With these things in mind, we submit a draft of a bill which could be substituted for the present SB 110 language. The effect of this bill would be to leave it to the driver to ascertain who will have access. It would, however, recognize that insurance carriers and others do depend on access for decisions they make, and should not be forced to take a particular action - such as issue a policy - without the facts disclosed by the record.

I would be pleased to provide any other information you and the committee may desire. We know the deadline has passed for action by the full Senate this year, but would greatly appreciate a hearing in your committee at your earliest opportunity.

Sincerely,

M. T. Thomas

MTT/pl

cc: Senator Dankworth
Senatory Meland
Senator Bennett
Senator Ray

STATEMENT OF MIKE THOMAS
(REPRESENTING THE AMERICAN INSURANCE ASSOCIATION)
CONCERNING SB 110

On the last day of the Tenth Legislature, FCCS CSSB 471 was passed by both houses of the Legislature. That bill had gone to Free Conference as a 3-page bill dealing with motor vehicle fees, and came back as an 84-page bill made up of what had been SB 471, SB 321 (a revision of the Motor Vehicle Code) and SB 594 (extending an industrial incentive tax credit). SB 321 had been referred to Senate Judiciary and Finance Committees, and on the last day of the Session it was still in Senate Judiciary.

Within SB 321, and therefore in the version of SB 471 that passed, was a new AS 28.15.151, a copy of which is attached as Exhibit A. That section limits access to drivers' records maintained by DMV, to certain other agencies and to the driver himself. It expressly forbids insurance companies from requiring access to the records as a condition of selling insurance to the driver.

Insurance companies, of course, rely heavily on the drivers' record to determine whom to insure and what rates to charge. All their rating plans depend on access to those records. In fact, in other states, companies are criticized heavily for using factors other than driving records, such as age, sex or neighborhood, as underwriting criteria. If companies don't know who are good drivers and who are not, they will have to set rates assuming that some unknown number of applicants will be risks that are so bad they would not be written voluntarily, or would be written only with a substantial surcharge, as in the assigned risk pool. The rates that would result would of course be higher, and very unfair to those with good records. They could lead in turn to more uninsured motorists (now estimated at 25-40%), and less competition by insurers in Alaska.

The application of AS 28.15.151 has been enjoined by the Superior Court, pending reconsideration of that provision by the Legislature. In entering the injunction, the Court found that there were "serious and substantial" questions concerning the manner in which SB 471 was passed, and further found that an injunction was in the public interest. The Court had before it affidavits of Richard L. Block, then Director of Insurance, and Roger Grummett, then President of the Alaska Independent Insurance Agents and

Brokers, Inc., a trade association of most of the independent agents and brokers in the State. Pertinent excerpts from those affidavits are attached as Exhibits B and C. (Full copies of all pleadings are available).

Nobody wants or intends to go forward with the lawsuit, since it raises questions that would go to the validity of all of SB 471, and not just the section we are concerned with here.

What we ask is only that insurance companies - and perhaps others with legitimate need - be given access to the drivers' records. As set out more fully in the statements of Mr. Block and Mr. Grummett, we think that such access is essential if we are to try to keep insurance rates rationally related to the risk insured, and if we are to encourage competition in the Alaska insurance markets.

EXCERPT FROM AFFIDAVIT OF RICHARD L. BLOCK

The effect of Section 28.15.151 of Chapter 178, SLA 1978, and particularly subparagraphs (e) and (f) of that section, is to deny access by insurance companies to drivers' records maintained on drivers licensed in the State of Alaska, either directly or indirectly. That denial of access would have predictable and adverse effects upon large numbers of persons buying insurance in the State of Alaska, and upon the insurance industry itself.

Most rating plans for the sale of automobile insurance within the State of Alaska which are presently approved by my Division and in effect assume access to driving records as a basis for underwriting. The driving records are used both to screen for acceptable risks and to set rates. Companies set their own internal policies as to what risks they will voluntarily write, and drivers with records reflecting traffic violations or traffic accidents are often required to procure insurance from alternate insurance programs offered by the insurer or pay scheduled surcharges. Many companies also offer a range of rates depending on driving records, offering premium credits for the same coverage in the event the driver has a clean driving record.

There is in operation in the State of Alaska an "assigned risk plan" for private passenger automobiles and an "assigned risk pool" for commercial automobile risks, to insure that persons that want automobile insurance but do not meet underwriting criteria of the carriers are able to buy insurance. Risks are allocated to the companies who write automobile insurance in the State, and those companies are allowed to charge a substantially higher rate, recognizing the increased risk that persons who do not meet company underwriting standards present.

The effect of Section 151 would be to prohibit the use of driving records as a criteria for underwriting and thereby to invalidate the underlying assumptions in the rating plans presently approved. The indirect effect would be to force the companies to write insurance for an unknown number of persons who did not meet their underwriting criteria, persons who would normally be placed in the assigned risk pool. Some companies, especially those who now as a matter of company underwriting policy, write only better risks, would have to consider whether they could or would write on this completely different basis in the State of Alaska. All companies would be forced to file new rating plans taking into consideration the lack of access to driving records.

Predictably, companies would seek approval of rates which would be high enough to provide for the inclusion of risks which the companies have found by experience to be unprofitable at any rate lower than the assigned risk pool rates. Should the Division approve these rate filings, substantial numbers of insureds would be forced to pay substantially in excess of current rates and substantially in excess of what the experience of their hazard class dictates, thus making the rate unfairly discriminatory and violative of AS 21.36.080. If the Division disaproves, many insurers could be expected to withdraw from writing in this State further exacerbating the now tenuous automobile insurance market in this State.

The enforcement of Section 151 would have a definite tendency to make automobile insurance less competitive and more expensive within the State of Alaska, particularly for those persons who have average or better than average driving records.

EXCERPTS FROM AFFIDAVIT OF ROGER GRUMMETT

The principals of my company, and indeed all insurance agents actively engaged in the business in this State, are quite concerned about the impact of Section 21.13.151 of Chapter 178, SLA 1978. If it goes into effect on October 15, 1978, it will have a severe impact on all facets of automobile insurance in the State.

There will undoubtedly be a severe restriction in available market, since virtually all companies writing private passenger automobile insurance base their underwriting and rating on past driving experience and motor vehicle reports. Denial of access to those reports will result in a substantial loss of business to the companies presently in the market, and therefore will result in very restricted markets for the consumer. It is likely that the restricted market will mean overall higher rates for those consumers that are still able to obtain automobile insurance through standard companies. As a matter of fact, we have already received notice from one of our major underwriters, indicating that because of the passage of the statute, they will not accept any new private passenger automobile business. The restriction in market, which has already begun, will also undoubtedly have adverse impact on those drivers who have clean records, not only because of the restriction in markets and lessening of competition, but also because the carriers will have to charge higher rates to cover the unknown risks.

There will also be a substantial amount of lost revenue to the brokers and agents in the State of Alaska. Attempting to market any individual private passenger automobile risk will become very time consuming and expensive for the brokers. Further, many accounts that are not written in standard markets will undoubtedly wind up in the assigned risk pool, which charges a higher rate to the insured but develops a lower commission rate. It is also quite likely that a number of individuals will choose to do without insurance due to the higher rates, which is not only a poor result for the remainder of the driving public, but will result in additional lost revenue to agents and brokers.

EXHIBIT C

SB 110

TESTIMONY OF THE DIVISION OF INSURANCE

BEFORE THE SENATE JUDICIARY COMMITTEE

FEBRUARY 12, 1980

The Division of Insurance supports this legislation. AS 28.15.151 was added to the statutes with 19 Ch. 178 SLA 1978. That statute bars access to motor vehicle records by insurance companies. The effect of the statutes is presently under a temporary restraining order issued by the court. The proposal before you would, again, permit insurers access to motor vehicle records.

Almost all automobile insurance rating plans used in Alaska and, indeed in most other states, use motor vehicle data in the rating plan as a means to distribute their auto insurance premium needs. The driver with moving violations is likely to be paying a higher premium for his insurance than is the driver with no moving violations, and we view that as appropriate. If the motor vehicle records are denied insurers, then all of the automobile rating structures on file with the Division of Insurance will have to be replaced with one that no longer considers that information. The effect of this will be to redistribute those surcharge premiums, currently being applied to drivers with violations, to all drivers, resulting in an increase of premium for the driver with no violations on record. Additionally, most carriers utilize motor vehicle record information in their selection of business, even aside from the rating of that selection. This selection has generally resulted in some wide variations in rates amongst insurers. With removal of this tool of selectivity, it is expected that the companies with lower rate structures will have increases in their rate structures as the experience on the new selection is felt. We do not believe that this result is desirable. We would urge that the committee act to continue availability of this data to insurers.

Failure to pass this or a similar bill will result in a vacation of the temporary restraining order already mentioned by the court. The impact of that on our program will be substantial since many new rating proposals will have to be reviewed for propriety, compliance with statute and waiting of new forms of discrimation for fairness. Further, the statistical studies and data available for previous years in Alaska will no longer be usable. This will leave Alaska automobile rate levels in doubt for at least three or four years to come. Passage of this particular legislation is very important.

SB

115

COMMITTEE REPORT

SENATE

2/7/79

FURTHER: None

Date: _____

Mr. President:

The Committee on JUDICIARY has had SB 115

civil liability of gratuitous servers of alcoholic beverages

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[X] replace with CS for SB 115 [X] same title [ ] new title

and recommends [illegible]

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

[illegible]

MEMBERS HAVING
OTHER RECOMMENDATIONS:

[illegible]

[illegible]
CHAIRMAN

S 60 (Rev. 12/78)

March 10, 1980

The Honorable Samuel R. Cotten,
Alaska State Representative
Room 208 Capitol Building
Juneau, Alaska

Dear Sam:

What you propose to do to good old SB 115 meets with my approbation.

I only wish you could carry it one step further and provide protection for non-commercial purveyors like you and me when we pour in our homes.

However, protecting the owner/operator is a step in the right direction.

Regards,

Robert H. Ziegler, Sr.

RHZ:lk

Alaska State Legislature

House of Representatives

Committee on Rules

Pouch V
State Capitol
Juneau, Alaska 99811

Official Business

DATE: March 6, 1980

TO: Rep. Buchholdt
Rep. Meekins
Rep. Parr
Sen. Rodey
Sen. Ziegler

FROM: Rep. Cotten

RE: House Rules Committee Substitute for HCS CSSB 115

The Rules Committee is considering a committee substitute for HCS CSSB 115. I would appreciate your comments on it. The following is the proposed change:

> Sec. LIMITATION ON CIVIL LIABILITY. A licensee, or the employee or agent of a licensee, who furnishes an alcoholic beverage to an individual on premises licensed under this title may not be held civilly liable for injuries resulting from the intoxication of that individual unless the furnishing of alcohol beverages occurred in violation of AS 04.15.020(a) and (d), 04.15.060(e), or 04.15.080.

The statutes that deal with th exceptions are listed below:

> AS 04.15.020. Restrictions on sale or disposition of liquor. (a) Sale to minors or intoxicated persons. It is unlawful to give, barter or sell any intoxicating liquors, including beer and wine, to a person under the age of 19 years or to an intoxicated person, and it is unlawful for a licensee to permit the giving, selling, bartering or drinking of any intoxicating liquor within the premises covered by a license to or by either of the forbidden classes, nor shall the licensee permit the drinking of hard or distilled liquors by any person upon the premises covered by his license, unless it is permitted under the classification of his license.
>
> (d) Presence of minors on premises. It is unlawful for a person under the age of 19 years to enter or remain upon licenses premises unless he is accompanied by his parent, guardian or spouse who has attained the age of 19 years. A person under the age of 19 years may enter and remain upon licensed premises which are also recognized as a restaurant for the purpose of dining or dancing if accompanied

by his parent, guardian, or spouse who has attained the age of 19 years, or by the parent or guardian of any other minor also present, or by any other adult with the consent of the minor's parent or guardian. The Alcoholic Beverage Control Bo.., with the approval of the city council if the premises are within the city or with the approval of the borough assembly if the premises are outside the city but within a borough, shall designate which premises are restaurants for the purposes of this section. Licensed premises are premises holding licenses under AS 04.10.020(a)-04.10.020(d). The Alcoholic Beverage Control Board shall promulgate regulations for the designation of restaurants and the continuation or withdrawal of the designation. No establishment may be designated as a restaurant for the purposes of dining without the consent of the licensee.

AS 04.15.060. Purchases by Minors. (e) A licensee, or his employee, who allows to remain upon licensed premises where intoxicating liquor is sold, a person under the age of 19 years not in company of his parent or legal guardian or spouse who has attained the age of 19 years, or sells, gives or serves intoxicating liquor to a person under the age of 19 years without having procured the signature of the person upon a statement as provided in this section, or who knowingly sells, gives, or serves intoxicating liquor to or allows the person to remain on licensed premises where intoxicating liquor is sold, is guilty of a misdemeanor.

AS 04.15.080. Giving of intoxicating liquor to persons under the age of 19 years. (a) A person or firm, company, corporation or an employee thereof who sells, barters, gives or delivers to a person under the age of 19 years, any intoxicating liquor is guilty of a misdemeanor, and upon conviction is punishable by imprisonment of not more than one year, or by a fine of not more than $500, or by both.

(b) The term "person" as used in this section does not include parent as to his own child, a guardian as to his ward or a licensed physician or nurse in giving medical treatment.

Intoxicated person is defined under AS 47.37.270(10) as:

"Intoxicated person" means a person whose mental or physical functioning is substantially impaired as a result of the use of alcohol.

A definition for "drunken person" is suggested in SSSB 239 which is:

"Drunken person" means a person exhibiting those plain and easily observed or discovered outward manifestations of behavior commonly known to be produced by the use of intoxicating liquor.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K–STATE CAPITOL
JUNEAU, ALASKA 99811

April 2, 1979

The Honorable Bill Ray
The Honorable Mike Colletta
Alaska State Legislature
Pouch V
Juneau, Alaska 99801

Re: Dram Shop Liability Question
Our File #J-66-569-79

Dear Senators Ray and Colletta:

You requested our opinion whether removal of the word "lawfully" from CSSB 115 (Rules) would shield a tavern keeper from liability for injuries resulting from the tavern keeper serving liquor to an intoxicated adult or a minor in violation of AS 04.15.020(a). For the reasons which follow, we believe removing the word "lawfully" from that measure would have the effect of shielding a tavern k .per from civil liability for injuries resulting from the tavern keeper serving an intoxicated individual or a minor in violation of the statute.

Section 2 of CSSB 115 (Rules) would add a new section to the Alaska Statutes to read:

> Section 09.65.097. LIMITATIONS ON THE CIVIL LIABILITY OF LAWFULL BEVERAGE PROVIDERS. A person who lawfully provides an alcoholic beverage to an individual may not be held

> civilly liable for injuries resulting from the intoxication of that individual.

This Statute would codify the general common law rule:

> [I]t is not a tort to either sell or give intoxicating liquor to ordinary able-bodied men, and it has been frequently held that in the absence of statute, there can be no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person so furnished. The reason usually given for this rule is that the drinking of the liquor, not the furnishing of it, is the proximate cause of the injury. The rule is based on the obvious fact that one cannot become intoxicated by reason of liquor furnished if he does not drink it.
>
> 45 Am. Jr. 2d, INTOXICATING LIQUORS §553 at pp. 852-853 (footnotes omitted).

However, some jurisdictions do afford a cause of action against a provider of liquor for injuries resulting from intoxication. This frequently is accomplished by legislative enactments known as "dram shop acts" which place statutory liability on the person selling or furnishing the liquor which caused the intoxication. 45 Am. Jur. 2d, INTOXICATING LIQUORS, §§561 et seq. Occasionally, liability has been found in the absence of a dram shop act "where the liquor was given or sold to a person who is in such a condition as to be deprived of his will-power or responsibility for his behavior, or to a habitual drunkard, or in violation of a prohibitory statute." 45 Am. Jr. 2d, INTOXICATING LIQUORS, §554 at page 853 (footnote omitted).

In Alaska, AS 04.15.020(a) prohibits furnishing intoxicating liquor to minors and to intoxicated persons. The Alaska Supreme Court has not ruled on the precise issue whether furnishing liquor to a minor or intoxicated person in violation of AS 04.15.020(a) gives a third person injured as a result of intoxication a cause of action against the person furnishing the liquor. However, there are strong indications that the court would hold that a violation of AS 04.15.020(a) gives an injured party such a cause of action against the provider of the liquor.

The Federal District Court for Alaska has held that under Alaska law, a violation of AS 04.15.020(a) is negligence per se, giving the injured party a cause of action against the tavern keeper. Vance v. United States, 355 F. Supp. 756 (D. Alaska 1973).*/

In Barton v. Lund, 563 P. 2d 875, 877 n.6 (Alaska 1977), a three-justice Alaska Supreme Court expressly refused to reach the issue of liability resulting from a violation of AS 04.15.020(a) in holding that such a violation would not support a cause of action against a liquor licensee under AS 04.15.180 who had no control over the actual operation of the tavern. The majority noted that the

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*/ The Court in Vance did not discuss the pre-statehood case of Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Alaska 1950), which reached an opposite result under the Territorial predecessor to AS 04.15.020(a).

Federal District Court had found such liability under Alaska law in Vance, supra, and that the California Supreme Court found such liability based on a violation of a criminal statute similar to AS 04.15.020(a), Vesely v. Sager, 46 P. 2d 151 (California 1971), and based purely on the common law without reliance on the statute. Bernhard v. Harrah's Club, 546 P. 2d 719 (California), Cert. denied, 429 U.S. 859 (1976).*/ The majority did cite Bachner v. Rich, 554 P. 2d 430 (Alaska 1976), and Farrell v. Baxter, 44 P. 2d 250 (Alaska 1971), cases not involving intoxicating liquor, in both of which the court held that a statute established a standard of care which, when violated, constituted negligence as a matter of law. Extending the holding of those cases to the intoxicating liquor situation would result in a finding of liability, the result reached by Federal District Court in Vance.

Justices Boochever and Rabinowitz, dissenting in Barton, not only appeared to approve the Federal District Court's holding in Vance but would have imposed vicarious

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*/ In response to these cases, the California legislature amended Cal. Bus. & Prof. Code §25602 and Cal. Civ. Code §1714 to abrogate the results of those decisions in favor of the traditional common law rule holding that the consumption, not the furnishing, of intoxicating liquor is the proximate cause of injuries resulting from intoxication. Ch. 929, 1978 Cal. Adv. Legis. Serv. A copy of that enactment is attached for your information.

liability for violations of AS 04.15.020(a) on licensees under AS 04.15.180 who take no active part in the conduct of the tavern's business. They appeared to assume that a violation of AS 04.15.020(a) gives rise to a cause of action against the provider of liquor, the result reached in Vance.

Enactment of CSSB 115 (Rules), as it now reads, would not appear to change the law in Alaska (as it appears in the cited cases) one way or the other. It might raise a question regarding liability where liquor was furnished in a matter which was technically unlawful--e.g., liquor sold on election day in violation of AS 04.15.020(c) but lawfully sold in all other respects--but that question currently exists in the absence of such a statute. Enactment of CSSB 115 (Rules) with the word "lawfully" removed, however, would appear to absolve any provider of an alcoholic beverage from any liability for injuries resulting from the consumer's intoxication. This would be true regardless of whether the provider of the liquor violated AS 04.15.020(a) by furnishing the liquor to a minor or an intoxicated person or violated any other statute dealing with the furnishing of liquor. In other words, it would preclude the court from finding any provider of intoxicating liquor liable for injuries suffered as a result of intoxication, even when the liquor was fur-

nished to an intoxicated person or a minor in violation of AS 04.15.020(a).

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By: G. Thomas Koester
Thomas G. Koester
Assistant Attorney General

TGK:bwb

Enclosure

Chapter 929

An act to amend Section 25602 of the Business and Professions Code, and to amend Section 1714 of the Civil Code, relating to proximate cause.

LEGISLATIVE COUNSEL'S DIGEST

SB 1645, Ayala. Alcoholic beverage liability: proximate cause.

The California courts have recently interpreted existing law as imposing civil liability upon persons who sell, furnish, give or cause to be given alcoholic beverages to an intoxicated person when such person inflicts injury upon a third party.

This bill would specifically prohibit the imposition of civil liability in such instance.

This bill would also state a legislative declaration that prior judicial interpretation shall be reinstated so that such civil liability to a third party is incurred solely by the intoxicated person. The bill would also provide specifically that 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 people of the State of California do enact as follows:

SECTION 1. Section 25602 of the Business and Professions Code is amended to read:

25602. (a) 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.

(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 (_____ Cal. 3d _____) 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.

SEC. 2. Section 1714 of the Civil Code is amended to read:

1714. (a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

(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 (_____ Cal. 3d _____) 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.

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This bill would also state a legislative declaration that prior judicial interpretation shall be reinstated so that such civil liability to a third party is incurred solely by the intoxicated person. The bill would also provide specifically that 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.

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(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 (_____ Cal. 3d _____) 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.

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(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.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

April 11, 1979

The Honorable Bill Ray
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Dram Shop Liability Question
Our File J-66-569-79

Dear Senator Ray:

In a phone conversation earlier today, you indicated that our letter of April 2, 1979 did not completely answer your question regarding the effect of CSSB 115 (Rules) on third-person liability for injuries suffered as a result of that third person furnishing intoxicating liquor to another. You indicated that your question was whether enactment of CSSB 115 (Rules) would shield third persons from liability for injuries resulting from another's intoxication if the intoxicating liquor was furnished lawfully. For the reasons which follow, we believe it would provide such a shield.

Section 2 of CSSB 115 (Rules) would add a new section to the Alaska Statutes to read:

> Section 09.65.097. LIMITATIONS ON THE CIVIL LIABILITY OF LAWFUL BEVERAGE PROVIDERS. A person who lawfully provides an alcoholic beverage to an individual may not be held civilly liable for injuries resulting from the intoxication of that individual.

This statute would codify the rule which seems to be rather universal: A third person who lawfully furnishes liquor is not liable for injuries resulting from the consumption of that liquor. This appears to be the rule even in states like California where a third person will be liable for such injuries if he unlawfully provides liquor.

We hope this answers your question. However, it is possible that it does not. It appears that there are two

possible sources for any confusion which remains: (1) Differences of opinion regarding the existing law of third-person liability in Alaska; and (2) differences of opinion regarding the effect of the language in CSSB 115 (Rules). We must point out that this is a developing area of law, and we cannot predict with absolute certainty what result our Court will reach under any given statutory enactment. However, we believe our Court would hold that the language of CSSB 115 (Rules), as it now appears, would shield third persons furnishing intoxicating liquor from liability for injuries suffered as a result of intoxication where the furnishing of that liquor was not in violation of existing law. We will work with you and/or other legislators in drafting appropriate language to accomplish whatever policy that the legislature determines is appropriate in this area if further amendment to SB 115 is desired.

In the meantime, we hope you find this of some assistance.

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By: G. Thomas Koester
G. Thomas Koester
Assistant Attorney General

GTK:dlm

cc: Senator Mike Colletta
Senator Patrick Rodey

VIOLATION OF STATUTES

Runge v. Watts, 589 P.2d 145 (Mont. 1979):

Plaintiff was injured in collision with car driven by intoxicated minor. Minor was furnished alcoholic beverages by defendant, a private individual, in violation of a state statute. In holding that complaint was properly dismissed, court states at 589 P.2d 147:

> Traditionally, there has been greater justification for imposing liability on a commercial purveyor than on a social purveyor. There is a greater need for some check on the pecuniary motives of those engaged in the business of selling alcoholic beverages. In addition a commercial vendor is in a better position to observe his customers and monitor their level of intoxication by virtue of the fact that the seller is more likely to communicate with the patron each time he serves a new drink.
>
> Taking this into consideration, we are reluctant to extend the liability of persons serving alcoholic beverages to a social setting when the legislature has to date failed to extend that liability to commercial vendors by virtue of dramshop legislation.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 9981[illegible]
907 465-3800

MEMORANDUM February 8, 1979

SUBJECT: Court cases in California and Alaska regarding liability of provider of intoxicating beverages for damages caused by intoxicated person: (Work Order No. 6060)

TO: Senator Robert Ziegler

FROM: Joseph A. Guthrie, Legislative Counsel

Attached you will find the California cases you requested. Also, you will find a federal case construing Alaska law, Vance v. United States, 355 F Supp. 756 (1973) which finds (1) that violation of Alaska's law prohibiting service to intoxicated persons is negligence per se; and (2) that public policy requires that a provider of alcoholic beverages, whether liquor licensee or social host, be held to be the proximate cause of damages caused by the person he serves liquor to.

Attachment

JAG:nem

George D. Cary as Register of Copyrights is null and void;

2. That the defendant Mumford is enjoined from appointing a Register of Copyrights unless and until he follows the procedures of the Library of Congress governing that appointment;

3. That the defendant Mumford be required to implement corrective action to remedy the findings of discrimination against the plaintiff, in accordance with the regulations of the Library of Congress as construed in the Opinion filed in this case;

4. Nothing in this Order shall prevent the defendant Mumford from making a temporary or interim appointment of an Acting Register of Copyrights during the period in which the procedures of the Library of Congress are being complied with, but any such interim or temporary appointment shall be without prejudice to plaintiff's rights to be considered for the position of Register of Copyrights; and

5. That the defendants' motion for summary judgment be and is hereby denied.

Mrs. John C. VANCE, Individually and as Guardian Ad Litem for John C. Vance, et al., Plaintiffs,

v.

UNITED STATES of America, Defendant.

Civ. No. A-84-71.

United States District Court, D. Alaska.

March 16, 1973.

Action was brought against the United States under the Federal Tort Claims Act on theory that plaintiff's husband was negligently served intoxicating liquors at noncommissioned officers' club at Alaskan air force station. On defendant's motion for summary judgment, the District Court, Plummer, Chief Judge, held that agent of the United States had a duty to the husband to exercise reasonable care in dispensing intoxicants, and a breach of that duty could be found to have been the proximate cause of his injuries; further, such a breach occurred if defendant violated Alaskan statute which makes it a crime to give or sell liquor to minors or intoxicated persons, and a breach could also be found if defendant failed to take additional reasonable precautions; and contributory negligence would be a defense only if the statute was not violated.

Motion denied.

1. Negligence ⇐6

Under Alaskan law, an unexcused violation of a statute of regulation is negligence in itself if court adopts the statute as defining the conduct of a reasonable man, and if the statute is not so adopted, a violation may be considered as evidence of negligence; and court may and usually must adopt the statute as the minimum standard of care if purpose thereof is at least in part to protect class of persons which includes the one whose interest is invaded, and to protect particular interest invaded, and to protect that interest against the kind of harm which resulted, and to protect that interest against particular hazard from which harm resulted.

2. Intoxicating Liquors ⇐159(1), 161

Statute which makes it a crime to give or sell liquor to minors or intoxicated persons applies to private clubs. AS 04.15.020(a).

3. Intoxicating Liquors ⇐286

Alaskan statute making it a crime to give or sell liquor to minors or intoxicated persons represented the minimum standard of conduct to be observed by agent of the United States, against which Federal Tort Claims Act suit was brought on theory that plaintiff's husband had been negligently served intoxicating liquors at noncommissioned officers' club at Alaskan air force station.

AS 04.15.020(a); 28 U.S.C.A. §§ 1346(b), 2674.

4. Negligence ⇐6, 80

Where plaintiff's claim is grounded on alleged negligence of defendant's agent, contributory negligence would ordinarily be a defense, and this is true even though the negligence may be proved by comparing defendant's conduct to a statutory norm rather than to the hypothetical conduct of a reasonable man; however, there are exceptional statutes which are intended to protect persons from their own misconduct and to place the entire responsibility for the harm upon the one who has violated the statute.

5. Intoxicating Liquors ⇐295

Contributory negligence is not a defense to negligence per se based upon a violation of Alaskan statute which makes it a crime to give or sell liquor to minors or intoxicated persons. AS 04.15.020(a).

6. United States ⇐78(8)

Holding that claim against United States on theory that plaintiff's husband was negligently served intoxicating liquors at noncommissioned officers' club at Alaskan air force station was cognizable under the Federal Tort Claims Act was not impaired by later holding that contributory negligence is not a defense to negligence per se based upon a violation by defendant's agent of Alaskan statute making it a crime to give or sell liquor to intoxicated persons. AS 04.15.020(a); 28 U.S.C.A. §§ 1346(b), 2674.

7. Intoxicating Liquors ⇐285, 295

In action brought against the United States under Federal Tort Claims Act on theory that plaintiff's husband was negligently served intoxicating liquors at noncommissioned officers' club at Alaskan air force station, Alaskan statute making it a crime to give or sell liquor to minors or intoxicated persons merely set the minimum standard of care, and compliance therewith did not relieve defendant from liability if its agent was negligent in failing to take additional precautions; and if the agent were found to have been negligent even though he did not violate the statute, then contributory negligence would become a defense. AS 04.15.020(a); 28 U.S.C.A. §§ 1346(b), 2674.

8. Negligence ⇐142

Under Alaskan law, it is error for trial court to dismiss a claim on the ground of contributory negligence prior to a determination on the issue of negligence.

9. Intoxicating Liquors ⇐295

Unless and until agent of the United States, against which suit was brought under the Federal Tort Claims Act on theory that plaintiff's husband was negligently served intoxicating liquors at noncommissioned officers' club at Alaskan air force station, was found to have complied with Alaskan statute making it crime to give or sell liquor to minors or intoxicated persons, but to have nevertheless failed to take further reasonable precautions, a determination on the question of contributory negligence by plaintiff's husband would be premature. AS 04.15.020(a); 28 U.S.C.A. §§ 1346(b), 2674.

10. Federal Civil Procedure ⇐2155

Both duty and proximate causation are issues of law to be decided by the court.

11. Federal Civil Procedure ⇐709

Unlike contributory negligence, duty and proximate causation are elements of plaintiff's cause of action, in the absence of either of which plaintiff has failed to state a claim upon which relief can be granted. Fed.Rules Civ.Proc. rule 12(b), 28 U.S.C.A.

12. Negligence ⇐56(1)

Proximate causation is a matter of public policy and therefore subject to the changing attitudes and needs of society.

13. Intoxicating Liquors ⇐291

If a liquor vendor's conduct may, under the modern view, be the proximate cause of injuries to third persons,

a fortiori it may be the proximate cause of injuries to the customer himself. AS 04.15.020(a).

14. Intoxicating Liquors ⇨286, 291

Agent of United States, against which action was brought under Federal Tort Claims Act on theory that plaintiff's husband was negligently served intoxicating liquors at noncommissioned officers' club at Alaskan air force station, had duty to husband to exercise reasonable care in dispensing intoxicants, and a breach of that duty could be found to have been proximate cause of his injuries; further, such a breach occurred if defendant violated Alaskan statute making it a crime to give or sell liquor to intoxicated persons, and a breach could also be found if defendant failed to take additional reasonable precautions. 28 U.S.C.A. §§ 1346(b), 2674; AS 04.15.020(a).

Leroy J. Barker, of Robison, McCaskey, Strachan & Hoge, Anchorage, Alaska, for plaintiffs.

A. Lee Petersen, Asst. U. S. Atty., Anchorage, Alaska, for defendant.

MEMORANDUM AND ORDER

PLUMMER, Chief Judge.

This case comes before the court on defendant's second motion for summary judgment. Plaintiff is seeking recovery in this action for injuries to John C. Vance and his dependents resulting from injuries sustained by Mr. Vance while he was intoxicated. Plaintiff's action is brought against the United States under the Federal Tort Claims Act, 28 U.S.C. A. §§ 1346(b) and 2674, on the theory that Mr. Vance was negligently served intoxicating liquors at the Non-Commissioned Officers' Club at Clear Air Force Station, Alaska.

Defendant's first motion for summary judgment was denied on June 21, 1972, but defendant has renewed its motion in light of two recent decisions from California, Carlisle v. Kanayer, 24 Cal.App. 3d 587, 101 Cal.Rptr. 246 (1972), and Sargent v. Goldberg, 25 Cal.App.3d 940, 102 Cal.Rptr. 300 (1972). In these cases the California Court of Appeals held that contributory negligence is a defense where the claim is based upon injuries to an intoxicated person as it is in the present case. Defendant contends that by becoming intoxicated Mr. Vance was contributorily negligent as a matter of law and that a trial is therefore unnecessary.

In its order of June 21, 1972, the court held that plaintiff's claim is cognizable under the law of Alaska and the Federal Tort Claims Act, but the court did not discuss the effect of contributory negligence.

It is necessary to begin with an examination of the effect on this case of A.S. 04.15.020(a), which makes it a crime to give or sell liquor to minors or intoxicated persons. Plaintiff does not contend that this statute creates a new civil cause of action. *Compare, e. g.*: Campbell v. Village of Silver Bay, 315 F.2d 568 (8th Cir. 1963); Konsler v. United States, 288 F.Supp. 895 (N.D.Ill.1968). Rather, plaintiff contends that this statute sets a minimum standard of care for purposes of the common law cause of action based upon ordinary negligence.[1] That is, plaintiff is contending that a violation of this statute is negligence *per se*.

In Ferrell v. Baxter, 484 P.2d 250 (Alaska 1971), the Alaska Supreme Court approved the rules of negligence *per se* found in Restatement (2d) of Torts at sections 286 and 288. Although *Ferrell* involved the violation of a traffic regulation, the court clearly did not

1. Defendant has characterized this issue as whether the statute "extends" civil liability. This terminology can only lead to confusion. In contexts such as this, a statute either *creates a cause of action* or it *sets a standard of care* (which standard may or may not be adopted by the court as defining the conduct of a reasonable man, pursuant to the rules set forth in Restatement (2d) of Torts at sections 286 and 288).

intend to limit the doctrine to traffic cases. *See generally* Comment, 2 UCLA-Alaska Law Review 54, 63–67 (1972).

[1] Under the Restatement rule followed in Alaska, an unexcused violation of a statute or regulation is negligence in itself if the court adopts the statute as defining the conduct of a reasonable man. (If the statute is not so adopted, a violation may be considered as evidence of negligence.) The court may and usually must adopt the statute as the minimum standard of care if the purpose of the statute is at least in part: (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.

Applying this test to the statute in question, it is clear that requirements (b), (c) and (d) are satisfied; the statute unquestionably is designed at least in part to protect against personal injuries caused by intoxication. The principal issue is whether requirement (a) is met; that is, whether the consumer himself is within the protected class.

[2, 3] Defendant first contends that the statute does not apply to a private club such as the Non-Commissioned Officers' Club involved in this case since drinking in such clubs is tantamount to drinking in one's own home. The short answer to this contention is that the statute proscribes not only selling liquor to an intoxicated person but also *giving* liquor to such a person. The statute draws no distinctions among the places where liquor might be served. Turning to the nub of the issue, it is apparent that, although the principal purpose of the statute may have been to protect innocent third parties from the negligence of an intoxicated consumer, the purpose at least in part was also to protect the consumer himself. If the consumer involved in this case were a minor rather than an alleged intoxicated person, it would be logical to conclude that the statute was enacted by the Legislature to protect minors. The statute does not purport to discriminate between minors and intoxicated persons and therefore it should logically follow that both are protected. Accordingly, the court adopts A.S. 04.15.020(a) as the minimum standard of conduct for defendant's agent in the present case.

[4] Since plaintiff's claim is grounded upon the alleged negligence of defendant's agent, contributory negligence would ordinarily be a defense. This is true even though the negligence may be proved by comparing the defendant's conduct to a statutory norm rather than to the hypothetical conduct of a reasonable man.[2] See Restatement (2d) of Torts section 483. However, as section 483 also points out, there are exceptional statutes which are intended to protect persons from their own misconduct and to place the entire responsibility for the harm upon the one who has violated the statute. The Restatement cites the following example:

> "Thus a statute which prohibits the sale of firearms to minors may be clearly intended, among other purposes, to protect them against their own inexperience, lack of judgment, and tendency toward negligence, and to make the seller solely responsible for any harm to them resulting from the sale. In such a case the purpose of the statute would be defeated if the contributory negligence of the minor were permitted to bar his recovery."

[5] A.S. 04.15.020(a) presents an even more compelling example of a statute intended to place the entire responsi-

2. Plaintiff has argued that since a consumer is within the protected class his contributory negligence can not be a defense. This simply does not follow. For example, no one would contend that contributory negligence is not a defense in an automobile collision case where the defendant violated a traffic regulation, notwithstanding that the plaintiff was in the protected class.

bility for resulting harm upon the violator, for it is virtually impossible for the statute to be violated without contributory negligence on the part of the plaintiff-consumer. Also, like the example in the Restatement, the statute is clearly intended to protect minors from their own misconduct. Since the statute does not purport to treat sales to minors differently from sales to intoxicated persons, it should logically follow that both are protected to the same extent. The two California cases cited by defendant as the basis for renewing its motion for summary judgment, *supra*, did not take into account section 483 of the Restatement. In fact, the Restatement rules of negligence *per se* have not been adopted in California as they have in Alaska. *See* Vesely v. Sager, 5 Cal.3d 153, 95 Cal.Rptr. 623, 486 P.2d 151 (1971), applying a legislative codification of the common law rule of negligence *per se*. Nor can it be said that Mr. Vance was contributorily negligent *per se* if he is found to have violated A.S. 11.45.032 (making certain drunkenness a crime), for the purpose of that statute is obviously to prevent annoyance and not to protect one who serves liquor to an intoxicated person against civil liability. The court therefore holds that contributory negligence is not a defense to negligence *per se* based upon a violation of A.S. 04.15.020(a).

[6] Defendant contends that if contributory negligence is not a defense then the case becomes one of "strict liability," and that strict liability is not consented to in the Federal Tort Claims Act. Defendant relies upon Konsler v. United States, 288 F.Supp. 895 (N.D.Ill. 1968). However, the government's liability in that case was predicated upon a Dram Shop Act which created a new civil cause of action without regard to fault. Here, plaintiff does not contend that the statute creates a new cause of action but that the statute merely sets the minimum standard of care for purposes of ordinary negligence liability. Therefore removing the defense of contributory negligence does not result in strict liability, because negligence is still required. Plaintiff's claim is still based upon an allegedly "negligent or wrongful act or omission" of a federal employee within the meaning of 28 U.S.C. § 1346(b). Compare Dalehite v. United States, 346 U.S. 15, 45, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). Thus, the court's holding of June 21, 1972, that this claim is cognizable under the Federal Tort Claims Act is not impaired by its holding today that contributory negligence is not a defense to negligence *per se* based upon a violation of A.S. 04.15.020(a).

[7] It is important to remember that A.S. 04.15.020(a) merely sets the *minimum* standard of care. Compliance with the statute does not relieve defendant from liability if defendant was negligent in failing to take additional precautions. Restatement (2d) of Torts section 288(c); Prosser, Law of Torts (4th Ed.) at p. 203. And if defendant's agent is found to have been negligent even though he did not violate the statute, then contributory negligence becomes a defense. Since the statutory minimum has been met, no longer is it proper to place the entire responsibility for the harm upon the violator pursuant to Restatement section 483. To this extent, then, contributory negligence remains a defense.

[8, 9] Defendant seeks to have the court hold that Mr. Vance was contributorily negligent as a matter of law. However, the defense of contributory negligence may not be adjudicated at this state of the proceedings. In Young v. State, 491 P.2d 122 (Alaska 1971), the Alaska Supreme Court held that it is error for the trial court to dismiss a claim on the ground of contributory negligence prior to a determination on the issue of negligence. Although this rule might be characterized as one of procedure and therefore not binding upon this court in a diversity case, the reasoning of the Alaska Supreme Court convinces this court that such a rule is salutary and should be followed in this case. Accordingly, unless and until defendant is found to have complied with

the statute but nevertheless to have failed to take further reasonable precautions, a determination on the question of contributory negligence would be premature.

[10, 11] Dismissal at this state would be proper, however, if defendant owed no *duty* to Mr. Vance or if defendant's acts were not the *proximate cause* of plaintiff's injuries. Both duty and proximate causation are issues of law to be decided by the court and not by the trier of fact. Prosser, Law of Torts (4th Ed.) at 206 n. 7 and 244 nn. 61–62. And unlike contributory negligence, duty and proximate causation are elements of plaintiff's cause of action, in the absence of either of which plaintiff has failed to state a claim upon which relief can be granted. Disposition on this ground by motion prior to trial is authorized by Rule 12(b) of the Federal Rules of Civil Procedure. It is therefore appropriate to examine the merits of a contention that these elements of plaintiff's case are absent.

[12, 13] At common law, the consumer of intoxicants was generally unable to recover against the person furnishing the drinks for personal injuries to the consumer resulting from intoxication. *See* Annotation, 54 A.L.R.2d 1152. The rationale of these cases was that the defendant's acts were not the proximate cause of the plaintiff's injuries. In a related group of cases, involving injuries caused by, rather than to, a consumer of intoxicants, the same rule historically protected the vendor from liability to such third persons, again based on the absence of proximate cause. *See* Annotation, 75 A.L.R.2d 833. However, proximate causation is a matter of public policy and therefore subject to the changing attitudes and needs of society. *See* Prosser, Law of Torts, at p. 244 et seq. The modern view, and probably the majority view, in cases involving a liquor vendor's liability to third persons is that the furnishing of intoxicants may be the proximate cause of the injuries. *See* Vesely v. Sager, 5 Cal.3d 153, 95 Cal.Rptr. 623, 486 P.2d 151 (1971), and authorities there cited. If a vendor's conduct may be the proximate cause of injuries to third persons, *a fortiori* it may be the proximate cause of injuries to the customer himself. This conclusion also refutes the alternative contention that no duty exists in these cases, for the two concepts—duty and proximate causation—involve identical questions and in cases like this are really just two ways of phrasing the same determinations of law and public policy. Prosser, Law of Torts at p. 244–245. The court therefore holds that defendant owed a duty to Mr. Vance to exercise reasonable care in dispensing intoxicating liquors and that a breach of this duty may be found to be the proximate cause of plaintiff's injuries.

[14] In summary, the court holds as follows. Defendant had a duty to Mr. Vance to exercise reasonable care in dispensing intoxicants, and a breach of this duty may be found to have been the proximate cause of plaintiff's injuries. Such a breach occurred if defendant violated A.S. 04.15.020(a), but a breach may also be found if defendant failed to take additional reasonable precautions. Contributory negligence is a defense only if the statute was not violated.

The court expresses no opinion on whether Mr. Vance was contributorily negligent, for to do so would be premature at this point. Nor does the court express an opinion on whether the statute was violated, whether defendant was otherwise negligent, or whether defendant's conduct was a proximate cause of plaintiff's injuries under the circumstances of this case.

It is hereby ordered that plaintiff's second motion for summary judgment is denied.

546 P.2d 719
16 Cal.3d 313

Richard A. BERNHARD, Plaintiff and Appellant,

v.

HARRAH'S CLUB, Defendant and Respondent.

S. F. 23242.

Supreme Court of California, In Bank.
March 2, 1976.
Rehearing Denied April 22, 1976.

California resident brought action for personal injuries against Nevada tavern owners alleging that their sale of intoxicating beverages to patrons was proximate cause of his injury. The Superior Court, Sacramento County, Joseph G. Babich, J., entered judgment of dismissal, and plaintiff appealed. The Supreme Court, Sullivan, J., held that tavern owners who actively solicited California business were liable for injuries which were proximately caused by sale of alcoholic beverages to intoxicated patrons who inflicted injuries upon California resident in automobile accident occurring in California, notwithstanding fact that Nevada law did not permit such recovery.

Reversed and remanded.

1. Torts ⇐2

Choice of law in tort actions is determined by analysis of respective interests of states involved in order to decide which law is most appropriately applied to issues involved.

2. Intoxicating Liquors ⇐302

Tavern owner may be civilly liable to third person for injuries proximately caused by former by selling or furnishing alcoholic beverages to intoxicated patron who inflicts injuries on latter. West's Ann.Bus. & Prof.Code, § 25602.

3. Intoxicating Liquors ⇐302

Nevada law denies recovery against tavern owner by third person for injuries proximately caused by former by selling or furnishing alcoholic beverages to intoxicated patron who inflicts injuries on latter.

4. Torts ⇐2

Although two involved states may have different laws governing issue presented in tort action, there is a problem in selecting applicable rule of law only if both states have interest in having their respective law applied.

5. Action ⇐17
Intoxicating Liquors ⇐288

California law would be applied to determine whether Nevada tavern owners who actively solicited California business would be liable to California resident for injuries which were proximately caused by tavern owner's selling alcoholic beverages to intoxicated patrons who subsequently caused automobile accident in California resulting in injuries to California resident. West's Ann.Bus. & Prof.Code, § 25602.

6. Intoxicating Liquors ⇐302

Nevada tavern owners who actively solicited California business would be liable to California resident for injuries which were proximately caused by tavern owner's selling alcoholic beverages to intoxicated patrons who subsequently inflicted injuries upon California resident in automobile accident occurring in California, notwithstanding fact that Nevada law did not permit such recovery. West's Ann.Bus. & Prof.Code, § 25602.

7. Courts ⇐29

Section of Business and Professions Code providing that sale of alcoholic beverage to intoxicated person is misdemeanor has no extraterritorial effect that would be applicable to Nevada tavern owners. West's Ann.Bus. & Prof.Code, § 25602.

8. Intoxicating Liquors ⇐285

Fact that section of Business and Professions Code providing that sale of alcoholic beverages to intoxicated persons is misdemeanor was not applicable to Nevada tavern owners so as to warrant imposition of civil liability on basis of its violation, did not preclude recovery on basis of negli-

gence apart from the statute. West's Ann.Bus. & Prof.Code, § 25602.

Frederick W. Stephenson, Sacramento, for plaintiff and appellant.

Hardy, Erich & Brown and Leo H. Schuering, Jr., Sacramento, for defendant and respondent.

[215] SULLIVAN, Justice.

Plaintiff appeals from a judgment of dismissal entered upon an order sustaining without leave to amend the general demurrer of defendant Harrah's Club to plaintiff's first amended complaint.

Plaintiff's complaint, containing only one count, alleged in substance the following: Defendant Harrah's Club, a Nevada corporation, owned and operated gambling establishments in the State of Nevada in which intoxicating liquors were sold, furnished to the public and given away for consumption on the premises. Defendant advertised for and solicited in California the business of California residents at such establishments knowing and expecting that many California residents would use the public highways in going to and from defendant's drinking and gambling establishments.

On July 24, 1971, Fern and Philip Myers, in response to defendant's advertisements and solicitations, drove from their California residence to defendant's gambling and drinking club in Nevada, where they stayed until the early morning hours of July 25, 1971. During their stay, the Myers were served numerous alcoholic beverages by defendant's employees, progressively reaching a point of obvious intoxication rendering them incapable of safely driving a car. Nonetheless defendant continued to serve and furnish the Myers alcoholic beverages.

[216] While still in this intoxicated state, the Myers drove their car back to California. Proceeding in a northeasterly direction on Highway 49, near Nevada City, California, the Myers' car, driven negligently by a still intoxicated Fern Myers, drifted across the center line into the lane of oncoming traffic and collided head-on with plaintiff Richard A. Bernhard, a resident of California, who was then driving his motorcycle along said highway. As a result of the collision plaintiff suffered severe injuries. Defendant's sale and furnishing of alcoholic beverages to the Myers, who were intoxicated to the point of being unable to drive safely, was negligent and was the proximate cause of the plaintiff's injuries in the ensuing automobile accident in California for which plaintiff prayed $100,000 in damages.

Defendant filed a general demurrer to the first amended complaint. In essence it was grounded on the following contentions: that Nevada law denies recovery against a tavern keeper by a third person for injuries proximately caused by the former by selling or furnishing alcoholic beverages to an intoxicated patron who inflicts the injuries on the latter; that Nevada law governed since the alleged tort was committed by defendant in Nevada; and that section 25602 of the California Business and Professions Code which established the duty necessary for liability under our decision in *Vesely v. Sager* (1971) 5 Cal.3d 153, 95 Cal.Rptr. 623, 486 P.2d 151, was inapplicable to a Nevada tavern. The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal. This appeal followed.

[1] We face a problem in the choice of law governing a tort action. As we have made clear on other occasions, we no longer adhere to the rule that the law of the place of the wrong is applicable in a California forum regardless of the issues before the court. (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 579, 114 Cal.Rptr. 106, 522 P.2d 666; *Reich v. Purcell* (1967) 67 Cal.2d 551, 555, 63 Cal.Rptr. 31, 432 P.2d 727.) Rather we have adopted in its place a rule requiring an analysis of the respective interests of the states involved —the objective of which is "to determine the law that most appropriately applies to

the issue involved." (*Hurtado, supra*, 11 Cal.3d at pp. 579-580, 114 Cal.Rptr. 106, 522 P.2d 666, quoting from *Reich, supra*, 67 Cal.2d at p. 555, 63 Cal.Rptr. 31, 34, 432 P.2d 727, 730.)

The issue involved in the case at bench is the civil liability of defendant tavern keeper to plaintiff, a third person, for injuries allegedly caused by the former by selling and furnishing alcoholic beverages in Nevada to intoxicated patrons who subsequently injured plaintiff in California. Two states are involved: (1) California—the place of plaintiff's residence and domicile, the place where he was injured, and the forum; and (2) Nevada—the place of defendant's residence and the place of the wrong.

[2, 3] We observe at the start that the laws of the two states—California and Nevada—applicable to the issue involved are not identical. California imposes liability on tavern keepers in this state for conduct such as here alleged. In *Vesely v. Sager, supra*, 5 Cal.3d 153, 166, 95 Cal.Rptr. 623, 632, 486 P.2d 151, 160, this court rejected the contention that "civil liability for tavern keepers should be left to future legislative action . . . . 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 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 . . . . 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 . . . . It is clear that Business and Professions Code section 25602 [making it a misdemeanor to sell to an obviously intoxicated person] is a statute to which this presumption [of negligence, Evidence Code section 669] applies and that the policy expressed in the statute is to promote the safety of the people of California . . . ." Nevada on the other hand refuses to impose such liability. In *Hamm v. Carson City Nuggett, Inc.* (1969) 85 N. W. 99, 450 P.2d 358, 359, the court held it would create neither common law liability nor liability based on the criminal statute banning sale of alcoholic beverages to a person who is drunk, because "if civil liability is to be imposed, it should be accomplished by legislative act after appropriate surveys, hearings, and investigations to ascertain the need for it and the expected consequences to follow." It is noteworthy that in *Hamm* the Nevada court in relying on the common law rule denying liability cited our decision in *Cole v. Rush* (1955) 45 Cal.2d 345, 289 P.2d 450, later overruled by us in *Vesely* to the extent that it was inconsistent with that decision. (See *Vesely v. Sager, supra*, 5 Cal.3d at p. 167, 95 Cal. Rptr. 623, 486 P.2d 151.)

[4] Although California and Nevada, the two "involved states" (*Reich v. Purcell, supra*, 67 Cal.2d 551, 553, 63 Cal.Rptr. 31, 432 P.2d 727; see also *Hurtado v. Superior Court, supra*, 11 Cal.3d 574, 579, 114 Cal.Rptr. 106, 522 P.2d 666), have different laws governing the issue presented in the case at bench, we encounter a problem in selecting the applicable rule of law only if *both* states have an interest in having their respective laws applied. "[G]enerally speaking the forum will apply its own rule 1318
of decision unless a party litigant timely invokes the law of a foreign state. In such event he must demonstrate that the latter rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to the case before it. [Citations.]" (*Hurtado, supra*, 11 Cal.3d at p. 581, 114 Cal.Rptr. at p. 110, 522 P.2d at p. 670.)

Defendant contends that Nevada has a definite interest in having its rule of decision applied in this case in order to protect its resident tavern keepers like defendant from being subjected to a civil liability which Nevada has not imposed either by legislative enactment or decisional law. It is urged that in *Hamm v. Carson City*

Nuggett, supra, 85 Nev. 99, 450 P.2d 358, 359, the Supreme Court of Nevada clearly delineated the policy underlying denial of civil liability of tavern keepers who sell to obviously intoxicated patrons: "Those opposed to extending liability point out that to hold otherwise would subject the tavern owner to ruinous exposure everytime he poured a drink and would multiply litigation endlessly in a claim-conscious society. Every liquor vendor visited by the patron who became intoxicated would be a likely defendant in subsequent litigation flowing from the patron's wrongful conduct . . . . Judicial restraint is a worthwhile practice when the proposed new doctrine [has] implications far beyond the perception of the court asked to declare it. They urge that if civil liability is to be imposed, it should be accomplished by legislative act after appropriate surveys, hearings, and investigations . . . . We prefer this point of view." Accordingly defendant argues that the Nevada rule of decision is the appropriate one for the forum to apply.

Plaintiff on the other hand points out that California also has an interest in applying its own rule of decision to the case at bench. California imposes on tavern keepers civil liability to third parties injured by persons to whom the tavern keeper has sold alcoholic beverages when they are obviously intoxicated "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," (*Vesely v. Sager, supra*, 5 Cal.3d 153, 165, 95 Cal.Rptr. 623, 631, 486 P.2d 151, 159.) California, it is urged, has a special interest in affording this protection to all California residents injured in California.

[5] Thus, since the case at bench involves a California resident (plaintiff) injured in this state by intoxicated drivers and a Nevada resident tavern keeper (defendant) which served alcoholic beverages to them in Nevada, it is clear that each state has an interest in the application of its respective law of liability and nonliability. It goes without saying that these interests conflict. Therefore, unlike *Reich v. Purcell, supra*, 67 Cal.2d 551, 63 Cal.Rptr. 31, 432 P.2d 727, and *Hurtado v. Superior Court, supra*, 11 Cal.3d 574, 114 Cal.Rptr. 106, 522 P.2d 666, where we were faced with "false conflicts," in the instant case for the first time since applying a governmental interest analysis as a choice of law doctrine in *Reich*, we are confronted with a "true" conflicts case. We must therefore determine the appropriate rule of decision in a controversy where each of the states involved has a legitimate but conflicting interest in applying its own law in respect to the civil liability of tavern keepers.

The search for the proper resolution of a true conflicts case, while proceeding within orthodox parameters of governmental interest analysis, has generated much scholarly examination and discussion.[1] The father of the governmental interest approach,[2] Professor Brainerd Currie,

1. Baxter, *Choice of Law and the Federal System* (1963) 16 Stan.L.Rev. 1; Cavers, The Choice of Law Process (1965) 114-224; Horowitz, *The Law of Choice of Law in California—A Restatement* (1974) 21 U.C.L.A. L.Rev. 719, 748-758; *Conflict of Laws Round Table: A Symposium* (1972) 57 Iowa L.Rev. 1219-1270; *Symposium, Conflict of Laws Round Table* (1971) 49 Texas L.Rev. 211-245; Sedler, *Reviews-Conflicts Commentary* 50 Texas L.Rev. 1064-1083; Weintraub, Commentary on the Conflict of Laws (1971). We note that no case has been called to our attention, nor are we aware of one, which has discussed this problem in a context relevant to the case at bench.

2. Traditionally the search for choice of law rules focused upon the interests of the immediate parties to the action in terms of their private rights. Thus, it concentrated "upon the same factors that would be dispositive in a similar case wholly internal to a single state. I cannot escape the conclusion that a search so oriented must prove unrewarding. Every choice-of-law case involves several parties, each of whom would prevail if the interested law of one rather than another state were applied. Each party is 'right,' 'worthy,' and

originally took the position that in a true conflicts situation the law of the forum should always be applied. (Currie, Selected Essays on Conflicts of Laws (1963) p. 184.) However, upon further reflection, Currie suggested that when under the governmental interest approach a preliminary analysis reveals an apparent conflict of interest upon the forum's assertion of its own rule of decision, the forum should reexamine its policy to determine if a more restrained interpretation of it is more appropriate. "To assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of a local interest will conflict with that of a foreign state is a sound reason why the conception should be reexamined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose . . . . An analysis of this kind . . . was brilliantly performed by Justice Traynor in *Bernkrant v. Fowler* (1961) 55 Cal.2d 588, 12 Cal.Rptr. 266, 360 P.2d 906." (Currie, *The Disinterested Third State* (1963) 28 Law & Contemp. Prob., pp. 754, 757; see also Sedler in *Symposium, Conflict of Laws Round Table, supra*, 49 Texas L.Rev. 211, at pp. 224-225.) This process of reexamination requires identification of a "real interest as opposed to a hypothetical interest" on the part of the forum (Sedler, *Value of Principled Preferences*, 49 Texas L.Rev. 224) and can be approached under principles of "comparative impairment." (Baxter, *Choice of Law and the Federal System, supra*, 16 Stan.L.Rev. 1-22; Horowitz, *The Law of Choice of Law in California—A Restatement, supra*, 21 U.C.L.A.L.Rev. 719, 748-758.)

Once this preliminary analysis has identified a true conflict of the governmental interests involved as applied to the parties under the particular circumstances of the case, the "comparative impairment" approach to the resolution of such conflict seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. This analysis proceeds on the principle that true conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied. Exponents of this process of analysis emphasize that it is very different from a weighing process. The court does not " 'weigh' the conflicting governmental interests in the sense of determining which conflicting law manifested the 'better' or the 'worthier' social policy on the specific issue. An attempted balancing of conflicting state policies in that sense . . . is difficult to justify in the context of a federal system in which, within constitutional limits, states are empowered to mold their policies as they wish

'deserving' and 'ought in all fairness' to prevail under one of the competing bodies of law and in the view of one of the competing groups of lawmakers. Fact situations which differ only in that they are internal to a single state have been assessed by the different groups of lawmakers, and each has reached a different value judgment on the rule best calculated to serve the overall interest of its community. If attention is confined to the circumstances of the immediate parties, the conflict between the internal laws and between the value judgments they are intended to implement cannot be resolved by the judge unless he is prepared to impose still another value judgment upon the controversy. . . . [¶] These difficulties can be avoided if normative criteria can be found which relate to the very aspects of a conflicts case that distinguish it from an analogous internal case. That such criteria can be elaborated in many, if not all, conflicts cases has been demonstrated by several writers who have urged that conflicts cases be resolved on the basis of the governmental interests involved. . . . [¶] [T]he process of resolving choice cases is necessarily one of allocating spheres of legal control among states. His [Professor Currie] thesis, like mine, is that the process of allocation should not be performed unconsciously, that the private interests in choice cases are necessarily in balance, and that the cases can be decided by viewing them as instances of conflicting states interests rather than of conflicting private interests." (Baxter, *Choice of Law and the Federal System, supra*, 16 Stan.L.Rev. 1, 5, 6, 22, fn. omitted.)

. . . . [The process] can accurately be described as . . . accommodation of conflicting state policies, as a problem of allocating domains of law-making power in multi-state contexts—limitations on the reach of [1321] state policies as distinguished from evaluating the wisdom of those policies . . . . [E]mphasis is placed on the appropriate scope of conflicting state policies rather than on the 'quality of those policies . . . .'" (Horowitz, *The Law of Choice of Law in California—A Restatement*, *supra*, 21 U.C.L.A.L.Rev. 719, 753; see also Baxter, *Choice of Law and the Federal System*, *supra*, 16 Stan.L.Rev. 1, 18–19.) However, the true function of this methodology can probably be appreciated only casuistically in its application to an endless variety of choice of law problems. (See, e. g., the hypothetical situations set forth in *Baxter*, *op. cit.*, pp. 10-17.)

Although the concept and nomenclature of this methodology may have received fuller recognition at a later time, it is noteworthy that the core of its rationale was applied by Justice Traynor in his opinion for this court in *People v. One 1953 Ford Victoria* (1957) 48 Cal.2d 595, 311 P.2d 480. There in a proceeding to forfeit an automobile for unlawful transportation of narcotics we dealt with the question whether a chattel mortgage of the vehicle given in Texas and, admittedly valid both in that state and this, succumbed to the forfeiture proceedings. The purchaser of the car, having executed a note and chattel mortgage for the unpaid purchase price, without the consent of the mortgagee drove the vehicle to California where he used it to transport marijuana. Applicable California statutes made it clear that they did not contemplate the forfeiture of the interest of an innocent mortgagee, that is a person whose "interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged . . . ." Texas had no similar statute; nor had the mortgagee, though proving that the mortgage was bona fide, also proved that he had made the above reasonable investigation of the mortgagor.

It was clear that Texas had an interest in seeing that valid security interests created upon the lawful purchase of automobiles in Texas be enforceable and recognized. California had an interest in controlling the transportation of narcotics. Each interest was at stake in the case, since the chattel mortgage had been validly created in Texas and the car was used to transport narcotics in California. The crucial question confronting the court was whether the "reasonable investigation" required by statute of a California mortgagee applied to the Texas mortgagee. Employing what was in substance a "comparative impairment" approach, the court answered the question in the negative. "It is contended that a holding that the 'reasonable investigation' requirement is not applicable to respondent will subvert the enforcement of California narcotics laws. We are not persuaded . . . that such dire consequences will ensue. The state may still forfeit the interest of the wrongdoer. It has done so in this case. Moreover, the Legislature has made plain its purpose not to forfeit the interests of innocent mortgagees. It has not made plain that 'reasonable investigation' of the purchaser is such an essential element of innocence that it must be made even by an out-of-state mortgagee although such mortgagee could not reasonably be expected to make such investigation." (*Id.* 48 Cal.2d at p. 599, 311 P.2d at p. 482.)

[6] Mindful of the above principles governing our choice of law, we proceed to examine the California policy underlying the imposition of civil liability upon tavern keepers. At its broadest limits this policy would afford protection to all persons injured in California by intoxicated persons who have been sold or furnished alcoholic beverages while intoxicated regardless of where such beverages were sold or furnished. Such a broad policy would natu-

ally embrace situations where the intoxicated actor had been provided with liquor by out-of-state tavern keepers. Although the State of Nevada does not impose such civil liability on its tavern keepers, nevertheless they are subject to *criminal* penalties under a statute making it unlawful to sell or give intoxicating liquor to any person who is drunk or known to be an habitual drunkard. (See Nev.Rev.Stats. 202.-30), see *Hamm v. Carson City Nuggett, Inc., supra*, 85 Nev. 99, 450 P.2d 358.)

We need not, and accordingly do not here determine the outer limits to which California's policy should be extended, for it appears clear to us that it must encompass defendant, who as alleged in the complaint, "advertis[es] for and otherwise solicit[s] in California the business of California residents at defendant HARRAH'S CLUB Nevada drinking and gambling establishments, knowing and expecting said California residents, in response to said advertising and solicitation, to use the public highways of the State of California in going and coming from defendant HARRAH'S CLUB Nevada drinking and gambling establishments." Defendant by the course of its chosen commercial practice has put itself at the heart of California's regulatory interest, namely to prevent tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California in the intoxicated state. It seems clear that California cannot reasonably effectuate its policy if it does not extend its regulation to include out-of-state tavern keepers such as defendant who regularly and purposely sell intoxicating beverages to California residents in places and under conditions in which it is reasonably certain these residents will return to California and act therein while still in an intoxicated state. California's interest would be very significantly impaired if its policy were not applied to defendant. 1 323

Since the act of selling alcoholic beverages to obviously intoxicated persons is already proscribed in Nevada, the application of California's rule of civil liability would not impose an entirely new duty requiring the ability to distinguish between California residents and other patrons. Rather the imposition of such liability involves an increased economic exposure, which, at least for businesses which actively solicit extensive California patronage, is a foreseeable and coverable business expense. Moreover, Nevada's interest in protecting its tavern keepers from civil liability of a boundless and unrestricted nature will not be significantly impaired when as in the instant case liability is imposed only on those tavern keepers who actively solicit California business.[3]

Therefore, upon reexamining the policy underlying California's rule of decision and giving such policy a more restrained interpretation for the purpose of this case pursuant to the principles of the law of choice of law discussed above, we conclude that California has an important and abiding interest in applying its rule of decision to the case at bench, that the policy of this state would be more significantly impaired

1. Defendant asserts that Nevada's law must be applied because it is the law of the place of sale and cites three cases in support of that proposition, *Trapp v. 5-10 Investment Corporation* (1970) 8 Cir., 424 F.2d 1261; *Zucker v. Vogt* (1961) D.C.Conn., 200 F.Supp. 340; and *Schmidt v. Driscol Hotel* (1937) 249 Minn. 376, 82 N.W.2d 365. It is true that all three cases applied the law of the place of sale of the alcohol, but not for that reason. In *Trapp* and *Zucker* all the states involved had dram shop acts which would permit civil liability and the federal courts determined that the applicable forum state would give effect to the common policy of liability for sale to intoxicated persons regardless of traditional tort conflict rules. *Schmidt* is the only case where one state, Wisconsin, did not have a dram shop act and the other state, Minnesota, did. However, in that case even though the injury occurred in Wisconsin, the alcohol was sold and consumed in Minnesota and all the parties involved were from Minnesota. Moreover, none of these cases involved a case of true conflict between two state interests where the court endeavored to resolve the conflict by resort to the principles of governmental interest analysis. They are therefore inapposite.

if such rule were not applied and that the trial court erred in not applying California law.

Defendant argues, however, that even if California law is applied, the demurrer was nonetheless properly sustained because the tavern keeper's duty stated in *Vesely v. Sager, supra,* 5 Cal.3d 153, 95 Cal.Rptr. 623, 486 P.2d 151, is based on Business and Professions Code section 25602, which is a criminal statute and thus without extraterritorial effect. It is quite true, as defendant argues, that in *Vesely* we determined "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 forth in Evidence Code section 669, subdivision (a) is established." (5 Cal.3d at p. 157, 95 Cal.Rptr. at p. 625, 486 P.2d at p. 153.)

[7] It is also clear, as defendant's argument points out, that since, unlike the California vendor in *Vesely,* defendant was a Nevada resident which furnished the alcoholic beverage to the Myers in that state, the above California statute had no extraterritorial effect and that civil liability could not be posited on defendant's violation of a California criminal law. We recognize, therefore, that we cannot make the same determination as quoted above with respect to defendant that we made with repect to the defendant vendor in *Vesely.*

However, our decision in *Vesely* was much broader than defendant would have it. There, at the very outset of our opinion, we declared that the traditional common law rule denying recovery on the ground that the furnishing of alcoholic beverage is not the proximate cause of the injuries inflicted on a third person by an intoxicated individual "is patently unsound." (5 Cal.3d at p. 157, 95 Cal.Rptr. 623, 486 P.2d 151.) Observing that "[u]ntil fairly recently, it was uniformly held that [such] an action could not be maintained at common law" (*id.* 5 Cal.3d at p. 158, 95 Cal.Rptr. at p. 627, 486 P.2d at p. 155) and reviewing in detail the common law rule (*id.* 5 Cal.3d at pp. 158-164, 95 Cal.Rptr. at p. 631, 486 P.2d at p. 159) we concluded 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." We reasoned: "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 which makes such furnishing negligent." (*Id.* 5 Cal.3d at p. 164, 95 Cal. Rptr. at p. 627, 486 P.2d at p. 155.)

Proceeding to the question of the tavern keeper's duty in this respect and rejecting his contention that civil liability for tavern keepers should be left to future legislative action, we noted that "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 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." (5 Cal.3d at p. 166, 95 Cal. Rptr. at p. 632, 486 P.2d at p. 160.)

[8] In sum, our opinion in *Vesely* struck down the old common law rule of nonliability constructed on the basis that the consumption, not the sale, of alcoholic beverages was the proximate cause of the injuries inflicted by the intoxicated person. 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. Certainly, we said nothing in *Vesely* indicative of an intention to retain

the former rule that an action at common law does not lie. The fact then, that in the case at bench, section 25602 of the Business and Professions Code is not applicable to this defendant in Nevada so as to warrant the imposition of civil liability on the basis of its violation, does not preclude recovery on the basis of negligence apart from the statute. Pertinent here is our observation in *Rowland v. Christian* (1968) 69 Cal.2d 108, 118–119, 70 Cal.Rptr. 97, 104, 443 P.2d 561, 568: "It bears repetition that the basic policy of this state set forth by the Legislature in section 1714 of the Civil Code is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property."

The judgment is reversed and the cause is remanded to the trial court with directions to overrule the demurrer and to allow defendant a reasonable time within which to answer.

WRIGHT, C. J., and McCOMB, TOBRINER, MOSK, CLARK and MOLINARI, JJ.*, concur.

Rehearing denied; RICHARDSON, J., did not participate.

546 P.2d 727

16 Cal.3d 341

[Sup] Bertram S. GRIGGS, as Superintendent, etc., Petitioner,

v.

The SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent;

Robert B. HEDBERG et al., Real Parties in Interest.

L. A. 30524.

Supreme Court of California, In Bank.

March 3, 1976.

Superintendent of the California institution for men sought writ of mandate to compel respondent superior court to quash orders to show cause and to dismiss proceedings in each of matters wherein real parties in interest, while inmates at institution, made applications for habeas corpus relief. The Supreme Court, Wrig[illegible], C. J., held that 1966 constitutional revision eliminated territorial limitation on power of superior court to entertain petition for habeas corpus relief; that Supreme Court could provide rules of judicial procedure to be followed by superior courts in exercise of that unlimited jurisdiction; that generally where habeas corpus challenge is to particular judgment or sentence, petition should be transferred to court which rendered judgment; that if habeas corpus challenge is to conditions of inmate's confinement, petition should be transferred to superior court of county wherein inmate is confined; and that habeas corpus claim that Department of Corrections' records erroneously reflected prior conviction which precluded inmate from assignment to work camp could properly be heard by superior court wherein inmate was confined when his petition was filed.

Petition for peremptory writ denied.

McComb J., concurred in part and dissented in part with opinion.

Opinion, 50 Cal.App.3d 738, 123 Cal. Rptr. 583, vacated.

1. Courts ⇐24
Stipulations ⇐3

Parties to judicial proceeding cannot, either jointly or severally, effectively stipulate or concede that court either has or lacks jurisdiction to act in particular matter.

2. Constitutional Law ⇐14

Court is obligated to accord reasonable meaning to revision of any constitutional provisio .

3. Habeas Corpus ⇐48

Constitutional revision of 1966 eliminated territorial limitation on power of a superior court to entertain petitions for ha-

* Assigned by the Chairman of the Judicial Council.

which caused the accident had been transferred to Strong pursuant to a contract of sale, it is clear that the language of the endorsement specifically excludes Strong from the class of persons insured under such endorsement.

Fourth: In summary, the insurance contract without the Garage Endorsement clearly covers the accident and insures Strong to its limits of $250,000 and $500,000. The accident falls within the defined hazards of the endorsement; but Strong is excluded as a person insured because he took possession under a contract of sale. However, it is not clear what effect Strong's exclusion from coverage under the endorsement was intended to have upon his coverage under the general policy. As discussed in the majority opinion (see mimeo opn. pp. 10–11), the policy is ambiguous as to whether the exclusion from the endorsement is meant to exclude Strong *only* from coverage under the endorsement or to exclude him from coverage under *both* the general policy *and* the endorsement.

Under settled principles, this ambiguity must be resolved in favor of the insured. (Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 269, 54 Cal.Rptr. 104, 419 P.2d 168.) Therefore, I am of the view that Strong is excluded only from coverage under the endorsement; he continues to be covered under the general provisions of the policy.[5] Consequently, I agree with the majority that the appropriate policy limits are $250,000 per person and $500,000 per accident, and that the judgment must be affirmed.

WRIGHT, C. J., and PETERS, J., concur.

5. Since I find that Strong was covered under the basic insuring agreements of the policy, I find it unnecessary to discuss the applicability of the Comprehensive Liability Policy—General Automobile Endorsement (UU 3050). That endorsement applies only where the policy is certified as proof of financial responsibility or where a person not insured under the terms of the policy becomes an insured by operation of a financial responsibility law. Neither condition exists in the present case; hence, the UU 3050 endorsement is inapplicable.

486 P.2d 151
5 Cal.3d 153

Miles A. VESELY, Plaintiff and Appellant, 153

v.

William A. SAGER, Defendant and Respondent.

L. A. 29836.

Supreme Court of California, In Bank.

June 24, 1971.

Injured motorist brought action against tavern owner and others for injuries sustained when motorist's automobile was struck by automobile driven by allegedly intoxicated tavern patron. The Superior Court, San Bernardino County, A. D. Mitchell, J., dismissed the complaint as to the tavern owner and the motorist appealed. The Supreme Court, Wright, C. J., held that motorist was within the class of persons for whose protection statute which makes it a misdemeanor to sell liquor to an intoxicated person was enacted and the injuries motorist suffered resulted from occurrence that statute is designed to prevent thereby fastening liability upon tavern owner in event of adequate proof.

Reversed.

Opinion in 11 Cal.App.3d 1104, 90 Cal. Rptr. 387, vacated.

1. Appeal and Error ⇐102, 103

Order sustaining demurrer without leave to amend and order granting motion to strike are nonappealable.

2. Appeal and Error ⇐422

Although plaintiff's notice of appeal stated that the same was from nonappealable order sustaining demurrer without leave to amend and granting motion to strike, where trial court, after notice of appeal was filed, entered order dismissing

action as to defendant and no prejudice would accrue to defendant, Supreme Court would treat notice of appeal as applying to order dismissing action and would treat notice as having been filed after entry of order of dismissal. West's Ann.Bus. & Prof.Code, § 25602; West's Ann.Code Civ. Proc. § 437c.

3. Negligence ⇐56(1.9), 62(3)

Actor may be liable if his negligence is a substantial factor in causing injury and he is not relieved of liability because of intervening act of third person if such act was reasonably foreseeable at time of his negligent conduct.

4. Intoxicating Liquors ⇐291

Furnishing of alcoholic beverage to intoxicated person may be proximate cause of injuries inflicted by that individual upon a third person, and if furnishing is a proximate cause it is because consumption, resulting intoxication, and injury producing conduct are foreseeable intervening causes, or at least injury producing conduct is one of the hazards which makes such furnishing negligence.

5. Negligence ⇐2

Duty of care and attendant standard of conduct required of a reasonable man may be found in legislative enactment which does not provide for civil liability.

6. Negligence ⇐121(1)

Presumption of negligence arises from violation of statute which was enacted to protect class of persons of which plaintiff is a member against type of harm which plaintiff suffered as a result of violation of statute. West's Ann.Evid.Code, § 669.

7. Intoxicating Liquors ⇐161

Statute making person who sells or furnishes alcoholic beverages to any habitual or common drunkard or to any obviously intoxicated person guilty of misdemeanor is enacted for the purpose of protecting members of general public from injuries to person and danger to property resulting from excessive use of intoxicating liquor. West's Ann.Bus. & Prof.Code, §§ 23001, 25602.

8. Intoxicating Liquors ⇐283

Motorist on highway whose vehicle was struck by an allegedly intoxicated driver to whom defendant tavern owner had sold liquor was within the class of persons for whose protection statute which makes it a misdemeanor to sell liquor to an intoxicated person was enacted and the injuries plaintiff driver suffered resulted from occurrence that statute is designed to prevent, thereby fastening liability on tavern owner in event of proper proof. West's Ann.Bus. & Prof.Code, § 25602.

9. Intoxicating Liquors ⇐308

If defendant tavern owner sold liquor to patron who was in an intoxicated condition, patron drove from tavern and veered across to other lane of highway and struck automobile operated by plaintiff who was injured as a result of collision, sale was in violation of statute making sale of liquor to intoxicated persons a misdemeanor and the violation proximately caused plaintiff's injuries, a presumption would arise that tavern owner was negligent in furnishing alcoholic beverages to patron. West's Ann. Bus. & Prof.Code, § 25602; West's Ann. Evid.Code, § 669(a).

10 Intoxicating Liquors ⇐306

Complaint of motorist asserting that defendant tavern owner sold liquor to intoxicated patron in violation of statute and that such patron then drove from tavern and veered into wrong lane of highway and struck plaintiff's automobile resulting in injuries to plaintiff was sufficient to state a cause of action against tavern owner. West's Ann.Bus. & Prof.Code, § 25602; West's Ann.Evid.Code, § 669(a).

11. Intoxicating Liquors ⇐308

Statute making it a misdemeanor to furnish or sell liquor to an intoxicated person is a statute to which the statutory presumption of a failure of a person to exercise due care arising from violation of statute, ordinance or regulation of public entity applies. West's Ann.Bus. & Prof. Code, § 25602; West's Ann.Evid.Code, § 669(a).

12. Pleading ⇐360(1, 3), 365(1)

A "speaking motion" to dismiss or strike is one which is supported by facts outside the pleadings and such facts are ordinarily set forth in affidavit or declaration.

See publication Words and Phrases for other judicial constructions and definitions.

13. Judgment ⇐183

Nonstatutory speaking motion to strike or dismiss allegations of complaint would be treated as a motion for summary judgment. West's Ann.Code Civ.Proc. § 437c.

14. Judgment ⇐185.1(4)

Statements of defendant tavern owner, sued by injured motorist operating vehicle struck by allegedly intoxicated tavern patron, to effect that his codefendants were not in his employment on the date of accident and that he had no ownership interest or any other interest in the vehicle being driven by defendant were not mere conclusions of law as contended by plaintiff claiming error in granting defendant tavern owner's motion to strike as a sham, treated as a motion for summary judgment, that portion of complaint alleging that patron was driving automobile with the consent of the other defendants who were agents and employee of the others acting within scope of agency and employment, and plaintiff could not rely on allegations of his complaint to controvert statements in defendant's declaration.

15. Judgment ⇐185.2(9)

Failure of opposing party to file counter-affidavits or declaration does not relieve party moving for summary judgment of burden of establishing evidentiary facts of every element necessary to entitle him to a judgment.

16. Judgment ⇐185.3(21)

Defendant tavern owner, sued by motorist for injuries sustained when motorist's automobile was struck by vehicle being driven by allegedly intoxicated tavern patron, through the filing of his declaration that his codefendants were not in his employment on date of accident and that he had no ownership interest or any other interest in vehicle being driven by patron failed to discharge burden of establishing evidentiary facts entitling him to summary judgment with respect to causes of action based on theories of respondeat superior or the imputed negligence provisions of Vehicle Code. West's Ann.Vehicle Code, §§ 17150 et seq., 17154.

Hafif & Shernoff and Stephen L. Odgers, Claremont, for plaintiff and appellant.

Murchison, Cumming, Baker & Velpmen and Ronald R. McQuoid, Los Angeles, for defendant and respondent.

WRIGHT, Chief Justice. 157

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 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.)

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 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 of exercising the same degree
1158 of volitional control over his consumption 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 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 accident" and that he never had any ownership interest or any other interest in the automobile driven by O'Connell.

[1,2] 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]

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. 389, 411 P.2d 108; Stigall v. City of Taft (1962) 58 Cal.2d 565, 567–568, 25 Cal.Rptr. 441, 375 P.2d 289.

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, 62 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 (1969) 183 Cal.App.2d 798, 799, 6 Cal.Rptr. 877; 3 Witkin, Cal.Procedure, 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 63, 68-69, 48 Cal.Rptr. 886, 410 P.2d 350; 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 Smith, Inc. (1969) 272 Cal.App.2d 334,

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 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; State for Use of 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; 45 Am.Jur.2d, Intoxicating 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, 104 P.2d 147.) 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.

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 Railway Company (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 defendant's 160
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 whiskey to the plaintiff would come nearer being a proximate cause of the injury than the ejection from the railway train. • • • [Y]et 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,

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. 609-610, 323 P.2d 158.)

1. 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), or after repeated warnings not to furnish alcoholic beverages to such spouse (Swanson v. Ball (1940) 67 S.D. 91, 290 N.W. 482). It has also been [illegible] 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 Or. 92, 35 P.2d 6[illegible].) 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 Strob.) 525.)

§ 421; Cruse v. Aden, 127 Ill. 231, 234, [20 N.E. 73, 3 L.R.A. 327]." (186 Cal. at p. 384, 199 P. at p. 525.)

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 [illegible] 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 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 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, 143 P.2d at p. 955.)

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 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, 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 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, 289 P.2d at p. 457.) 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.

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 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. denied 362 U.S. 903, 80 S.Ct. 611, 4 L.Ed.2d 554; Deeds v. United States (D.Mont.1969) 306 F.Supp. 348; Prevatt v. McClennan (Fla.Dist.Ct.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.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 (Sup.Ct.1965) 47 Misc. 2d 381, 262 N.Y.S.2d 290; Jardine v. Upper Darby Lodge No. 1973, Inc. (1964) 413 Pa. 626, 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; Ramsey v. Anctil (1965) 106 N.H. 375, 211 A.2d 900. Contra, Carr v. Turner (Ark.1965) 385 S.W.2d 656; Hull v. Rund (1962) 150 Colo. 425, 374 P.2d 351; Cowman v. Hansen (1958) 250 Iowa 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 Bar (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, 156 A.2d 1. In *Waynick* the plaintiffs, residents of Michigan, brought an action for personal injuries against three 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 of alcoholic liquor 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 "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 to a person

163 he knows or should know 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, 156 A.2d at p. 8.) 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 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, 156 A.2d at p. 9.) 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 and intervening cause are left to the jury for its factual determination." (*Id.* at p. 203, 156 A.2d at p. 9.) 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 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.

[3] 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. Hamm (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 (1945) 26 Cal.2d 213, 218, 157 P.2d 372; Stasulat v. Pacific Gas & Elec. Co. (1937) 8 Cal.2d 631, 637, 67 P.2d 678; Prosser, Proximate Cause in California (1950) 38 Cal.L.Rev. 369.) 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, 13 Cal.Rptr. 521, 362 P.2d 345; Richardson v Hamm, supra, 44 Cal.2d at p. 777, 285 P.2d 269; 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, supra, 26 Cal.2d at p. 218, 157 P.2d 372; 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.) 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 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, 60 Cal.Rptr. 510, 430 P.2d 68; Richardson v. Hamm, supra, 44 Cal.2d 772, at p. 777, 285 P.2d 269; McEvoy v. American Pool Corp., supra, 32 Cal.2d 295 at p. 299, 195 P.2d 783.)

[4] 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. 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 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, 6] 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, 172 P.2d 1; 2 Witkin, Summary of Cal. Law (1960) Torts, § 234.) 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 District (1947) 29 Cal.2d 581, 177 P.2d 279.) The Legislature has recently codified this presumption with the adoption of Evidence Code section 669: "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." 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 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, 217 N.E.2d 847; Rapaport v. Nichols, supra, 31 N.J. 188, at p. 202, 156 A.2d 1.)

[8-10] From the facts alleged in the complaint it appears that plaintiff is within

the class of persons for 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
166 to an injured third person is 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 16000-16053 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.

[11] Defendant's argument 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 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 valdiity 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. (196.) 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 it applies.*" (Emphasis added; Cal.Law Revision Com.Rep. p. 109; see, Evid.Code, § 605.) 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. & Prof. 167 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.

For the reasons discussed herein, we overrule Cole v. Rush (1955) 45 2d 345, 289 P.2d 450 and Lammers v. Pacific Electric Railway Company (1921) 186 Cal.

379, 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 Hutson v. Dwyer (1943) 61 Cal.App.2d 803, 143 P.2d 952.

Motion to Strike

Plaintiff contends that the trial court erred in granting 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.

[12] 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 a "speaking motion,"[4] 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, 502.) In Pianka v. State of California (1956) 46 Cal.2d 208, 211, 293 P.2d 458, 461, 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." 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] 1168

Defendant relies upon Lincoln v. Didak, supra, 162 Cal.App.2d 625, 328 P.2d 498, 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.

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. 108.) Such facts ordinarily are set forth in an affidavit or declaration. (See Lincoln v. Didak, supra, 162 Cal.App.2d 625 at p. 630, 328 P.2d 498; 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, 311 P.2d 8, 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."

[13] The conclusions reached by the court in *Lincoln* lack support.[7] The court's 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, 311 P.2d 8, decided nearly two years after the enactment of section 435,[8] we emphasized the continuing validity of our decision in *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] 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]

[14] 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. In addition, plaintiff cannot rely upon the allegations of his verified complaint to controvert the statements in defendant's declaration. (See Coyne v. Krempelo (1950) 36 Cal.2d 257, 263, 223 P.2d 244; 2 Witkin, Cal. Procedure, § 78, p. 1715.)

[15] Nevertheless, defendant's declaration is insufficient to warrant summary judgment. The standards for determining when summary judgment should be granted were reiterated by this court in Stationers Corp. v. Dun & Bradstreet, Inc.

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 spenking motion to dismiss or strike a complaint as a motion for summary judgment. (See Hosking v. Spartan Properties Inc. (1969) 275 Cal.App.2d 152, 154–156, 79 Cal.Rptr. 893; Triodyne, Inc. v. Superior Court (1968) 240 Cal.App.2d 536, 542–543, 49 Cal.Rptr. 717; Auberry Union School District v. Rafferty (1964) 226 Cal.App.2d 599, 603, 38 Cal.Rptr. 223; Lerner v. Ehrlich, supra, 222 Cal.App.2d 171–172, 35 Cal.Rptr. 106; Vallejo v. Montebello Sewer Co. (1963) 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 p. 614, fn. 2, 311 P.2d 8, and the various decisions of the Courts of Appeal following those two cases, Witkin reports that the use of nonstatutory 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, 311 P.2d 8, 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, 311 P.2d 8.)

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." (34 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. 1120.)

(1965) 62 Cal.2d 412, 417, 42 Cal.Rptr. 449, 452, 398 P.2d 785, 788: "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." 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 Company (1966) 240 Cal.App.2d 173, 175, 49 Cal.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 (1967 Supp.) § 78, p. 626.) Defendant, through the filing of his declaration, has failed to discharge this burden.

[16] 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 54, 139 P.2d 645.) 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 interest in a vehicle (see Veh.Code, § 17154 (negligence of operator imputed to bailee); Friedenthal, Imputed Contributory Negligence (1964) 17 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.

McCOMB, PETERS, TOBRINER, MOSK, BURKE and SULLIVAN, JJ., concur.

486 P.2d 163
5 Cal.3d 229

GENERAL MOTORS CORPORATION, Plaintiff and Appellant,

v.

CITY OF LOS ANGELES, Defendant and Respondent.

L. A. 29762, 29763.

Supreme Court of California, In Bank.

June 28, 1971.

Rehearing Denied July 28, 1971.

Actions by automobile manufacturer against city for refund of business privilege license taxes paid. The Superior Court, Los Angeles County, Robert W. Kenny, J., entered summary judgments in favor of city and manufacturer appealed. The Supreme Court, Sullivan, J., held that imposition of business privilege tax with respect to gross receipts from sales of automobiles assembled within city and shipped to dealers outside city pursuant to orders placed at in-city or out-of-city zone offices did not result in taxation of significant extraterritorial values on theory that automobiles were not "wholly manufactured" within city, but the inclusion of unapportioned gross receipts from sales of automobiles assembled outside city and shipped to

(*Ferguson v. Keays* (1971) 4 Cal.3d 649, 654, 94 Cal.Rptr. 398, 484 P.2d 70), this holding in the majority opinion and in *Gilbert, supra*, should not stand.

577 P.2d 669
21 Cal.3d 144

[144] James Stewart COULTER et al., Petitioners,

v.

The SUPERIOR COURT OF SAN MATEO COUNTY, Respondent;

SCHWARTZ & REYNOLDS & CO. et al., Real Parties in Interest.

S.F. 23667.

Supreme Court of California, In Bank.

April 26, 1978.

Passenger who was injured in automobile accident brought action against owner and manager of apartment complex in which the motorist had consumed intoxicating liquors prior to the accident. The defendant's demurrers were sustained and the passenger sought mandamus. The Supreme Court, Richardson, J., held that: (1) under both the Business and Professions Code and common-law principles, a social host who furnishes alcoholic beverages to an obviously intoxicated person, under circumstances which created reasonably foreseeable risk of harm to others, may be held legally accountable to those third persons who were injured when that harm occurs, and (2) count of complaint which merely alleged that the apartment owners permitted the motorist to drink on the premises and that the apartment manager, in some unspecified manner, aided and encouraged the motorist to drink to excess did not set forth a basis for imposing liability.

Writ issued.

Mosk, J., concurred and filed an opinion in which Bird, C. J., concurred.

Newman, J., concurred in part and dissented in part.

Clark, J., dissented in part.

1. Mandamus ⇐39

Mandamus was available to review orders sustaining demurrers without leave to amend where trial would be required on remaining causes of action and granted mandamus might prevent a needless and expensive trial followed by reversal and retrial. (Per Richardson, J., with two Justices concurring, two Justices concurring specially and one Justice concurring in part.)

2. Intoxicating Liquors ⇐299

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. (Per Richardson, J., with two Justices concurring, two Justices concurring specially, and one Justice concurring in part.) West's Ann.Bus. & Prof.Code, § 25602.

3. Negligence ⇐59

A person is liable for the foreseeable injuries caused by his failure to exercise reasonable care. (Per Richardson, J., with two Justices concurring, two Justices concurring specially, and one Justice concurring in part.)

4. Negligence ⇐136(2)

The existence of a duty of reasonable care is primarily a question of law and is dependent upon a variety of relevant factors, of which foreseeability of the risk is a primary consideration. (Per Richardson, J., with two Justices concurring, two Justices concurring specially, and one Justice concurring in part.)

5. Intoxicating Liquors ⇐288

Service of alcoholic beverages to an obviously intoxicated person by one who

knows that the intoxicated person intends to drive a motor vehicle creates a reasonably foreseeable risk of injury to those on the highway; one who serves alcoholic beverages under such circumstances fails to exercise reasonable care. (Per Richardson, J., with two Justices concurring, two Justices concurring specially, and one Justice concurring in part.)

6. Intoxicating Liquors ⇐295

The term "obviously intoxicated" is not too broad or subjective to serve as a satisfactory measure for imposition of civil liability on one who serves intoxicating liquors to a person who is obviously intoxicated and who later injured a third party; the use of intoxicating liquors by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are "plain" and "easily seen or discovered;" if those manifestations exist and the seller still serves a customer, he has violated the law whether because of his failure to observe what is plain and easily seen or discovered or because, having observed, he ignored that which was apparent. (Per Richardson, J., with two Justices concurring, two Justices concurring specially, and one Justice concurring in part.)

See publication Words and Phrases for other judicial constructions and definitions.

7. Intoxicating Liquors ⇐306

Complaint which alleged that owners of apartment permitted motorist to drink on their premises and that the apartment manager, in some unspecified manner, "aided, abetted, participated and encouraged" the motorist to drink to excess did not assert that the owner or manager or their agents actually furnished liquor to the motorist and thus did not provide a basis for imposition of liability on the owner or manager for injuries received by a passenger riding with the motorist following his consumption of liquor on the apartment premises. (Per Richardson, J., with two Justices concurring, two Justices concurring specially, and one Justice concurring in part.) West's Ann.Bus. & Prof.Code, § 25602.

8. Intoxicating Liquors ⇐306

Complaint which alleged only that motorist consumed large amounts of alcoholic beverages in recreation room in apartment complex and that the apartment owners permitted the motorist to drink on the premises and that the apartment manager somehow aided and encouraged the motorist to drink to excess did not provide any basis for finding that the owners or the manager had any special relationship with either the motorist or with a passenger in his automobile so that liability for injuries received by the passenger in an automobile collision after the motorist consumed the alcohol could not be imposed upon the manager or the owners on the basis of their failure to control the conduct of the motorist. (Per Richardson, J., with two Justices concurring, two Justices concurring specially, and one Justice concurring in part.)

Dahl, Hefner, Stark & Marois, C. Afton Moore, III, Sacramento, and Judy R. Campos, Davis, for petitioners.

No appearance for respondent.

Thornton, Taylor & Downs and Jerome F. Downs, San Francisco, for real parties in interest.

[1] RICHARDSON, Justice. [147]

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 imposed on those who furnish intoxicating liquors, and discuss the reasons for our adoption of the foregoing principle.

In the first cause of action of his complaint, plaintiff James Coulter alleged that

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 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 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.

[1] Defendants' demurrers to the first and second causes of action were sustained without leave to amend. Plaintiffs seek mandate from us to compel the trial court to overrule the demurrers and proceed to trial on all causes of action. 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, fn. 4, 373 P.2d 439, fn. 4), 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, fn. 4, 475 P.2d 441, fn. 4). In the matter before us mandamus is available as a remedy and we inquire into the propriety of the trial court's ruling.

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.) Our courts reasoned that "it is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use . . . ." (*Id.*, at p. 356, 289 P.2d at p. 457.) 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 "[I]t 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 which makes such furnishing negli-

g nt." (*Id.*, at p. 164, 95 Cal.Rptr. at p. 631, 486 P.2d at p. 159.)

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 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, 95 Cal.Rptr. 623, 486 P.2d 151; 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, 95 Cal.Rptr. at p. 625, 486 P.2d at p. 153.) 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 s... 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 [1150] foreseeable danger or risk of injury to third persons. We examine more closely the statutory and common law bases for our conclusion.

1. *Business and Professions Code Section 25602*

[2] 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 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 of similar statutory language supports the foregoing conclusion. Construing section 25602, the appellate court in *Coffman v. Kennedy*

(1977), 74 Cal.App.3d 28, 36-37, 141 Cal. Rptr. 267, reached a parallel result. The *Coffman* court reviewed cases from other [151] 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, 141 Cal.Rptr. p. 272.)

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; but see *Elgar v. Kajet* (1975), 84 Misc.2d 100, 375 N.Y.S.2d 548, 551-552, affd. 55 A.D.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.

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, 95 Cal.Rptr. at p. 631, 486 P.2d at p. 159); and (2) the noncommercial supplier's civil liability for a violation of section 25602 remained an open question (*id.*, at p. 157, 95 Cal.Rptr. 623, 486 P.2d 151). We think it of some, but not controlling, significance that, following *Vesely*, the Legislature has failed to amend section 25602 to exclude such liability.

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 § 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, 95 Cal.Rptr. 623, 486 P.2d 151.) [152]

For all of the foregoing reasons, we conclude 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*

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, 95 Cal.Rptr. 623, 486 P.2d 151.) However, as we recently explained in *Bernhard v. Harrah's Club* (1976), 16 Cal.3d 313, 128 Cal.

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, 128 Cal.Rptr. at p. 222, 546 P.2d at p. 726, italics added.)

[3–5] 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 v. Christian* (1968), 69 Cal.2d 108, 112, 70 Cal.Rptr. 97, 443 P.2d 561; *Dillon v. Legg* (1968) 68 Cal.2d 728, 739, 69 Cal.Rptr. 72, 441 P.2d 912; see Civ.Code, § 1714.) Although we have, on occasion, described the foregoing rule as having civil rather than common law origins (*Rowland*, supra, 69 Cal.2d at p. 112, 70 Cal.Rptr. 97, 443 P.2d 561), the principle has most frequently been expressed in the negligence formulation that the defendant owes the plaintiff a "duty" of reasonable care. 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, 471, 539 P.2d 36, 39.) 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. (See *Vesely*, 5 Cal.3d at p. 164, 95 Cal.Rptr. 623, 486 P.2d 151.) Simply put, one who serves alcoholic beverages under such circumstances fails to exercise reasonable care.

We have previously 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, 69 Cal.2d at p. 113, 70 Cal.Rptr. at p. 100, 443 P.2d at p. 564)

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. Where such circumstances exist, as are herein alleged, it is not difficult to discern a close connection between defendant's conduct and the injury suffered by plaintiffs. (E. g., *Alcorn v. Anbro Engineering, Inc.* (1970), 2 Cal.3d 493, 496, 86 Cal.Rptr. 88, 468 P.2d 216.) 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.

Finally, we do not conclude that the burden upon the noncommercial suppliers of intoxicating beverages and the consequences to the community of imposing civil

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 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." ((July 11, 1977) U.S. News and World Report, at p. 33.) In the light of the 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.

[6] 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. of 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 seen or discovered.' If such outward manifestations exist and the seller still serve 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, 185 P.2d at p. 106, 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.

[7] We conclude that defendants' demurrer was improperly sustained as to plaintiffs' first cause of action. 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 (2) defendant Montgomery (the apartment manager), in some unspecified manner,

"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* (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 Or. 632, 485 P.2d 18, 22 [no liability for merely providing a room where alcoholic beverages are served].)

[8] 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 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.

TOBRINER and MANUEL, JJ., concur.

MOSK, Justice, concurring.

I concur.

While I agree with the underlying scheme 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 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.

BIRD, C. J., concurs.

NEWMAN, Justice, concurring and dissenting.

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 second cause, should never be included or that individuals who allegedly "participated

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, Justice, dissenting.

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, 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]

577 P.2d 677
21 Cal.3d 158

[158] The PEOPLE, Plaintiff and Respondent,

v.

Henry M. FOGELSON, Defendant and Appellant.

Cr. 19823.

Supreme Court of California.

April 26, 1978.

Defendant was convicted in the Municipal Court, of Los Angeles, Sidney A. Cherniss, Jr., J., of soliciting contributions on public property without a permit, and he appealed. The Supreme Court, Bird, C. J., held that the ordinance imposed an impermissible restriction on free speech and the free exercise of religion, and was invalid on its face, where it gave administrative officials unlimited discretion to prevent or deny permission to engage in constitutionally protected forms of solicitation.

Reversed.

Mosk, J., concurred and filed opinion in which Clark, J., joined.

1. Municipal Corporations ⇐121

Defendant, convicted of violating ordinance prohibiting solicitation of contributions on city property without permit, had standing to challenge constitutionality of such ordinance despite his failure to apply for permit thereunder. U.S.C.A.Const. Amend. 1.

2. Constitutional Law ⇐47

While individual charged with violating law or regulation may attack constitutionality thereof only as it applies to facts of his or her case, court may consider measure as it applies to others when law or regulation is challenged on its face as substantially encroaching upon First Amendment protected activity. U.S.C.A.Const. Amend. 1.

3. Constitutional Law ⇐90.1(4)

Ordinance prohibiting solicitation on city property was not free from constitutional attack for facial overbreadth on ground that it did not on its face purport to regulate First Amendment activity where, in fact, ordinance attempted to regulate virtually all forms of solicitation, many of which constituted First Amendment protective activity. U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⇐84, 90(3)

Test of regulation's overbreadth turns on extent to which it lends itself to improper application to protected conduct, not whether it explicitly refers to speech or religion. U.S.C.A.Const. Amend. 1.

5. Constitutional Law ⇐90.1(1)

Although commercial speech has not traditionally enjoyed constitutional protection, commercial solicitation or promotion of constitutionally-protected written works is protected as incident to First Amendment

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

Alaska State Legislature

SENATOR MIKE COLLETTA

SENATE FLOOR LEADER

Senate

MEMORANDUM APRIL 12, 1979

TO: SENATOR ZIEGLER

FROM: SENATOR COLLETTA

ATTACHED PLEASE FIND CORRESPONDENCE WE HAVE RECEIVED REGARDING THE LIABILITY QUESTION RAISED IN SENATE BILL 115.

P.O. BOX 3168, ANCHORAGE 99501 • POUCH V JUNEAU 99811

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

April 11, 1979

The Honorable Bill Ray
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Dram Shop Liability Question
Our File J-66-569-79

Dear Senator Ray:

In a phone conversation earlier today, you indicated that our letter of April 2, 1979 did not completely answer your question regarding the effect of CSSB 115 (Rules) on third-person liability for injuries suffered as a result of that third person furnishing intoxicating liquor to another. You indicated that your question was whether enactment of CSSB 115 (Rules) would shield third persons from liability for injuries resulting from another's intoxication if the intoxicating liquor was furnished lawfully. For the reasons which follow, we believe it would provide such a shield.

Section 2 of CSSB 115 (Rules) would add a new section to the Alaska Statutes to read:

> Section 09.65.097. LIMITATIONS ON THE CIVIL LIABILITY OF LAWFUL BEVERAGE PROVIDERS. A person who lawfully provides an alcoholic beverage to an individual may not be held civilly liable for injuries resulting from the intoxication of that individual.

This statute would codify the rule which seems to be rather universal: A third person who lawfully furnishes liquor is not liable for injuries resulting from the consumption of that liquor. This appears to be the rule even in states like California where a third person will be liable for such injuries if he unlawfully provides liquor.

We hope this answers your question. However, it is possible that it does not. It appears that there are two

03-CSLH

possible sources for any confusion which remains: (1) Differences of opinion regarding the existing law of third-person liability in Alaska; and (2) differences of opinion regarding the effect of the language in CSSB 115 (Rules). We must point out that this is a developing area of law, and we cannot predict with absolute certainty what result our Court will reach under any given statutory enactment. However, we believe our Court would hold that the language of CSSB 115 (Rules), as it now appears, would shield third persons furnishing intoxicating liquor from liability for injuries suffered as a result of intoxication where the furnishing of that liquor was not in violation of existing law. We will work with you and/or other legislators in drafting appropriate language to accomplish whatever policy that the legislature determines is appropriate in this area if further amendment to SB 115 is desired.

In the meantime, we hope you find this of some assistance.

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By: G. Thomas Koester
G. Thomas Koester
Assistant Attorney General

GTK:dlm

cc: Senator Mike Colletta
Senator Patrick Rodey

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

April 2, 1979

The Honorable Bill Ray
The Honorable Mike Colletta
Alaska State Legislature
Pouch V
Juneau, Alaska 99801

Re: Dram Shop Liability Question
Our File #J-66-569-79

Dear Senators Ray and Colletta:

You requested our opinion whether removal of the word "lawfully" from CSSB 115 (Rules) would shield a tavern keeper from liability for injuries resulting from the tavern keeper serving liquor to an intoxicated adult or a minor in violation of AS 04.15.020(a). For the reasons which follow, we believe removing the word "lawfully" from that measure would have the effect of shielding a tavern keeper from civil liability for injuries resulting from the tavern keeper serving an intoxicated individual or a minor in violation of the statute.

Section 2 of CSSB 115 (Rules) would add a new section to the Alaska Statutes to read:

> Section 09.65.097. LIMITATIONS ON THE CIVIL LIABILITY OF LAWFULL BEVERAGE PROVIDERS. A person who lawfully provides an alcoholic beverage to an individual may not be held

> civilly liable for injuries resulting from the intoxication of that individual.

This Statute would codify the general common law rule:

> [I]t is not a tort to either sell or give intoxicating liquor to ordinary able-bodied men, and it has been frequently held that in the absence of statute, there can be no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person so furnished. The reason usually given for this rule is that the drinking of the liquor, not the furnishing of it, is the proximate cause of the injury. The rule is based on the obvious fact that one cannot become intoxicated by reason of liquor furnished if he does not drink it.
>
> 45 Am. Jr. 2d, INTOXICATING LIQUORS, §553 at pp. 852-853 (footnotes omitted).

However, some jurisdictions do afford a cause of action against a provider of liquor for injuries resulting from intoxication. This frequently is accomplished by legislative enactments known as "dram shop acts" which place statutory liability on the person selling or furnishing the liquor which caused the intoxication. 45 Am. Jur. 2d, INTOXICATING LIQUORS, §§561 et seq. Occasionally, liability has been found in the absence of a dram shop act "where the liquor was given or sold to a person who is in such a condition as to be deprived of his will-power or responsibility for his behavior, or to a habitual drunkard, or in violation of a prohibitory statute." 45 Am. Jr. 2d, INTOXICATING LIQUORS, §554 at page 853 (footnote omitted).

In Alaska, AS 04.15.020(a) prohibits furnishing intoxicating liquor to minors and to intoxicated persons. The Alaska Supreme Court has not ruled on the precise issue whether furnishing liquor to a minor or intoxicated person in violation of AS 04.15.020(a) gives a third person injured as a result of intoxication a cause of action against the person furnishing the liquor. However, there are strong indications that the court would hold that a violation of AS 04.15.020(a) gives an injured party such a cause of action against the provider of the liquor.

The Federal District Court for Alaska has held that under Alaska law, a violation of AS 04.15.020(a) is negligence per se, giving the injured party a cause of action against the tavern keeper. Vance v. United States, 355 F. Supp. 756 (D. Alaska 1973).*/

In Barton v. Lund, 563 P. 2d 875, 877 n.6 (Alaska 1977), a three-justice Alaska Supreme Court expressly refused to reach the issue of liability resulting from a violation of AS 04.15.020(a) in holding that such a violation would not support a cause of action against a liquor licensee under AS 04.15.180 who had no control over the actual operation of the tavern. The majority noted that the

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*/ The Court in Vance did not discuss the pre-statehood case of Cherbonnier v. Rafalovich, 88 F. Supp. 900 (D. Alaska 1950), which reached an opposite result under the Territorial predecessor to AS 04.15.020(a).

Federal District Court had found such liability under Alaska law in Vance, supra, and that the California Supreme Court found such liability based on a violation of a criminal statute similar to AS 04.15.020(a), Vesely v. Sager, 46 P. 2d 151 (California 1971), and based purely on the common law without reliance on the statute. Bernhard v. Harrah's Club, 546 P. 2d 719 (California), Cert. denied, 429 U.S. 859 (1976).*/ The majority did cite Bachner v. Rich, 554 P. 2d 430 (Alaska 1976), and Farrell v. Baxter, 44 P. 2d 250 (Alaska 1971), cases not involving intoxicating liquor, in both of which the court held that a statute established a standard of care which, when violated, constituted negligence as a matter of law. Extending the holding of those cases to the intoxicating liquor situation would result in a finding of liability, the result reached by Federal District Court in Vance.

Justices Boochever and Rabinowitz, dissenting in Barton, not only appeared to approve the Federal District Court's holding in Vance but would have imposed vicarious

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*/ In response to these cases, the California legislature amended Cal. Bus. & Prof. Code §25602 and Cal. Civ. Code §1714 to abrogate the results of those decisions in favor of the traditional common law rule holding that the consumption, not the furnishing, of intoxicating liquor is the proximate cause of injuries resulting from intoxication. Ch. 929, 1978 Cal. Adv. Legis. Serv. A copy of that enactment is attached for your information.

liability for violations of AS 04.15.020(a) on licensees under AS 04.15.180 who take no active part in the conduct of the tavern's business. They appeared to assume that a violation of AS 04.15.020(a) gives rise to a cause of action against the provider of liquor, the result reached in Vance.

Enactment of CSSB 115 (Rules), as it now reads, would not appear to change the law in Alaska (as it appears in the cited cases) one way or the other. It might raise a question regarding liability where liquor was furnished in a matter which was technically unlawful--e.g., liquor sold on election day in violation of AS 04.15.020(c) but lawfully sold in all other respects--but that question currently exists in the absence of such a statute. Enactment of CSSB 115 (Rules) with the word "lawfully" removed, however, would appear to absolve any provider of an alcoholic beverage from any liability for injuries resulting from the consumer's intoxication. This would be true regardless of whether the provider of the liquor violated AS 04.15.020(a) by furnishing the liquor to a minor or an intoxicated person or violated any other statute dealing with the furnishing of liquor. In other words, it would preclude the court from finding any provider of intoxicating liquor liable for injuries suffered as a result of intoxication, even when the liquor was fur-

nished to an intoxicated person or a minor in violation of AS 04.15.020(a).

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By:
Thomas G. Koester
Assistant Attorney General

TGK:bwb

Enclosure

An act to amend Section 25602 of the Business and Professions Code, and to amend Section 1714 of the Civil Code, relating to proximate cause.

LEGISLATIVE COUNSEL'S DIGEST

SB 1645, Ayala. Alcoholic beverage liability: proximate cause.

The California courts have recently interpreted existing law as imposing civil liability upon persons who sell, furnish, give or cause to be given alcoholic beverages to an intoxicated person when such person inflicts injury upon a third party.

This bill would specifically prohibit the imposition of civil liability in such instance.

This bill would also state a legislative declaration that prior judicial interpretation shall be reinstated so that such civil liability to a third party is incurred solely by the intoxicated person. The bill would also provide specifically that 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 people of the State of California do enact as follows:

SECTION 1. Section 25602 of the Business and Professions Code is amended to read:

25602. (a) 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.

(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 (_____ Cal. 3d _____) 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.

SEC. 2. Section 1714 of the Civil Code is amended to read:

1714. (a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

(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 (_____ Cal. 3d _____) and 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.

SB

122

COMMITTEE REPORT

SENATE

2/8/79

FURTHER: Finance

Date: 2/8/79

Mr. President:

The Committee on JUDICIARY has had SB 122

relating to permanent fund; amending Appellate Rule 45, Alaska Rules of Court Procedure

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____ CHAIRMAN

S 60 (Rev. 12/78)

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S – JUNEAU 99811

April 14, 1980

The Honorable Clem Tillion, Co-Chairman
The Honorable Joe McKinnon, Co-Chairman
Free Conference Committee on SB 122
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Gentlemen:

The Department of Revenue has reviewed the tentative agreement reached in your Committee last Saturday and has estimated the revenue effects of the amendments to the personal income tax for Fiscal Years 1980 and 1981. These are $276.1 million total, which when combined with the $128.5 million estimated for Permanent Fund Dividends, yields a grand total of $404.6 million.

The estimate of the $276.1 million for the income tax amendment is based on the following:

Tax returns were filed by March 1, 1980 for 1979 for a total of 91,966 taxpayers, of which 76,166 were residents. Of these residents, 7,389 claimed first year "Freeman credits" of $100 and 68,777 claimed second year credits; 9.70 percent of the 76,166 resident filers were filing for the first time.

Assuming that the proportion of first-time filers has not materially changed since the end of TAPS construction, this means that the 9.7 percent who are now filing for the first time would get no refund, another 9.7 percent who filed for the first time last year would get a one-third refund, another 9.7 percent would get a two-thirds refund, and the remainder would get full refunds. Thus,

9.7%	(1st-time filers)	x 0/3 refund =	0% refunded
9.7%	(2nd-time filers)	x 1/3 refund =	3.23% refunded
9.7%	(3rd-time filers)	x 2/3 refund =	6.47% refunded
70.9%	(other filers)	x 3/3 refund =	70.90% refunded
100.0%	TOTAL		80.60% refunded

04-02LH

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S – JUNEAU 99811

April 14, 1980

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70.9% (other filers)	x 3/3 refund =	70.90% refunded
100.0% TOTAL		80.60% refunded

04-D2LH

During 1979 we collected approximately $125 million in withholding and estimated tax payments. As people now file returns for that tax year, we expect refunds to exceed additional payments by $15 million. Our current estimate of the net tax for 1979 after these adjustments is $110.3 million. If 80.6 percent of this is refundable, the refund would be $88.9 million.

In the first quarter of calendar year 1980, withholding and estimated tax payments were $36,164,100. We estimate another $35 million for the second quarter, making a total of $71.2 million for the half year. The refundable and/or uncollected portion (80.6%) of this is $57.4 million.

For FY 81, net income tax receipts will be $161.0 million (12/79 forecast). The uncollected portion, at 80.6 percent, would be $129.8 million.

The total revenue impact in refunded or uncollected income taxes is

$88.9 million (refund of 1979)
57.4 million (refund of 1/1/80-6/30/80 receipts)
129.8 million (uncollected FY 81 tax estimate)
$276.1 million Total

These figures will be incorporated in our Fiscal Note for the tax amendment bill, once it is clear which bill (SB 122 or SB 39.) will serve as the vehicle.

Sincerely,

Thomas K. Williams
Commissioner

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S - JUNEAU 99811

April 14, 1980

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70.9%	(other filers) x 3/3 refund =	70.90%	refunded
100.0%	TOTAL	80.60%	refunded

During 1979 we collected approximately $125 million in withholding and estimated tax payments. As people now file returns for that tax year, we expect refunds to exceed additional payments by $15 million. Our current estimate of the net tax for 1979 after these adjustments is $110.3 million. If 80.6 percent of this is refundable, the refund would be $88.9 million.

In the first quarter of calendar year 1980, withholding and estimated tax payments were $36,164,100. We estimate another $35 million for the second quarter, making a total of $71.2 million for the half year. The refundable and/or uncollected portion (80.6%) of this is $57.4 million.

For FY 81, net income tax receipts will be $161.0 million (12/79 forecast). The uncollected portion, at 80.6 percent, would be $129.8 million.

The total revenue impact in refunded or uncollected income taxes is

$88.9 million (refund of 1979)
57.4 million (refund of 1/1/80-6/30/80 receipts)
129.8 million (uncollected FY 81 tax estimate)
$276.1 million Total

These figures will be incorporated in our Fiscal Note for the tax amendment bill, once it is clear which bill (SB 122 or SB 394) will serve as the vehicle.

Sincerely,

Thomas K. Williams
Commissioner

SB

141

COMMITTEE REPORT

SENATE

FURTHER: None

2/13/79

Date: 3/6/79

Mr. President:

The Committee on JUDICIARY has had SB 141

relating to sentencing of criminal defendants

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the ___ _____ _____ Committee

MEMBERS SIGNING DO PASS

MEMBERS HAVING OTHER RECOMMENDATIONS:

_____ CHAIRMAN

S 60 (Rev. 12/78)

Superior Court

State of Alaska

FIRST JUDICIAL DISTRICT
415 MAIN STREET, ROOM 402
KETCHIKAN, ALASKA 99901

Chambers of
THOMAS E. SCHULZ, Judge

SB 141

February 21, 1979

Hon. Robert H. Ziegler, Sr.
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Re: An Act Relating to Probation

Dear Bob:

I have reviewed the proposed legislation that would allow imprisonment as a condition of a suspended imposition of sentence and thus, get us out of the disaster fomented by the Boyne decision. I think that the proposed legislation covers all the bases. I particularly like the provisions for deductions for good conduct but I'm not so sure that I agree with the provisions allowing parole. If parole is to be a factor, I think the minimum term of imprisonment should be one year rather than 180 days. In my experience, when a judge suspends imposition of sentence but feels that the defendant should serve some time in prison, he usually has a definite period of time in mind and putting parole eligibility into the equation just makes it more difficult to arrive at a sentence that gets the desired results. I also feel that imprisonment as a condition of a suspended imposition of sentence should never involve more than one year's incarceration anyway. If the guy needs to go to jail longer than a year, he probably should not have gotten an SIS anyway. Of course, the same argument can be made at the six month level but frequently that young slow learner comes along that you want to give a good sharp jolt to but still leave him an opportunity to clear his record of the conviction and so I would like to see the latitude of using up to a year's imprisonment as a condition of an SIS and without having to worry about parole. The good time deduction is fine. If the guy can get along in the institution and obey all the rules and get his good time deduction, he should be able to earn it.

Under Sec. 5, the Act is take effect on January 1, 1980. The new Criminal Code goes into effect on January 1, 1980, as I understand it at this time, and we would not have the Boyne problem under the new Criminal Code because the statute specifically authorizes the judge to impose a period of imprisonment as a condition of probation. I would much prefer to see this Act rammed through