d 430, 437.) [5]

In *Strang* v. *Cabrol, supra*, 37 Cal.3d 720, the Supreme Court reaffirmed the statutory immunities: "Guided by settled principles of statutory construction we conclude that the sweeping civil immunity now provided by Civil Code section 1714 and section 25602 was intended to encompass the situation where alcoholic beverages are sold [***11] to a person 'under the age of 21 years' (§ 25658), except where the sale is by a licensee to a 'minor' who, at the time of sale, is 'obviously intoxicated' within the meaning of section 25602.1." (*Strang, supra*, at p. 724.) The *Strang* court went on to say: "The maxim *expressio unius est exclusio alterius* applies here. Under this familiar rule of construction, an express exclusion from the operation of a statute indicates the Legislature intended no other exceptions are to be implied. [Citations.] The 'single exception' to the 'sweeping immunity' afforded by the 1978 amendments (*Cory* v. *Shierloh, supra*, at p. 436) is in cases of sale by a licensee to an obviously intoxicated minor (§ 25602.1). If the Legislature had intended also to exclude sales to sober, underage persons from the reach of the superseding statute, it could have said so directly by amending section 25658 to that effect." (*Strang, supra*, at p. 725.) [6]

[***12] **(2)** Pursuant to *Strang*, we conclude that if the Legislature had intended to exclude from the statutory immunities the furnishing of alcoholic beverages by a social host to an intoxicated minor, it would have done so by expressly amending Civil Code section 1714. [7] (See *Rogers* v. *Alvas* (1984) 160 Cal.App.3d 997, 1001-1004 [207 Cal.Rptr. 60].)

[*135] Appellants nevertheless argue that the judicial exception [***13] to the statutory immunity announced in *Cantor* v. *Anderson, supra*, 126 Cal.App.3d 124, controls here. In *Cantor*, the plaintiff, who ran a home for developmentally disabled persons, was injured by a developmentally disabled resident after he consumed alcoholic beverages and attacked her. The defendants, neighbors of the plaintiff, served alcoholic beverages to the resident, knowing of his disability. The resident suffered a seizure, lost consciousness, was unable to control his conduct, and subsequently became violent. He injured the plaintiff, who attempted to help him. (*Id*., at p. 126.)

The *Cantor* court noted that the 1978 amendments returned the law to the rule of *Cole* v. *Rush, supra*, 45 Cal.2d 345. [**728] (*Cantor* v. *Anderson, supra*, 126 Cal.App.3d at p. 129.) It then proceeded to explain: "But in returning to the rule of *Cole*, we also return to the limitations of the rule. As *Cole* said of the common law rule, there is '"no remedy for injury or death following the mere sale of liquor to the *ordinary [person]*, either on the theory that it is a direct wrong or on the ground that it is negligence, which imposes a legal liability [***14] on the seller for damages resulting from the intoxication."' (Italics added [by the *Cantor* court].) [Citations.] *Cole* further said '(1) that as to a *competent* person it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use; (2) that the *competent* person voluntarily consuming intoxicating liquor contributed directly to any injury caused thereby . . . .' (*Cole*, at p. 356; cf. 57 Cal.L.Rev. 995, 1004.) (Italics added [by the *Cantor* court].)

"Thus, the common law rule did not affect liability for the furnishing of alcoholic beverages to a person unable to voluntarily resist its consumption; e.g., one 'who was in such

[5] The *Cory* court relied on Business and Professions Code section 25602, subdivision (b), in reaching its conclusion. The court therefore did not have to decide whether the defendants, who allegedly charged an entrance fee to the party, could be deemed "social hosts," "who are also shielded from civil liability by Civil Code section 1714, subdivision (c)." (*Cory* v. *Shierloh, supra*, 29 Cal.3d at p. 437.)

[6] Business and Professions Code section 25602.1 provides: "Notwithstanding subdivision (b) of Section 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed pursuant to Section 23300 who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage to any obviously intoxicated minor where the furnishing, sale or giving of such beverage to the minor is the proximate cause of the personal injury or death sustained by such person."

[7] The *Strang* court resolved a conflict among the Courts of Appeal, holding that there was no liability for selling or furnishing alcoholic beverages to a minor who was not obviously intoxicated. (*Strang* v. *Cabrol, supra*, 37 Cal.3d at p. 721.) It disapproved *Burke* v. *Superior Court* (1982) 129 Cal.App.3d 570 [181 Cal.Rptr. 149], which had held that a licensee who sells alcoholic beverages to a sober person under age 21 could be liable to injured third parties when the buyer becomes intoxicated and injures them by his or her drunk driving. (*Strang, supra*, at p. 728.)

a condition as to be deprived of his [or her] will power or responsibility for his [or her] behavior . . . .' (Fn. omitted.) [Citation.]" (*Cantor* v. *Anderson, supra*, 126 Cal.App.3d at p. 130.) The court held that liability could be found where an injury was the joint product of an exceptional mental or physical condition and alcohol. (*Id.*, at pp. 130-131.)

The *Cantor* court expressly stated that its holding was limited to the facts before it: "Our [***15] decision is a narrow one. Nothing in our opinion should be construed as saying that developmentally disabled or retarded persons are as a class excluded from the provisions of [Civ. Code] section 1714. We in no way imply that retarded or developmentally disabled persons are necessarily incapable of handling alcohol consumption. We hold, simply, that [*136] where a social host knows his [or her] guest is one who *because of* some exceptional physical or mental condition should not be served alcoholic beverages and is or should be aware of the risks included in providing such person with alcohol, the host is not protected by the provisions of section 1714, subdivisions (b) and (c)." (*Cantor* v. *Anderson, supra*, 126 Cal.App.3d at p. 132.)

Appellants argue that Dodgin suffered from some exceptional physical or mental condition in that he was a minor and "incapable of exercising the same degree of volitional control over [his] consumption or [*sic*] alcoholic beverages as the average, reasonable, competent person."

In his declaration in opposition to motion for summary judgment, Dr. Herbert Moskowitz, appellants' expert witness, opined that Dodgin was possessed [***16] of a type of exceptional mental or physical condition. He stated that because of his youth and inexperience, Dodgin was more impaired than the average competent adult after ingesting the same quantity of alcohol, that he was less knowledgeable than the average competent adult regarding the consequences of ingesting alcohol, and that he was more easily influenced by the effects of alcohol than the average competent adult would be. Thus, youth alone would constitute an "exceptional mental or physical condition."

Appellants cite *Burke* v. *Superior Court, supra*, 129 Cal.App.3d 570, 575, and *Brockett* v. *Kitchen Boyd Motor Co*. (1972) 24 Cal.App.3d 87, 94 [100 Cal.Rptr. 752], for the proposition that youth constitutes a physical condition which precludes the safe and lawful consumption, provision, and use of alcohol. In disapproving *Burke*, the Supreme Court stated in *Strang* v. *Cabrol, supra*, 37 Cal.3d 720, 726: "The *Cole* definition of an 'ordinary [person]' who voluntarily consumes liquor embraces a minor engaging in the same conduct, absent some additional showing that the minor is incompetent, incapable of voluntary action, or otherwise suffers from [***17] some peculiar mental disability (see, e.g., *Cantor* v. *Anderson, supra*, 126 Cal.App.3d 124). Although the facts in *Cole* concerned an adult who became intoxicated, the court relied on an [**729] Arizona decision holding that no cause of action was stated against a 'tavernkeeper who unlawfully sold intoxicating liquor to a child of the age of 15, upon which she became intoxicated, because "It cannot be said as a matter of law that a child of fifteen has neither will nor choice nor discretion whatever" . . . .' (*Cole, supra*, 45 Cal.2d at p. 353, quoting *Collier* v. *Stamatis* (1945) 63 Ariz. 285 [162 P.2d 125, 126-127].) Indeed, Civil Code section 41 creates the presumption that a minor, like an adult, is ordinarily responsible for his [or her] torts. [Citation.]" Here, appellants make no additional showing that Dodgin was [*137] incompetent, incapable of voluntary action, or otherwise suffered from some peculiar mental disability. [8]

[***18] The statutory provisions of Civil Code section 1714 and Business and Professions Code section 25602 immunize a social host against civil liability for furnishing alcoholic beverages to an intoxicated minor. Therefore, the trial court properly granted respondents' motion for summary judgment.

The judgment is affirmed.

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[8] Business and Professions Code section 25658, subdivision (a), provides: "(a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." Respondents are not civilly liable by reason of violating that section. (*Strang* v. *Cabrol, supra*, 37 Cal.3d 720, 727.)