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Emergence of the "Tender Years" Doctrine: Too Young to Drink, but Capable of Escaping the Civil Consequences?

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California¹ appellate courts have invariably rejected the liquor furnisher's² civil liability for damages beyond the premises³

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1. Under limited circumstances, other state courts have held a tavern owner civilly liable to a patron. *See, e.g.*, *McCue v. Klein*, 60 Tex. 168, 48 Am. Rep. 260 (1883) (owner's consumption wager as to patron); *Woodring ex rel. Woodring v. Jacobino*, 54 Wash. 504, 103 P. 809 (1909) (habitual patron starting brawl); *Riden v. Grimm Bros.*, 97 Tenn. 220, 36 S.W. 1097 (1896) (written notice not to serve particular patron).

2. This article focuses upon the status of the plaintiff drinker which precludes recovery in negligence from any furnisher of alcoholic beverages. Hence, no distinction is made as to liability: (1) of social hosts (see Annot., 53 A.L.R.3d 1285 (1973)); (2) for irregular sales (see Annot., 8 A.L.R.3d 1412 (1966)); (3) for gifts (see Annot., 75 A.L.R.2d 833 (1961)); (4) of patricular owners (see Annot., 18 A.L.R.3d 1323 (1968)). The terms seller, vendor, tavern owner, furnisher and server are therefore used interchangeably.

3. This article does not deal with a tavern owner's on-premises liability to a patron. *See generally* *Cole v. Rush*, 45 Cal.2d 345, 289 P.2d 450 (1955) (decendent

incurred by *any* patron, resulting from the latter's intoxication.⁴ A recent decision negated the use of comparative negligence to impose liability on the patron, at least in the case of *adult* plaintiffs.⁵ On June 2, 1977, a trial court's decision of first impression, holding that a tavern owner might be found liable to a *minor* patron,⁶ was denied appellate review on procedural grounds.⁷

This article will review judicial and legislative reaction to pressures to extend the server's liability to his patron. The unreasonableness of the tender years rationale, which has been asserted to establish liability where none is generally believed to exist,⁸ will be asserted in support of the conclusion that this class of minor plaintiffs cannot be permitted to benefit from its own wrongdoing. Potential defendants and their insurers must not bear the intolerable economic burden of assuming primary responsibility for consequences of drinking-related criminal conduct of minors, which often defies the law of self-preservation.

I. RETREAT FROM COMMON LAW IMMUNITY

A. *Liability to Third Party—Antecedent of Liability to Patron*

A vendor of alcoholic beverages had no common law liability to his patron, nor to any third party injured as a result of conduct by an intoxicated patron.⁹ Nearly sixty years ago, the

struck head on pavement at bar door); *Halford v. Dodot*, 201 Ill. App. 50 (1915) (patron assault on sheriff); *Judson v. Parry*, 38 Wash. 37, 80 P. 194 (190) (1905) (patron shot by co-patron).

4. *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972). The basis of this decision was the application of the contributory negligence doctrine. This rationale was confirmed in *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976) subsequent to the establishment of comparative negligence.

5. *Id.* at 853, 129 Cal. Rptr. at 608. Dicta specifically noted the adult status of the unsuccessful plaintiff.

6. Minute Order on Demurrer *Blumenfeld v. Ronnie Bud, Inc.*, Civ. No. EA C 23670 (Los Angeles Super. Ct., April 22, 1977).

7. Minute Order of *Ronnie Bud Inc. v. Super. Ct.*, Civ. No. 51197 (Cal. Ct. App. June 2, 1977). The substantive liability issue involved the "tender years" of the seventeen year old patron who became excessively intoxicated just prior to causing an automobile accident. Appellate review of the server's liability was avoided by the conclusion that the facts did not warrant the extraordinary relief sought by writ of mandate to vacate overruling of the demurrer of the defendant server to the patron's complaint.

8. See generally text related to notes 23-41 *infra*.

9. *Seibel v. Leach*, 213 Wis. 66, 288 N.W. 774 (1939); *Collier v. Stamatis*, 63 Ariz. 285, 162 P.2d 125 (1945); *Howlett v. Doglio*, 402 Ill. 311, 83 N.E.2d 708 (1949); *State ex rel. Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951); *Nolan v. Morelli*, 154 Conn. 432, 226 A.2d 383 (1967).

California Supreme Court had stated that the furnishing of such beverages did not proximately cause injury to any third party.¹⁰

Judicial reasoning in two leading cases evidenced growing dissatisfaction with this traditional common law approach as to the innocent third party. A Federal District Court, interpreting an Illinois statute prohibiting liquor sales to obviously intoxicated persons, determined that Michigan third party plaintiffs were proximately injured by illegal sales to intoxicated patrons.¹¹ That statute was construed as being enacted for the protection of any member of the public who sustained injury as a result of intoxication produced or augmented by the sale.¹² In New Jersey, although the state's dramshop act had been repealed, a widow successfully stated a cause of action under common law negligence principles against a tavern owner who served a minor patron driver.¹³ This result further evidenced creation of a tavern owner's liability to third parties where a sale to a minor resulted in a clearly foreseeable and unreasonable risk of harm to others.¹⁴

In 1971, the Supreme Court of California reevaluated¹⁵ its common law position that voluntary consumption, rather than the sale or gift of intoxicating liquor, proximately causes drinking-related injuries.¹⁶ After considering the abrogation of tavern owners liability to third party persons in other jurisdictions, it held that a sale to an obviously intoxicated person violated the intent of the legislature¹⁷ to protect members of the *general public* from injury resulting from a patron's excessive con-

10. *Lammers v. Pacific Electric Ry. Co.*, 186 Cal. 379, 384, 199 P. 523, 525 (1921).

11. *Waynick v. Chicago's Last Dep't Store*, 269 F.2d 322 (1959).

12. *Id.* at 325.

13. *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959).

14. *Id.* at 201, 256 A.2d at 8.

15. *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 143 P.2d 952 (1943) (no liability to patron); *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949) (no liability to third party).

16. *Vesely v. Sager*, 5 Cal.3d 153, 95 Cal. Rptr. 623 (1971). The primary emphasis was placed upon duty, rather than causation, with the result that the server's breach of duty to the public under CAL. BUS. & PROF. CODE § 25602 and CAL. EVID. CODE § 669 renders him liable to the third party innocent-driver.

17. The Alcoholic Beverages Control Act makes it a misdemeanor to furnish alcoholic beverages to an obviously intoxicated person. CAL. BUS. & PROF. CODE § 25602 (West 1964).

sumption.¹⁸ Judicial emphasis was shifted from the drinker's causation to the vendor's duty to the public. This decision facilitated the infusion into California jurisprudence of the national trend toward negligence per se for liquor vendors, in regard to injured third parties. The furnisher of alcoholic beverages now shares with the patron the legal responsibility for losses clearly foreseeable in an unreasonable risk to third parties in the patron's drunken behavior.

B. Current Non-Liability to Patron

It is well established that the recipient of intoxicating beverages cannot state a cause of action in negligence against the supplier.¹⁹ No California decision has held to the contrary.²⁰ Furthermore, the common law does not make an exception allowing an intoxicated minor to sue the furnisher of alcoholic beverages for his drinking related injuries.²¹

The underlying rationale stems from the common law²² concept of *in pari delicto*.²³ As succinctly stated by Professor Prosser, public policy dictates that:

[N]o one should be rewarded with damages for his own voluntary participation in a wrong, *particularly where*, as is usually the case, *he himself commits a crime*; that the state is fully able to protect itself by a criminal prosecution; and that the parties, if they give any thought to the law at all, which is quite improbable, are quite as likely to be encouraged by the hope that if they get hurt they can still win in court.²⁴

California courts have uniformly utilized this concept to prevent the customer from recouping self-inflicted damages from his vendor.

In *Cooper v. National Railroad Passenger Corp.*,²⁵ negligent service of intoxicating beverages to a railroad passenger, in

18. See Comment, *Dram Shop Liability—A Judicial Response*, 57 CAL. L. REV. 995, 996 n.6 (1969).

19. *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976); *Carlisle v. Kanawyer*, 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972); *Sargent v. Goldberg*, 25 Cal. App. 3d 940, 102 Cal. Rptr. 300 (1972).

20. The lone California trial court finding of such liability known to the author is that cited in text related to notes 6 and 7, *supra*.

21. *Westbrook v. Miller*, 98 App. Div. 590, 90 N.Y.S. 558 (1904); *Cavin v. Smith*, 228 Minn. 322, 37 N.W.2d 368 (1949); *Vallentine v. Azar*, 8 Ariz. App. 247, 445 P.2d 449 (1968).

22. *Matthews v. Ollerton*, Comb. 218, 90 Eng. Rep. 438 (1693).

23. The phrase is technically defined as "In equal fault; equally culpable or criminal; in a case of equal fault or guilt." BLACK'S LAW DICTIONARY 898 (Rev. 4th ed. 1968).

24. W. PROSSER, HANDBOOK ON THE LAW OF TORTS 107 (4th ed. 1971) (emphasis added).

25. 45 Cal. App. 3d 389, 119 Cal. Rptr. 541 (1975).

violation of California Business and Professions Code § 25602,²⁶ failed to support a cause of action by the passenger's heir against the server.²⁷ Relying upon decisions²⁸ subsequent to *Vesley v. Sager*,²⁹ the court held that the extension of the seller's liability to third parties did not alter the existing rule of non-liability to the drinker. The court noted that:

[W]hile the bartender who serves alcoholic beverages to an obviously intoxicated patron is violating the criminal law (Bus. & Prof. Code, § 25602) the patron is likewise violating the criminal law by being drunk in a public place (Pen. Code, § 647, subd. (f)). We have here a classic instance of parties *in pari delicto* or equal criminal fault and in their relationship to one another the law normally leaves the parties in the condition it finds them.³⁰

The heir was not permitted to shift responsibility for intoxication-induced injury from the customer to the server.³¹

The vendee's violation of a minor criminal statute constitutes a sufficient basis for barring the vendee's negligence suit against the vendor. In *Rose v. International Brotherhood of Electrical Workers*,³² the face of the Complaint demonstrated that the patron violated California Penal Code § 647 (f),³³ being drunk in a public place. Plaintiff's decedent was *in pari delicto* with the defendant vendor who illegally served his obviously intoxicated vendee in violation of the law.³⁴ Rose's violation of

26. Any person who furnishes alcoholic beverages to an obviously intoxicated person is guilty of a misdemeanor. CAL. BUS. & PROF. CODE § 25602 (West 1964).

27. *Cooper v. National Railroad Passenger Corp.*, 45 Cal. App. 3d 389, 395, 119 Cal. Rptr. 541, 545 (1975). The Court reversed dismissal of the second specification of negligence regarding the common carrier's failure to furnish safe passage facilities.

28. *Sargent v. Goldberg*, 25 Cal. App. 3d 940, 102 Cal. Rptr. 300 (1972) (liquor store operator's demurrer to complaint sustained since seller liable to general public but not to drinker or his heirs); *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972) (drinker's excessive consumption causing him to choke to death in his own vomit bars the heirs' recovery against tavern owner).

29. 5 Cal. 3d 153, 95 Cal. Rptr. 623 (1971).

30. *Cooper v. National Railroad Passenger Corp.*, 45 Cal. App. 3d 389, 394, 119 Cal. Rptr. 541, 544-45 (1975).

31. *Cooper* was decided prior to the adoption of comparative negligence. For a decision in the same appellate district stating that comparative negligence would not have altered the applicability of *in pari delicto* in *Cooper*, see *Rose v. International Brotherhood of Electrical Workers*, 58 Cal. App. 3d 276, 280, 129 Cal. Rptr. 736, 738 (1976).

32. 58 Cal. App. 3d at 279-80, 129 Cal. Rptr. at 738.

33. This brand of disorderly conduct constituted a misdemeanor. CAL. PENAL CODE § 647 (f) (West Supp. 1975).

34. See CAL. BUS. & PROF. CODE § 25602 (West 1964).

but one³⁵ relatively minor criminal statute resulted in dismissal because tort law leaves parties sharing criminal fault where it finds them.

Judicial application of the doctrine of *in pari delicto* to bar the server's liability to the drinker is reflected in decisions subsequent to *Nga Li v. Yellow Cab. Co.*,³⁶ which established the doctrine of comparative negligence in California. In *Kindt v. Kauffman*,³⁷ a customer served while obviously intoxicated was found to be guilty of *willful* misconduct rather than mere *negligent* misconduct when he was subsequently injured in a car collision.

Kauffman served Kindt, who was obviously intoxicated. Kindt thereafter operated his automobile, apparently in violation of the Motor Vehicle Code,³⁸ whereby he sustained personal injury in a collision. The majority reasoned that the drunken driver was not merely negligent. He proceeded to consume alcohol in sufficient quantity to bring about the predictable result.³⁹ The court rejected the argument that the comparative negligence doctrine of *Li*⁴⁰ included a correlative doctrine of comparative willful misconduct.⁴¹

Li does not operate to extend the tavern owner's liability to the drunken patron. Permitting such liability would allow culpable parties to escape an accounting for their misdeeds in spite of the doctrine of *in pari delicto* which denies recovery under these circumstances. As aptly stated by the court:

Heretofore, no recovery has been allowed such a plaintiff; to now allow it in any degree would be to award a pure and simple financial windfall to an underserving plaintiff, which no amount of temporal theorizing can change.⁴²

The *Kindt* Court did not, however, condone the seller's violation of state criminal statutes. A rule of seller's liability would shield patrons engaging in illegal liquor consumption. They would not be civilly answerable for the results of their criminal

35. The trial court relied, *inter alia*, upon the Penal Code violation to support its dismissal, which was affirmed in an appellate opinion additionally noting existence of the patron's Motor Vehicle Code violation.

36. 13 Cal.3d 804, 119 Cal. Rptr. 858 (1975).

37. 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

38. It is unlawful for any person to operate a vehicle while under the influence of alcohol. CAL. VEH. CODE § 23102(a) & (b) (West Supp. 1976).

39. *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 852, 129 Cal. Rptr. 603, 608 (1976).

40. 13 Cal. 3d 804, 119 Cal. Rptr. 858 (1975). See note 36, *supra*.

41. *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 853, 129 Cal. Rptr. 603, 608 (1976).

42. *Id.* at 857, 129 Cal. Rptr. at 611.

conduct such as being drunk in public,⁴³ operating a motor vehicle under the influence of alcohol,⁴⁴ and drinking under age.⁴⁵

This concern prompted the California Legislature to specifically decline extension of the tavern owner's civil liability to the patron. In 1972 the Ketchum Bill⁴⁶ was introduced shortly after judicial establishment of server's liability to third parties.⁴⁷ This Bill constituted the sole legislative attempt to establish the vendor's liability to the vendee for breach of due care in serving the vendee.⁴⁸ Although subsequently amended⁴⁹ and passed⁵⁰ by the Assembly, the Ketchum Bill died in the Senate.⁵¹ The Legislature thereby joined two appellate courts⁵² in rejecting assertions that the *adult* patron occupies the same position as the innocent third party damaged by the not so innocent patron.⁵³

Recent attempts to generate server liability to *minor* patrons⁵⁴ foreshadow a significant case of first impression in this area where there is generally thought to be no liability. A number of theories have been asserted in various jurisdictions to support establishment of vendor civil liability to minor vendees. This article will now demonstrate the impropriety of compensating the minor patron pursuant to these arguments.

43. CAL. PENAL CODE § 647 (f) (West supp. 1977).

44. CAL. VEH. CODE § 23102 (a) & (b) (West Supp. 1977).

45. CAL. BUS. & PROF. CODE § 25658 (b) (West 1964).

46. Assembly Bill No. 1864, March 15, 1972, 1 Cal. Ass. J. 1066 (1972). Assemblyman Ketchum sought insertion of a new Civil Code § 1714.8 designed to hold the seller liable to the buyer by reason of failure to exercise due care in management of his property or person so as to curb violations of the Alcoholic Beverage Control Act related to drunken driving.

47. *Vesely v. Sager*, 5 Cal. 3d 153, 95 Cal. Rptr. 623 (1971).

48. *See generally* *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 851, 129 Cal. Rptr. 603, 607 (1976).

49. 3 CAL. ASS. J. 4960, June 16, 1972.

50. 4 CAL. ASS. J. 5919, July 6, 1972.

51. 5 CAL. ASS. J. 8751, Jan. 2, 1973.

52. *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972); *Sargent v. Goldberg*, 25 Cal. App. 3d 940, 102 Cal. Rptr. 300 (1972).

53. Three appellate courts have subsequently denied additional attempts to extend the server's liability to the patron. *Kindt v. Kauffman*, 67 Cal. App. 3d 845, 129 Cal. Rptr. 604 (1976); *Rose v. International Brotherhood of Electrical Workers*, 58 Cal. App. 3d 276, 129 Cal. Rptr. 736 (1976); *Cooper v. National Railroad Passenger Corp.*, 45 Cal. App. 3d 389, 119 Cal. Rptr. 541 (1975).

54. *See, e.g.*, text related to notes 6 and 7 *supra*.

II. THE PREMISES REEVALUATED

A. *Tender Years Dicta*

The California prohibition against serving alcoholic beverages to a minor,⁵⁵ whether or not intoxicated, is noted in appellate dicta recognizing special plaintiffs deserving of extensive protection of the laws. In *Brockett v. Kitchen Boyd Motor Co.*,⁵⁶ the Court of Appeal reversed the sustaining of a general demurrer in a personal injury action against the employer of an intoxicated minor employee whose vehicle injured plaintiffs.⁵⁷ The court held that an employer is liable, as is a commercial vendor, to third parties injured by reason of the illegal furnishing of alcohol to a minor, with knowledge that the minor would drive upon public highways.⁵⁸ As stated by the court:

Section 25658 was adopted . . . *presumably* because the legislative body believed that most minors are neither physically or mentally equipped to handle the consumption of intoxicating liquor.

Section 25658 is directed to a special class; it pertains to young people who because of their tender years and inexperience are unable to cope with the inhibiting of alcoholic beverages.⁵⁹

It is readily evident that such statutory provisions prohibiting certain transactions with minors were designed to protect minors from harmful influences.⁶⁰ However, such expressions of the legislature should not be recharacterized to establish civil liability for a harm which differs from that contemplated by the statute. The quoted dictum dealt solely with the furnisher's liability to innocent third parties arising out of the risk creating act of serving a great deal of liquor to a minor who was placed in his vehicle by the employer and directed to drive home through traffic.⁶¹

In *Kindt v. Kauffman*,⁶² the Court of Appeal affirmed the sustaining of the bar owner's general demurrer to an adult customer's complaint. Incident to its determination that the comparative negligence doctrine was inapplicable, the court commented:

55. CAL. BUS. & PROF. CODE § 25658 (a) & (c) (West 1964).

56. 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).

57. *Id.* at 94, 100 Cal. Rptr. at 756.

58. *Id.* at 93, 100 Cal. Rptr. at 756.

59. *Id.* at 93-94, 100 Cal. Rptr. at 756 (emphasis added).

60. *Lacabanne Properties, Inc. v. Dep't Alcoholic Bev. Control*, 261 Cal. App. 181, 188, 67 Cal. Rptr. 734, 739 (1968); *People v. Baker*, 38 Cal. App. 28.

61. *Brockett v. Kitchen Boyd Motor Co.*, 24 Cal. App. 3d 87, 89, 100 Cal. Rptr. 752, 753 (1972).

62. 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

Let us note parenthetically that we are not here concerned with a minor (*citation omitted*), nor with an alcoholic who suffers from an irresistible and pathological urge to drink excessively. Such a person *may*, in fact, be physically ill and incapable of self-control, thus under certain *extremely limited and extraordinary* circumstances *not* guilty of willful misconduct.⁶³

This language is susceptible to judicial interpretation that minor patrons may state a cause of action against the vendor. Such a viewpoint is unsound, however. The quoted language is drawn from a holding that did not actually require a plenary determination of the comparative negligence issue.⁶⁴ Furthermore, the quoted language demands the necessary inference that only the most unusual circumstances could justify holding the minor's conduct to be negligent,⁶⁵ rather than willful.⁶⁶ Therefore, the judicial tone should be characterized as one of hostility, rather than liberality, to the minor plaintiff on this issue.

As California courts have not squarely dealt with the issue of the minor patron plaintiff, more significant bases for predicting the proper result must be analyzed. The premise that minors constitute a class meriting civil protection must be scrutinized.

B. The Minor's Statutory Protection

The major impact of *Vesely*⁶⁷ involves highway safety. There exists, however, no direct nexus between the vendor's violation of an alcoholic beverage control act and the minor vendee's injuries to himself. The National Insurance Institute for Highway Safety has concluded that alcohol is a major factor in fatal motor vehicle crashes,⁶⁸ yet the National Social Science Institute has determined that taverns are not an *important* factor in

63. *Id.*, at 853.

64. *Id.* at 860, 129 Cal. Rptr. at 613. Judgment at dismissal was entered prior to finality of *Li*. The issue treated was whether *Li* also espoused a doctrine of comparative willful conduct so as to abrogate the bar of *in pari delicto*.

65. If the minor's conduct is deemed mere negligence then the doctrine of *in pari delicto* cannot bar his recovery under comparative negligence.

66. If the minor's conduct is deemed willful, then the doctrine of *in pari delicto* bars his recovery since *Kindt* prospectively mandates the inapplicability of comparative negligence theories set forth under *Li*.

67. *Vesely v. Sager*, 5 Cal.3d 153, 95 Cal. Rptr. 623 (1971) (established vendor's tort liability to third party injured by drunk patron).

68. Williams, Rich, Zador & Robertson, *The Legal Minimum Drinking Age and Fatal Motor Vehicle Crashes*, 4 J. LEGAL STUDIES 219, 220 (1975).

the production of alcoholic delinquency among minors.⁶⁹ In spite of such findings, various state alcohol control laws have been urged in support of the proposition that minors, deserving of special protection under the criminal law, are equally deserving civil plaintiffs.⁷⁰

The 1977 tentative draft of the Restatement of Torts⁷¹ suggests that a likely tool for asserting a civil remedy for a protected class may be found in an existing criminal statute.⁷² It provides that courts may extend such remedies to those deemed to be within the statutorily-protected class to further the effectiveness of the criminal statute.⁷³ The minor patron's negligence would be disregarded since the prohibition against serving a minor assertedly places the entire responsibility on the defendant furnisher,⁷⁴ especially in the case of the minor⁷⁵ who is

69. Sterne, Pittman & Coe, *Teenagers, Drinking and the Law—A Study of Arrest Trends for Alcohol-Related Offenses*, 11 CRIME & DELINQUENCY 78, 81 (1965). The authors refer to the "[s]mall minority of them [tavernowners who] capitalize on this opportunity for illicit business, catering to the teenage trade, seldom checking ages. . . ." *Id.* at 81.

70. See, e.g., Comment, *Dramshop Liability—A Judicial Response*, 57 CAL. L. REV. 995, 1025 (1969); Comment, *Common Law Liability of Tavern Owners*, 1971 WASH. UNIV. L.Q. 645, 651 n.34 (1971); Keenan, *Liquor Law Liability in California*, 14 SANTA CLARA LAWYER 46, 77 (1973); Comment, *Civil Liability for Furnishing Liquor in California*, 5 PAC. L.J. 186, 201 n.98 (1974); Comment, *Intoxication—Liability and Recovery: A Practical Look at New York's Dram Shop Act*, 39 ALB. L. REV. 15, 21-23 (1974). For commentators' denials of patron recovery, which do not distinguish between adults and minors, see Comment, *Civil Liability Under the Michigan Liquor Control Act*, 46 J. URBAN LAW 87, 101 (1968); Schubert, *The Iowa Dram Shop Act—Causes of Action and Defenses*, 23 DRAKE L. REV. 16, 23 (1973); Comment, *Intoxication: No longer a Bar to Patron's Action Against Tavern Owner*, 22 LOY. L. REV. 867, 874 (1976).

71. RESTATEMENT (SECOND) OF TORTS § 874A at 65 (Tent. Draft No. 23, 1977).

72. See, e.g., CAL. BUS. & PROF. CODE § 25658 (West 1964) which directs that:

(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.

(c) Any on-sale licensee who knowingly permits a person under the age of 21 years to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under the age of 21 years, is guilty of a misdemeanor.

73. The Draft creates a tort action for violation of a legislative provision:

When a legislative provision proscribes or requires certain conduct for the benefit of a class of persons but does not provide a civil remedy for the violation, the Court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

RESTATEMENT (SECOND) OF TORTS § 874A at 65 (Tent. Draft No. 23, 1977).

74. Regarding the effect of patron's negligence, the Restatement provides that:

The plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute *unless the*

allegedly mentally deficient.⁷⁶

This Restatement transformation of criminal prohibition into civil remedy for the protected class has been judicially relied upon in other jurisdictions.⁷⁷ It has been utilized to establish liability to patrons where no legislative enactment has altered the common law immunity of the furnisher of alcoholic beverages.⁷⁸ Such decisions typically reject the defendant vendor's argument that the vendee plaintiff is not a member of the class of persons intended to be protected by the applicable statute. These jurisdictions thereby override the effect of the vendee's contributory misconduct, even though he consciously and voluntarily reduces himself to the state of intoxication.⁷⁹ California rejected this approach in *Carlisle v. Kanaywer*, establishing that the defense of contributory negligence precluded the adult vendee's action, as the vendor's acts do not

effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant.

RESTATEMENT (SECOND) OF TORTS § 483 (1965) (emphasis added).

75. Regarding the standard of care applicable to children, the Restatement provides that:

A child is a person of such immature years as to be incapable of exercising the judgment . . . and prudence demanded by the standard of the reasonable man applicable to adults. The rule stated in this Section is commonly applied to children of tender years.

Most of the cases which have applied the rule in this Section have involved the contributory negligence of children where the reason for special protection of them is readily apparent. . . .

RESTATEMENT (SECOND) OF TORTS § 283A, comment *a* at 14-15 (1965).

76. Regarding the effect of a mental deficiency, the Restatement provides that:

Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.

RESTATEMENT (SECOND) OF TORTS § 283B (1965) (emphasis added).

77. See, e.g., *Galvin v. Jennings*, 289 F.2d 15, 19 (1961); *Majors v. Brodhead Hotel*, 416 Pa. 265, 269, 205 A.2d 873, 876 (1965); *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 590, 218 A.2d 630, 635 (1966).

78. The text of most "dram shop" acts is set forth in Note, *Private Individuals Who Furnish Alcoholic Beverages to Minors or Intoxicated Persons in Violation of Law May Be Liable Under Provisions of Minnesota Dram Shop Act for Injuries Sustained by Third Persons*, 6 CREIGHTON L. REV. 106, n.32 (1973).

79. Relying upon the language of an 1861 decision, a frequently cited Pennsylvania lower appellate court reiterated that "[I]f the deceased [patron] was already intoxicated, he was incapable of legal acts, like an idiot or child, and the doctrine of concurring negligence is inapplicable." *Schelin v. Goldberg*, 188 Pa. Super. 341, 345 (1958).

transcend mere negligence⁸⁰ so as to thrust the patron into the class of persons protected by the applicable statute.⁸¹ The *Carlisle* court implicitly rejected the theory⁸² that patron vendees are entitled to bring civil actions. They are not within any statutorily protected class envisioned by *Vesely*.⁸³ The patron's contributory negligence therefore barred such a cause of action.

Subsequent to adoption of comparative negligence, the leading decision of *Kindt v. Kauffman*⁸⁴ affirmed the bar to a patron's suit. The impeccable logic of that decision concludes that a patron's recovery in any degree would only result in a windfall to an undeserving plaintiff "which no amount of temporal theorizing can change."⁸⁵ However, the *Kindt* court summarily noted that the facts of the case did not involve a minor patron plaintiff.⁸⁶ This parenthetical reference may have surfaced due to some limited, recurring authority relating to minors as a special class to be shielded from the evils of liquor.⁸⁷ One can focus upon this legal gap involving minors only by a more complete application of Restatement principles. Section 483 of the Restatement has been cited as proposing that the vendor's statutory negligence precludes his ability to allocate any fault to the vendee.⁸⁸ The Restatement logic regarding prohibitions against sales of firearms to minors⁸⁹ and child labor⁹⁰ has appeared in the decisions in some jurisdictions,⁹¹ and in dicta in California,⁹² encouraging the minor's recovery based on the defendant's statutory negligence. The court in *Brockett v. Kitchen Boyd Motor Co.* noted that the Legislature's codification of statutory negligence in the California Evidence Code,⁹³ coupled with the

80. 24 Cal. App. 3d 587, 591, 101 Cal. Rptr. 246, 248 (1972).

81. CAL. BUS. & PROF. CODE § 25602 (West 1964) (serving an obviously intoxicated person).

82. See note 77-79 and related text *supra*.

83. *Vesely v. Sager*, 5 Cal.3d 153, 95 Cal. Rptr. 623 (1971). The *Carlisle* Court, relying upon *Vesely*, which did not deal with serving a minor, appropriately reasoned that "*Vesely* holds that the purpose of section 25602 is to protect 'members of the general public from injuries to person . . . resulting from the excessive use of intoxicating liquor' [and] [t]hat purpose would be defeated by the immunity appellants seek for the drinker himself." *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 592, 101 Cal. Rptr. 246, 248 (1972).

84. 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

85. *Id.*, at 857, 129 Cal. Rptr. at 611.

86. *Id.*, at 853, 129 Cal. Rptr. at 608. See also Section II A. *supra*.

87. See notes 73-76 and related text *supra*.

88. See authorities cited in note 77 *supra*.

89. RESTATEMENT (SECOND) OF TORTS, § 483, Comment c (1965).

90. *Id.*, Comment e.

91. See, e.g., *Tamiami Gun Shop v. Klein*, 116 So.2d 421, 423 (Fla. 1959).

92. *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 853, 129 Cal. Rptr. 603, 608 (1976).

93. Failure to exercise due care in presumed where a statutory violation

presumption that most minors are incapable of properly consuming alcohol, allows for a recovery by "anyone who is injured as a result of the minor's intoxication and for whose benefit the statute was enacted."⁹⁴ An inference has been drawn from this decision that the vendee minor is included within the class compensable for drinking-related injuries. The alleged result is that the minor is not *in pari delicto* with the defendant furnisher,⁹⁵ since the child's standard of conduct need only conform to that of a person of like age, intelligence, and experience under the circumstances.⁹⁶

None of the referenced decisions have properly taken into account a rudimentary Restatement exception to the standard of care applicable to the minor. The view of the American Law Institute regarding a child engaging in an adult activity is that:

An exception to the rule stated in this Section [minor's special standard of care] may arise where the child engages in an activity which is normally undertaken only by adults, and for which adult qualifications are required.⁹⁷

Certain activities engaged in by minors are so potentially hazardous as to require that the minor be held to an adult standard of care. It has been held that a child must exercise the same standard of care as an adult motor vehicle driver.⁹⁸ When a minor operates a vehicle, he forfeits his right to have the reasonableness of his conduct measured by a standard commensurate with his age. As stated by a New York Court construing Restatement § 283A,⁹⁹ the general interest in the welfare and protection of infants is such that the Courts should draw upon

causes injury of the nature the statute was designed to prevent, and plaintiff is a member of the class the statute was designed to protect. CAL. EVID. CODE § 669 (West Supp. 1977).

94. 24 Cal. App. 3d 87, 93, 100 Cal. Rptr. 752, 756 (1972).

95. See, e.g., note 6 *supra*.

96. Regarding the minor's standard of care, the Restatement provides that "[i]f the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under the circumstances." RESTATEMENT (SECOND) OF TORTS § 283A (1965). For related Restatement commentary regarding special protection, see note 75 *supra*.

97. RESTATEMENT (SECOND) OF TORTS § 283A, Comment c (1965).

98. Prichard v. Veterans Cab Co., 63 Cal.2d 727, 47 Cal. Rptr. 904 (1965); Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1966); Dawson v. Hoffman, 43 Ill. App. 2d 17, 192 N.E.2d 695 (1963); Williams v. Esaw, 214 Kan. 658, 522 P.2d 950 (1974).

99. See note 96 *supra*.

community experience in determining to what standard they should be held.¹⁰⁰

Minnesota's Supreme Court set forth the minor's duty of care, when engaging in adult activities, by stating that:

[I]t would be unfair to the public to permit a minor to observe any other standards of care and conduct than those expected of all others. . . .¹⁰¹

It is submitted that the same rationale applies to a minor's conduct when he violates California's prohibitions against drinking under age,¹⁰² operating a motor vehicle under the influence of alcohol¹⁰³ or becoming drunk in public.¹⁰⁴ An adult's violation of any of these statutes precludes recovery from the furnisher under the doctrine of *in pari delicto*.¹⁰⁵ Mischaracterizing the minor patron as a member of the general public protected from the vendor's wrongdoing by way of civil remedy would violate the common law maxim which prohibits one from profiting by his own wrongdoing.¹⁰⁶ This would trigger a rash of lawsuits by minor vendees to the detriment of the remaining members of the class of "general public." The drinking minor could breach the adult duty of care to innocent drivers, yet shift some or all responsibility for criminal misconduct to the furnisher. In this way, the governmental interest in protecting minors from the evils of alcohol would be thwarted since they could engage in this highly hazardous conduct, but escape the civil consequences of their attempts to act as adults.

Thus there exists a strong policy argument for treating such minors as adults. They engage in activities which community experience has demonstrated to be hazardous, not only to themselves but to others. The innocent members of the general public who drive or park along the primrose path, already have a civil remedy for the furnisher's negligence.¹⁰⁷ Extending protection to drinking minors, a hybrid class of natural adults who are currently barred from recovery,¹⁰⁸ would jeopardize clearly innocent members of the class to whom the furnisher of alcoholic

100. *Neumann v. Shlansky*, 58 Misc.2d 128, 134, 294 N.Y.S. 2d 628, 633 (1968).

101. *Dellwo v. Pearson*, 259 Minn. 452, 458, 107 N.W.2d 859, 863 (1961).

102. CAL. BUS. & PROF. CODE § 25658 (c) (West 1964).

103. CAL. MOTOR VEH. CODE § 23102 (a) & (b) (West 1964).

104. CAL. PENAL CODE § 647 (f) (West Supp. 1975).

105. *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976); *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 101 Cal. Rptr. (1972).

106. No one can take advantage of his own wrong. CAL. CIV. CODE § 3517 (West 1970).

107. *Vesely v. Sager*, 5 Cal.3d 153, 95 Cal. Rptr. 623 (1971).

108. *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976); *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972).

beverages is duty-bound. Rulings in other jurisdictions, which include all vendees within the protected class,¹⁰⁹ unwisely treat the minor as an incompetent merely due to some preconceived notion that he has no capacity to drink.

The express purposes of the California Alcoholic Beverage Control Act is to eliminate the evils resulting from unlawful disposition of alcohol and to promote temperance in the use and consumption of alcohol.¹¹⁰ These purposes would be far too liberally construed were they to include the promotion of safety if the alleged child portion of the class could profit from its risk creating conduct. Self-policing by a minor provides the primary defense against the evils of intoxication. Outside policing by the furnisher plays only a secondary role. Failure of the minor patron to control his own conduct should not be excused or condoned by failure of the bartender to police the patron's drinking. The person with primary responsibility is the minor patron who should have no recourse for self-incurred losses against the tavernowner. Willful criminal conduct of the minor should prevent attempts to resort to the comparative negligence doctrine to frustrate the *in pari delicto* bar to recovery.¹¹¹ Innocent members of the general public should not bear the risk that tainted members of their class can undertake illegal liquor consumption without being personally liable for their own criminally dangerous conduct. The minor patron, engaged in adult activities, cannot be permitted to shift any responsibility for his reckless disregard for the safety of others to the furnisher.

C. Criminal Prohibitions as a Rule of Civil Liability

A furnisher of alcoholic beverages violates California criminal laws when he either serves a minor,¹¹² or serves an obviously intoxicated one.¹¹³ This conduct contravenes the policy of the Alcoholic Beverage Control (ABC) Act that is to shield minors from the evil of intemperance.¹¹⁴ None of the ABC regulations

109. See note 77 *supra*.

110. CAL. BUS. & PROF. CODE § 23001 (West 1964).

111. *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

112. CAL. BUS. & PROF. CODE § 25658 (a) & (c) (West 1964).

113. CAL. BUS. & PROF. CODE § 25602 (West 1964).

114. CAL. BUS. & PROF. CODE § 23001 (West 1964); CAL. BUS. & PROF. CODE § 25658(a) & (c) (West 1964).

provide a civil remedy, as permitted by statute¹¹⁵ and case law¹¹⁶ in other jurisdictions.

The common law is typically composed of two separate ingredients—criminal prohibitions to suppress the mischief and civil prohibitions to advance related remedies. California's ABC Act does not provide for civil remedies by anyone injured as a result of its violations.¹¹⁷ It does provide that all provisions of the Act are to be liberally construed for the accomplishment of its purposes.¹¹⁸

California courts recognize that a criminal prohibition can become a rule of civil liability. This occurs when the court is willing to treat a breach of the criminal law as evidence of the need for a controlling civil standard.¹¹⁹ The existence of such a criminal statute is only one element¹²⁰ in determining whether the patron may shift responsibility for his willful misconduct to the server. The courts should discourage violation of penal statutes, yet doubt has been expressed that this end should be sought through the medium of civil litigation.¹²¹

Governmental interests may be protected by strictly enforced criminal sanctions. A minor patron, already aware that he receives special criminal treatment under the law, would be encouraged by the prospect that if he is injured by his illegal drinking he can still prosecute the server in a civil suit. This

115. See, e.g., N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1964), which expressly provides for exemplary damages.

116. *Graham v. General U.S. Grant* Post No. 2665, 97 Ill. App. 2d 139, 239 N.E.2d 856 (1968), imposing liability on the server even where the sale is legal.

117. But see Note, *Private Individual Who Furnish Alcoholic Beverages to Minors or Intoxicated Persons in Violation of Law May be Liable Under Provisions of Minnesota Dram Shop Act for Injuries Sustained by Third Persons*, 6 CREIGHTON L. REV. at 106, n.32 (1973), for a collection of ABC Acts which provide for civil damages (none expressly in favor of patron).

118. CAL. BUS. & PROF. CODE § 23001 (West 1964). Civil Damage Acts in other jurisdictions, penal in nature but remedial in character, have been traditionally construed so as to suppress the mischief and advance the remedy. *Mead v. Stratton*, 87 N.Y. 493, 41 Am. Rep. 386 (1882); *Buckmaster v. McElroy*, 20 Neb. 557, 31 N.W. 76, 57 Am. Rep. 843 (1886); *Howlett v. Doglio*, 402 Ill. 311, 83 N.E.2d 708 (1949).

119. *Clinkscales v. Carver*, 22 Cal.2d 72, 75, 136 P.2d 777, 778 (1943) (driver negligent per se notwithstanding defect in ordinance's authorization); *Alber v. Owens*, 66 Cal.2d 790, 798, 427 P.2d 781, 787, 59 Cal. Rptr. 117, 123 (1967) (injured employee not contributorily negligent due to employer's violation of safety statute).

120. *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 854, 129 Cal. Rptr. 603, 609 (1976) (tavern owner not liable to patron).

121. *Sayadoff v. Warda*, 125 Cal. App. 2d 626, 271 P.2d 140 (1954); *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 857, 129 Cal. Rptr. 603, 611 (1976).

conduct would result in no complaint if the minor drank without incident, but a windfall civil recovery otherwise.

D. *Li's Effect Upon the Post-Vesely Decisions*

Proponents of minor patron recovery will argue that post-*Vesely*¹²² decisions,¹²³ denying recovery to the patron, have been undercut by *Li's*¹²⁴ adoption of comparative negligence. As argued by the strong dissent in *Kindt v. Kauffman*,¹²⁵ the post-*Vesely* decisions barring patrons from recovery under the doctrines of contributory negligence and assumption of the risk have lost their precedential force as a result of *Li*.¹²⁶ The thrust of the dissent in *Kindt* was that the majority's characterization of the patron's conduct as willful, so that comparative negligence is not an applicable remedy, is a question of fact rather than law.¹²⁷ Based upon this premise, the next link in the argument supporting patron recovery is that a violation of the statute prohibiting service to a minor is far different in kind than serving an obviously intoxicated adult. Thus a legal determination that the child is incapable of willful misconduct is warranted.

The child undertaking such willful misconduct cannot be deemed merely negligent so as to bring his conduct within the ambit of comparative negligence. Allowing the minor patron's lawsuit would improperly free him from the reasonable man standard required by *Carlisle*¹²⁸ and the Restatement.¹²⁹

The minor patron shares equal criminal fault with the server. The acts of consuming alcohol and driving under the influence

122. *Vesely v. Sager*, 5 Cal.3d 153, 95 Cal. Rptr. 623 (1971).

123. *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972); *Sargent v. Goldberg*, 25 Cal. App. 3d 940, 102 Cal. Rptr. 300 (1972); *Cooper v. National Railroad Passenger Corp.*, 45 Cal. App. 3d 389, 119 Cal. Rptr. 541 (1975); *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976); *Rose v. International Brotherhood of Electrical Workers*, 58 Cal. App. 3d 276, 129 Cal. Rptr. 736 (1976).

124. *Nga Li v. Yellow Cab Co.*, 13 Cal.3d 804, 119 Cal. Rptr. 858 (1975).

125. 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

126. *Id.*, at 864, 129 Cal. Rptr. at 615-16.

127. *Id.* at 866, 129 Cal. Rptr. at 617.

128. *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 591, 101 Cal. Rptr. 246, 248 (1972).

129. See Section II B. *supra*, setting forth the argument that engaging in an adult activity subjects the minor to the standard of care required of an adult.

of alcohol demonstrate willful disregard for the minor's own safety. Therefore, comparative negligence concepts have no application when the party seeking recovery has been guilty of wanton misconduct. The furnisher does not participate in the self-policing relationship of the minor to himself, nor of the parent to the minor. The rash of lawsuits, likely to flow from permitting minor patron recovery, would result in no foreseeable change in the rate of adherence to the law prohibiting service of alcohol to minors. Increased tavern owner insurance premiums, the cost of which will be born by the drinking public to cover the additional civil liability, would do little to strengthen existing criminal sanctions.

E. Extending Liability or Judicial Legislation

The ABC Act extends no civil remedy to anyone injured as a result of violations. It may, however, be argued that the courts are free to construe the common law so as to hold a server civilly liable to a minor drinker. The California Supreme Court has determined that the common law extends such a remedy to third parties,¹³⁰ specifically reserving the issue of patron recovery for a future date.¹³¹ California's lower appellate courts have evidenced concern about extending the rule of liability to the patron in view of the State Supreme Court's restraint.¹³²

The legislature declined to extend Civil Code § 25602¹³³ to create civil liability to the injured patron, just after the State Supreme Court extended it to innocent third parties.¹³⁴ Although there has been no legislative attempt to create civil liability on the server under Civil Code § 25658,¹³⁵ it is submitted that broad social and economic ramifications of this issue should be analyzed by the Legislature rather than by judicial fiat in a limited factual context. A California court recently acknowledged deference to the legislature on this issue by the Connecticut Supreme Court:

130. *Vesely v. Sager*, 5 Cal.3d 153, 95 Cal. Rptr. 623 (1971).

131. *Id.*, at 157, 95 Cal. Rptr. at 625. The lower appellate courts have decided this issue against, at least, the adult patron. See authorities cited in note 123 *supra*.

132. As stated in the first post-*Vesely* decision, "[i]n light of that purposeful restraint, it hardly benefits a lower court to expand the role in this new and potentially dangerous field." *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 592, 101 Cal. Rptr. 246, 248 (1972).

133. See note 26, *supra*, and see text related to notes 46-51 *supra*, regarding the illegal serving of an obviously intoxicated customer.

134. *Vesely v. Sager*, 5 Cal.3d 153, 95 Cal. Rptr. 623 (1971).

135. One cannot furnish alcoholic beverages to a minor. CAL. BUS. & PROF. CODE § 25658 (a) & (c) (West 1964).

To recompense in damages in injury to an intoxicated person or his property resulting from his own overindulgence in intoxicating liquor might, quite properly, be felt by the General Assembly to encourage, rather than to discourage, such overindulgence.¹³⁶

The California legislature has already considered the issue of patron recovery in the context of § 25602.¹³⁷ The acts or omissions covered by this section are sufficiently related to § 25658¹³⁸ and the minor patron recovery issue to suggest that judicial restraint remains appropriate until the legislature has decided to reconsider patron recovery.

III. CONCLUSION

Concededly, the vendor could obtain insurance coverage against the additional risk inherent in becoming civilly liable to minor patrons and can recover his increased premiums by related price increases. Even without such insurance, he usually is in a better position to assume the loss. Holding him liable to minor patrons might encourage greater care to serve only adults, as required by law. The flaw fatal to this conclusion is that a nexus exists between risk shifting and the desired result of reducing drunk driving by teenagers.

National studies show that the tavern is of little consequence in juvenile misconduct.¹³⁹ Vendor liability to such a patron would encourage further disregard of the criminal law by those underserving minors engaged in the adult activities of drinking and driving. Stricter law enforcement,¹⁴⁰ by way of *Criminal sanctions* for both furnisher and consumer, rather than windfall civil recovery by the latter, constitutes the most acceptable means of resolving this social problem. To compensate a criminal for injuries incurred in the commission of a crime is a wholly irrational approach to crime reduction, and has no place in California jurisprudence.

136. *Nolan v. Morelli*, 154 Conn. 432, 440, 226 A.2d 383, 387 (1967), cited in *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 851, 129 Cal. Rptr. 603, 607 (1976).

137. See text related to notes 46-51 *supra*.

138. See note 135 *supra*.

139. See note 69 and related text *supra*.

140. See generally *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 859 n.6, 129 Cal. Rptr. 603, 612 n.6 (1976).

