THE ARIZONA SUPREME COURT

1967-68

INTRODUCTION

With this issue, the *Arizona Law Review* introduces the *Arizona Supreme Court,* a summary of selected opinions handed down by the court during the past year. To the faithful, this may suggest no more than a new name for the old "Summary of Arizona Law," which has appeared intermittently in some form since the Review's inception (most recently in vol. 9, no. 1 as the "Recent Decisions" section). In the *Arizona Supreme Court,* however, the Editorial Board will present a deeper analysis of the most significant recent opinions of the court than has been the past practice. Since the court sits continuously throughout the year, "recent" has been fixed arbitrarily to include cases decided between May 1, 1967 and February 29, 1968.[1]

In the half-century since Justice Ross[2] wrote its first opinion, the Arizona Supreme Court has handed down perhaps ten thousand decisions. While this corpus of work has certainly found its way into the annals of American jurisprudence, the court must be regarded as a relative newcomer to a world based upon precedent and longevity.

The court's heritage, however, extends substantially beyond its official inauguration upon Arizona's attainment of statehood in 1912, into the days of the frontier and its territorial courts. Initially a part of the Territory of New Mexico,[3] the Arizona of the 1850's completely lacked law and order, or so President Buchanan believed:

> The population of Arizona, now numbering more than ten thousand souls, are practically destitute of government, of laws, or of any regular administration of justice. Murder, rapine and other crimes are committed with impunity.[4]

If this state of affairs was not enough to prompt recognition of Arizona as a separate territory, a brief period during which Arizona was hailed as a territory of the Confederate States of America provided Congress with the necessary impetus.

Confederate sympathizers in what is now Arizona met in conven-

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[1] In future years this note will cover the fiscal year beginning on March first.

[2] Henry D. Ross was an associate justice on the first court.

[3] What is now Arizona originally formed a part of the Territory of New Mexico, the latter consisting of land acquired by the United States through the Treaty of Guadalupe Hidalgo of 1848, and the Gadsden Purchase of 1853. The Organic Act established Arizona as a separate territory. *See* Act of Feb. 24, 1863, ch. 56, § 1, 12 Stat. 664.

[4] J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, 3099-3100 (1899).

tion, repudiated the suzerainty of the United States, and declared for attachment to the Confederacy. In August, 1861, the commander of a battalion of Confederate infantry, acting upon the resolution of the convention, issued a proclamation declaring Arizona to be a Confederate territory.[5] He then installed himself as military governor and proceeded to appoint executive and judicial officers. This administration was short-lived however, coming to an end with the intervention of federal troops in the summer of 1862.

The judicial system set in motion by the confederates was patterned on that previously existing in the New Mexico territory. As a separate territory, Arizona retained that peculiar arrangement of courts common to those areas of the nation struggling for statehood.[6] At the time of the organization of the Territory of Arizona in 1863, Congress provided in the Organic Act for the establishment of three judicial districts.[7] Like the New Mexico territory, each district consisted of a court exercising jurisdiction over cases arising under the Constitution and laws of the United States. At the same time these courts were serving in a federal capacity, they were also operating as territorial courts, with identical judges and coterminous boundaries, to enforce local law. The Supreme Court of the Territory of Arizona, composed of these same sturdy men sitting en banc, was vested with appellate jurisdiction over both the "territorial" and "United States" cases. This curious procedure engendered a feeling among members of the territorial bar "that the Supreme Court was misnamed and should be termed the 'Supreme Court of Affirmance'."[8]

The judges who presided over these early courts have been variously characterized as "unblushing rascals"[9] and "conscientious and scholarly men"[10] by their contemporaries. Much of the criticism leveled at them has been attributed to the fact that "the Arizona of that day was 'the land of opportunity' and a few of the 'justices' were 'opportunists,' and not so much concerned with leaving traces of having been great jurists, as in making their fortunes."[11]

Typical of this group was the court's first chief justice, William F. Turner, who was charged at one time or another during his six years on the bench with partiality, absenting himself unduly from the terri-

[5] For an account of the battle of San Augustine Springs between this force and the Union garrison, see C. SMITH, ARIZONA HISTORICAL REVIEW IV 19-22 (1931).
[6] *See* E. POMEROY, THE TERRITORIES AND THE UNITED STATES (1947).
[7] Act of Feb. 24, 1863, ch. 56, § 2, 12 Stat. 665.
[8] R. SLOAN, MEMOIRS OF AN ARIZONA JUDGE 79 (1932).
[9] Weekly Arizona Miner, Feb. 3, 1872, at 2, col. 5.
[10] Arizona Daily Star, Jan. 30, 1910, at 10, col. 1.
[11] Arizona Weekly Gazette, May 22, 1952, at 8, col. 1.

tory, pettifogging, and "various other short-comings too numerous to mention."[12]

In contrast, however, were the contributions to Arizona law of men like William T. Howell — of the same court — whose now famous "Howell Code" was the first codification of laws in the territory.[13]

In many ways the administration of justice in the territory was not unlike today's; many problems are common to both. Then as now, for example, it was hot in Arizona. Judge Sloan,[14] who in 1888 became the first resident of the Territory of Arizona to be appointed to its bench, recalled having seen, on the grave marker of a workman who died during the construction of the Arizona Canal in 1884, the following epitaph:

> Here lies John Coil,
> a son of toil,
> who died on Arizona soil.
> He was a man of considerable vim,
> but this here air was too hot for him.[15]

Neither was humor absent in the courtroom. One territorial judge,[16] after dispatching a juror in shirtsleeves "home" to get his coat, was chagrined when, three days later, he discovered the juror lived eighty miles away.

Whatever the foibles of these early justices, the Arizona Supreme Court has, since statehood, been characterized by a long list of distinguished members: Names like Ross, Stanford, Udall, Lockwood, McAllister, Windes and many others speak eloquently of its caliber and achievement. The current court bears relation to this heritage by consanguinity as well as quality. Justices Lockwood and Udall are both second generation members.[17] Joining them are Chief Justice McFarland and Justices Bernstein and Struckmeyer.

The court's work this year, and thus the emphasis of the following note, has centered on criminal law and procedure. The *Miranda*[18] and *Gault*[19] decisions, in which the court played the advocate's role in the United States Supreme Court, have been further interpreted in *State v. Sanders*[20] and *In re Application of Billie*[21] respectively. Another signifi-

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[12] The Arizona Miner, Feb. 26, 1870, at 3, col. 4.
[13] The Howell Code (1864).
[14] Richard E. Sloan served on the court from 1897 through 1909. He was also a territorial governor and historian. See note 8 *supra*.
[15] R. SLOAN, MEMOIRS OF AN ARIZONA JUDGE 19 (1932).
[16] W. F. Fitzgerald, who served on the bench in 1885, was said to have been a stickler for decorum.
[17] In 1964, Justice Lorna E. Lockwood became the first female jurist in the nation to be appointed chief justice of a state supreme court.
[18] Miranda v. Arizona, 384 U.S. 436 (1966).
[19] *In re* Gault, 387 U.S. 1 (1967).
[20] 102 Ariz. 565, 435 P.2d 39 (1967).
[21] 436 P.2d 130 (Ariz. 1968).

cant area lies in the field of insurance law where the *Mayflower*[22] doctrine was applied in *Sandoval v. Chenoweth*[23] and the *Dairyland* cases.[24]

Finally, it should be noted that several of the court's major decisions, including *Morgan v. Hays*,[25] *Pioneer Plumbing Co. v. Southwest Savings & Loan Ass'n*,[26] *Knight v. Metropolitan Life Insurance Co.*[27] and *Kintner v. Wolfe*,[28] have been prepared for the last issue as casenotes and therefore do not appear in this section other than by reference.

It is the hope of the Editorial Board that, as the *Arizona Supreme Court* develops into an annual feature covering *all* significant decisions of the court, both students and members of the bar will be substantially aided in evaluating the court's work and in keeping abreast of changes in Arizona law.

Michael A. Beale
Recent Decisions Editor

[22] Jenkins v. Mayflower Ins. Exchange, 93 Ariz. 287, 380 P.2d 145 (1963).
[23] 102 Ariz. 241, 428 P.2d 98 (1967).
[24] Dairyland Mut. Ins. Co. v. Andersen, 102 Ariz. 515, 433 P.2d 963 (1967); Universal Underwriters Ins. Co. v. Dairyland Mut. Ins. Co., 102 Ariz. 518, 433 P.2d 966 (1967).
[25] 102 Ariz. 150, 426 P.2d 647 (1967).
[26] 102 Ariz. 258, 428 P.2d 115 (1967).
[27] 437 P.2d 416 (Ariz. 1968).
[28] 102 Ariz. 164, 426 P.2d 798 (1967).

THE ARIZONA SUPREME COURT 1967-68

CONTENTS

CONTENTS — *Continued*

CONTENTS — *Continued*

I. ADMINISTRATIVE LAW

Campbell v. Chatwin.[1] Three causes were combined and brought before the supreme court on petitions for writs of prohibition to prevent the superior court from staying the suspension of drivers' licenses and motor vehicle registrations by the Highway Department and remanding the causes to the Highway Department for further proceedings. The petitioner, the Highway Department, contended that the lower court was without power to make such orders where the plaintiffs had not exhausted administrative remedies prior to filing suit in superior court.

Two plaintiffs, Raible and Gaumer, were involved in separate automobile accidents. Neither had insurance, and in both cases, the Director of the Financial Responsibility Branch of the Arizona Highway Department set the amount of security which was to be posted by the plaintiffs. They failed to post the security, and the Director suspended their drivers' licenses and registrations pursuant to the Financial Responsibility Act.[2] Neither party requested an administrative hearing from the Highway Department as provided for in the Responsibility Act,[3] but instead filed suit in superior court seeking stay orders on the suspensions and trials de novo. The trial court granted the stay orders and the trial. At the trial the actions were dismissed on the ground that plaintiffs had failed to exhaust administrative remedies, and the court directed the plaintiffs to pursue such remedies. The plaintiffs then requested review from the Highway Department, but the Department refused the requests since the 10 day time limit for seeking review, as prescribed by the Responsibility Act,[4] had elapsed. In further proceedings, the superior court again issued stay orders and a remand for administrative hearings, whereupon the Highway Department petitioned the court of appeals for a writ of prohibition to stay further proceedings in the superior court.

The court of appeals found that, under their interpretation of the Financial Responsibility Act, it is not required that an administrative hearing be sought before judicial review can be had. The court, in

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[1] 102 Ariz. 251, 428 P.2d 108 (1967).

[2] ARIZ. REV. STAT. ANN. § 28-1142 A (Supp. 1967).

> The superintendent shall, within sixty days after the receipt of a report of a motor vehicle accident within this state which has resulted in bodily injury or death or damage to the property of any one person in excess of one hundred dollars, suspend the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident, . . . unless such operator or owner or both shall deposit security in a sum which is sufficient in the judgment of the superintendent to satisfy any judgment or judgments for damages resulting from the accident as may be recovered against the operator or owner . . . . Notice of the suspension shall be sent by the superintendent to the operator and owner not less than ten days prior to the effective date of the suspension and shall state the amount required as security. . . .

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

[4] ARIZ. REV. STAT. ANN. § 28-1142 A (Supp. 1967), quoted in note 2 *supra.*

discussing *Schecter v. Killingsworth*,[5] said the language in that case required that if an administrative hearing were to be had, it must be requested and conducted prior to the effective date of the suspension (*i.e.*, 10 days after notice of suspension), but that such language did not *require* the holding of a hearing before an aggrieved party could appeal to the courts. The argument made by the Highway Department that the provision in the Act providing for a trial de novo, by necessary implication, requires that the available administrative remedies be *exhausted* prior to seeking judicial review was, according to the court, persuasive but not controlling. The court of appeals held, therefore, that the superior court had jurisdiction and should not have remanded the cases for further administrative proceedings, but should have proceeded with a determination of the merits of the action.

The supreme court, on petition for review, held that since no administrative hearing was requested or obtained by the plaintiffs, the superior court had no jurisdiction to proceed with the matter. The nature of an appeal from an administrative decision is a trial de novo which logically contemplates a prior proceeding, *i.e.*, an administrative hearing. A failure to make a timely request for such a hearing will finalize the ruling of the agency, and it will not thereafter be subject to judicial review.

The Financial Responsibility Act clearly states that the suspension ordered by the superintendent shall become effective ten days after notice is given to the operator.[6] It also clearly provides that a person aggrieved by an "order or act" of the superintendent may appeal to the courts within ten days.[7] However, the language of the statute does not clarify whether an operator must seek a hearing by the Department between the date of notice of suspension and the effective date of suspension before he can appeal to the courts. The supreme court ruled that the application of the doctrine of exhaustion of administrative remedies is "necessary to a proper interpretation of the statute."[8]

In justifying its position, the court stated that the doctrine of exhaustion of remedies was a long-settled rule in Arizona, and that it was not the intent of the legislature in adopting the Financial Responsibility Act to allow persons to bypass administrative remedies and go directly to the courts.

Disagreeing with the interpretation of the *Schecter* case by the court of appeals, the supreme court said that the case "indicated that we considered the administrative hearing a prerequisite to judicial review."[9]

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[5] 93 Ariz. 273, 380 P.2d 136 (1963).
[6] ARIZ. REV. STAT. ANN. § 28-1142 A (Supp. 1967), quoted in note 2 *supra*.
[7] ARIZ. REV. STAT. ANN. § 28-1122 B (1956).
[8] 102 Ariz. 251, 257, 428 P.2d 108, 114 (1967).
[9] *Id.*

The third plaintiff involved herein, a Mr. Ryan, had his license suspended pursuant to the Uniform Motor Vehicle Operators' and Chauffeurs' License Act[10] for frequent violations of serious traffic offenses. The Highway Department notified Ryan that the statute provided that he could have an administrative hearing within 20 days after receipt by the Department of a request for such hearing; Ryan, however, instead filed suit in superior court as did the other plaintiffs herein. The superior court judge issued orders staying the suspension pending a trial de novo. The Highway Department, as in the other two cases, sought a writ of prohibition in the court of appeals. That court held that under the Judicial Review Act,[11] the court must give the Highway Department notice and opportunity to be heard before issuing stay orders and that the court's failure to do so was error, but that there was no need to exhaust administrative remedies before appealing to the courts. As in the cases of Raible and Gaumer, the supreme court reversed the court of appeals as to the necessity of exhaustion of remedies, saying that until administrative remedies had been exhausted, the courts had no jurisdiction and consequently had no power to issue stay orders or require further administrative proceedings where the time allowed to seek such hearings had run.

In the Ryan case the court used reasoning similar to that in the cases of Raible and Gaumer. The License Act provides for a right of appeal to the courts when a person is aggrieved by an order of the Department;[12] the appeal must be within thirty days after the suspension has become effective. The court ruled that the legislature contemplated an exhaustion of remedies and that if the operator failed to seek the administrative hearing provided by statute before the effective date of suspension, he was not "aggrieved" and waived all rights to such hearing. Without such a prior hearing, the court has no jurisdiction over the plaintiff.

The underlying issue involved in all three cases is whether an administrative hearing is required before the court can obtain jurisdiction. Although the court considered the relevant statutes in detail, they do

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[10] ARIZ. REV. STAT. ANN. § 28-446 A (Supp. 1967):
The department is authorized to suspend the license of an operator or chauffeur without preliminary hearing upon a showing by its records of other sufficient evidence that the licensee:

. . .

3. Has been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways.

[11] ARIZ. REV. STAT. ANN. § 12-911 A (1956).

[12] ARIZ. REV. STAT. ANN. § 28-451 (1956).
A person denied a license, or whose license has been cancelled, suspended or revoked by the department . . . shall have the right to file a petition within thirty days *thereafter* for a hearing on the matter in the superior court in the county wherein the person resides . . . . (emphasis added).

not resolve the issue. Rather, it seems the court followed the general tendency of state courts to apply the doctrine of exhaustion of remedies to all areas of administrative law unless the case falls into one of the exceptions to the general rule.[13] Four such exceptions noted by the court were: (1) where, by statute, the remedy is permissive rather than mandatory, (2) where jurisdiction of the agency is being contested, (3) where the agency's expertise is unnecessary, or (4) where irreparable harm will be caused to the party by requiring the exhaustion of remedies. The court, however, found no justification for invoking any of these exceptions in the instant case.

Mueller v. Phoenix ex rel. Phoenix Board of Adjustment II.[14] The Phoenix Board of Adjustment granted a use permit (subject to several stipulations designed to insure compliance with the applicable Phoenix City Zoning Ordinance[15]) to reconstruct a non-conforming use destroyed by fire. The use consisted of a restaurant-nightclub-apartment facility that had evolved from a guest house under the permissive "accessory use" provisions of the Zoning Ordinance.[16] The facility was located in an area zoned single family residential, but live entertainment, outdoor lights, patio parties, and billboard advertising were much in evidence prior to its destruction. The superior court, on petition for writ of certiorari filed by neighboring landowners, affirmed the Board's order. Petitioners claimed that the respondent Board was without jurisdiction to grant the use permit since the applicant had not established the facts upon which such jurisdiction depends: that the granting of such a permit would not be detrimental to surrounding persons or property, and that the use covered by the permit would be in conformity with the conditions, requirements or standards prescribed therefor by the Phoenix City Zoning Ordinance. Petitioners also alleged that the Board had overstepped the bounds of its authority in allowing the expansion of the non-conforming use in the past and certain accessory uses, namely the sale of hard liquor and the use of billboard advertising, and in allowing the construction of facilities larger than the original non-conforming use. Therefore, alleged petitioners, the Board's action constituted a de-facto re-zoning without authority since such is within the domain of the city council. On appeal, *held*, affirmed. The Board

[13] K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.01 (1959).

[14] 102 Ariz. 575, 435 P.2d 472 (1967).

[15] § 109(b) requires that the non-conforming use covered by the use permit, the manner of conducting the same, and any building involved, will not be detrimental to persons residing or working in the vicinity, to adjacent property, to the neighborhood or the public welfare in general, and would be in full conformity to any conditions, requirements, or standards prescribed by the zoning ordinance.

[16] PHOENIX ARIZ. ZONING ORDINANCE G-449, ch. II (1967) defines an accessory use as: "A subordinate use of a building, other structure, or use of land; a. which is clearly incidental to the use of the main building, other structure or use of land, and b. which is customary in connection with the main building, other structure or use of land, and c. which is located on the same lot with the main building, other structure or use of land."

had sufficient evidence on which to make a finding that the non-conforming use permit would not be detrimental to surrounding people or property, and would be in full conformity to any conditions, requirements or standards prescribed therefor by the zoning ordinance, and accordingly, the Board had jurisdiction to grant the requested permit.

The supreme court applied two different standards to the jurisdictional and non-jurisdictional issues in the case. In determining whether the use would not be detrimental to surrounding people or property and in conformity with the standards of the zoning ordinance, the court independently examined the sufficiency of the evidence. In determining the non-jurisdictional issues the court gave the findings of the Board the presumption of validity usually given the findings of an administrative agency.

In finding "sufficient" evidence that the use would not be detrimental to surrounding people or property, the court in its opinion noted the testimony of four favorable witnesses, but without weighing it against countervailing testimony. In considering the use's conformity with the zoning ordinance, the court *implied* this necessary finding from the Board's issuance of the use permit, despite the fact that the Board did not state its conclusion in so many words. It then noted that the stipulations required by the board and the presence before it of the plans for reconstruction was sufficient evidence that the use was in conformity with the zoning ordinance. It is not clear from the court's opinion what quantum or standard of evidence will be required by the court to determine these jurisdictional questions in the future. In this case the court did not seem to weigh the evidence, but rather to look for support in the record. Justice Struckmeyer, in dissent, disagreed with the majority's finding, stating that the evidence was insufficient by *any standard.*

In considering the seemingly non-jurisdictional issues in the case, the court gave great weight to the findings of the Board. Looking at the various steps in the growth of this non-conforming use, the court found that reasonable men could determine that each step was within the standards of the zoning ordinance. The court indulged the presumption of validity of the determinations of the Board, feeling that it could not say as a matter of law that a nightclub-restaurant-apartment facility could not be determined to be a reasonable and lawful expansion of the original non-conforming use, or that the serving of hard liquor was such a radical departure from serving beer and wine. An outdoor business sign was felt to be an intergral part of a business; to allow a business as a non-conforming use, and yet to say as a matter of law that the business could not identify its location or advertise its wares seemed an "extreme position." Justice Struckmeyer felt that this finding was

illegal as a matter of law. He felt there was no way in which the conversion of the guest home into a nightclub could be rationalized under existing zoning law, and the Board's action was a "blatant example of thwarting the purposes of zoning" and that the result was "outrageous."[17]

Perhaps the real impact of this case, which turns on disputed findings of fact, is the deference which the court shows for the rulings of the Board of Adjustment. Even where jurisdictional issues are in dispute, the court seems committed to leaving all questions of judgment to the administrative boards which the legislature has empowered to handle such matters.

School District v. Superior Court.[18] A school district sought a writ of prohibition from the supreme court to prohibit the superior court from issuing a permanent writ of mandamus to the school board forcing it to renew the employment contract of a probationary teacher. The school district contended that the notification of non-renewal of a probationary teacher, as required by the Arizona Teacher Tenure Act[19] was satisfied, and that the language of such notice is sufficient if it simply states the undesirable traits upon which the board based its refusal to renew the teacher's contract, without any further detail. The teacher claimed that the terms "lack of cooperation and insubordination," used in the notice given the teacher, were "gross conclusions" and did not constitute "reasons" for the dismissal as required by the statute. The supreme court held that the lower court "was without jurisdiction to supersede the discretion of the School District" and therefore made permanent the alternative writ of prohibition. Ruling that "good cause" is not required by the Arizona Teacher Tenure Act for the dismissal of a probationary teacher, the court held that the "statement of reasons" required by the Act need not specify any details and that the notice of non-renewal is sufficient if it states generally the type of conduct which the school administration finds undesirable.

The purpose of a statement of reasons in the notification of termination of employment is to point out the teacher's inadequacies to help him correct them and to facilitate his obtaining other suitable employment. The terms "insubordination and lack of cooperation" before the court in the instant case are generic, categorizing the type of conduct which the school board or superintendent found objectionable. The court felt that both these terms have fixed and well understood meanings so they do not leave the teacher or his future employers in ignorance of the causes of his dismissal. This being so, the purposes of the statutory requirement were satisfied.

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[17] 102 Ariz. at 587, 435 P.2d at 484.
[18] 102 Ariz. 478, 433 P.2d 28 (1967).
[19] ARIZ. REV. STAT. ANN. §§ 15-251 to -261 (1956), *as amended,* (Supp. 1967).

In 1953, in *Tempe Union High School District v. Hopkins*,[20] where the school district gave *no reasons* for the failure to renew the employment contract of a probationary teacher, the court held that the dismissal was void and ordered the teacher reinstated, holding the school district strictly to the procedural requirements of the statute. The instant case concerned the further question: How detailed must the statement of reasons be? In answering this question the court reviewed the provisions of the Teacher Tenure Act. In refusing to renew the contract of a probationary teacher, the local school board must send a timely[21] written notice of dismissal, incorporating therein a statement of reasons for the dismissal.[22] The probationary teacher is not entitled to a hearing before the board,[23] and the supreme court has indicated that courts will review the decision of the board only when it appears clearly that the board has abused its discretionary function.[24] To establish abuse of discretion, giving the court jurisdiction to review the action of the board, the applicant must show that the board relied on reasons which reasonable men would agree were arbitrary and capricious.[25] Otherwise the sufficiency of the reasons is a matter exclusively for the judgment of the school administration. Presumably, if a teacher's contract was not renewed because he was exercising a constitutionally protected right, this too would be reviewable.[26]

Termination by a *failure to renew* the employment contract of a probationary teacher may be contrasted with the *dismissal* of a probationary teacher under an existing contract. To discharge a probationary teacher under an existing contract, the board must show "good cause"[27] at a hearing in which the probationary teacher, like the continuing teacher, is allowed to testify and to present evidence and statements in his own behalf.[28] Thus, under the Teacher Tenure Act, the principal distinction between the rights of teachers with and without tenure is that on failure to renew the employment contract, one is entitled to a hearing and appeal while the other, as in the instant case, is not.

This statutory scheme is designed to give school administrators complete discretion in building and retaining a qualified teaching staff. During the first three years a teacher may be dismissed without a showing of cause. Thereafter his job security is protected by the provisions for a hearing, a "good cause" standard, and a right of judicial review.

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[20] 76 Ariz. 228, 262 P.2d 387 (1953).
[21] School Dist. v. Barber, 85 Ariz. 95, 332 P.2d 496 (1958).
[22] Tempe Union High School Dist. v. Hopkins, 76 Ariz. 228, 262 P.2d 387 (1953).
[23] ARIZ. REV. STAT. ANN. § 15-259 (1956).
[24] Chesly v. Jones, 81 Ariz. 1, 299 P.2d 179 (1956).
[25] *Id.* at 3, 299 P.2d at 181.
[26] *Cf.* Parrish v. Civil Service Comm'n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).
[27] Johnson v. Board of Educ., 101 Ariz. 268, 419 P.2d 52 (1966).
[28] *Id.*

The requirement that reasons be given the probationary teacher when his contract is not renewed is a matter of the legislature's grace. Perhaps the spirit of the requirement would be better realized by a more detailed statement of the reasons for dismissal than that given in the instant case, but it is clear that no more is required for a valid notice of failure to renew a contract.

State ex rel. Pickrell v. Downey.[29] The residents of Paradise Valley petitioned the Board of Supervisors of Maricopa County for incorporation. A hearing was held on the validity of the petition and a resolution of incorporation was passed by the Board. Subsequently, the Attorney General instituted a quo warranto proceeding in the superior court on behalf of the state, claiming that the Board was without jurisdiction to act because two-thirds of all real property taxpayers in the area had not signed the petition and the area did not constitute a community as required by the incorporation statute.[30] The Board, on the other hand, claimed the phrase "board is satisfied" in the statute renders an order of the Board conclusive and its findings of fact not subject to review. The trial court upheld the Board's contention and refused to receive evidence other than the record of the Board's proceedings. On appeal, the supreme court reversed, holding that an order of incorporation is subject to review in quo warranto proceedings, and that this review is not limited to the record before the Board since the Board's jurisdiction rests upon the validity of the facts alleged in the petition for incorporation.

The Board had contended that its order of incorporation was based upon "legislative" as opposed to "jurisdictional" facts, legislative facts being those which the statute does not unconditionally require, and therefore, that the facts were not reviewable in quo warranto since the purpose of such a writ is to inquire into the jurisdiction of an administrative board. The court, however, reasoned that the discretion vested in the Board by the statutory language "the board is satisfied" is *legal*

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[29] 102 Ariz. 360, 430 P.2d 122 (1967).

[30] ARIZ. REV. STAT. ANN. § 9-101 (1956).

A. When two thirds of the real property taxpayers residing in a community containing a population of five hundred or more inhabitants petition the board of supervisors, setting forth the metes and bounds of the community, and the name under which the petitioners desire to be incorporated, and praying for the incorporation of the community into a city or town, and *the board is satisfied* that two thirds of the real property taxpayers residing in the community have signed the petition, it shall, by an order entered of record, declare the community incorporated as a city or town.

. . . .

D. For the purposes of this section, the word community shall mean a locality in which a body of people reside in more or less proximity having common interests in such services as public health, public protection, fire protection, and water which bind together the people of the area, and where the people are acquainted and mingle in business, social, educational and recreational activities. (emphasis added).

discretion to determine whether conditions of the statute governing municipal incorporations have been met. Consequently, any abuse of discretion by the Board is subject to review on direct attack. Therefore, the court ruled that evidence is admissible to contradict the petition for incorporation and to show that the territory did not contain the required population notwithstanding the recitals in the petition to the contrary.

Considering what constitutes a "community" under the incorporation statute, the court said that the essence of a community was the fact that several hundred people resided in a small area of 2.85 square miles and that such residents had common interests in such services as public health, public protection, fire protection and water. That the area contained no businesses, industry, stores, offices or transportation facilities, or that some or most of the services came from without the area or were available to others without the area would not defeat the common interests which should be the controlling element.

From the court's decision it appears that, once petitioned, the Board has discretion to determine if the jurisdictional facts called for in the incorporation statute exist. Such findings of fact, however, may be challenged by the state in a quo warranto action since the Board is an agent of the state. It should be noted that *only* the state can attack the finding of the Board as a matter of right, although any person may do so *upon leave of the court* when the state has refused to bring the action.[31] Once an action is brought, the trial court may review all relevant evidence to determine whether the necessary jurisdictional facts which empower the Board to act exist. Where they do not exist, the court may properly set aside the decision of the administrative agency for lack of jurisdiction.

This jurisdictional approach of reviewing actions of administrative agencies is well established in Arizona.[32] However, Arizona has greatly liberalized the traditional rules which have previously defined and limited the extraordinary writ of quo warranto. In the instant case the court states that *abuse of discretion* is reviewable in quo warranto.[33] This is by no means the same as a review of jurisdiction in its traditional sense. To abuse its discretion, the Board must *have* discretion; to recognize the existence of discretion is a fortiori to recognize jurisdiction.[34]

[31] Faulkner v. Board of Supervisors, 17 Ariz. 139, 149 P. 382 (1915).

[32] Parnell v. State, 68 Ariz. 401, 206 P.2d 1047 (1949); Hunt v. Norton, 68 Ariz. 1, 198 P.2d 124 (1948); Board of Supervisors v. Udall, 38 Ariz. 497, 1 P.2d 343 (1939).

[33] 102 Ariz. 360, 364, 430 P.2d 122, 126 (1967).

[34] For a general discussion of the courts' attitudes toward extraordinary writs, see Lesher, *Extraordinary Writs in the Appellate Courts of Arizona*, 7 ARIZ. L. REV. 34 (1965).

This standard of review in quo warranto probably will allow an examination of more than strictly jurisdictional facts in the future. The liberalized approach will allow the courts more latitude in their review of administrative action by means of all the extraordinary writs.[35]

II. ATTORNEYS

Application of Klahr[1] was an original proceeding on application for admission to the State Bar of Arizona. Applicant graduated first in his class from the University of Arizona College of Law, and took the bar examination in February of 1967. The State Bar Committee on Examinations and Admissions refused to grade his examination "because doubt had been raised as to his moral character."[2] The court then appointed a special committee to investigate his qualifications. Based on the evidence presented, the committee recommended to the court that applicant not be admitted to the bar. This recommendation was based on the fact that "substantial doubt" had been raised as to applicant's good moral character.[3] A minority of the five-man committee filed a dissent in which they recommended applicant be admitted. Applicant then filed with the supreme court a petition for review and an application for admission to the bar.[4] The court granted the application, holding that the question of good moral character in an applicant to the bar is an ad hoc determination to be made on the merits of each case, and that such character is not shown to be lacking through evidence of "poor judgment" and "a lack of maturity."[5] The court ordered that applicant be admitted upon compliance with the remaining statutory requirements.

The recommendation of the majority of the committee was based on four specific findings. First, they found that applicant was "not candid" and "less than truthful"[6] in testimony concerning his participation in two suits pending in the Arizona superior court, and also had engaged in the unauthorized practice of law.[7] Although no one testified against the applicant in this regard, the committee said that "the high praise and superlative descriptions of character witnesses as to what sort of boy they had known pale into insignificance when the man proves less than candid to those who are to judge him."[8]

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[35] *See generally* Lesher, *supra* note 34.

[1] 102 Ariz. 529, 433 P.2d 977 (1967).
[2] *Id.* at 530, 433 P.2d at 978.
[3] *Id.*
[4] ARIZ. SUP. CT. R. 28(c)(XI) allows an applicant to apply directly to the supreme court for admission to the state bar.
[5] 102 Ariz. at 531, 433 P.2d at 979.
[6] *Id.* at 530, 433 P.2d at 978.
[7] ARIZ. REV. STAT. ANN. § 32-261 (1956) makes the unauthorized practice of law a misdemeanor.
[8] Reply to Petition for Review, at 6, Application of Klahr, 102 Ariz. 529, 433 P.2d 977 (1967).

Next, the committee noted a violation of the Canons of Ethics, Canon 20, finding that applicant used public pressure, through the device of soliciting newspaper coverage, to influence matters pending in court. Applicant had released a report alleging misdoings in the Maricopa County Juvenile Department. He claimed that he had a duty to reveal this information because it was of legitimate public interest. Applicant also observed that Canon 20 is a special ethical rule applying only to licensed attorneys, and not part of a general moral code which must be followed prior to one's admission to the Bar. The committee agreed that applicant was technically correct but felt his legal excuse said little of his moral character.

Third, the committee found that applicant demonstrated either "wilful dissembling or childish immaturity"[9] in attempting to justify the release of confidential and privileged information from the Juvenile Department report. Applicant claimed this information was not confidential, although in earlier testimony he had said it was. He explained that this inconsistency was due to an "unfortunate choice of words."[10]

Finally, the committee found evidence that applicant used the defense of minority to avoid contractual obligations under circumstances where it could be inferred that applicant knew he could disaffirm the contracts before he entered into them and that he later used this legal power to avoid payment. The committee reasoned that the defense of infancy is "a shield, not a sword,"[11] and that an infant should not speculate at the expense of another or profit from the mere fact of infancy.

The court declined to discuss the charges of the committee separately, saying that the evidence as a whole failed to overcome applicant's prima facie case of good moral character.

It is the duty of the investigating committee to give its honest opinion of the candidate's moral character, to "'put up the red flag' as to those applicants about whom it has some substantial doubt."[12] This the committee did. It is the duty of the supreme court, however, to determine whether that opinion is supported by competent evidence.[13] The findings of the committee are only a recommendation;[14] actual power of admission to the Bar is a judicial function resting solely in the court.[15]

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[9] 102 Ariz. at 530, 433 P.2d at 978.
[10] Reply to Petition for Review, at 12, Application of Klahr, 102 Ariz. 529, 433 P.2d 977 (1967).
[11] Worman Motor Co. v. Hill, 54 Ariz. 227, 234, 94 P.2d 865, 868 (1939).
[12] Application of Burke, 87 Ariz. 336, 339, 351 P.2d 169, 171 (1960).
[13] Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964).
[14] Hallinan v. State Bar, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).
[15] Application of Burke, 87 Ariz. 336, 351, P.2d 169 (1960); Application of Courtney, 83 Ariz. 231, 319 P.2d 991 (1957).

The practice of law in Arizona is a right conditioned solely on objective qualifications,[16] one being that an applicant possess "good moral character."[17] Some states have attempted to define this concept. Vermont, for example, says "[t]he test is whether that behavior [applicant's past acts] truly portrays an inherent and fixed quality of character of an unsavory, dishonest, debased, and corrupt nature."[18] California has defined it as "an absence of proven conduct or acts which have been historically considered as manifestations of 'moral turpitude'."[19] The *Klahr* court held that the concept escapes adequate definition in the abstract, and that each case must be judged on its own merits.

Hackin v. State[20] was an original habeas corpus proceeding brought in the Arizona supreme court to test petitioner's detention following his conviction under a state statute for unlicensed practice of law.[21] Petitioner, who was not a member of the Arizona bar, had appeared in a habeas corpus hearing in the Arizona superior court on behalf of an indigent prisoner, seeking court-appointed counsel for him. When the court refused, he chose to represent the man himself, despite warnings that his actions would constitute a misdemeanor. Petitioner challenged his conviction on the grounds that the licensing statute is unconstitutionally vague, and that another statute,[22] expressly permitting a layman to make habeas corpus *application* for an imprisoned person, should be extended to allow the layman to also *represent* that person in court. The court, denying the writ, held that the words "practices law" used in the licensing statute are sufficiently clear to include the representation of an indigent at a habeas corpus hearing, and that the statutory exception, allowing a layman to sign the application for such a writ, does not include the subsequent representation of the applicant at his hearing.

The court noted that since a layman might assist in the preparation of an application where the prisoner, locked in a cell, could not do so himself, there is a logical basis for the statutory exception allowing the

[16] Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1965); Application of Burke, 87 Ariz. 336, 351 P.2d 169 (1960).

[17] Application of Courtney, 83 Ariz. 231, 319 P.2d 991 (1957). ARIZ. SUP. CT. R. 28(c)(IV)(4).

[18] *In re* Monaghan, 126 Vt. 53, 222 A.2d 665, 671 (1966).

[19] Konigsberg v. State Bar of California, 353 U.S. 252, 263 (1957).

[20] 102 Ariz. 218, 427 P.2d 910, *appeal dismissed*, 88 S. Ct. 325 (1967).

[21] ARIZ. REV. STAT. ANN. § 32-261 B (1956): "A person who, not being an active member of the state bar, or who after he has been disbarred, or while suspended from membership in the state bar, practices law, is guilty of a misdemeanor."

[22] ARIZ. REV. STAT. ANN. § 13-2002 (1956):

> Application for the writ shall be made by verified petition, signed either by the party for whose relief it is intended or by some person in his behalf, and shall state that the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is so confined or restrained, naming all the parties, if they are known, or describing them if they are not known. If the imprisonment is alleged to be illegal, the petition shall also state the particulars of the alleged illegality.

layman to sign the application even though it might otherwise be considered the "practice of law." Moreover, since an application for a writ need only be a simple statement of the facts on which the applicant bases his claim for relief,[23] there is generally no need for special legal training in its preparation. The court noted that while a *lawyer* might be of assistance at the hearing, a layman's presence, due to his lack of legal training, could not be helpful.

In disallowing petitioner's "vagueness" contention, the court found the term "practice of law" was clear enough to inform petitioner that his appearance in open court on behalf of the indigent was in violation of the licensing statute.[24]

The court noted that an indigent is not entitled to court-appointed counsel at a habeas corpus proceeding[25] since applications for habeas corpus are considered not criminal, but rather civil proceedings to test the legality of detention.[26] The court cited the recent case of *Palmer v. State*,[27] which held that the constitutional right to counsel in a criminal proceeding does not extend to an indigent applicant for habeas corpus relief.

Hackin appealed the decision to the Supreme Court of the United States where the case was dismissed for lack of a substantial federal question.[28] Mr. Justice Douglas, however, entered a vigorous dissent, stressing the present inadequate legal aid for the poor. He noted *Gideon v. Wainwright*,[29] which held that indigent defendants in felony prosecutions have the right to appointed counsel. Justice Douglas noted that an Arizona case had held that an indigent prisoner facing extradition proceedings brought by another state had no right to court-appointed counsel since such processes are separate "from the prosecution of the offense itself, and the procedure is ministerial rather than judicial."[30] The Justice expressed doubt "whether pigeonholing criminal proceedings into categories such as felony, misdemeanor, habeas corpus, etc., is a proper means for the states to develop the full scope of the *Gideon* rule."[31] Earlier dissents in the Supreme Court have found fault with

[23] Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966); State *ex rel.* Patterson v. Superior Court, 26 Ariz. 584, 229 P. 96 (1924).
[24] In *State Bar v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 87, 366 P.2d 1, 9 (1961), the "practice of law" was defined as "those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries . . . ."
[25] State *ex rel.* Wood v. Johnson, 216 Tenn. 531, 393 S.W.2d 135 (1965).
[26] Leonard v. Eyman, 1 Ariz. App. 593, 405 P.2d 903 (1965).
[27] 99 Ariz. 93, 407 P.2d 64 (1965), *cert. denied*, 385 U.S. 854 (1966).
[28] Hackin v. Arizona, 88 S. Ct. 325 (1967).
[29] 372 U.S. 335 (1963).
[30] State v. Bost, 2 Ariz. App. 431, 433, 409 P.2d 590, 592 (1966). *See also* Hackin v. Arizona, 88 S. Ct. 325 n.1 (1967).
[31] Hackin v. Arizona, 88 S. Ct. 325 n.1 (1967).

analogous distinctions[32] and have suggested that equal justice in the form of legal representation for the poor should be extended to purely civil proceedings.[33]

Mr. Justice Douglas expressed dismay at the broad sweep of Arizona's licensing statute and its potential for preventing well-meaning laymen from providing legal and semi-legal aid for indigents, especially where the uneducated poor are unable to assert their constitutional rights due solely to lack of legal assistance. The Justice questioned whether "a state, under guise of protecting its citizens from legal quacks and charlatans, can make criminals of those who, in good faith and for no personal profit, assist the indigent" to assert their rights.[34]

Petitioner Hackin was graduated from an unaccredited law school and was refused admission to the Arizona bar.[35] His services were rendered openly and gratuitously. The Arizona court admits that legal advice could be an aid to a prisoner at a habeas corpus hearing. Until the right to counsel is recognized in these proceedings, it would be useful to allow laymen more skilled than the petitioners to aid them at their hearings.[36]

III. Civil Procedure

Dunn v. Superior Court.[1] Plaintiff brought an action in Maricopa county for the alleged wrongful death of his wife in an automobile accident in Graham county. Both plaintiff and defendant were non-residents of Arizona and service was obtained by registered mail pursuant to Arizona's non-resident motorist responsibility statute.[2] This statute contains no venue provisions and defendant claimed that, since he was a non-resident, the action could only be brought in the county where the accident occurred. His motion for a change of venue[3] to Graham county was granted. Plaintiff's petition for writ of certiorari was denied by the

[32] DeJoseph v. Connecticut, 385 U.S. 982 (1966); Winters v. Beck, 385 U.S. 907 (1966).
[33] Williams v. Shaffer, 385 U.S. 1037 (1967).
[34] Hackin v. Arizona, 88 S. Ct. 325, 326 (1967); *cf.* NAACP v. Button, 371 U.S. 415, 439 (1963).
[35] Hackin v. Lockwood, 361 F.2d 499 (9th Cir. 1966), *cert. denied,* 385 U.S. 960 (1966).
[36] *See* Woods, *The Criminal Justice Act of 1964: A Study in Administrative Death,* 5 Am. Crim. Law Q. 54 (1967). The author discusses the validity of the criminal/civil distinction when used to exclude indigent petitioners for habeas corpus from the benefits of the Criminal Justice Act.

[1] 102 Ariz. 198, 427 P.2d 516 (1967).
[2] Ariz. Rev. Stat. Ann. § 28-503 (1956) (provides that a plaintiff may obtain service on a non-resident defendant by serving process on the motor vehicle superintendent and sending notice of such service and a copy of the summons and complaint to the defendant by registered mail).
[3] Ariz. Rev. Stat. Ann. § 12-404 (1956).

court of appeals but the supreme court, in granting the writ, *held*, the trial court was not statutorily required to grant the change of venue. Where both parties to an open action brought pursuant to the non-resident motorist statute are non-residents, venue is properly laid in any county in the state since the motorist statute contains no venue provision and the venue statute, providing that an action for trespass "may" be brought where the trespass occurred,[4] is not mandatory.

To reach this result, the court found it necessary to determine what, if any, venue restrictions are placed on actions brought under the non-resident motorist statute when both parties are non-residents. Since the general venue statute has no specific provision for venue in such a situation, the court was called upon to construe the venue statute and the non-resident motorist statute together.

The court reviewed the history and purpose of the statutes. A venue statute in Arizona was first enacted in 1901[5] and the legislature covered as many situations as it could forsee at that time. The purpose of the statute was to restrict the common law rule that venue of a transitory action could be laid in any county in which the defendant could be found and served.[6] Thus, under the statute, where the defendant is a resident of the state, he can only be sued *in the county where he resides.*[7] However, there are qualifications to this general rule. For example, where the defendant is a non-resident, the rule obviously does not apply and the plaintiff may bring the action in the county where *he* resides.[8] Where the action is for trespass (which has been held to include negligence in the operation of an automobile[9]) the plaintiff may bring suit either where the trespass occurred or where the defendant resides or may be found.[10] In 1901, however, the current frequency of actions between non-residents was not envisioned.[11] By 1935, the auto-

[4] ARIZ. REV. STAT. ANN. § 12-401(10) (1956) (provides that where the foundation of an action is a trespass, the action "may be brought in the county where the trespass occurred or in the county where the defendant resides or may be found").

[5] ARIZ. REV. STAT. CIV. CODE § 1294 (1901) (essentially the same as the present venue statute).

[6] Pride v. Superior Court, 87 Ariz. 157, 348 P.2d 924 (1960).

[7] ARIZ. REV. STAT. ANN. § 12-401 (1956) (provides that no person shall be sued out of the county where he resides).

[8] ARIZ. REV. STAT. ANN. § 12-401(1) (1956).

[9] In *Pride v. Superior Court*, 87 Ariz. 157, 348 P.2d 924 (1960), the court held that *affirmative* acts of negligence constituted trespass within the trespass exception. In the principal case, the court cited *Pride* as holding that trespass includes negligence in the operation of an automobile, without distinguishing between "active" and "passive" negligence. This distinction has created some confusion in Texas, from whom we took our venue statute. However, in *Smitheran v. Superior Court*, 5 Ariz. App. 170, 414 P.2d 461 (1966), the court of appeals squarely met the issue and declared that it was unrealistic to attempt a distinction between misfeasance and nonfeasance, holding that *all* acts of negligence constitute trespass under the trespass exception.

[10] ARIZ. REV. STAT. ANN. § 12-401(10) (1956).

[11] In 1901, constructive service upon a non-resident was not possible under the rule of *Pennoyer v. Neff*, 95 U.S. 714 (1877). Since jurisdiction over a non-resident defendant was not easily obtained even by a resident plaintiff, it is certain that

mobile had become a popular mode of interstate travel, with a resulting increase in accidents involving out-of-state motorists. The purpose of the non-resident motorist responsibility statute was to provide a method whereby a non-resident motorist could be made to respond in an action for negligence within the state of Arizona. But here also, the legislature failed to specify venue for actions brought under the statute with the result that venue of actions between two non-resident parties was not provided for anywhere.

To aid in the construction of these statutes, the Court reviewed other authorities which had resolved the issue of the instant case under their non-resident motorist statutes. Some states have restricted venue to the county where the accident occurred[12] while others have allowed the action to be brought in any county in the state.[13] The court found the case of *Claseman v. Feeny*,[14] in the second category, to be most persuasive. The Minnesota venue statute provided that an action for negligence arising from an automobile accident "may" be brought in the county where the action arose or the county of the residence of the defendant.[15] The court held that since the action could be brought where the defendant resided, if the defendant was a non-resident, the action should be triable in any county designated by the plaintiff. Since that Minnesota statute is very similar to Arizona's, the court adopted the *Claseman* rationale.

Since the plaintiff has an election to bring his suit in any court of proper venue, the defendant is not entitled, as a matter of right, to a change of venue to the county where the accident occurred. However, the plaintiff's choice of venue is not absolute; the defendant, upon a showing of "venue non conveniens" may obtain a change of venue.[16]

It is possible that a *resident* plaintiff may wish to exercise the same degree of choice in an action against a non-resident as was afforded the

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the legislature did not conceive that a non-resident plaintiff would desire to sue a non-resident defendant in an Arizona court where the parties' only connection with the state was through their operation of a motor vehicle.

[12] *E.g.*, Williams v. Meredith, 326 Pa. 570, 192 A. 924 (1937). The venue statute allowed actions to be brought in the county where the accident occurred. The court held that the "long arm" statute, being in derogation of common law, must be strictly construed, and the venue statute allowing actions to be brought in the county of the accident must be interpreted as restricting actions under the service statute to the county of the accident.

[13] *E.g.*, Alcarese v. Stinger, 197 Md. 236, 78 A.2d 651 (1951). The venue statute and the service statute were silent as to venue of an action against a non-resident, and the court therefore held that venue must be governed by common law. Since at common law a tort action was transitory and could be brought in any county a plaintiff might find the defendant, the plaintiff could bring the action in any county he might designate.

[14] 211 Minn. 266, 300 N.W. 818 (1941).

[15] MASON'S MINN. STAT. OF 1927, § 9213-1 (Supp. 1940).

[16] ARIZ. REV. STAT. ANN. § 12-406 (1956) (provides that either party may obtain a change of venue on showing adequate cause).

non-resident plaintiff in the instant case, rather than bring his action in the county of his residence or the county where the accident occurred. It would seem that the court's decision would apply whether the plaintiff was a resident or not, particularly since the cases upon which the court relied in the instant case all involved a *resident* plaintiff and a *non-resident* defendant. Both the venue provision covering the resident plaintiff and the provision covering trespass, state that the "plaintiff may" bring the action in the county of his residence or the county where the accident occurred. Since this "may" has previously been interpreted as being permissive,[17] these provisions could be construed as merely suggesting, rather than restricting, possible choices of venues for the resident plaintiff as well.

Ramada Inns, Inc. v. Lane and Bird Advertising, Inc.[18] Plaintiff brought an action against defendant, a corporation, for a money judgment and defendant's Illinois house counsel advised defendant's president that an answer to the complaint signed only by the president could properly be filed. The president acted accordingly and plaintiff filed an affidavit of default urging that the answer be regarded as a nullity since it was not signed by an attorney. Defendant then filed an amended answer, signed by an attorney, and moved to set aside entry of default on the grounds of excusable neglect and the existence of a meritorious defense. The trial court denied the motion and entered a judgment. On appeal, *held,* reversed. Although a corporation can neither practice law in its own behalf nor appear in court through an agent not an attorney, where a corporate defendant's delay in answering properly is occasioned by excusable neglect and it asserts a meritorious defense, a default judgment against it may be set aside.

The question raised by the principal case was one of first impression in Arizona: whether a private corporate entity falls within the meaning of the Rule of Civil Procedure allowing a "party" to sign his own pleading.[19] The court adopted the majority view that a corporation cannot practice law on its own behalf or appear in court through an agent not a licensed attorney. This decision is consistent with the court's position in *State Bar of Arizona v. Arizona Land Title & Trust Co.*,[20] where it held that a corporation could not practice law *under any circumstances.* There it was reasoned that the fictional nature of a

[17] Massengill v. Superior Court, 3 Ariz. App. 588, 416 P.2d 1009 (1966).
[18] 102 Ariz. 127, 426 P.2d 395 (1967).
[19] ARIZ. R. CIV. P. 11. The Rule requires that every pleading of a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney shall sign his own pleading.
[20] 90 Ariz. 76, 366 P.2d 1 (1961). *See also* Paradise v. Nowlin, 86 Cal. App. 2d 897, 195 P.2d 867 (1948) (stating that, while it is true a natural person can represent himself in court, a corporation is not a natural but an artificial entity, created by law, and as such can neither practice law nor appear or act in person).

corporation does not permit it to meet the rigid and extensive requirements which must be met to hold a license to practice law.

However, default judgments are not favored,[21] and the court in the instant case held that although defendant's president's signature on the answer did render it a "nullity," and its amended answer was not timely, the default judgment should be set aside. This ruling was based on an interpretation of Rule 60(c), Arizona Rules of Civil Procedure, which provides for setting aside a default judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect.[22] The court found that defendant's reliance on the advice of counsel on a point of law not settled in this jurisdiction was the act of a reasonable and prudent man in the same circumstances and thus constituted excusable neglect. This factor, combined with defendant's uncontroverted averment of a meritorious defense,[23] makes the result consistent with the policy of the Rules of Civil Procedure to allow parties a reasonable opportunity to litigate claims on their merits.[24]

A possible problem raised by the instant case is that a corporation may simply be too impoverished to retain the services of an attorney.[25] No doubt one of the major reasons underlying the court's decision in *State ex rel. Frohmiller v. Hendrix*[26] — holding that an *indivdual* is not practicing law without a license when acting only for himself — was the recognition that an attorney's services are expensive and an individual should not be denied his day in court simply because he cannot afford one. Neither does the fictional nature of the corporate entity isolate it from such financial woes. It is possible that a weighing of interests could result in some criteria by which a corporation, upon a showing of its financial position, would be allowed to litigate a claim without the services of an attorney.

Union Interchange, Inc. v. Van Aalsburg.[27] Plaintiff brought an

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[21] Marsh v. Riskas, 73 Ariz. 7, 236 P.2d 816 (1951).

[22] In *Brown v. Beck*, 64 Ariz. 299, 169 P.2d 855 (1946), where the defendant was under the mistaken belief that he was served at a day subsequent to that shown on the process server's return, the court set aside a judgment on the ground of mistake.

[23] In *Rogers v. Tapo*, 72 Ariz. 53, 230 P.2d 522 (1951), the court held it is not enough that defendant show excusable neglect; he must also show he had a meritorious defense.

[24] Hendrie Buick Co. v. Mack, 88 Ariz. 248, 355 P.2d 892 (1960).

[25] Victor & Co. v. Sleininger, 255 App. Div. 673, 9 N.Y.S.2d 323 (1939). The court construed art. 8, § 3 of the Constitution of New York (1894), which provided that all corporations shall have the right to sue and be subject to suit in all courts in like cases as natural persons. In holding that a corporation could appear in its own behalf, the court stated that a corporation might be too impoverished to retain an attorney or unable to find one to prosecute a claim thought to be hopeless. (Subsequent legislative changes have nullified this decision and a corporation is no longer able to appear in *propria persona* in New York.)

[26] 59 Ariz. 184, 124 P.2d 768 (1942).

[27] 102 Ariz. 461, 432 P.2d 589 (1967).

action for breach of contract and, although summons was issued, it was never served on the defendants. Four years later plaintiff filed an "amended complaint" consisting of a verbatim recital of the original complaint, and process was served at that time. Defendants filed an answer and appeared at the pre-trial conference where they learned of the original complaint for the first time. Defendants then amended their answer and set up abatement of the action under Arizona Rule of Civil Procedure 6(f)[28] as an affirmative defense since service had not been made on the defendants within one year from the filing of the original complaint. Defendants' motion for summary judgment was granted on the ground that the first action had abated. On appeal, *held,* reversed. Since summary judgment goes to the merits of a claim and constitutes a bar to a later suit, it cannot properly be granted on the sole ground that the action has abated, since this defect is rectified by a re-filing of the original complaint.

The court thus clarified the legal significance of abatement of an action under Rule 6(f). In 1924, in *McCullough v. Western Land & Cattle Co.*,[29] the court held that failure to effect service within one year, if not waived, would defeat the plaintiff's action for the present but would not bar him from "recommencing it in a better way."[30] The court in the instant case recognized that plaintiff's first action had abated, but held that filing of the "amended complaint" placed the plaintiff within the spirit and intent of the *McCullough* rule and thus the abatement of plaintiff's action was rendered moot. This ruling sets forth one way whereby a plaintiff wishing to refile on an action that has abated under Rule 6(f) may recommence it "in a better way," provided the statute of limitations has not run in the meantime.

The court then considered whether abatement under Rule 6(f) could be a proper foundation for summary judgment. Abatement does not go to the merits of a case but relates to a party's observance of procedural rules. Where the plaintiff has "failed to prosecute or comply with" the Rules of Civil Procedure, Rule 41(b)[31] permits a dismissal without prejudice which does not bar the plaintiff from later refiling the same cause of action.[32] On the other hand, a summary judgment is properly granted only where the pleadings, affidavits, oral testimony

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[28] ARIZ. R. CIV. P. 6(f) (provides that an action shall abate if the summons is not issued and served, or the service by publication commenced, within one year from the filing of the complaint).

[29] 27 Ariz. 154, 231 P. 618 (1924) (construing ARIZ. REV. STAT. CIV. CODE § 6-460 (1913), which provided that an action shall abate if the summons be not issued and served within one year from filing of the complaint).

[30] *Id.* at 158, 231 P. at 619.

[31] ARIZ. R. CIV. P. 41(b) (provides that for failure of the plaintiff to prosecute or comply with the rules, a defendant may move for a dismissal of the action. *Unless otherwise specified,* such a dismissal operates as an adjudication upon the merits of the case).

[32] Adams v. Bear, 87 Ariz. 172, 349 P.2d 184 (1960).

and briefs of the parties affirmatively show that there are no genuine issues as to any material fact and, in addition, that the moving party is entitled to judgment as a matter of law.[33] Therefore abatement cannot properly be raised by a motion for summary judgment. Since defendants' amended answer denied plaintiff's other allegations, thus joining genuine issues of material fact, there were no grounds to support such a motion in this case.

IV. Commercial Law

A. Contracts

Automotive Tire Service, Inc. v. First Nat'l Bank.[1] Defendant, a retailer, maintained an open account with a supplier and mailed it a check for merchandise received. However, after deciding to discontinue business with the supplier and return the merchandise, defendant executed a valid stop payment order on the check. Plaintiff, the bank in which the defendant maintained his account, inadvertantly paid the check from the defendant's account notwithstanding the stop payment order. Upon learning that the check had been paid, defendant protested and plaintiff agreed to recredit his account on the strength of defendant's assurance that when the merchandise was returned to the supplier and their affairs settled, the amount would be repaid to the bank. The merchandise was not returned by the defendant but was sold instead. The bank was not repaid from the proceeds and brought suit to recover the amount recredited to the defendant's account. On appeal from a judgment for the plaintiff, the court affirmed the decision below. Where a bank, although paying a check over its depositor's valid stop payment order, suffers damage to the enrichment of the depositor, the bank is entitled to restitution from the depositor as a matter of equity.

Defendant maintained unsuccessfully that the bank breached its legal obligation, created by contract, to honor his stop payment order, relying on the common law proposition (based on contract law), that if a bank paid a check over a valid stop payment order, it did so at its peril and could neither charge the depositor's account nor recover the amount paid.[2] The court, while acknowledging the accuracy of this proposition, found that, as a result of the agreement plaintiff acted to its detriment while conversely defendant had "in no way suffered any damage as a result of the entire transaction."[3]

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[33] Ariz. R. Civ. P. 56(b), (c).

[1] 102 Ariz. 512, 433 P.2d 804 (1967).

[2] *E.g.*, Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 P. 947 (1926); Tremont Trust Co. v. Burack, 235 Mass. 398, 126 N.E. 782 (1920).

[3] 102 Ariz. at 514, 433 P.2d at 806 (1967).

The court considered the fact that the bank had recredited defendant's account on the good faith reliance that when the defendant settled his affairs with the supplier it would be repaid. Defendant's failure to repay the bank after the sale of the merchandise was not in good faith but rather an attempt to escape from its obligations to the supplier and the bank. Therefore, the court reasoned, the defendant would be unjustly enriched at the bank's expense without suffering any damage, since the court found that the defendant was indebted to the payee and that the bank's payment relieved the defendant of this legal obligation.[4]

The Uniform Commercial Code was enacted in Arizona shortly after this decision was rendered. Were the instant case decided under the Code, plaintiff in attempting to recover the amount recredited to the defendant's account could rely on A.R.S. § 44-2633:

> If a payor bank has paid an item over the stop payment order of the drawer or maker . . . to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights:
>
> . . . .
>
> 2. Of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose. . . .[5]

This section of the Code allows the bank to be subrogated to both the rights of the payee against the drawer and of the drawer against the payee,[6] on the item, or with respect to the transaction out of which the item arose. Thus if the drawer has good cause to stop payment the bank is subrogated to the drawer's rights against the payee; conversely if the drawer's stop payment order is unwarranted the bank assumes the payee's rights against the drawer. These subrogation rights exist only to the extent necessary to prevent unjust enrichment of others at the bank's expense.

Co-op Dairy Inc. v. Dean,[7] involved an oral contract of employment for a period of one year. No evidence was admitted at the trial as to when the contract was to begin. Plaintiff interviewed defendant, a dairy, concerning employment, at which time they orally agreed to terms "for a minimum period of one year." Defendant also promised to pay the cost of moving plaintiff's family from Oklahoma to Arizona. The following day plaintiff signed a one year lease on an apartment, went to Oklahoma to assist his family in moving, and thirteen days

[4] The court found the amount paid was due and payable to the payee supplier.
[5] ARIZ. REV. STAT. ANN. § 44-2633 (1968).
[6] ARIZ. REV. STAT. ANN. § 44-2633(3) (1968).
[7] 102 Ariz. 573, 435 P.2d 470 (1967).

after entering the oral contract, reported for work. A short time later he was fired without legal justification. Plaintiff brought this action for breach of oral contract and sought to recover his moving expenses and the balance of one year's salary under the contract, less what he was able to earn on a subsequent job. Judgment was entered for plaintiff and defendant appealed, contending that an oral contract for a period of one year, to begin in the future, was within the Arizona Statute of Frauds[8] and was therefore unenforceable. In affirming the lower court's decision, the supreme court held that the statutory provision "not to be performed within one year" means there must not be the *slightest possibility* that the contract can be performed within that time.

Plaintiff contended that a contract which is to commence on the day following its making and is to continue for one year is not within the Statute, and that the signing of a one year rental lease the following day was in effect beginning performance under the contract. In answer, the court stated that signing the lease was not proof that the contract began the following day, but that plaintiff's failure to report for some thirteen days was not proof he *could not have reported* the following day. The court agreed that as a general rule of law, a one year contract to begin in the future is within the Statute; however, if it were *possible* for performance to begin the following day, the Statute of Frauds would not apply because performance could be completed within the required period.[9]

It is interesting to note in the record that it was understood between the parties that plaintiff would not start work until after he had moved his family. The court stated it was not necessary to take this statement literally. It could mean that plaintiff did not *have* to report until his family was moved, or it could mean he *could not* report until his family was moved. The court chose the former meaning, relying on dictum from a United States Court of Appeals case[10] which stated: "The Statute of Frauds is an anachronism in modern life and we are not disposed to expand its destructive force."

Kintner v. Wolfe.[11] See casenote 9 *Arizona Law Review* 477.

U.S. Fidelity & Guaranty Co. v. Olds Bros. Lumber Co.[12] Plaintiff

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[8] ARIZ. REV. STAT. ANN. § 44-101(5) (1956).

[9] The court cited with approval a California case relied upon by the plaintiff. That case held that the statutory words "not to be performed within one year" are now uniformly construed to exclude the day upon which the agreement is made; that is, the year is considered to begin with the following day and to end at the close of the anniversary of the day on which the agreement is made. Columbia Pictures Corp. v. DeToth, 87 Cal. App. 2d 620, 633, 197 P.2d 580, 588 (1948).

[10] Farmer v. Arabian Am. Oil Co., 277 F.2d 46, 51 (2d Cir. 1960).

[11] 102 Ariz. 164, 426 P.2d 798 (1967).

[12] 102 Ariz. 366, 430 P.2d 128 (1967).

and defendant, on many prior occasions, had entered into separate written "Special Indemnity Agreements" on behalf of a building contractor with whom defendant, a lumber and building supplies dealer, had a beneficial commercial relationship. In these agreements, defendant had contracted to indemnify plaintiff, a surety, for any losses sustained in posting performance bonds for the contractor on his various jobs. For the sake of convenience, plaintiff and defendant merged these separate agreements into a "General Indemnity Agreement" on behalf of the same contractor. After plaintiff sustained a loss on one of these bonds, defendant refused to indemnify, alleging that a prior oral agreement between the parties provided that plaintiff would not post any such bond until he had first notified, and obtained the approval of, the defendant. The lower court held that the oral statements were collateral to the writing and therefore not covered by the parol evidence rule. From a judgment for defendant, *held*, reversed. Parol testimony may be admitted into evidence only when the written agreement is *completely* silent as to the subject matter sought to be established by parol.

That part of the "General Indemnity Agreement" which dealt with the assumption of secondary liability by plaintiff provided as follows:

> [T]he Undersigned [defendant] expressly agrees that *the Surety's* [plaintiff's] *acceptance of the application*, written or otherwise from a representative who is believed by the Surety in good faith to be an authorized agent of the Principal and the execution of any of such bonds and other obligations *shall constitute in each instance a request from the Undersigned for the Surety to assume suretyship. . . .*[13] (emphasis supplied).

Defendant based his argument on the theory of conditional delivery of the General Indemnity Agreement contending that each application by the contractor was meant to be a separate contract, dependent for viability upon the condition that defendant orally approve each application; and that the language of the written agreement, quoted above, did not deal with delivery.

The parol evidence rule is, of course, established law in Arizona. Yet, while conditions precedent to delivery have been defined by the court with regard to other types of contracts, they have never been applied to contracts of guaranty and suretyship.[14] The court recog-

[13] *Id.* at 368, 430 P.2d at 130.

[14] *See, e.g.*, Bank of Douglas v. Robinson, 78 Ariz. 231, 278 P.2d 417 (1954) (bank officer's promise that bank would not hold maker of a promissory note liable was beyond his authority, and not binding on the bank); Hoopes v. Long, 40 Ariz. 25, 9 P.2d 196 (1932) (parol condition contradicting terms of promissory note held inadmissible); Pleasant v. Arizona Storage & Distrib. Co., 34 Ariz. 68, 267 P. 794 (1928) (contemporaneous or subsequent oral agreement modifying written contract must have proper consideration); Fidelity Title Guar. Co. v. Ruby, 16 Ariz. 75, 141 P. 117 (1914) (parol evidence admissible to show conditional delivery of promissory note written in absolute terms); Hurley v. YMCA, 16 Ariz. 26, 140 P. 816 (1914); Lount v. YMCA, 16 Ariz. 34, 140 P. 819 (1914) (promises to subscribe to a building fund conditioned upon other subscriptions totaling a certain amount).

nized that "conditional delivery" and "conditions precedent to delivery" are known exceptions to the admissibility of parol evidence in Arizona,[15] since delivery deals with the initiation of the contract itself: if an existing condition precedent to delivery is not met, the contract never comes into being. However, a condition to delivery, like any other term, must not contradict or vary the legal import of the agreement, if it is to be admissible.

The distinction between a condition precedent to delivery, to which the parol evidence rule does not apply, and *any* parol agreement which is at variance with the terms of the *writing* to which the rule *does* apply, was critical in the instant case. The test applied was whether the contract was *entirely silent* as to the subject matter with which the oral condition dealt. In order for a condition precedent to be admitted under the parol evidence rule, it may not deal with the subject matter of the writing in *any* form. In the words of the court, the "oral agreement does not have to be a *specific* form of contradiction."[16] (emphasis added). Thus, the court found that the alleged condition precedent to delivery was inadmissible since that matter had been touched upon in the writing, thereby making it unnecessary to rule on the general question of the admissibility of parol evidence regarding conditions precedent to delivery.[17]

Justice Struckmeyer, in dissent, felt that since the subject of the oral agreement was not *specifically* dealt with in writing, the majority should not have found the parol evidence rule applicable.

B. Insurance

Dairyland Mutual Insurance Co. v. Andersen,[18] *Universal Underwriters Insurance Co. v. Dairyland Mutual Insurance Co.*,[19] and *Sandoval v. Chenoweth*.[20] These three decisions have added significantly to

[15] *E.g.*, Parker v. Gentry, 62 Ariz. 115, 154 P.2d 517 (1944); Fidelity Title Guar. Co. v. Ruby, 16 Ariz. 75, 141 P. 117 (1914); Hurley v. YMCA, 16 Ariz. 26, 140 P. 816 (1914).

[16] U.S. Fidelity & Guar. Co. v. Olds Bros. Lumber Co., 102 Ariz. 366, 370, 430 P.2d 128, 132 (1967).

[17] In dictum, the court stated that once a contract had been written and delivered, one party could not, by parol evidence, modify and change the express terms of the written instrument. The court distinguished between valid conditions precedent to delivery on the one hand, and promises of future action once delivery had occurred, pre-agreed modifications of a subsequently executed agreement, and conditions subsequent on the other. National Bank & Trust Co. v. Becker, 38 Ill. App. 2d 307, 187 N.E.2d 355 (1962) (condition subsequent); Farmer's Sav. Bank v. Weeks, 209 Iowa 26, 227 N.W. 508 (1929) (promise of future action); Meyer v. Armstrong, 49 Wash. 2d 598, 304 P.2d 710 (1956) (pre-agreed modification of a subsequently executed agreement).

[18] 102 Ariz. 515, 433 P.2d 963 (1967).

[19] 102 Ariz. 518, 433 P.2d 966 (1967).

[20] 102 Ariz. 241, 428 P.2d 98 (1967).

Arizona's changing automobile liability insurance law by amplifying its Financial Responsibility Act.[21]

In *Sandoval v. Chenoweth,* the defendant, insured by Financial Indemnity Company, was served with a summons and complaint after having been involved in an automobile accident with the plaintiff. Defendant neither notified Financial of such service nor appeared to defend himself and a default judgment was entered against him for $35,000. Based on this judgment, a writ of garnishment was issued against Financial for the full amount of the judgment. The plaintiff received summary judgment in the garnishment proceedings, in the amount of $5,000. Both appealed from this judgment. Plaintiff urged that the garnishment judgment be for the full $35,000, while Financial contended it should not be liable at all since the defendant did not comply with a policy provision requiring the insured to forward all summons and other legal papers to the insurer. Financial also contended it would be deprived of property without due process of law since it was not notified that the insured defendant had been sued, and thus never had a chance to defend against the plaintiff's claim. The court of appeals reversed the $5,000 judgment for the plaintiff and held Financial not liable. On petition for review, the supreme court found Financial liable for the full $35,000, holding that the Arizona Financial Responsibility Act both voided the "non-notification" clause in the policy and extended coverage to the full limits of the policy, and that Financial had not been deprived of due process of law since Financial's nine week delay in moving to set aside the default judgment constituted a failure to move within a "reasonable time" as required by Rule 60(c) of the Rules of Civil Procedure.

The court disposed of the "non-notification" clause in defendant's policy on the basis of § 28-1170 F of the Financial Responsibility Act, which states:

> Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein . . . and *no violation of the policy shall defeat or void the policy.* (emphasis added).

The court reasoned that since it had previously held, in *Jenkins v. Mayflower Insurance Exchange,*[22] that the term "motor vehicle liability policy" as used in the Act means *all* automobile liability insurance poli-

[21] ARIZ. REV. STAT. ANN. § 28-1101 to -1225 (1956). This Act, entitled the "Uniform Motor Vehicle Safety Responsibility Act," but popularly called the "Financial Responsibility Act," is designed to protect users of the public highways against financially irresponsible or insolvent motorists. The constitutionality of the Act was upheld in *Schecter v. Killingsworth,* 93 Ariz. 273, 380 P.2d 136 (1963).

[22] 93 Ariz. 287, 380 P.2d 145 (1963). Before the *Mayflower* decision there had been some question as to whether the term "motor vehicle liability policy" meant all policies, or was limited to a particular class of policies that had been "certified" as provided in the Act to give proof of future financial responsibility.

cies, the above-quoted section of the Act applied to the defendant's policy, thus voiding the "non-notification" clause and leaving Financial liable.

As to the validity of the underlying judgment, the court also rejected the insurer's claim that it was deprived of due process of law, reasoning that the insurer had been provided an adequate remedy — a motion to have the judgment set aside under Rule 60(c).[23] However, since nine weeks had elapsed between the time Financial learned of the default judgment and its motion to set it aside under this rule, the court found that the trial court did not abuse its discretion in denying the motion in this case.

It is noteworthy that the court held Financial liable for the full $35,000. Although this amount was within the policy limits, it is in excess of the $5,000 minimum then required by the Financial Responsibility Act.[24] The applicable section states that coverage in excess of that required by the Act "shall not be subject to the provisions of this chapter."[25] The court, however, held that this section was inoperative, reasoning that since it expressly applies to "motor vehicle liability policies," and since the distinction between those policies and other kinds of automobile liability policies was abolished by the *Mayflower* decision,[26] the section was made ineffectual for any purpose.

The principal effect of the *Sandoval* decision appears to be that, since an insured cannot void his policy by failing to notify his insurer of a lawsuit, he cannot do so by violating any other term of his policy either. The public policy underlying the Act will be served by this extension since it will prevent injured plaintiffs from going uncompensated because of a violation of the terms of the policy by an otherwise insolvent defendant. On the other hand, this is a rather severe limitation on the insurer's contractual freedom since it must pay a default judgment notwithstanding the insured's failure to notify it of the suit as required by the insurance contract. The insurer, of course, will pass this added risk on to other policyholders in the form of higher policy premiums.

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[23] ARIZ. R. CIV. P. 60(c) (Supp. 1967).

> On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment. *The motion shall be made within a reasonable time,* and for reasons (1), (2) and (3) not more than six months after the judgment, order or proceeding was entered or taken. . . . The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (emphasis added).

[24] At the time the cause of action in *Sandoval* arose, the Financial Responsibility Act required a minimum of $5,000 coverage for personal injuries to any one person, and a minimum of $10,000 total coverage for personal injuries in any one accident. This was raised to $10,000 and $20,000 respectively in 1961. ARIZ. REV. STAT. ANN. § 28-1170 B(2) (Supp. 1967).

[25] ARIZ. REV. STAT. ANN. § 28-1170 G (Supp. 1967).

[26] Jenkins v. Mayflower Ins. Exch., 93 Ariz. 287, 380 P.2d 145 (1963).

Another major effect of *Sandoval* is to extend full coverage — to the limits of the defendant's policy — to anyone covered by that policy by operation of law, instead of extending it only to the minimum amounts required by the Act. The logic set forth by the court in reaching this result is unclear at best, since the Financial Responsibility Act states that coverage furnished by a "motor vehicle liability policy" in excess of that required by the Act "shall not be subject to the provisions of this chapter."[27] Since the court held in *Mayflower* that the term "motor vehicle liability policy" means *all* automobile liability policies, the plain meaning of the section would seem to be that any coverage in excess of that required by the Act would not be affected by the Act. In the instant case, the Act would thus not void the "non-notification" clause as to the coverage in excess of that required ($5,000). The court, however, held that since the section refers specifically to "motor vehicle liability policies," and since this term as defined in *Mayflower* means all policies, the entire section is rendered ineffectual. The only reason for voiding the clause would seem to be that the court here recognizd that the legislature meant only "certified"[28] policies when it used the term "motor vehicle liability policy," but since it had previously held in *Mayflower* that the term meant *all* policies, the section was thereby made ineffectual because the obvious distinction intended by the legislature was disregarded. If this is the reasoning, it puts the court in the position of admitting by implication that its *Mayflower* decision four years earlier defines "motor vehicle liability policy" in a way not intended by the legislature.

In *Dairyland Mutual Insurance Company v. Andersen,*[29] another policy provision was voided on the basis of the *Mayflower* decision. Like *Sandoval,* the *Andersen* case applied the *Mayflower* doctrine to void a provision which otherwise would have excused the insurer from liability. While in *Sandoval* it was a "notification" provision, in the instant case it was a provision excluding a specific driver from coverage under the policy covering the vehicle.

In *Andersen,* two insurance companies were garnished after Andersen, who was arguably within the broad coverage of policies issued by both, was adjudicated liable for plaintiff's personal injuries. The injuries were sustained when Andersen, driving a vehicle he did not own, which was insured by the Great Basin Insurance Company, collided with plaintiff's vehicle. The Great Basin policy contained a provision specifically excluding Andersen from coverage. Andersen was, however, covered under his own policy with Dairyland Mutual Insurance Company. Although both policies contained "other insurance" clauses which pro-

[27] ARIZ. REV. STAT. ANN. § 28-1170 G (Supp. 1967).
[28] See note 22 *supra.*
[29] 102 Ariz. 515, 433 P.2d 963 (1967).

vided that the loss was to be apportioned in accordance with the relative maximum policy limits with all other insurance covering the same liability, the Dairyland policy had an additional provision: in the event the insured was driving an automobile which he did not own, Dairyland's coverage would be "excess" and apply *only after all other valid and collectible insurance had been completely expended.* From a judgment in the garnishment proceedings against both insurance companies, this appeal was taken. The court voided the Great Basin exclusionary provision as being contrary to the statutory "omnibus" clause[30] as interpreted in the *Mayflower* case, and held that when the driver of an automobile is covered by two policies, both having "other insurance" clauses, but one also containing an "excess" clause, the "excess" clause will be upheld since it is not inconsistent with the purpose of the Financial Responsibility Act.[31]

The court stated that in interpreting an insurance policy, the intention of the parties should govern, insofar as the policy complies with public policy. The intention of Dairyland was to provide no coverage until all other valid and collectible insurance had been exhausted. Here, the court found that the policies were unambiguous, and that they were not conflicting nor inconsistent. Reading them together, the court therefore held Great Basin primarily liable to the extent of its policy limits.

Great Basin contended its policy's provision specifically excluding Andersen should have been given its intended effect, setting forth two arguments why *Mayflower* should not be applied to the exclusionary clause in question — that *Mayflower* was distinguishable on its facts and should be limited to clauses attempting to exclude a *class* of people[32] and not those in which a specific *individual* is excluded, as in the Great Basin policy, and that *Mayflower* should not be applied since Dairyland's policy was still applicable despite Great Basin's exclusionary provision and thus the public was protected against an uninsured motorist in compliance with the Act. The court rejected these contentions, saying only that it refused to "engraft exceptions" on the rule.

Great Basin further argued against the garnishment by pointing to another provision in its policy,[33] requiring *reimbursement* from the in-

[30] ARIZ. REV. STAT. ANN. § 28-1102 to -1225 (1956).
[31] ARIZ. REV. STAT. ANN. § 28-1170 (1956).
[32] In *Mayflower* the exclusionary provision denied coverage to any person in the Armed Forces.
[33] 9. Financial Responsibility Laws — Coverages A and C:
When this policy is certified as proof of financial responsibility for the future under the provisions of the motor vehicle financial responsibility law of any state or province, such insurance as is afforded by this policy for bodily injury liability or for property damages liability shall comply with the provisions of such law which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during

sured where statutory requirements caused the company to make payments it was not obligated to make under the terms of the policy. Great Basin contended that since Andersen must reimburse it, it was not *indebted* to him, and not being indebted to him could not be garnished for a judgment against him. The court, however, rejected this contention as contrary to the policy of the Financial Responsibility Act.

Andersen, on the other hand, contended that since he must reimburse Great Basin, he was in effect, *not covered* under Great Basin's policy, and therefore the only valid and collectible insurance was Dairyland's. The court disposed of this contention by reasoning that Andersen's obligation to reimburse Great Basin was a *contractual* liability resting on his privity with Great Basin, and not the type of liability covered by the Dairyland policy. It is interesting to note here that while the court based its finding on Andersen's "contractual" liability to Great Basin, in fact Andersen's only insurance contract was with Dairyland.[34] If this holding is applicable generally it will defeat completely the protection that a person has when driving an automobile other than his own. If his own liability policy contains an "excess" clause and the policy on the car contains a reimbursement provision, he will be required to pay the full amount of any liability imposed upon him arising out of an accident. His purpose in buying his personal policy was to protect himself from this possibility.

The court again dealt with the *Mayflower* doctrine in *Universal Underwriters Insurance Company v. Dairyland Mutual Insurance Company.*[35] Here both parties had "other insurance" clauses in their policies, but only the Universal policy had an "excess" clause. The Dairyland policy contained a provision excluding coverage to any person or organization operating an automobile "sales agency" or "repair shop." On the basis of this exclusionary clause, Dairyland refused to defend its insured, the owner of the vehicle, since the accident occurred due to the negligence of an employee of a "repair shop." Universal, the insurer of the repair shop, undertook the defense and after trial settled the lawsuit, and then brought an action against Dairyland to recover the amount of the judgment. Dairyland avoided liability in the trial

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the policy period of any automobile insured hereunder, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. *The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.* (emphasis added).

[34] The court ordered upon remand that it be determined whether Great Basin's policy was actually certified so that Section 9 of Great Basin's contract would apply, thereby giving rise to his duty to reimburse Great Basin. It is interesting to note here that the court is recognizing a distinction between certified and non-certified policies, a distinction which the court refused to recognize in *Mayflower.*

[35] 102 Ariz. 518, 433 P.2d 966 (1967).

court by relying upon the exclusionary provision in its policy. The court of appeals held Dairyland's exclusionary clause void as contrary to *Mayflower*, but affirmed the result of the lower court, reasoning that "excess" and "other insurance" clauses are but "one method by which insurers limit their liability," that *Mayflower* should apply to them and render them of no effect, and that "primary liability should be derivative of the negligence of the named insured."[36] On petition for review, the court reversed, refusing to apply the *Mayflower* principle to "other insurance" and "excess" clauses, gave effect to the "excess" clause in the Universal policy, and held Dairyland primarily liable.

Since the judgment exceeded Dairyland's policy limits, thus bringing Universal's "excess" clause into play, Universal argued that Dairyland's refusal to defend its insured constituted bad faith toward its insured and therefore Dairyland should be liable for the *entire* judgment. The court, however, answered that there was no privity of contract between the two companies and hence, such a defense could properly be asserted only by Dairyland's insured.

Prior to these pronouncements of the court, the area of liability apportionment had been unclear in Arizona. It would appear that the court has now clarified the Financial Responsibility Act as it applies to this area. "Other insurance" and "excess" clauses are not void under the *Mayflower* decision, but rather will be given their full effect when two or more insurance companies insure the same risk. Thus, where the policies are not conflicting or inconsistent, liability will be decided by the provisions in the policies. Presumably, where the policies cannot be read together, *e.g.*, where both contain "excess" clauses, they will be apportioned in proportion to the maximum limits of the applicable policies.

Knight v. Metropolitan Life Ins. Co.[37] See casenote 9 *Arizona Law Review* 497.

C. Secured Transactions

Price v. Universal C.I.T. Credit Corp.[38] Plaintiff entered into an agreement with one Daymus, a used car dealer, whereby plaintiff agreed to finance the purchase of cars by Daymus in return for a promise by Daymus that upon the sale of each car he would repay the amount advanced plus a service charge. Plaintiff was to hold the certificates of title endorsed in blank by the parties from whom Daymus had purchased the cars. It was assumed that this would protect all parties concerned

[36] 5 Ariz. App. 174, 424 P.2d 465, *rehearing denied*, 5 Ariz. App. 296 at 299, 425 P.2d 866 at 869 (1967).
[37] 437 P.2d 416 (Ariz. 1968).
[38] 102 Ariz. 227, 427 P.2d 919 (1967).

since a buyer presumably would request a certificate of title at the time of the sale, discover plaintiff's security interest, and demand that Daymus redeem the certificate from plaintiff. It was also felt that this would simplify the paperwork required in transferring the title since title applications often take several weeks to process through the Motor Vehicle Division. Pursuant to this agreement, plaintiff advanced money for the purchase of a Porsche and a Jaguar, which Daymus sold a few days later by conditional sales contracts — the Porsche to one Easley, and the Jaguar to one Walden. The contracts were then sold and assigned to the defendant, a financing corporation. Neither buyer requested to see the certificates of title and defendant relied on Daymus to handle the transfers. Daymus failed to pay plaintiff the money he received from the assignments and later went into bankruptcy. Shortly thereafter plaintiff had the blank titles reissued in his name and brought an action against the defendant. Due to the unique circumstances which followed the sale of the two automobiles, and the distinct legal ramifications which arose thereby, the court's determination of the rights of the parties as to each transaction will be considered separately.

The Jaguar. Walden, the purchaser of the Jaguar, refused to make the payments and was released from the contract by the defendant who took over the ownership of the automobile. As to the Jaguar, plaintiff sought to recover damages for conversion and to have defendant declared a constructive trustee. In upholding the lower court's decision denying the requested relief, the supreme court held that Walden purchased without notice of plaintiff's interest and acquired good title to the Jaguar, free of plaintiff's lien, and therefore transferred good title.

The basic problem in cases such as this stems from a conflict between policy considerations in favor of protecting buyers in the ordinary course of business and a statutory system which permits an automobile financer to protect his interest in automobiles offered for sale by dealers. In the instant case, the court recognized the general rule as to chattels that constructive notice (usually obtained by recording of the chattel mortgage) is not afforded by the recording of a chattel mortgage where the mortgagee permits the chattel to remain in the hands of a dealer engaged in the sale of the same or similar goods.[39] An apparent authority is created in the dealer to sell the goods and an innocent purchaser generally obtains title to such chattels free of the mortgagee's lien. However, the court was also faced with the fact that Arizona, like most states, has adopted certificate-of-title legislation providing that no instrument affecting or evidencing title or ownership of any motor vehicle is valid against subsequent purchasers without notice

[39] *Id.* at 231, 427 P.2d 923, quoting from Mixon v. Whitman, 279 Ala. 249, 184 So. 2d 332 (1966).

until the requirements of the statute have been complied with,[40] which includes depositing a copy of such instrument with the motor vehicle division.[41] The instrument is then filed and the vehicle division issues a new certificate of title indicating the lien or encumbrance and the amount thereof.[42] Upon proper issuance of a new certificate of title a purchaser is charged with constructive notice of any liens against the vehicle described therein.[43] Moreover, no dealer may possess or offer for sale any vehicle in his possession without also possessing a duly and regularly assigned certificate of title thereto,[44] which he is required to deliver to the purchaser at the time of sale.[45] The purpose of such legislation is not only to make it more difficult for a thief to dispose of a stolen car, but also to protect the buyer and lienholder against fraudulent conduct by dishonest dealers.[46]

In the instant case, the purchasers did not receive a certificate of title at the time of sale because of a failure on the part of both plaintiff and Daymus to comply with statutory requirements. Plaintiff held the certificates and failed to perfect his lien; Daymus failed to deliver the certificates to the purchasers. Since defendant acquired whatever rights he had to the Jaguar from the purchaser, the court was called upon to determine whether title passed to Walden free of plaintiff's lien, notwithstanding lack of a certificate of title.

In reaching its conclusion the court adopted the reasoning of a District of Columbia case involving similar circumstances and statutory provisions.[47] There the court stated that such statutes are ". . . a bulwark, not a trap. The mortgagee is favored so long as he acts consistently with the statutory conditions. But when he goes further . . . , he destroys the foundation upon which his own protection rests."[48]

The plaintiff contended that the buyers could have ascertained Daymus' lack of title by a search of the public records and therefore were not innocent purchasers. The court rejected this contention and found that although the buyers did not check these records, an examination would have uncovered no more information than they assumed from appearances: the records would have disclosed the names of the previous owners, and the previous owners would have confirmed the sales to Daymus.[49]

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[40] ARIZ. REV. STAT. ANN. § 28-325 A (1956).
[41] ARIZ. REV. STAT. ANN. § 28-325 B (1956).
[42] ARIZ. REV. STAT. ANN. § 28-325 C (1956).
[43] ARIZ. REV. STAT. ANN. § 28-325 E (1956).
[44] ARIZ. REV. STAT. ANN. § 28-1310 (1956).
[45] ARIZ. REV. STAT. ANN. § 28-314 A (1956).
[46] Sorenson v. Pagenkopf, 151 Kan. 913, 101 P.2d 928 (1940).
[47] Fogle v. General Credit Inc., 122 F.2d 45 (D.C. Cir. 1941).
[48] *Id.* at 49.
[49] 102 Ariz. 227, 231-32, 427 P.2d 919, 923-24 (1967).

Plaintiff, relying on *Pacific Finance Corp. v. Gherna*,[50] also contended that since the sales were not made in compliance with Arizona certificate-of-title laws they were "void ab initio." He construed that case "to mean that a certificate of title *must* be transferred and assigned, to effect a valid sale. . . ."[51] (emphasis added) In refusing to accept plaintiff's construction of *Gherna*, the court found that "on the contrary, the language indicates that the contract is valid and that the seller owes a duty to deliver the title certificate to the buyer."[52]

Thus, the court concluded that the buyers from Daymus acquired good title to the vehicles, that they had the "right and ability to transfer good title to the vehicles, and therefore [the action against defendant] for the conversion of the Jaguar must fail."[53]

Price was decided prior to Arizona's enactment of the Uniform Commercial Code. However, the result reached would not have been changed under the Code since the plaintiff did not perfect his security interest in the vehicles by having the titles reissued in his name.[54] Moreover, the result would have been the same under the Code *even if plaintiff had perfected* his lien as prescribed by A.R.S. § 28-325. The Code provides that "[a] buyer in ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."[55] A "buyer in ordinary course of business" is defined as:

> a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind. . . .[56]

Here Walden and Easley, without knowledge of plaintiff's interest, purchased automobiles from Daymus who was in the business of selling used cars. As pointed out in Comment 2 to Section 9-307 (A.R.S. §

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[50] 36 Ariz. 509, 287 P. 304 (1930). The following language in *Gherna* was relied upon by plaintiff:

> [i]t was the duty of the [seller], at the time it sold the car . . . to also deliver him a properly assigned Arizona certificate of title. Having failed to do that, it was in default on its contract. . . . *Id.* at 517, 287 P. at 306.

[51] Price v. Universal C.I.T. Credit Corp., 102 Ariz. 227, 232, 427 P.2d 919, 924 (1967).

[52] *Id.*

[53] *Id.*

[54] The Code provides that where state law requires indication on a certificate of title of a security interest this shall be the exclusive method of perfecting such security interests in motor vehicles. UNIFORM COMMERCIAL CODE § 9-302(3), (4) (ARIZ. REV. STAT. ANN. § 44-3123 C, D (1968)). Thus, a security interest in motor vehicles would be perfected under the code by compliance with the certificate-of-title legislation. Section 9-301 (A.R.S. § 44-3122), by implication, provides that any buyer takes free of an *unperfected* security interest.

[55] UNIFORM COMMERCIAL CODE § 9-307(1) (ARIZ. REV. STAT. ANN. § 44-3128 A (1968)).

[56] UNIFORM COMMERCIAL CODE § 1-201(9) (ARIZ. REV. STAT. ANN. § 44-2208(9) (1968)).

44-3128), the financer will not be protected against a buyer in the ordinary course of business unless the buyer knows of the existence of the security interest, and "knows, in addition, that the sale is in violation of some term in the security agreement. . . ."

Under Arizona's certificate-of-title legislation, once the lien or encumbrance is recorded on the face of the title, subsequent purchasers are charged with constructive notice of the interest.[57] Prior to enactment of the Code, such a purchaser would probably have taken title subject to the interest indicated thereon. However, under Section 9-307(1) of the Code, such a purchaser would take free of the interest listed on the title. This result does not present a conflict between the existing certificate of title statute and the new Code provision, for Section 9-307(1), in protecting a buyer in the ordinary course *even though he knows of the existence of the security interest,* would apply regardless of the constructive notice. Moreover, even if the two provisions were assumed to conflict, that part of the Act inconsistent with the Code would have been repealed upon enactment of the Code.[58]

The Porsche. Easley, the purchaser of the Porsche, paid off the contract on his car and subsequently sold it to another car dealer. The plaintiff sought to recover damages from defendant for conversion of the conditional sales contract on the Porsche and to have defendant declared a constructive trustee of the contract. The supreme court upheld the lower court's decision in favor of defendant holding that the defendant could not be held liable for conversion of the conditional sales contract because he was a bona fide purchaser of the contract, without notice of plaintiff's interest.

Plaintiff's principal argument was that the assignee of a conditional sales contract could acquire no greater rights than those of his assignor. The court found, however, that this principle did not apply where the conditional sales contract is sold in the ordinary course of business to a bona fide purchaser for value and without notice. In certain circumstances when a sale of a chattel destroys a lien, an equitable lien will attach to the proceeds of that sale (here the conditional sales contract). However, an equitable interest in proceeds is cut off when the proceeds are later acquired by a bona fide purchaser (defendant in this case).

The Uniform Commercial Code sections discussed earlier would require this same result. But what would the result under the Code have been if plaintiff had perfected his security interest? Section 9-308[59] provides that:

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[57] ARIZ. REV. STAT. ANN. § 28-325 E (1956).
[58] Act of February 20, 1967; ch. 3, § 6, Ariz. Laws 1967: "[A]ll other laws and parts of laws inconsistent herewith are hereby repealed. . . ."
[59] ARIZ. REV. STAT. ANN. § 44-3129 (1968).

> [a] purchaser of chattel paper who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in chattel paper which is claimed merely as proceeds of inventory subject to a security interest, even though he knows that the specific paper is subject to the security interest.

"Chattel paper" is defined by the Code as "a writing . . . which evidence[s] both a monetary obligation and a security interest in . . . specific goods."[60] The conditional sales contract evidenced a monetary obligation and a security interest in the Porsche when assigned to defendant. "Proceeds" is defined as "whatever is received when collateral [Daymus' inventory] or proceeds is sold, exchanged, collected or otherwise disposed of."[61] Here the proceeds from the sale of the Porsche constituted the conditional sales contract for which defendant paid cash. Since defendant purchased chattel paper (the conditional sales contract) for new value (cash) and took possession of it in the ordinary course of his business, his interest in the contract is superior to that of the plaintiff, who claims merely the proceeds of inventory (the Porsche) subject to a security interest (plaintiff's lien). Moreover, even if defendant had known of plaintiff's security interest in the contract, defendant's rights would have been superior to those of plaintiff.

It appears that the Code does not provide a way for inventory financers to preserve their interest where a dealer transfers the property to a buyer in the ordinary course of business and breaches the terms of the financing agreement. Financers would be well-advised to exercise care to deal with only the most reputable of businessmen in the first instance and frequently to police the conduct of dealers with whom they have contracted to insure compliance with the terms of the agreement.

The result in *Price* is consistent with the general rule that when a lienholder allows a dealer to offer merchandise for sale, creating an apparent authority in the dealer to sell the goods, the lienholder will be estopped from asserting his lien. As the court pointed out, "[w]hen one of two persons must . . . bear the loss, it should fall upon the one whose business is the handling of such transactions. By this rule we shift the risk of loss to the one who has the necessary expertise to protect himself. . . ."[62]

Pioneer Plumbing Supply Co. v. Southwest Sav. & Loan Ass'n.[63] See casenote 9 *Arizona Law Review* 502 (1968).

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[60] UNIFORM COMMERCIAL CODE § 9-105(1)(b) (ARIZ. REV. STAT. ANN. § 44-3105 A(2) (1968)).

[61] UNIFORM COMMERCIAL CODE § 9-306(1) (ARIZ. REV. STAT. ANN. § 44-3127 (1968)).

[62] Price v. Universal C.I.T. Credit Corp., 102 Ariz. 227, 427 P.2d 919 (1967).

[63] 102 Ariz. 258, 428 P.2d 115 (1967).

V. Constitutional Law

A. Establishment of Religion

Community Council v. Jordan.[1] Petitioner, an Arizona non-profit corporation doing business as the Community Council, entered into a contract with the Arizona State Department of Public Welfare for the purpose of promoting the coordination of community resources into a central intake process to eliminate duplication and overlapping in the disbursement of charity funds.[2] Under the terms of the contract the Council's agent — the Salvation Army — would furnish emergency relief to persons in need and would be reimbursed by the Department to the extent of forty percent of the money disbursed. The parties assumed that at least forty percent of the aid recipients would qualify for state welfare. Respondents, the State Auditor and Governor, rejected the claims submitted to the state under this contract on the ground that payment thereof would be in conflict with the Arizona Constitution's prohibitions against use of public funds in aid or support of religious purposes.[3] On petition to the Supreme Court of Arizona for writ of mandamus to compel payment of the claims, the court rejected respondents' contention, holding that "aid" given in the form of partially matching reimbursements by the state for direct, actual costs of relief, aid and assistance to third parties of whatever faith in emergency situations, and not to the church itself, is not the type of "aid" contemplated by the constitutional prohibitions.

Thus, in Arizona, a state agency may now do business with and discharge part of its duties through a sectarian institution without contravening constitutional prohibitions, provided, of course, that in so doing its actions do not specifically encourage or tend to encourage the preference of one religion over another, or religion per se over no religion.[4] In determining that the state's participation in the instant case did not constitute the prohibited aid or support, the court considered the two major philosophies: the strict view, wherein no public funds could be given to a sectarian organization, notwithstanding the fact that it was merely a conduit and received no financial aid or support therefrom,[5] and the more liberal or practical view, in which the circumstances of each case would be analyzed to see if there is any violation

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[1] 102 Ariz. 448, 432 P.2d 460 (1967).

[2] *Id.* at 450, 432 P.2d at 462.

[3] Ariz. Const. art. 2 § 12: "[N]o public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment. . . ."

Ariz. Const. art. 9 § 10: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."

[4] 102 Ariz. 448, 454, 432 P.2d 460, 466 (1967).

[5] *See, e.g.*, Bennet v. City of La Grange, 153 Ga. 428, 112 S.E. 482 (1922); Cook County v. Chicago Indus. School, 125 Ill. 540, 18 N.E. 183 (1888).

of state or federal constitutional prohibitions.[6] The court preferred the second and more practical approach, pointing out that while prohibitions against use of public assets for religious purposes were included in the constitution to perpetuate the doctrine of separation of church and state, that doctrine did not include *total* non-recognition of either church or state by the other.[7]

Although the problem presented in the instant case had been approached previously in several different manners by other jurisdictions, this was a question of first impression in Arizona.

The first approach considered by the Arizona court was one it termed the "Doctrine of Substitution" or "Value Received Theory."[8] This was first raised in an Illinois case[9] where it was contended that payments or contributions by a governmental agency to a religious institution for valid services rendered to recipients of state support were not banned because they merely relieved the state of a burden it would otherwise have to bear. Both the Illinois and Arizona courts rejected this theory on the ground that its ultimate conclusion could be that *all* such aid or support could be turned over to sectarian groups and thus validly be supported by the state.

However, in the instant case, the Arizona court also factually distinguished the Illinois case, which it said represented the "Full Reimbursement Plan,"[10] on the ground that the quantum of reimbursement made by the state in that case — a full 100 percent of actual costs as compared with only 40 percent in the present case — constituted "aid." This distinction has led the Illinois court to adopt the "Less Than Cost" doctrine[11] in subsequent cases[12] when the reimbursement was *less* than the actual cost of maintenance and tuition, the court reasoning that it was the *state*, not the sectarian group, which benefited by payments of less than cost.

A similar doctrine, denominated the "Limited Full Reimbursement Plan,"[13] was rejected by a Georgia court, which held that even though

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[6] *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947); St. Hedwig's Indus. School v. Cook County, 289 Ill. 432, 124 N.E. 629 (1919); Dunn v. Chicago Indus. School, 280 Ill. 613, 117 N.E. 735 (1917); Truitt v. Maryland Bd. of Pub. Works, 243 Md. 375, 221 A.2d 370 (1966); Murrow Indian Orphans Home v. Childers, 197 Okla. 249, 171 P.2d 600 (1946).

The upcoming United States Supreme Court decision in *Flast v. Cohen*, 88 S.Ct. 1942 (1968) will open the door for a great many more federal cases in this area.

[7] 102 Ariz. 448, 451, 432 P.2d 460, 463 (1967).

[8] *Id.* at 452, 432 P.2d at 464.

[9] Cook County v. Chicago Indus. School, 125 Ill. 540, 18 N.E. 183 (1888).

[10] 102 Ariz. 448, 452, 432 P.2d 460, 464 (1967).

[11] *Id.* at 453, 432 P.2d at 465.

[12] *E.g.*, St. Hedwig's Indus. School v. Cook County, 289 Ill. 432, 124 N.E. 629 (1919); Dunn v. Addison Manual Training School, 281 Ill. 352, 117 N.E. 993 (1917); Dunn v. Chicago Indus. School, 280 Ill. 613, 117 N.E. 735 (1917).

[13] 102 Ariz. 448, 453, 432 P.2d 460, 465 (1967).

the cost to the government might be less than actual expenses — the religious organization there was to receive full reimbursement *up to a specified amount* — it nevertheless gave "a great advantage and the most substantial aid to the Salvation Army in the prosecution of its benevolent and religious purposes."[14] Although the Arizona court agreed with this result, it also agreed with the dissent in the Georgia case that such "aid" is not the type of "aid" prohibited by the Arizona Constitution, which the Arizona court defined as "assistance in any form whatsoever which would encourage or tend to encourage the preference of one religion over another, or religion per se over no religion."[15]

The court said the theory followed in the instant case, designated as the "Partially Matching Plan,"[16] would hardly be "aiding" the religious organization toward a sound financial future by encouraging it to spend more than it would receive. If the Salvation Army were compelled to enter into such an agreement, the court pointed out, the contract would be unconstitutional in that it would "aid" *other* religions *not* forced to operate at a loss.

Two possible dangers in the "Full Reimbursement" and "Limited Full Reimbursement" plans were found to be either not present or of no concern here. The first "danger" — that the reimbursement might cover not only actual costs but also costs of administration — clearly an aid to the secular institution — was not shown by the evidence. The second, that not all of the recipients of the emergency aid will qualify for state welfare, was overcome by the court's statement that "the emergency nature of the aid required to be rendered dictates a practical approach to a practical problem."[17]

A final theory discussed by the court, and one by which the case might also have been resolved, was the "Child Benefit Theory," or more accurately, in the court's opinion, the "True Beneficiary Theory." In an earlier Arizona case[18] the court held that payments made by the county to a private hospital, which in turn paid the funds to a doctor, were regarded as having been made directly from the county to the doctor. This rationale was approved in the instant case; the court considered the funds as being paid from the state directly to those it said were the real or true beneficiaries, the individuals who receive the emergency aid.

The decision seems clearly correct in refusing to construe the constitutional prohibition against using state funds to support religion (designed to prevent state-established or protected religions) so as to preclude use by the state of already-established religious organizations in

[14] Bennett v. City of La Grange, 153 Ga. 428, 437, 112 S.E. 482, 486 (1922).
[15] 102 Ariz. 448, 454, 432 P.2d 460, 466 (1967).
[16] *Id.*
[17] *Id.* at 455, 432 P.2d at 467.
[18] Pima County v. Anklam, 48 Ariz. 248, 61 P.2d 172 (1936).

the accomplishment of the valid state objective of tendering assistance to the poor.[19]

B. FULL FAITH AND CREDIT

Catchpole v. Narramore.[20] Defendant purchased California realty and gave security for the purchase price in the form of a deed of trust which was junior to a third party's mortgage on the property. Defendant's note and deed of trust were assigned by the seller to plaintiff. Defendant, in turn, sold the property and, after it was damaged by a tidal wave, the purchasers defaulted and the holder of the senior encumbrance foreclosed in California. As a result of the foreclosure sale, plaintiff's lien was destroyed and this action was instituted in Arizona against defendants for the deficiency still due on the note. Summary judgment for the plaintiff was affirmed by the court of appeals on the ground that a California statute precluding deficiency judgments was *procedural* and therefore inapplicable to this suit in Arizona. On appeal, *held,* reversed. Where the *lex loci contractu* is that of a sister state, the determination of that state as to which of its laws are substantive, so as to be given full faith and credit under the federal Constitution, will be binding on the Arizona court entertaining a claim arising out of such contract.

Defendant argued that California law should be applied since the contract was executed and to be performed in California. The court agreed, stating that "parties are presumed to contract with reference to the laws of the state where the contract is to be performed and which are deemed to have been embodied in the contract."[21] The conflict turned upon the nature of the California statute[22] which disallows deficiency judgments upon realty foreclosure sales.[23] Plaintiff claimed it was procedural and sought to recover his deficiency under the law of the forum — Arizona.[24]

In support of his claim, plaintiff pointed to the Arizona court's pronouncement in *Martin v. Midgett*: "We agree that the provisions of California Code of Civil Procedure § 580b . . . are procedural only . . . ."[25]

Defendant, on the other hand, contended that § 580(b) is substantive, relying on the following language of the California court:

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[19] *Cf.* Everson v. Board of Educ., 330 U.S. 1 (1947).
[20] 102 Ariz. 248, 428 P.2d 105 (1967).
[21] *Id.* at 251, 428 P.2d at 108.
[22] CAL. CIV. PRO. CODE § 580b (West 1954).
[23] Bargioni v. Hill, 59 Cal. 2d 121, 378 P.2d 593, 28 Cal. Rptr. 321 (1963) (stating the underlying rationale of § 580(b) as discouraging land sales that are unsound because the land is overvalued and, in the event of a general decline in land values, to avoid compounding the downtrend by burdening defaulting purchasers with personal liability as well as loss of the land).
[24] ARIZ. REV. STAT. ANN. §§ 33-725, 727 (1956) (allowing a deficiency judgment where the security is insufficient to satisfy the debt).
[25] 100 Ariz. 284, 288, 413 P.2d 754, 757 (1966).

> The operation of the statute in the circumstances is *far more than procedural.* The statute attempts to so affect the contract that only a portion of the indebtedness may be recovered, notwithstanding the borrower of the money may well be able to pay in full. This certainly impairs the obligation of contract.[26] (emphasis supplied).

The Arizona court recognized the binding effect of the interpretation given by the California courts to California law.[27] The court's reasoning was as follows: The contract was made in California and was to be performed there; the subject matter was located in California; thus the substantive law of California applied. Since § 580(b) is of a substantive nature,[28] Arizona is bound to follow interpretations of such statutes by the courts of those states and, where warranted, give full faith and credit to their statutes.

It appears that by denying the defendant, a resident of Arizona, his rights under the Arizona statute, the court has yielded its own public policy regarding deficiency judgments in deference to the public policy of California. This case can be criticized for failing to uphold the legitimate domestic policy of Arizona and for not meeting squarely the true issues involved — the weighing of the different contacts with, and interests of, the two states in the transaction and the constitutional limitations on the extra-territorial application of a state's restriction of remedies.[29]

VI. Criminal Law and Procedure

A. Constitutional Protections

State v. Burrell.[1] The defendants were escapees from the Arizona State Prison who had fired at police officers during a high speed chase which led to their recapture on June 11, 1963. On June 14, 1963, a complaint was filed charging them with assault with intent to commit murder. Before the arrest warrants could be served, however, they were returned to prison. The warrants were finally served on both defendants on October 1, 1964. A preliminary hearing was held five days later

[26] Hales v. Snowden, 19 Cal. App. 2d 366, 369, 65 P.2d 847, 850 (1937). *See also* Stone v. Lobsien, 112 Cal. App. 2d 750, 247 P.2d 357 (1952).

[27] *See* Kendrick v. Sovereign Camp of the Woodmen of the World, 55 Ariz. 458, 103 P.2d 463 (1940).

[28] "While superficially § 580(b) is directed to the seller's remedy, it affects a substantive right — that of the seller to recoup the balance due on the purchase price of real property. The statute does not simply govern applicable procedures; it obliterates the debtor's liability." 102 Ariz. at 250, 251, 428 P.2d at 107, 108 (1967).

[29] *Cf.* Angel v. Bullington, 330 U.S. 183 (1947). *See generally* Currie, *Purchase Money Mortgages and State Lines: A Study in Conflict of Laws Method,* 1960 Duke L.J. 1, *reprinted in* Currie, Selected Essays on the Conflict of Laws 376 (1963).

[1] 102 Ariz. 136, 426 P.2d 633 (1967).

and informations were filed on November 4, 1964. Following arraignment, defendants appeared with counsel, pled not guilty, and were subsequently tried and convicted on December 28, 1964. On appeal, the defendants contended that they had been deprived of due process and had been denied their constitutional right to a speedy trial because of the sixteen month delay between the time of their recapture in June, 1963, and the time of their first preliminary hearing in October, 1964. The supreme court affirmed the conviction, holding that the protection afforded by the Arizona and federal constitutions entitling an accused to a speedy trial[2] does not apply until "after a prosecution is commenced or an accused is held to answer" by a magistrate.[3]

In Arizona, a person is "held to answer" after the preliminary hearing where it is determined "whether there is probable cause to hold the defendant on the basis of the testimony presented."[4]

Although the court cited other cases[5] as authority, it relied principally on its decision in *State v. Maldonado*[6] which was decided in 1962 under a similar fact situation: in *Maldonado*, the defendant was detained in jail seventy-nine days from the date of his arrest until his first preliminary hearing. The Arizona supreme court held that this detention did not violate his right to a speedy trial because the right did not begin until he had been "held to answer" by a magistrate, *i.e.*, until after the preliminary hearing. The court also said that in order for there to be a denial of a speedy trial, and therefore a deprivation of due process, the delay involved must be such as to prevent a fair trial. Applying the *Maldonado* standard to the instant case, the court noted that the period between the commencement of the right and the rendering of the judgment was not unduly or prejudicially long.[7]

The court also discussed Rule 236 of the Arizona Rules of Criminal Procedure — the "30-60 day rule" — which provides that a prosecution shall be dismissed if an information is not filed within thirty days after a person had been "held to answer" for an offense and that the accused must be brought to trial within sixty days after the indictment has been found or the information filed. This rule was designed to implement[8]

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[2] ARIZ. CONST. art. 2, § 24 provides in part that "In criminal prosecutions, the accused shall have the right to . . . have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed . . . ;" U.S. CONST. amend. VI provides in part that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

[3] It appears that "after a prosecution is commenced" indicates the standard which is applied to misdemeanor cases only. This explains the court's use of the alternative.

[4] State v. Marlin, 5 Ariz. App. 524, 528, 428 P.2d 699, 703 (1967).

[5] Foley v. United States, 290 F.2d 562 (8th Cir.), *cert. denied*, 368 U.S. 888 (1961); D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); State v. Pruett, 101 Ariz. 65, 415 P.2d 888 (1966); Palmer v. State, 99 Ariz. 93, 407 P.2d 64 (1965).

[6] 92 Ariz. 70, 373 P.2d 583 (1962).

[7] 102 Ariz. 136, 426 P.2d 633, 634 (1967).

the speedy trial provision of the Arizona Constitution.[9] Since the defendants were held to answer on October 6, informations were filed on November 4, and their trial was held on December 28, the Rule 236 requirements were satisfied and the defendants were not deprived of their right to a speedy trial.

The defendants also contended that since they were not furnished with counsel prior to the time of the preliminary hearing they were denied due process of law. The court denied this contention, quoting from *State v. Schumacher*:[10] "there is no arbitrary point in time at which the right to counsel attaches in pretrial proceedings . . . the critical point is to be determined from the nature of the proceedings . . . ." There the court indicated that failure to assign counsel prior to preliminary examination is not a denial of the sixth amendment *unless* the defendant's position has been prejudiced thereby. Applying this reasoning to *Burrell*, the court felt that since the delay in furnishing defendants counsel did not deprive them of the opportunity to prepare effectively for and competently defend themselves at trial, their position had not been prejudiced, and hence there was no violation of due process.[11]

The effect of this decision on existing Arizona law is one of solidification regarding the right to a speedy trial. *Burrell* and its predecessors[12] seem to indicate that the court will continue to follow *Maldonado*, *i.e.*, the right to a speedy trial commences only at the time the accused has been held to answer by a magistrate. However, since the United States Supreme Court has made the sixth amendment guaranty of the right to a speedy trial applicable to the states through the fourteenth amendment in *Klopfer v. North Carolina*,[13] it is not unforseeable that a new federal standard may evolve which would make the right commence at an earlier stage of a criminal prosecution.[14]

In addition, the decision in *Burrell* has expanded the standard set in *Maldonado* regarding due process violations occasioned by delay. In *Maldonado*, the delay was between the arrest and the preliminary hearing, whereas in *Burrell*, it occurred between the commission of the

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[8] State v. Churchill, 82 Ariz. 375, 378, 313 P.2d 753, 754 (1957).

[9] ARIZ. CONST. art. 2, § 24.

[10] 97 Ariz. 354, 356, 400 P.2d 584, 585 (1965).

[11] Note, however, subsequent United States Supreme Court decisions in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967). Both cases held that an accused is entitled to counsel at pre-trial police "lineup" proceedings and indicate the trend in allowing the presence of counsel at any potentially prejudicial stage of a criminal prosecution.

[12] Palmer v. State, 99 Ariz. 93, 407 P.2d 64 (1965); State v. Pruett, 101 Ariz. 65, 415 P.2d 888 (1966); State v. Tuggle, 101 Ariz. 216, 418 P.2d 372 (1966); State v. Stout, 5 Ariz. App. 271, 425 P.2d 582 (1967).

[13] 368 U.S. 213 (1967).

[14] *Cf.* D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951) (holding that the constitutional right to a speedy trial arises after a formal complaint has been lodged against a defendant in a criminal case); *accord*, Hoopengarner v. United States, 270 F.2d 465 (6th Cir. 1959).

crime and the arrest. This seems to indicate that there can be a lengthy delay before arrest, *i.e.*, up to sixteen months, without a violation of due process as long as the delay involved does not deprive the defendant of a fair trial. It should be noted, however, that there is authority to the effect that a delay between the commission of the crime and the arrest can be a violation of due process of law. In *Ross v. United States*,[15] seven months elapsed between an alleged criminal sale of narcotics and the arrest. The United States Court of Appeals for the District of Columbia held that this purposeful delay, which apparently allowed the narcotics agent sufficient time to complete his investigation, was a violation of due process under the fifth amendment. This principle probably should not apply to the factual situation of the *Burrell* case since the defendants, lawfully confined in prison on a previous conviction, could hardly complain that they were prejudiced by the delay.

In the future, defendants whose trials have been delayed in either the *Maldonado* or *Burrell* situations should rely on these other developments in the federal law. There is a possibility that a delay which occurs after arrest will abridge the right to a speedy trial guaranteed by the federal Constitution in light of *Klopfer* and the federal standard regarding the commencement of the right.[16] A delay which occurs between the commission of crime and the arrest in particular circumstances may be a denial of due process of law in light of the *Ross* case.[17]

State v. Fowler.[18] The defendant, on trial for murder, contended he was justified in shooting the victim on the ground of self-defense since, among other things, the victim had the reputation for carrying a knife. However, no evidence that the victim actually had a knife at the time of the shooting was presented at trial and the absence of such evidence was called to the attention of the jury by the prosecuting attorney. After defendant's conviction, defense counsel learned the police had discovered a knife at the scene and it had remained, undisclosed, in police custody throughout the trial. Defendant thereupon filed a motion for new trial on the ground of newly discovered evidence and the prosecuting attorney's misconduct in failing to disclose the existence of the knife. The trial court denied the motion and defendant appealed, contending that failure of the state to disclose the evidence denied him due process of law. The supreme court held due process is violated where

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[15] 349 F.2d 210 (D.C. Cir. 1965); *see* 51 IOWA L. REV. 670 (1966).

[16] In addition, such a delay may be a denial of the constitutional right to bail. ARIZ. CONST. art. 2, § 22; U.S. CONST. amend. VIII. There is a possibility that dismissing an indictment or freeing a defendant may be the only remedies available to vindicate that right. *Cf.* Mapp v. Ohio, 367 U.S. 643 (1960).

[17] *See generally* Note, *The Right To A Speedy Criminal Trial*, 57 COLUM. L. REV. 846 (1957); Note, *Criminal Law and Procedure*, 56 GEO. L.J. 58, 90 (1968); Note, *Dismissal of the Indictment as a Remedy for Denial of the Right to Speedy Trial*, 64 YALE L.J. 1208 (1955); 20 STAN. L. REV. 476 (1966).

[18] 101 Ariz. 561, 422 P.2d 125 (1967).

the prosecution suppresses evidence discovered by the police which is favorable to the accused and which may be material to the defendant's case, notwithstanding the fact that no request was made by defense counsel.

The court cited the leading case of *Brady v. Maryland*,[19] in which the United States Supreme Court held the suppression by the prosecution of evidence favorable to an accused, after a request for its disclosure had been made, violated due process where the evidence was material either to guilt or punishment. The Arizona court, in this case, went beyond *Brady* in two respects. Although *Brady* discussed suppression of evidence by the prosecution, the court here equated *police* suppression with suppression by the prosecution, thus establishing the Arizona rule as including suppression of evidence by the investigative arm of the government. Also distinguishable from *Brady*, the court here held a request is not essential since such a requirement — for evidence of which defense counsel has no knowledge — would be unreasonable.[20]

A problem could now arise in Arizona, however, as to the proper procedural routes available to a defendant when there has been a "*Brady*-type" violation. In *Fowler* the defendant moved for a new trial under Rule 310 of the Arizona Rules of Criminal Procedure,[21] which affords relief only if newly discovered evidence would *probably* have changed the verdict, and only if defense counsel *could not* have discovered the evidence with due diligence. If these limitations are applied strictly, Rule 310 will not be an adequate post-conviction remedy where the prosecution has withheld information since suppression of evidence favorable to an accused violates due process even if there is only a *reasonable possibility* that the evidence might affect the verdict, and even if such evidence *could* have been discovered by a diligent defense counsel.

Arizona Rule 311[22] also provides for a new trial where the county

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[19] 373 U.S. 83 (1963).

[20] The Arizona court noted that cases subsequent to *Brady* have interpreted its language broadly in holding that a request by defense counsel is not essential; a conviction cannot stand when the prosecutor has either wilfully or negligently withheld information favorable to the accused. Other cases have held the fact that defense counsel could have discovered the evidence with due diligence is irrelevant, Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966), and that suppression by the police is a constitutional violation even though the prosecutor is himself unaware of the evidence, Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964).

[21] Rule 310:

> The court shall grant a new trial if any of the following grounds is established:
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> . . . .
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> 3. That new and material evidence, which if introduced at the trial would probably have changed the verdict or the finding of the court, is discovered which the defendant could not with reasonable diligence have discovered and produced upon the trial.

[22] Rule 311:

> A. The court shall grant a new trial if any of the following grounds is

attorney has been guilty of misconduct, but the effectiveness of this rule is severely limited by the requirement that the motion be made within three days after the verdict has been rendered.[23] Thus, unless Rule 310 is given a broad interpretation or unless the time limitation is extended under Rule 311, the result may be a failure of the state to provide an adequate remedy where a constitutional right has been violated.

A writ of habeas corpus is available in Arizona but its usefulness for "*Brady*-type" claims is unclear. The court in the past has echoed the common law doctrine that lack of jurisdiction in the trial court is the only ground for issuance of the writ, but in a recent opinion the court of appeals went out of its way to recognize that such a writ may be available as a remedy where a defendant is seeking a new trial on the ground of suppression of evidence.[24] The remaining post-conviction remedy in Arizona is a writ of *coram nobis* in which relief is limited to those errors which did not appear on the record and were unknown at the trial. This seems to afford sufficient relief where evidence has been suppressed, but there is some authority that this remedy has become obsolete.[25] However, the Arizona supreme court recently directed an order to the trial court based on a writ of *coram nobis*.[26] In view of recent decisions, it is possible that the writ of habeas corpus or *coram nobis* may be available as post-conviction remedies for a "*Brady*-type" violation where Rules 310 and 311 are insufficient. If not, the only relief available would be federal habeas corpus.

State v. Martin.[27] The defendant, charged with murder, relied on on the defense of insanity. During the course of the trial, and against the advice of his counsel, he vociferously demanded that he be allowed to testify in his own behalf. This was denied by the trial court. Defendant also demanded repeatedly that he be allowed to conduct his own defense. The trial court ruled that defendant had to be represented by counsel because the charge was too complicated for him to represent himself. Moreover, the defendant's conduct throughout the

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established, provided the substantial rights of the defendant have been thereby prejudiced:

. . . .

5. That the county attorney has been guilty of misconduct.

[23] Rule 308:

A motion for a new trial may be made only within three days after the rendition of the verdict or the finding of the court, unless the ground of the motion is newly discovered evidence as provided in Rule 310, in which event the motion may be made within one year after the rendition of the verdict or the finding of the court, or at a later time if the court for good cause permits.

[24] Cooper v. State, 438 P.2d 341 (Ariz. Ct. App. 1968).

[25] Billups v. Freeman, 5 Ariz. 268, 52 P. 367 (1898).

[26] State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966).

[27] 102 Ariz. 142, 426 P.2d 639 (1967).

trial was characterized by verbal outbursts and a total disregard of the court's rulings, prompting the judge to have him bound and gagged at times to preserve order. On appeal from his conviction, defendant contended that the court's refusal to permit him to testify was a denial of his rights under the Arizona Constitution.[28] In reversing the conviction, the court held that the failure of the trial judge to allow the accused to testify in his own behalf, even against the advice of counsel, constituted reversible error since this right cannot be waived independently by counsel.

Fundamental to our system of justice is the right of the accused to testify in his own behalf.[29] Generally, however, when the accused is represented by counsel, he is bound by his attorney's decisions regarding the conduct of his defense.[30] The court, in the instant case, was called upon to reconcile the conflict between these two propositions. In reversing the conviction, a limitation was placed upon counsel's discretion regarding trial strategy. Quoting from a recent United States Supreme Court case, the court adopted the rule that "where the circumstances are exceptional" a waiver by counsel will not "preclude the accused from asserting constitutional claims."[31] It is apparent that the court regards the accused's right to be a witness in his own behalf as an "exceptional" circumstance which cannot be waived over his objection.

Defendant also alleged as error the court's denial of his right to conduct his own defense. In some states, an accused has an absolute constitutional right to conduct his own defense,[32] but the Arizona court rejected such a rule citing *State v. Westbrook*,[33] where it held that competency to waive right of counsel, like competency to understand the proceedings and assist in the defense, must be determined independently by the trial court. In the instant case, the court found that the trial judge failed to give the defendant's waiver the consideration required by *Westbrook*. However, due to defendant's disruptive behavior, the court upheld the trial court's appointment of counsel since it is within the trial court's discretion to refuse a defendant's request to conduct his own defense when to allow him to do so would seriously

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[28] ARIZ. CONST. art. 2, § 24.

[29] *Id.*

[30] *In re* Hitchcock, 199 F. Supp. 228, 230 (D. Ariz. 1961), *cert. denied*, 369 U.S. 857 (1962), *cert. denied*, Hitchcock v. Arizona, 374 U.S. 484 (1963), *cert. denied*, Hitchcock v. Eyman, 376 U.S. 924 (1964).

> [O]nce he elects to be represented by counsel, the conduct of all phases of the trial is under the exclusive dominion and control of said attorney until such time as he is fully and formally discharged. The action of applicant's attorney . . . is absolutely binding upon [him] . . . .

[31] Henry v. Mississippi, 379 U.S. 443, 451 (1965).

[32] *See, e.g.*, Annot., 77 A.L.R.2d 1233 (1961); Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133 (1964-65).

[33] 101 Ariz. 206, 417 P.2d 530 (1966), *modifying* 99 Ariz. 30, 406 P.2d 388 (1965), which was *vacated per curiam*, 384 U.S. 150 (1966).

disrupt the proceedings.[34] It is settled in Arizona that the judgment of a trial court will be upheld if the correct legal conclusion is reached, although for the wrong reason.[35]

State v. Martinez.[36] The defendants were arrested and charged with kidnapping and robbery. While in jail, they were taken from their cells and confronted with witnesses for the purpose of routine identification. At this time no counsel was present. Prior to trial, the trial court denied defendants' motion to suppress the evidence regarding their identification and at the trial the jury returned a verdict of guilty. On appeal, *held,* affirmed. Where an accused is made to confront witnesses solely for the purposes of identification and no testimony elicited therefrom is offered at trial, he will not be heard to complain that his rights were violated because of the absence of counsel.

The defendants contended that the evidence concerning their identification should have been suppressed because the police gave them no forewarning as to the purpose of the "lineup" and they were neither told that they had the right to have counsel present, nor were they actually supplied with counsel during the confrontation. They further contended that the officers must inform the accuseds of their right to counsel or to remain silent, and by analogy, of their right to refuse to be confronted in such a manner.

In denying defendants' contentions, the supreme court based its decision on several factors. First, no testimony was elicited from the defendants during the time they were being identified was introduced at the trial. Also, the identification procedure was routine and necessary to determine whether the defendants should be held or released. Further, even if counsel had been present, there was nothing about which he could have advised the defendants, because the procedure did not involve any communication. In short, there was nothing that could be considered prejudicial due to the absence of counsel.

In support of its decision, the court cited *Schmerber v. California*[37] where the United States Supreme Court held, in part, that a blood test administered without the presence of counsel to one suspected of drunkenness after an automobile accident was not a violation of the accused's sixth amendment right to counsel. The only Arizona case relied upon by the court (in holding that the defendants could not complain of being made to stand for purpose of identification without the benefit of counsel) was *State v. Stelzriede.*[38] There, the defendant,

[34] United States v. Private Brands, Inc., 250 F.2d 554 (2d Cir. 1957), *cert. denied,* 355 U.S. 957 (1958).
[35] Nicholas v. Giles, 102 Ariz. 130, 426 P.2d 398 (1967).
[36] 102 Ariz. 178, 427 P.2d 129 (1967).
[37] 384 U.S. 757 (1966).
[38] 101 Ariz. 385, 420 P.2d 170 (1966).

notwithstanding repeated advice of her constitutional right to consult an attorney, made several voluntary inculpatory statements which were used against her at the trial. On appeal from her conviction, she contended, *inter alia,* that finger print evidence taken in the absence of counsel and against her will should not have been admissible. The court denied this contention, holding that this was no violation of her constitutional rights.

It appears, although not explicitly stated, that the court's purpose in relying upon *Schmerber* and *Stelzriede* was to show that an accused's constitutional right is not violated merely because he is required to submit to an identification procedure against his will and without the benefit of counsel. Another Arizona case which might also have been appropriately cited by the court is *State v. Schumacher.*[39] There the court concluded that there is no arbitrary point in time at which the right to counsel attaches in pre-trial proceedings and that the "critical point"[40] is to be determined on an ad hoc basis.

In dealing with the right to counsel at pre-trial police identification proceedings, the court moved into an area of constitutional law which at that time in Arizona had been dealt with only analogously.[41] As such, it is impossible to assess its effect on prior Arizona law. However, looking prospectively from the opinion in the instant case, subsequent United States Supreme Court pronouncements have wrought a complete turnabout in this area. It is interesting to note that less than two months later, the high court handed down two opinions which extended the sixth amendment guaranty of the right to counsel to pre-trial police "lineups." In both *United States v. Wade*[42] and *Gilbert v. California,*[43] the Court indicated that a criminal defendant has no right to refuse to be confronted with identifying witnesses at a police "lineup" and defined the post-indictment proceeding as a "critical stage" of the prosecution requiring the presence of counsel. The Court said that although evidence obtained without counsel at such a proceeding is presumed to be tainted, the state can rebut the presumption by showing a witness' independent ability to identify the defendant.

Since *Martinez* dealt with a preliminary proceeding, it might not have been affected by *Gilbert and Wade.* But in *Stoval v. Denno,* the Court suggested that the right to counsel at police identification pro-

[39] 99 Ariz. 354, 400 P.2d 584 (1965).
[40] The terminology "critical stage" of a state's criminal proceedings stems from *Hamilton v. Alabama,* 368 U.S. 52 (1961).
[41] State v. Anderson, 96 Ariz. 123, 392 P.2d 784 (1964) (held that the "right to counsel must be satisfied at least at the arraignment stage," but refused to discuss whether it could attach at an earlier stage); *cf.* State v. Alford, 98 Ariz. 124, 402 P.2d 551 (1965).
[42] 388 U.S. 218 (1967).
[43] 388 U.S. 263 (1967).

ceedings is not necessarily confined to the post-indictment stage of the prosecution: "We have, therefore, concluded that the confrontation is a 'critical stage,' and that counsel is required at *all* confrontations."[44] (emphasis supplied). These decisions would affect the fact situation presented in *Martinez* because the witness presumably identified the defendant in court and such identification evidence would be excluded if the *Wade* and *Gilbert* decisions were to have retroactive effect. However, in the *Denno* opinion, the Court held that the rule requiring exclusion of identification evidence tainted by exhibiting the accused to identifying witnesses in the absence of counsel was to appy prospectively only, thereby precluding any change in the outcome of *Martinez.*

State v. Saunders.[45] Following the discovery of the defendant with a woman's body in his blood-spattered apartment, a police officer took him by the arm and led him from his apartment toward a patrol car. At this time, and without advising Saunders of his constitutional rights under *Miranda,* the officer questioned him. His subsequent inculpatory statements were used as evidence against him at trial. He was convicted of murder and appealed, contending the admission of his statements constituted reversible error. The supreme court agreed, holding that the admission of statements made in response to questioning after an officer, having reasonable grounds to believe the defendant had committed a crime, took him by the arm and led him to the patrol car without advising him of his rights, was reversible error since the defendant was at that time "deprived of his freedom in a significant way" under the *Miranda* doctrine.

Since the resolution of the conflict in the instant case depended upon an interpretation of the landmark case of *Miranda v. Arizona,*[46] wherein "custodial interrogation" was defined as questioning induced by law enforcement officers after a person has been taken into custody *"or otherwise deprived of his freedom in any significant way"* (emphasis supplied), the *Saunders* court was called upon to determine whether the defendant was deprived of his freedom of action within the *Miranda* definition. The court previously had held that custodial interrogation in which a person is significantly deprived of his freedom includes questioning of a person prior to arrest by an officer holding a gun,[47] and questioning of a murder suspect in her own home by a deputy sheriff.[48] It was therefore not unexpected that the court held in the

[44] 388 U.S. 293, 298 (1967).
[45] 435 P.2d 39 (Ariz. 1967).
[46] 384 U.S. 436 (1966). It was held that statements stemming from "custodial interrogation" are inadmissible unless the accused is advised of his right to remain silent, that anything he does say may be used as evidence against him, and that he has the right to the presence of an attorney either retained or appointed.
[47] State v. Intogna, 101 Ariz. 275, 419 P.2d 59 (1966).
[48] State v. Anderson, 102 Ariz. 295, 428 P.2d 672 (1967).

instant case that the defendant was significantly deprived of his freedom where he was taken by the arm by an officer and led from his home toward a police patrol car.

The court in *Saunders* placed great emphasis on what the *officer* must have assumed and suspected before the incriminating statements were made[49] which should have alerted him to the fact that the defendant was a prime suspect and *Miranda* warnings were necessary. The court does not discuss, however, whether the *defendant* understood that *he* was no longer free to choose whether or not he wished to accompany the officer. Since the court did not discuss the effect of the defendant's state of mind on the issue of custody, *Saunders* leaves unanswered in Arizona the question whether a defendant would be in custody for *Miranda* purposes where an officer, without the use of physical coercion, merely *asks* the defendant to accompany him. Perhaps the court will look to the reasonable expectations of the *policeman* under the circumstances.

A District of Columbia case[50] indicates by analogy[51] that this would constitute "custody" within the meaning of *Miranda.* The case takes a more subjective approach in holding that a defendant is deprived of his freedom in a significant manner where *he* subjectively believes he must accompany the officer, even though he has been told he is free to go if he wishes. There the United States Court of Appeals for the District of Columbia Circuit found that the defendant necessarily must have understood that he was in the power and custody of the F.B.I. and that he submitted to the questioning as a result. The trial record had not made it clear whether the defendant did believe or had reason to believe he was under arrest. This was the determinative factor in the reversal of his conviction.

The Supreme Court in *Miranda* recognized that custodial interrogations are inherently coercive and to protect a defendant's right against self-incrimination it is necessary that warnings be given to dispel the coercive atmosphere. Since that court repeatedly stressed the psychological nature of such interrogations, it is evident that there was much concern with the *defendant's* state of mind. It is to be expected that future Arizona cases will place major stress on the question of whether or not the defendant reasonably believed he was in fact in custody.

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[49] The Court said the officer must have suspected the defendant before he took him out to the car and before the incriminating statements were made. The officer saw the defendant's clothes covered with blood and he knew the police had been called to investigate a possible homicide. When he entered the apartment, after the defendant had told him that nothing was wrong, and found blood all over and a dead woman he must have at least had a suspicion at that time that the defendant might be involved.

[50] Seals v. United States, 325 F.2d 1006 (D.C. Cir. 1963), *cert. denied,* 376 U.S. 964 (1964).

[51] In *Seals* the central issue was whether the use of the confession at trial should have been barred because it was the product of illegal detention by officers in

B. EVIDENCE

State v. Hughes.[52] Defendant, with his three year-old stepdaughter in the car, was turning into a market when his brakes failed. The car smashed into the market and the girl was seriously injured. There was a conflict in the evidence as to whether the brake failure occurred immediately before the crash or at some previous time. A similar conflict existed as to the child's injuries. It was shown that defendant, who was versed in insurance law, had bought a life insurance policy on the girl and then had doubled its size when he found out the double indemnity provision for "accidental death" was not yet in effect. He had been notified of final approval of the policy a few hours prior to the accident. Defendant was tried and convicted for attempted murder and appealed, contending that the trial court erred in admitting evidence of another incident which had occurred some five weeks prior to the crash, just after the policy was taken out. At that time, defendant, the girl, and two other children went boating at Canyon Lake. There was conflict in the testimony as to the position of the people in the boat and the manner in which the girl's lifejacket had been tied. The girl fell out of the boat, and defendant, who was driving, claimed he was not aware of this until one of the children mentioned it. He then searched the area for about five minutes before heading for the dock "to get help." On the way in he passed another boat, whose occupant went to the area, found the girl floating just under the surface of the water, and revived her. On appeal, the supreme court reversed, holding that if evidence tending to show alleged prior crimes — competent to establish motive, intent, absence of mistake or accident, identity and common scheme or plan — is entirely circumstantial, it is admissible only when consistent with the theory of guilt of the defendant, and inconsistent with every reasonable hypothesis of innocence.[53]

The general rule as to such testimony is that evidence of crimes entirely distinct from that with which the accused is charged is not relevant and hence inadmissible.[54] Such evidence would tend to distract a jury from a strict consideration of the case at hand, and would tempt them to try the defendant on his reputation and prior conduct rather than on his acts in the particular case before them.

There is a well-recognized exception to this rule when evidence of prior conduct tends to show intent, motive, identity, common plan or

violation of Federal Rule 5(a) which requires that the arrested person be taken before a commissioner without unnecessary delay. The court was concerned with the point at which arrest occurred.

[52] State v. Hughes, 102 Ariz. 118, 426 P.2d 386 (1967).

[53] *Id.* at 123, 426 P.2d. at 391.

[54] State v. Akins, 94 Ariz. 263, 383 P.2d 180 (1963).

scheme, or absence of mistake.[55] The theory supporting this position is that when the two crimes are related, proof of one tends to establish the other.[56]

Since evidence of the defendant's prior conduct in the instant case could serve such a purpose, the court was called upon to determine the quantum of evidence required to establish the prior act. In cases where the prior act resulted in a conviction, there is, of course, no question of the sufficiency of the evidence. When there is no conviction, however, as in the present case, there is a split of authority ranging from courts which require proof beyond a reasonable doubt[57] to those, constituting a decided majority, which require the proof to be clear,[58] clear and convincing,[59] or substantial.[60] Arizona, in the instant case, appeared to align itself with the majority in requiring "substantial evidence sufficient to take a case to a jury."[61]

Prior to *Hughes*, "substantial evidence" in this type of case had been defined in Arizona by the court of appeals. That court held that the evidence requirement lay in the area between a mere suspicion and a requirement for proof beyond a reasonable doubt,[62] leaving it to the trial court's discretion to apply this indefinite standard. In the instant case, the court used the term "substantial evidence," but clarified its definition, as applied to circumstantial evidence at least, in ruling that such evidence must be that which is consistent with the prosecution's theory of guilt and inconsistent with "every reasonable hypothesis" of innocence. This is the quantum of evidence normally required for a conviction upon circumstantial evidence.[63] Thus, the court decided that circumstantial evidence of previous crimes, where no direct evidence is presented, is admissible only when it points to proof of the commission of such act beyond a reasonable doubt.

Justice Udall, in dissent, argued that evidence of the previous incident in *Hughes* was sufficient to meet the test set forth in the court of appeals, and that the requirements set up by the court are much more demanding than the test of "substantial evidence" which the court nominally adopted.

Reasonable certainty that defendant actually committed the prior

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[55] State v. Garcia, 96 Ariz. 203, 393 P.2d 668 (1964); State v. Akins, 94 Ariz. 263, 383 P.2d 180 (1963); State v. Daymus, 90 Ariz. 294, 367 P.2d 647 (1961).
[56] State v. Akins, 94 Ariz. 263, 383 P.2d 180 (1963).
[57] Currey v. State, 169 Tex. Crim. 195, 333 S.W.2d 375 (1960).
[58] Hawkins v. State, 224 Miss. 309, 80 So. 2d 1 (1955).
[59] People v. Wade, 53 Cal. 2d 322, 348 P.2d 116, 1 Cal. Rptr. 683 (1959).
[60] People v. Lisenba, 89 P.2d 39 (Cal. 1939), *aff'd on rehearing*, 14 Cal. 2d 403, 94 P.2d 569 (1939), *aff'd*, 314 U.S. 219 (1941); State v. Carvelo, 45 Hawaii 16, 361 P.2d 45 (1961); State v. Hyde, 234 Mo. 200, 136 S.W. 316 (1911).
[61] State v. Hyde, 234 Mo. 200, 250, 136 S.W. 316, 331 (1911).
[62] State v. Waits, 1 Ariz. App. 463, 404 P.2d 729 (1965).
[63] State v. Alkhowarizmi, 101 Ariz. 514, 421 P.2d 871 (1966).

act is essential for a fair trial, but the rule adopted in *Hughes*, if extended beyond its facts, would seem to render the "prior bad acts" exception practically useless in cases where there is no prior conviction.

State v. Cota.[64] Defendant was charged with murder along with a codefendant, one Valenzuela. After their trial began Valenzuela entered a plea of guilty, but the trial continued as to defendant, who was convicted but granted a new trial. Subsequently, at a hearing before the trial judge, both parties gained knowledge that Valenzuela, if called as a witness at defendant's retrial, would invoke the privilege against self-incrimination and the court would sustain his claim of privilege since Valenzuela had successfully withdrawn his guilty plea and was to be tried separately. Defendant's objection to calling Valenzuela was overruled both at the hearing and in front of the jury when Valenzuela, after answering a few preliminary questions, invoked the privilege. Defendant was reconvicted and appealed, claiming that the calling of Valenzuela under the circumstances was reversible error since the defense would be unable to cross-examine him to rebut the inference of defendant's guilt created by his invocation of the privilege. The State, on the other hand, contended that calling Valenzuela was essential to prove its theory of the case — that defendant and Valenzuela perpetrated the crime together. In affirming the conviction, the supreme court held that calling a former co-defendant, who has withdrawn a plea of guilty, as a witness for the prosecution, with knowledge that said witness will invoke the privilege against self-incrimination, is not reversible error when to do otherwise would constitute the omission of an obvious step in the proof of the prosecution's theory of the case.

In reaching this result, the court discussed at length cases turning on two completely different points: Type (1), those cases holding that calling a codefendant with knowledge of his intent to claim the privilege against self-incrimination is generally reversible error because such refusal to testify could be used as an incriminating fact against the defendant,[65] and type (2), those cases refusing to look beyond the rule that the self-incrimination immunity is a *personal* privilege.[66] The court indicated that it was inappropriate to apply the first rationale in the instant case because here there was a *substantial* reason why it was important for the State to call Valenzuela. While the *Cota* decision reaches the same result as *State v. Cassady*,[67] an earlier decision based on the type

[64] 102 Ariz. 416, 432 P.2d 428 (1967).

[65] *E.g.*, Washburn v. State, 164 Tex. Crim. 448, 299 S.W.2d 706 (1956); Johnson v. State, 158 Tex. Crim. 6, 252 S.W.2d 462 (1952).

[66] *E.g.*, State v. Cassady, 67 Ariz. 48, 190 P.2d 501 (1948); State v. Addington, 158 Kan. 276, 147 P.2d 367 (1944); State v. Britton, 27 Wash. 2d 336, 178 P.2d 341 (1947).

[67] 67 Ariz. 48, 60, 190 P.2d 501, 509 (1948). There the court stated:

> [T]he privilege against incrimination is personal to the witness, and the

(2) rationale, the court's reasoning may imply that it will adopt the type (1) rationale in a future case where the substantial reason does not appear.

Since, in general, a witness' privilege against self-incrimination does not disqualify or excuse him from being called and appearing,[68] and, in this case, other evidence presented showed that Valenzuela was with defendant both before and after the commission of the crime,[69] the court concluded that the state was justified in calling him to show the jury that "it was presenting all the relevant evidence at its disposal in order to prove its theory of the case."[70]

A contrary view has been taken by Texas, which has held that "permitting the state to call a defendant to the stand and require him to claim his privilege against self-incrimination after being informed that the witness would decline to answer if so called" constitutes reversible error.[71] Other jurisdictions agree with this view, but require cautionary instructions to be given the jury to disregard the refusal of the codefendant to testify.[72]

The court in the instant case, however, pointed to authority for the prosecution's argument, drawn from *United States v. Gernie*,[73] to the effect that had the state not called the witness (since he was so closely associated with the defendant on the night of the crime) the defense might justifiably have argued that the state's failure to do so was an indication that the witness' testimony would not have corroborated the state's case against the defendant.[74]

This argument probably could be met by an agreement (which could be made a matter of the trial record, if necessary) between the court, defense counsel and state to the effect that the state would not call the witness under such circumstances and the defense in turn would not comment on the failure of the state to call the witness. While it is true that defense counsel possibly could breach such an agreement — with the result that the defendant might be acquitted and the state would then be powerless (because of double jeopardy) to try him again — as a practical matter, it is doubtful that any attorney would risk incurring the wrath and distrust of the court and the legal profession by such a flagrant act.

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accused is not entitled to have such evidence excluded which is claimed to have incriminated the witness.

[68] State v. Snyder, 244 Iowa 1244, 59 N.W.2d 223 (1953).

[69] 102 Ariz. 416, 420, 432 P.2d 428, 432 (1967).

[70] *Id.* at 421, 432 P.2d at 433.

[71] *See* cases cited note 2 *supra.*

[72] United States v. Maloney, 262 F.2d 535 (2d Cir. 1959); *accord,* United States v. Amadio, 215 F.2d 605 (7th Cir. 1954); De Gesualdo v. People, 147 Colo. 426, 364 P.2d 374 (1961); *see* United States v. Hiss, 185 F.2d 822 (2d Cir. 1950), *cert. denied,* 340 U.S. 948 (1951).

[73] 252 F.2d 664 (2d Cir.), *cert. denied,* 356 U.S. 968 (1958).

[74] 102 Ariz. 416, 421, 432 P.2d 428, 433 (1967).

While it did not feel the jury in the instant case was improperly influenced by the calling of Valenzuela, the court said this did not mean that a case *cannot* contain such improper behavior on the part of the prosecution as to deprive a defendant of a fair trial.[75] Here, the court noted, testimony of other witnesses as well as Valenzuela's own sworn statements in his motion to withdraw his guilty plea justified the state's action.

The court emphasized that the state's comment to the jury regarding Valenzuela's refusal to testify, while not desirable or even proper behavior, was not prejudicial "to an otherwise fair trial" and thus was not reversible error.[76]

It is hoped, however, that the court will look very carefully at future instances of the use of this type of evidence, especially where there has been an improper comment, to determine whether the defendant's rights have been prejudiced.

State v. Wright.[77] The defendant was charged with passing checks without an account, a felony.[78] At the arraignment defendant entered a plea of guilty but, prior to sentencing, the court allowed her to withdraw the plea and enter a plea of not guilty. At the ensuing trial evidence of the withdrawn guilty plea was elicited by the State during cross-examination of the defendant and without objection by defense counsel. Defendant was convicted and appealed on the basis of the admission into evidence of the withdrawn guilty plea. In reversing, the court, overruling its position in *Rascon v. State*,[79] held that the use of the withdrawn guilty plea as evidence was fundamental error. Arizona Rule 188, Rules of Criminal Procedure, allowing withdrawals of a guilty plea in a criminal action, does not contemplate *any* further use of the withdrawn plea since, in the words of the court, "[i]t is totally inconsistent with this rule to permit a plea of guilty to be later reinstated in the form of evidence."[80]

The *Rascon* court had allowed the admission of a withdrawn guilty plea because it felt that the plea was an admission of the charge and, being inconsistent with the present plea, was proper evidence for the jury to consider. Since the defendant voluntarily made the admission, the plea was considered competent evidence to be used against him.

In the instant case, defendant relied on several arguments in support of the abolishment of the *Rascon* rule. He pointed out that there are two distinct lines of authority as to whether a withdrawn plea of

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[75] *Id.* at 420, 432 P.2d at 432.
[76] *Id.* at 421, 432 P.2d at 433. It would, of course, have been otherwise were Valenzuela himself the accused.
[77] 103 Ariz. 52, 436 P.2d 601 (1968).
[78] ARIZ. REV. STAT. ANN. § 13-316 A(3) (1956), *as amended,* (Supp. 1967).
[79] 47 Ariz. 501, 57 P.2d 304 (1936).
[80] State v. Wright, 436 P.2d 601, 604 (Ariz. 1968).

guilty is admissible against a defendant in a trial on the same charge. A majority of courts hold such evidence is not admissible for any purpose at the subsequent trial.[81] The other view, adopted by the *Rascon* court, allows the withdrawn guilty plea to be considered by the jury along with all other evidence.[82] In the instant case, the court accepted the defendant's argument that *Rascon* was an adoption of the "minority view" that does not represent the law as it exists today.

The court felt that the admission of a withdrawn guilty plea was totally inconsistent with Criminal Rule 188 since the purpose of this rule is to place the accused in the *same position* he would have occupied had the plea never been made. Allowing it to be later admitted into evidence would make the rule "wholly illusory."[83]

Likewise, the court reasoned that the *Rascon* position is in conflict with Arizona Rule 184, Rules of Criminal Procedure, which provides that a defendant may, with consent of the court and county attorney, plead guilty to a lesser offense or to any lesser degree of the offense charged. If the consent is not given, the rule forbids any reference to the plea at the trial. The court recognized the public interest in settling cases without trials, as embodied in Rule 184, and recognized that a like interest is protected by Rule 188 — that guilty pleas should not be discouraged by allowing their withdrawal to prejudice the accused.

Finally, the court rejected the State's analogy to the use of a confession in open court, since the considerations motivating the guilty plea on one hand, and the confession on the other, are too dissimiliar. There are many reasons why a defendant might want to plead guilty which are unrelated to his actual guilt, *e.g.*, defendant may feel that he has a very weak case.

The court regarded the use of the withdrawn guilty plea as *fundamental* error; therefore, the defendant's failure to object to its admission did not preclude him from later raising the question of its propriety.[84]

C. Juveniles

Application of Billie.[85] In an adjudicatory hearing to determine whether or not two juveniles were delinquent, neither the juveniles nor their parents were advised of their children's right to be represented by counsel: a clear contravention of the United States Supreme Court decision of *In re Gault,*[86] decided two months later. The juveniles were committed to the State Industrial School at Ft. Grant, and their petition for a writ of habeas corpus was denied in the superior court. The court

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[81] Annot., 86 A.L.R.2d 327 (1962).
[82] *Id.*
[83] State v. Wright, 103 Ariz. 52, 436 P.2d 601, 605 (1968).
[84] *See, e.g.*, Wood v. United States, 128 F.2d 265 (D.C. Cir. 1942).
[85] 103 Ariz. 16, 436 P.2d 130 (1967).
[86] 387 U.S. 1 (1967) (holding that juvenile delinquency proceedings which may

of appeals, however, granted the writ and ordered the *release* of the two petitioners, holding that Gault was retroactive as far as the two juveniles were concerned.[87] On petition for review, *held,* judgment vacated, the supreme court holding that, although *Gault* should indeed be applied retroactively, upon granting a writ of habeas corpus the petitioners should be *remanded* to the juvenile court for further proceedings.

In reaching this result, the court followed a three step analysis. First, it examined what other jurisdictions had held regarding the same issue; second, it evaluated the reasoning by which the United States Supreme Court has determined whether a ruling should be prospective or retrospective; and finally, it analyzed the factors present in this situation, determining that *Gault* should be given retrospective application.

Two jurisdictions had passed on the issue at the time of the Arizona court's decision, but reached opposite results. The District of Columbia Court of Appeals, in *In re Wylie,*[88] held that one particular area of the *Gault* ruling — the necessity for notice of the specific items with which a juvenile is charged — should be applied prospectively only. On the other hand, in *Marsden v. Commonwealth,*[89] the Massachusetts court applied *Gault* retroactively in granting a new hearing to a juvenile who was adjudged delinquent without the benefit of counsel. Apparently, the court found the *reasoning* of neither case persuasive, although the result reached was the same as that in *Marsden.*

Without any clear mandate, the court then examined the criteria applied by the United States Supreme Court in several leading cases dealing with the retroactivity of constitutional decisions. In *Linkletter v. Walker,*[90] the Court held that the exclusionary rule of *Mapp v. Ohio*[91] would be given only prospective application. It indicated that the Federal Constitution neither prohibits nor requires a retrospective application, but that, on the contrary, each case must be considered on an ad hoc basis. Factors to be considered are the purpose and effect of the rule in question, and whether retrospective operation would further or retard its application.

In *Tehan v. Shott,*[92] it was held that *Griffin v. California*[93] could be applied prospectively only, reasoning that a retrospective application

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lead to commitment must measure up to the essentials of due process and fair treatment, one of which is notification to the child and his parents of the child's right to counsel).

[87] Application of Billie, 6 Ariz. App. 65, 429 P.2d 699 (1967).

[88] 231 A.2d 81 (D.C. Ct. App. 1967).

[89] 227 N.E.2d 1 (Mass. 1967).

[90] 381 U.S. 618 (1965).

[91] 367 U.S. 643 (1961).

[92] 382 U.S. 406 (1966).

[93] 380 U.S. 609 (1965) (holding that adverse comment on a defendant's failure to testify in a state criminal trial violates the constitutional privilege against self-incrimination).

would create great stresses on the administration of justice due to the fact that, prior to *Griffin*, several states had relied on the constitutionality of laws permitting comment on a defendant's failure to testify in a criminal case. Likewise, in *Johnson v. New Jersey*,[94] the *Escobedo*[95] and *Miranda*[96] decisions were held applicable only prospectively. Summarizing, Mr. Chief Justice Warren stated that:

> We gave retroactive effect to *Jackson v. Denno* . . . because confessions are likely to be highly persuasive with a jury, and if coerced they may well be untrustworthy by their very nature. On the other hand, we denied retrospective application to *Griffin v. State of California* . . . despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand. We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth determining process at trial.[97]

The Arizona court felt that the *Gault* ruling[98] affected "the very integrity of the fact finding process . . . [and] avert[ed] the clear danger of convicting the innocent,"[99] and therefore should be applied retroactively. The court considered the "thrust" of the *Gault* decision[100] in determining that its purpose could be furthered by retroactive application. It also considered the extent to which other safeguards to protect the child are available and concluded that other methods could not afford the requisite protection. In addition, the court noted that retroactive application would not substantially burden the administration of justice in the juvenile courts due to the short period of time which juveniles are actually detained.[101] The court concluded that the United States Supreme Court, in extending "the same protection of due process afforded adults under the Fourteenth Amendment . . . to children in juvenile court proceedings . . . intended to achieve the same retrospective effect in cases of all children whose delinquency adjudication and commitment had been accomplished without regard to compliance with the rules established in *Gault*."[102]

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[94] 384 U.S. 719 (1966).
[95] 378 U.S. 478 (1964).
[96] 384 U.S. 436 (1966).
[97] 103 Ariz. 16, 436 P.2d 130, 135 (1967).
[98] 387 U.S. 1 (1967), *supra* note 86.
[99] 436 P.2d 130, 135 (Ariz. 1967).
[100] "[I]n practice the juvenile court proceedings must afford strict judicial protection against an arbitrary exercise of authority under a false aegis of social expedience." 436 P.2d 130, 136 (Ariz. 1967).
[101] Notwithstanding the provisions of ARIZ. REV. STAT. ANN. § 8-236 B (1956), allowing a juvenile court to commit a child to a juvenile institution "for the term of the child's minority unless sooner discharged by the board of directors of state institutions for juveniles," the court took judicial notice of the fact that youths are seldom detained more than six months.
[102] 103 Ariz. 16, 436 P.2d 130, 136 (1967).

It should be noted that the central question involved is not the retroactivity of *Gault* per se but the retroactivity of the specific rights involved, *e.g.*, the juvenile must be notified of the charges made against him, he must be advised of his right to have either privately retained or court appointed counsel present, and he must be told of the fact that anything he says may be used against him. The juvenile's right to counsel and his right to be notified of the charges made against him should be applied retroactively because, if violated, they can impair the fact-finding process. However, the juvenile's privilege to be free from self-incrimination should be applied prospectively pursuant to the analogy of *Johnson v. New Jersey*.[103] The retroactive and prospective operation of the specific rights involved will certainly continue to face Arizona courts in the future.

State v. Maloney.[104] Defendant, at age sixteen, while under the jurisdiction of the juvenile court for the murders of his mother and stepfather, was taken to the police department for questioning, advised of his rights to counsel and to remain silent, and with a probation officer present, made incriminating statements which were later found by the trial court to be voluntary.[105] The juvenile court transferred defendant to be tried as an adult and his inculpatory statements were admitted as evidence against him at trial. He was convicted and appealed,[106] contending his statements, since made while under the jurisdiction of the juvenile court, and in the absence of proper warnings, should not have been admitted in evidence against him in subsequent criminal proceedings. The supreme court reversed, holding that inculpatory statements voluntarily made by a child while under the jurisdiction of the juvenile court cannot be used against him in a subsequent criminal proceeding after the juvenile court waives jurisdiction, *unless* both he and his parents are advised before questioning, not only of the child's right to counsel and privilege against self-incrimination, but also of the possibility that he may be transferred to be tried as an adult.

In requiring that the police advise both the child and his parents, the court anticipated the situation where parents may be deceased, unavailable, or where the interests of the child and his parents conflict. In such situations, the court indicated an attorney must be appointed to protect the child's interests.[107]

The court, in arriving at its decision, reasoned that the principles

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[103] 384 U.S. 719 (1966).
[104] 102 Ariz. 495, 433 P.2d 625 (1967).
[105] 101 Ariz. 111, 416 P.2d 544 (1966).
[106] Determination of the case was delayed pending the decision of the United States Supreme Court in *In re Gault*, 387 U.S. 1 (1967).
[107] Although the defendant in *Maloney* was accused of killing his mother and stepfather, the court pointed out that his natural father was alive and present at the transfer hearing and should have been notified of the child's rights.

of "fundamental fairness" that govern the fashioning of procedures to best serve the interest of children would be offended by admitting statements made in the setting of the juvenile court at a later trial for the purpose of securing the child's criminal conviction. The court felt the child's rights were not sufficiently protected by the presence of a juvenile probation officer whose role, by statute[108] and in fact, is that of an arresting officer and witness *against* the child.

In *State v. Shaw*,[109] statements made by a child were held inadmissible where no effort was made by the arresting officer to notify a juvenile probation officer as required by statute.[110] The court said its interpretation of the statute did not prevent the police from questioning a juvenile but only from subjecting him to interrogation without permission of the person appointed by law to see that the interrogation is conducted in a manner consonant with the purposes and policies of juvenile rehabilitation. *Maloney* has extended this statutory safeguard to include not only the requirement that a probation officer be notified forthwith, but that a parent, guardian, or counsel for the child be properly advised to assure the protection of his rights if his statements are to be admissible in subsequent criminal proceedings.

The court's conclusion in *Maloney* also rested on its interpertation of a statute[111] which provides that evidence *given in juvenile court* shall not be admissible in any proceeding in another court. Reasoning that an inculpatory statement obtained by the police while the child is within the jurisdiction of the juvenile court is part of the evidence-gathering function of that court, even though the evidence was *never offered to the juvenile court*, the court here found that the statute prohibits the use of such statements at a subsequent criminal proceeding unless proper warnings are given.

Although the United States Supreme Court, in the recent *Gault* decision, found certain protections for juveniles guaranteed by the fourteenth amendment, it specifically limited its holding to proceedings to determine delinquency by stating that it was not concerned with procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process. While *Maloney* has extended protection to juveniles at such pre-judicial stages, at least to protect them from the use of their inculpatory statements as evidence against them in the event of a

[108] ARIZ. REV. STAT. ANN. § 8-204 C. This was also noted in the *Gault* decision.
[109] 93 Ariz. 40, 378 P.2d 487 (1963).
[110] ARIZ. REV. STAT. ANN. § 8-221: "A peace officer, other than the probation officer, who arrests a child under the age of eighteen years shall forthwith notify the probation officer, and shall make such disposition of the child as the probation officer directs."
[111] ARIZ. REV. STAT. ANN. § 8-228 B: "The disposition of a child or of evidence given in the juvenile court shall not be admissible as evidence against the child in any proceedings in another court. . . ."

transfer to adult court when adequate warnings have not been given, other questions remain. May statements in violation of *Maloney* be used in *juvenile court* proceedings such as hearings to determine delinquency? Who may waive the child's rights — may either the child or the parent waive them, or must the waiver of both be secured? Is presence of the parent necessary for any questioning or only to help effectuate a waiver? When does the jurisdiction of the juvenile court begin — as soon as the child is taken into custody or during pre-custodial interrogation? Does the *Miranda* definition of custodial interrogation apply in the case of a juvenile? These and other questions are still to be answered in determining the procedural safeguards adequate to protect the juvenile's constitutional rights.

D. PROCEDURE

State v. Superior Court.[112] The Superior Court of Pima County impaneled a grand jury and in making a determination of their qualifications, the court made only the general statement that "the law says any person shall not be a juror who has been convicted of a felony or who stands charged with a felony." The jury was then told that if any of their number were in that class they would be excused. No reference was made as to any other statutory qualifications.[113] This grand jury subsequently returned an indictment and the case was assigned to the respondent, a superior court judge. A motion to quash the grand jury indictment was made on the ground that there was no examination made as to the qualifications of the jurors in compliance with statute.[114] Respondent granted the motion and ordered that the grand jury "be called to immediate session and discharged forthwith." On petition for certiorari by the State, the court of appeals set aside the order, holding that it was beyond respondent's jurisdiction. Respondent then petitioned the supreme court for review, where the order of the court of appeals was vacated and that of the superior court affirmed. A grand jury is not properly impaneled where there is no proper examination of prospective jurors as to their statutory qualifications, and a superior court judge has both jurisdiction and a mandatory duty, upon such a showing, to order a grand jury so impaneled discharged.

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[112] 102 Ariz. 388, 430 P.2d 408 (1967).

[113] These qualifications are as follows:

> Every juror, grand and petit, shall be a citizen of the United States, a resident of the county for at least six months next prior to being summoned as a juror, sober and intelligent, of sound mind and good moral character, over twenty-one years of age, able to understand the English language, and shall not have been convicted of a felony or be under indictment or other legal accusation of any felony. ARIZ. REV. STAT. ANN. § 21-101 (1956).

[114] ARIZ. R. CRIM. P. 82 provides: "When a grand jury is drawn and appears, the court and the county attorney or other prosecuting officer shall examine the jurors touching their qualifications as such jurors."

In the case at bar, the statutory requirements concerning impanelment of grand juries were not met,[115] since the jurors were not examined as to all their qualifications. Accordingly, "a challenge to the panel" was made.[116] Thus, the supreme court was called upon to determine, in effect, the proper procedure for dealing with an improperly impaneled grand jury. The court found that under the Rules of Criminal Procedure this is accomplished through the vehicle of a motion to quash the indictment,[117] which, if sustained, places an affirmative duty on the trial judge to discharge the panel.[118]

The order in question was predicated on the showing of grounds for a challenge to the entire panel. The petitioner's first argument was that the words "not selected or drawn according to the law" contained in the rule stating the grounds for a challenge to the panel[119] did not include the situation in the present case. The court disregarded as a distinction without consequence the fact that the superior court's statutory duty, according to Rule 82, was to examine the prospective grand jurors regarding their qualifications rather than select them.[120] The court relied on a Missouri case in which it was said that a jury is "selected" by examining the requisite number of veniremen as to their qualifications as prescribed by law.[121]

Most significant of the Rules of Criminal Procedure interpreted by the court, however, were Rules 82[122] and 88,[123] which the court regarded as "mandatory" in their application. As to Rule 82, the court reasoned that its purpose is to insure "protection of the defendant's statutory right to have only qualified jurors return an indictment against him." These qualifications are a matter of substance rather than form, and as such, cannot be deemed discretionary in their application because of the possible prejudice resulting from non-compliance. In the case of a grand jury panel the parties to be investigated are not permitted to examine the panel as is allowed in the case of a petit jury. Rule 82 then, provides the safeguard which must be strictly enforced to insure selection of a fair and impartial grand jury.

After finding Rule 82 applicable in the instant case, and the jury

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[115] *Id.*

[116] ARIZ. R. CRIM. P. 84 provides: "A challenge to the panel may be made only on the ground that the grand jurors were not selected or drawn according to law."

[117] ARIZ. R. CRIM. P. 169 A(2)(a) provides: "A motion to quash the indictment or information shall be available only on one or more of the following grounds. In the case of . . . an indictment . . . [t]hat there was ground for a challenge to the panel or to an individual grand juror."

[118] ARIZ. R. CRIM. P. 88 provides: "If a challenge to the panel is sustained, the grand jury shall be discharged."

[119] *See* Rule 84, quoted note 116 *supra.*

[120] *See* Rule 82, quoted note 114, *supra.*

[121] State v. Mason, 326 Mo. 973, 33 S.W.2d 895 (1930).

[122] *See* Rule 82, quoted note 114 *supra.*

[123] *See* Rule 88, quoted note 118 *supra.*

thus improperly impaneled, the court turned to petitioner's argument that the respondent had no jurisdiction to order the discharge under Rule 88 (providing that the panel shall be discharged if a challenge is sustained) since the jury had already been sworn. The court interpreted Rule 88 as placing upon the trial court an affirmative duty to discharge the grand jury immediately upon sustaining a challenge to the panel whether "before or after the jury is sworn." Juries operating under the impediment in the present case were dubbed "judicial nullities" by the court and therefore must be discharged at the earliest opportunity. Rule 88 was intended to deal with such situations, and "in order to fully effectuate its purpose, it must be construed to provide for mandatory discharge of the jury . . . ."

The importance of this decision lies in the court's resolve to strictly adhere to rules established as safeguards for the accused. The court recognized that grand juries are not subject to the scrutiny of *voir dire* as are their petit counterparts, and therefore that the procedural steps required to assure their competence should not be taken lightly.

State v. Superior Court.[124] It is important to note that the motion to quash recognized in the preceding case should be made prior to entering a plea since, in this case it was held that while indictments issued by a grand jury which had not been properly questioned as to its qualifications,[125] are voidable, the right to object to the indictment may be waived unless a motion to quash is made *prior to pleading* to the charge, or unless the court in its discretion allows the defendant to withdraw his plea for the purposes of making such motion.

In this case, precipitated by the preceding case, the defendants were indicted for burglary by the improperly impanelled grand jury and entered a plea of not guilty. No motions were made as to the sufficiency of the indictments in the time allotted after arraignment, or during the trial and the defendants were convicted as charged. The court of appeals reversed on other grounds and ordered a new trial.[126] Preceding the second trial, a motion to quash the indictment was granted by the superior court. In vacating that court's order quashing the indictment, the supreme court made it clear that all indictments issued by an improperly impanelled grand jury are not automatically void. Rather, *each* defendant must attack the indictment by the procedure stipulated in the Rules of Criminal Procedure, specifically Rules 84, 86, 169 and 166. The Rules indicate a motion to quash must be made *prior* to the plea unless the court permits it at a later time.

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[124] 102 Ariz. 588, 435 P.2d 485 (1967).
[125] State v. Superior Court, 102 Ariz. 388, 430 P.2d 408 (1967).
[126] State v. Jones, 6 Ariz. App. 26, 429 P.2d 518 (1967).

State ex rel. Corbin v. Murry.[127] A preliminary examination was set before respondent, a judge of the superior court, who was scheduled to preside as a committing magistrate. Respondent, however, refused to hear any evidence, ruling that he had no jurisdiction in the matter. Petitioner, the State of Arizona, sought a writ of mandamus from the Arizona supreme court to compel the preliminary examination. In issuing the writ, the court held that a superior court judge, sitting as a committing magistrate, has jurisdiction and may be compelled to hold preliminary examinations.

Respondent unsuccessfully contended that the petitioner had failed to comply with Arizona Supreme Court Rule 1(b) by not addressing his petition first to the court of appeals.[128] The court dismissed this on the ground that where the

> matter on its face concerns an important facet of the administration of justice, the jurisdiction of the Court of Appeals need not invariably be first invoked.[129]

The court was not persuaded by respondent's argument that the 1966 amendment of § 22-301 of the Arizona Revised Statutes[130] removed his jurisdiction. This statute allows the justice courts to conduct proceedings through preliminary examinations for felonies committed within their respective precincts. The jurisdiction of the superior court is fixed by the Arizona Constitution as including all "[c]ases and proceedings in which *exclusive* jurisdiction is not vested by law in another court."[131] (emphasis added). Respondent argued that, prior to the amendment, § 22-301 contained *no* provision limiting the justice court's jurisdiction over felonies, the only requirement being that the alleged crime be committed within the *county* where the justice court sat. Respondent reasoned, therefore, that the amendment must have been intended to vest *exclusive* jurisdiction to conduct preliminary examinations in the justice courts.

The supreme court, however, pointed to the history of § 22-301 to demonstrate that this was not the intent of the legislature. Prior to amendment, the supreme court, in *State ex rel. Corbin v. Superior Court,*[132] held that justice courts could sit as committing magistrates on a felony complaint on a *county wide* basis as contrasted with those specifically enumerated instances in the statute (*e.g.*, misdemeanors) where their jurisdiction was limited to crimes committed within a particular *precinct*

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[127] 102 Ariz. 184, 427 P.2d 135 (1967).
[128] ARIZ. SUP. CT. R. 1(b).
[129] 102 Ariz. 184, 185, 427 P.2d 135, 136 (1967).
[130] ARIZ. REV. STAT. ANN. § 22-301 (1956), *as amended,* (Supp. 1967).
[131] ARIZ. CONST. art. 6, § 14.
[132] State *ex rel.* Corbin v. Superior Court, 100 Ariz. 236, 413 P.2d 264, *modified on rehearing,* 100 Ariz. 362, 414 P.2d 738 (1966).

within the county. The result of this decision was widespread "forum shopping" between precincts. To alleviate this problem, § 22-301 was amended to limit the justice court's jurisdiction over preliminary examination to the particular precinct in which the felony had been committed.

The court then dismissed respondent's contention by indicating that since justices of the peace and superior court judges are magistrates,[133] respondent had jurisdiction to conduct the preliminary examination in the instant case. The court had previously held, in *State ex rel. Mahoney v. Stevens*,[134] that a "magistrate has a duty to conduct"[135] a preliminary examination. Since the amendment of § 22-301 did not alter the fact that a superior court judge is a magistrate, *Mahoney* was controlling and respondent could be compelled to proceed in the instant case.

VII. PUBLIC LAND LAW

State Land Department v. Painted Desert Park, Inc.[1] After defendant, the State Land Department, denied plaintiff a renewal of its lease of a parcel of state school land,[2] an appraisal was ordered by the Land Commissioner to determine the value of any reimbursable improvements on the land. The re-routing of a major highway had isolated and destroyed plaintiff's business, rendering the improvements useless for their original purpose. The state appraisers deemed the improvements valueless and the plaintiff was refused compensation. A judgment of the superior court in a trial de novo[3] allowing reimbursement

[133] ARIZ. REV. STAT. ANN. § 1-215(11), *as amended*, (Supp. 1967).
[134] 79 Ariz. 298, 288 P.2d 1077 (1955).
[135] *Id.* at 301, 288 P.2d at 1079.

[1] 102 Ariz. 272, 428 P.2d 424 (1967).

[2] Under the Arizona Enabling Act, ch. 310 §§ 24-30, 36 Stat. 572-76 (1910), Arizona was granted large portions of land to be held and administered in trust for the benefit of the public school system. The act provides for the sale and leasing of the lands to the highest bidder at a public auction; proceeds derived therefrom are likewise subject to the trust. The State Land Department, and more specifically the State Land Commissioner, are responsible for the disposition of these trust lands. ARIZ. REV. STAT. ANN. §§ 37-102, 132 (1956). For specific discussions of their nature and administration, see 8 ARIZ. L. REV. 133 (1966) and 9 ARIZ. L. REV. 113 (1967).

[3] ARIZ. REV. STAT. ANN. § 37-214 (1956), *as amended*, (Supp. 1967), provides the appeal procedure from a decision of the Commissioner and provides in part:

> D. An appeal from a final decision of the board of appeals or a final decision of the commissioner not relating to the classification or appraisal of lands or improvements may be taken by the commissioner or any other person adversely affected by the decision to the superior court of the county in which the major portion of the land or improvements in the appeal is located.
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> E. . . . The appeal shall be heard de novo . . . and shall either *affirm, reverse or modify* the decision appealed from. The decision of the superior court may be appealed to the supreme court in the manner appeals are allowed to that court from final judgments in civil actions. (emphasis added).

was reversed by the court of appeals.[4] On appeal, *held,* reversed. A lessee of state school lands is entitled to reimbursement for the construction of improvements made without prior approval of the State Land Department where the improvements were for the purposes provided in the lease, even though upon termination of the leasehold they no longer have any value for those original functions.

The Commission intended to exchange this parcel of land with the National Park Service for more suitable lands in other parts of the state.[5] The court of appeals determined that a lessee was entitled to be reimbursed by the state only when the state took trust lands for its own use.[6] No statutory provision expressly provided for state compensation to a lessee at the expiration of his lease when renewal was denied. If the Commissioner did not have any authority to make an appraisal under these circumstances, neither could the superior court exercise its appellate jurisdiction in a trial de novo to resolve any conflict arising out of such unsanctioned activity.

The supreme court, however, interpreted the Commissioner's statutory powers to include the authority to make an appraisal in such instances. Since the Commissioner has the power to make and renew a lease,[7] he has the responsibilities of a trustee, and accordingly, the duty of realizing some profits from the school lands. Reimbursing a lessee would encourage renting and the trust would ultimately profit. The duty to assess and reimburse for authorized improvements at the termination of a lease is implied from the responsibilities of the trusteeship and the state courts can exercise their appellate jurisdiction in controversies over these matters.

A lessee, however, is required to obtain approval from the Land Department if he intends to make improvements for purposes other than those in the lease.[8] In construing the underlying statute, the court

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[4] State Land Dep't v. Painted Desert Park, Inc., 3 Ariz. App. 568, 416 P.2d 989 (1966).

[5] The Land Department sought public domain lands fit for grazing in other parts of Apache County or Navajo County.

[6] ARIZ. REV. STAT. ANN. § 37-441 (1956), reads:

> The state may, when necessary for *its uses or for the uses of any state department* or institution, take over any state lands and the improvements thereon by reimbursing the owners for the improvements and the department or institution so using the lands shall leave them and pay such rental as the state land department requires. (emphasis added).

Section 37-442 outlines the administrative procedure required for the take-over. The court determined that the contemplated exchange of lands was not a "taking" under these provisions. Neither, the court felt, was the proposed transaction a "sale" which under § 37-242 would also have expressly entitled the lessee to compensation for improvements.

[7] ARIZ. REV. STAT. ANN. § 37-291 B (1956) provides in part:

> If the department determines the continued leasing of the land not in the best interest of the state, the lease shall not be renewed.

[8] ARIZ. REV. STAT. ANN. § 37-321 (1956), *as amended,* (Supp. 1967).

reasoned that it was not the legislature's intent to require a lessee to obtain permission every time he wanted to use his land in the manner provided for by the lease. On the other hand, it would be unfair to the state if improvements were made which rendered the land useless to subsequent lessees. The plaintiff placed improvements on the premises that were necessary to carry out the commercial purposes of its lease. Hence, the court held, approval was not required.

Once establishing the authority for the improvements, the court was called upon to place a "value" on them. The basis for appraising the value of improvements on leased state lands for the purpose of reimbursement is provided for by statute.[9] The court noted that merely because the improvements had no value for the particular use to which they had been previously put was not determinative of the issue. Rather, the statutory measures (the condition of the improvements, their current value, and suitability for use at the time they were made) must be considered along with the main consideration: has it "enhanced the value" of the land?[10] Although the improvements constructed in connection with the plaintiff's business — a tourist trading post at the edge of the Painted Desert — were useless for commercial purposes after Route 66 was moved, they nevertheless enhanced the value of the property. This value was recognized by the Park Service which desired to incorporate the installation in an expanded Painted Desert Park.

The excellent view afforded by the premises, and even the speculative land boom disclosed by the Land Department's appraisal, did more to affect the value of the land than did the improvements; yet, the court reasoned the improvements themselves were made more valuable by the circumstances, apparently ignoring for the moment the proposition that it is the improvement's enhancement to the value of the land that is most important in considering *their* value.

Aside from forming an express rule that in instances where a renewal of a lease of state school lands is denied, the lessee may be compensated for improvements made although without express consent of the Commission, the court also showed it could be quite imaginative in finding considerable "value" in an isolated trading post. The value of improvements on such lands, therefore, must be ascertained in view of *all* the attending circumstances, not solely their use after termination of the lease.

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[9] ARIZ. REV. STAT. ANN. § 37-322 (1956), *as amended*, (Supp. 1967).

[10] ARIZ. REV. STAT. ANN. § 37-101(10) reads:

> "*Improvements*" *means anything* permanent in character the result of labor or capital expended by the lessee or his predecessors in interest on state land in its reclamation or development, and the appropriation of water thereon, *which has enhanced the values thereof.* (emphasis added).

State ex rel. Arizona Highway Department v. Lassen.[11] In another matter relating to the administration of the public trust lands held under the Enabling Act,[12] the State Land Commissioner, in 1964, formulated and adopted Rule 12[13] of the State Land Department which, in substance, required the State Highway Department to pay the full appraised value for rights-of-way and material sites it sought on these lands. Prior to the adoption of the rule, the department had obtained the use of trust lands without being required to pay any compensation.[14] A writ of prohibition preventing enforcement of the rule was made permanent by the supreme court.[15] On certiorari, the Supreme Court of the United States reversed, holding that the Arizona Highway Department, as a state agency, is required to compensate the state school lands trust established by the Enabling Act for use it makes of them for highway purposes, and such compensation must be for the full appraisal value undiminished by the amount of any enhancement in value of remaining trust lands.[16] Implementing the remand and subsequent mandate of the Supreme Court of the United States, *held,* writ of prohibition against the State Land Commissioner quashed.

VIII. TORTS

Shannon v. Butler Homes, Inc.[1] and *Daugherty v. Montgomery Ward.*[2] In *Shannon,* the plaintiff, a nine year old child, collided with and broke an "Arcadia-styled" plate glass door while a social guest in the home of the defendant Larsen. Shannon, as guardian ad litem of the injured minor, brought an action against both the builder, Butler Homes, Inc., and the owner of the home. The trial court granted the defendants' motions for summary judgment, and the plaintiff appealed. The supreme court felt that there were so few material facts in the record that it would consider the appeal on the basis of the pleadings alone, as if the trial court had granted a motion to dismiss[3] or a judgment on the pleadings.[4]

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[11] 102 Ariz. 318, 428 P.2d 996 (1967).
[12] See note 2 in preceding case.
[13] STATE LAND DEPARTMENT RULE 12:
State and County Highway rights-of-way and material sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the right-of-way or material site has been made to the State Land Department. The appraised value of the right-of-way or material site shall be determined in accordance with the principles established in A.R.S. § 12-1122.
[14] State *ex rel.* Conway v. State Land Dep't, 62 Ariz. 248, 156 P.2d 201 (1945); Grosetta v. Choate, 51 Ariz. 248, 75 P.2d 1031 (1938).
[15] State *ex rel.* Arizona Highway Dep't v. Lassen, 99 Ariz. 161, 407 P.2d 747 (1965).
[16] Lassen v. Arizona *ex rel.* Arizona Highway Dep't, 385 U.S. 458 (1967).

[1] 102 Ariz. 312, 428 P.2d 990 (1967).
[2] 102 Ariz. 267, 428 P.2d 419 (1967).
[3] ARIZ. R. CIV. P. 12(b).
[4] ARIZ. R. CIV. P. 12(c).

The action against Butler Homes, Inc. The complaint alleged that the defendant, "having installed the door as the builder of the Larsen home, knew that it created a deceptive illusion of space and was a trap and failed to provide adequate warning by markings upon the door or to use laminated safety glass or glass of sufficiently strong qualities and characteristics." It also alleged that Butler Homes impliedly warranted the fitness of the door, and this warranty extended to the plaintiff as an invited guest upon the premises. The court, in affirming the judgment for the contractor, held that upon completion and acceptance of a contractor's work by the owner, the contractor was not liable for negligent conduct to third persons for injuries thereafter suffered unless the work was (1) inherently, intrinsically, or abnormally dangerous, or so manifestly defective as to be imminently dangerous to third persons and (2) not discovered by, or obvious to, the owner.

The court declared that the glass door in this case was like other common objects in and about the home, and not so dangerous to third persons that it could be said to have been embraced within the exception to the rule. The court therefore held that Butler Homes could not be held liable for injuries sustained by the plaintiff since the home had been completed and accepted by the owner, Larsen, before the injury occurred.

This result did little more than summarize and combine the holdings of prior Arizona decisions. Pre-existing Arizona law provided that one could bring an action in tort against a manufacturer or contractor where an item bought from the manufacturer or constructed by the contractor was defective and caused injury,[5] but, *ordinarily,* a contractor would be relieved of all liability in negligence for injuries sustained by *third persons,* once his work had been completed and accepted by the owner.[6] However, the court in the present case enunciated an exception to this rule — adopted by most jurisdictions which, like Arizona, adhere to the "contractor immunity rule"[7] — where the work is inherently, intrinsically, or imminently dangerous, a contractor will still be held liable to third persons even after the work has been completed and accepted by the owner.[8]

However, it should be noted that the court, in re-affirming these

[5] *Cf.* Kennecott Copper Corp. v. McDowell, 100 Ariz. 276, 413 P.2d 749 (1966); Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966).

[6] Kennecott Copper Corp. v. McDowell, 100 Ariz. 276, 413 P.2d 749 (1966).

[7] W. PROSSER, TORTS 694 (3d ed. 1964); *see, e.g.,* Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1 (1948); Andrews v. Del Guzzi, 56 Wash. 2d 381, 353 P.2d 422 (1960).

[8] *See, e.g.,* Kendrick v. Mason, 234 La. 271, 99 So. 2d 108 (1958). In this case, a contractor severed gas lines and failed to repair them and an explosion resulted. The court, although it still adhered to the "contractor immunity rule," held the contractor liable for damages even though the work had been completed and accepted by the town, because the work was imminently dangerous to third persons.

past holdings, remains in the minority.[9] A majority of jurisdictions provide that building contractors are to be held to the standard of reasonable care for the protection of anyone who might foreseeably be endangered by their negligence, *even after acceptance of the work* (except in cases where the contractors have merely carefully carried out the plans, specifications and directions given them by their employer).[10]

The action against Don Larsen. The complaint alleged that the plaintiff was an invited guest in defendant's home, that the glass door with which she collided created a deceptive illusion and was a trap by reason of the lighting conditions and absence of safety glass or signs or markings on the door, and that the defendant did not warn the minor plaintiff of the danger. It was also alleged that the door was an attractive nuisance. The court rejected the argument that the doctrine of attractive nuisance applied to the child *licensee*[11] but reversed, holding that although the occupier owed no duty of inspection or affirmative care to make the premises safe for a social guest's visit, he did have a duty to *warn* the licensee about concealed dangers known to him or of which he reasonably should have been aware. Whether or not there was a lack of appreciation of the condition on the part of the child licensee making it a hidden peril to the child, and whether the occupier reasonably warned the child about the condition were questions of fact for the jury.

The test of liability was whether the occupier exercised such care as a reasonable prudent person would exercise toward the licensee under like circumstances. Thus, the occupier was held to a greater degree of care toward a child licensee than toward an adult, since a child's capacity to appreciate a given danger may have been less than that of an adult. The court reasoned that since the plaintiff alleged that the glass door,

[9] In *Shannon*, the facts failed to state whether Butler Homes was a general contractor hired by defendant Larsen to build the home, or whether it was a builder-vendor who sold the land and home to Larsen. If Butler Homes was a builder-vendor, then the court's decision is in accord with the majority of other jurisdictions. However, the modern trend is toward the position that even builder-vendors should be held to the standard of reasonable care in the construction of a home to avoid unreasonable risk and danger to those who would normally be expected to occupy it. Rogers v. Scyphers, 36 U.S.L.W. 2657 (S.C. April 9, 1968). However, since the court based its decision on law which involved contractors, it is assumed that Butler Homes was a contractor, and thus by following the "contractor immunity rule," Arizona is in the minority. W. PROSSER, TORTS 695 (3d ed. 1964); *see, e.g.*, Thompson v. Burke Eng'r Sales Co., 252 Iowa 146, 106 N.W.2d 351 (1960); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

[10] W. PROSSER, TORTS 695 (3d ed. 1964); *see, e.g.*, Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Rogers v. Scyphers, 36 U.S.L.W. 2657 (S.C. April 9, 1968).

[11] Before the decision of the court in this case there had not been a case in Arizona which explicitly stated that the attractive nuisance doctrine applied only to *trespassing* children. In *MacNeil v. Perkins*, 84 Ariz. 74, 324 P.2d 211 (1958), the court *implied* that the doctrine applied only to child trespassers. Some states, however, apply this doctrine to injured child *licensees* as well. *See, e.g.*, Kemline v. Simonds, 231 Cal. App. 2d 165, 41 Cal. Rptr. 653 (1964).

because of its deceptive illusion, coupled with lighting conditions and the absence of signs and markings, created a trap or hidden peril of which the plaintiff was not warned, the plaintiff had stated a claim for relief which, if sustained by the evidence, would entitle her to the submission of her case to a jury.

The court in the instant case merely brought this fact situation within pre-existing Arizona law concerning the occupier's duty to a licensee. Prior Arizona law held that an occupier owed no duty to a licensee to inspect his premises,[12] but that he could not wilfully or wantonly cause the licensee harm.[13] Also, an occupier owed a licensee a duty to use reasonable care in his activities when he knew or should have known that the licensee was on his premises, and to warn the licensee against hidden perils or secret pitfalls on his premises.[14] However, where the licensee knew or should have known of a certain condition, or the danger was obvious or reasonably apparent, the licensee could not recover for injuries resulting from the condition.[15] The court used this "obvious or reasonably apparent" rule in *Daugherty v. Montgomery Ward.*

In *Daugherty,* the plaintiff, a *business invitee,* sustained injuries in an office of the defendant's store in a fall after a chair rolled away as she was attempting to sit down. Before the accident, the plaintiff was aware that the floor was slippery and that the chair had casters. One of the defendant's employees told her to be seated and pushed a chair with casters toward her for that purpose. The plaintiff attempted to sit on the chair but instead sat on the floor. In the action against the defendant for injuries sustained from the fall, plaintiff alleged the following grounds of negligence: (1) that the accident occurred because of the light weight of the chair, because it had casters, and also because of the extraordinary slipperiness of the floor, and that these facts were known or should have been known by the defendant; (2) that the defendant failed to supply a chair of reasonably stable quality; and (3) that the defendant failed to warn the plaintiff about the instability of the chair and of the dangerous situation resulting from this fact and the slipperiness of the floor. Therefore, the plaintiff alleged that the defendant's employee failed to discharge her duty to the plaintiff to maintain the premises and equipment in a safe condition. After a judgment for the plaintiff was entered on the jury's verdict, the defendant's motion for a "Judgment in Accordance with Motion for Directed Verdict" was

[12] *Cf.* Mull v. Roosevelt Irr. Dist., 77 Ariz. 344, 272 P.2d 342 (1954); Sanders v. Brown, 73 Ariz. 116, 238 P.2d 941 (1951).

[13] Sanders v. Brown, 73 Ariz. 116, 238 P.2d 941 (1951); Southwest Cotton Co. v. Pope, 25 Ariz. 364, 218 P. 152 (1923).

[14] Parker's Hamburger v. Fitzgerald, 88 Ariz. 276, 356 P.2d 25 (1960); Western Truck Lines Ltd. v. Du Vaull, 57 Ariz. 199, 112 P.2d 589 (1941).

[15] Sanders v. Brown, 73 Ariz. 116, 238 P.2d 941 (1951); Western Truck Lines Ltd. v. Du Vaull, 57 Ariz. 199, 112 P.2d 589 (1941).

granted and the plaintiff appealed. The court of appeals reversed and, on petition for review, the supreme court, vacating the judgment of the court of appeals and affirming the judgment of the trial court, held that there was no liability on the part of an invitor to an invitee for injuries inflicted from dangers that were as obvious or as well known to the invitee as to the invitor.

The record indicated that plaintiff had observed that the chair was on casters and rolled easily, and that she also knew that the floor was slippery. Thus, her knowledge was equal, if not superior, to that of the defendant, and the defendant could not be held liable for injuries sustained by the invitee for not warning of conditions of which she was already aware.

Prior to this decision, Arizona case law had already outlined the duties owed by an invitor to a business invitee. The invitee was entitled to assume that the premises were reasonably safe,[16] and thus the invitor owed a duty to inspect the premises and discover possible dangerous conditions of which the invitor did not know[17] and make and keep the premises in a reasonably safe condition.[18]

The majority of jurisdictions have held that where it is shown that an invitor had or should have had knowledge of a dangerous situation and had not corrected the danger or warned the invitee, he is liable for injuries which the invitee sustained because of the danger, *unless the injured person had full knowledge of all hazards resulting therefrom, or unless the hazard proximately causing the injury was so obvious that it could not reasonably have remained unnoticed.*[19] *Daugherty,* therefore, clearly expresses what had been implied in past Arizona decisions and was settled law: where there is equal knowledge of danger there can be no liability on the part of the invitor.

When *Daugherty* and *Shannon* are compared, it may seem that the court applied a more limited construction of an occupier's duty in *Daugherty* than in *Shannon.* However, the discrepancy between the supreme court's decisions in *Shannon* and *Daugherty* is not so glaring when it is recalled that in *Shannon* there were very few evidentiary facts — the court held that if the plaintiff's claim for relief was sustained *by the evidence,* she would be entitled to have her case submitted to

[16] Patania v. Silverstone, 3 Ariz. App. 424, 415 P.2d 139 (1966).
[17] Glowacki v. A.J. Bayless Markets, Inc., 76 Ariz. 295, 263 P.2d 799 (1953); Gee v. Salcido, 2 Ariz. App. 280, 408 P.2d 42 (1965).
[18] Busy Bee Buffet, Inc. v. Ferrell, 82 Ariz. 192, 310 P.2d 817 (1957); Gee v. Salcido, 2 Ariz. App. 280, 408 P.2d 42 (1965).
[19] Chevraux v. Nahas, 150 N.W.2d 78 (Iowa 1967); Smith v. Bernfeld, 226 Md. 400, 174 A.2d 53 (1961).

the jury — while in *Daugherty*, the case had gone to the jury and the court found the *evidence* showed plaintiff's superior knowledge of the dangerous condition. With these differences taken into account, the court's decisions in *Daugherty* and *Shannon* are quite reconcilable.

IX. WORKMEN'S COMPENSATION

Morgan v. Hays.[1] See casenote 9 *Arizona Law Review* 543 (1968).

[1] 102 Ariz. 150, 426 P.2d 647 (1967).

TABLE OF CASES