Notes

ATTORNEY AND CLIENT — COLLECTION AGENCIES — UNAUTHORIZED PRACTICE OF LAW. — *Andrus v. Guillot* (La. 1964).

Plaintiff, a collection agent, sued to recover a commission for the collection of a debt assigned to him by defendant. Their contract provided that plaintiff's fee would be 33 ⅓% of the claim unless the services of an attorney were required, in which case the fee would be 50%: 25% to go to the attorney and 25% to plaintiff. After plaintiff had refused to return the claim on defendant's request, defendant collected it through an attorney. Judgment was for plaintiff and a new trial granted. On re-trial, defendant's exception of no cause of action was overruled and the original judgment reinstated. On appeal, *held*, reversed. "[T]he contractual rights which plaintiff seeks to enforce in the instant case are illegal and against public policy because the consideration therefor calls for plaintiff to engage in the practice of law, which he is not qualified to do under the laws of this state."[1] *Andrus v. Guillot*, 160 So. 2d 804 (La. 1964).

Collection agencies have been under repeated attack by lawyers for engaging in the unauthorized practice of law.[2] This unauthorized practice generally falls into three areas: the use of quasi-legal techniques to recover claims from debtors; the representation of creditors and debtors in a legal capacity; and the referral of claims to attorneys for legal assistance.

Collection agencies may pursue peaceful recovery of debts through persuasion outside the legal framework.[3] However, because they are anxious to receive commissions,[4] and because they are not usually governed by the same exacting standards as professional men,[5] agencies sometimes resort to techniques reserved to the legal profession. Threats of legal proceedings against debtors or their employers,[6] service of

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[1] LA. REV. STAT. §§ 37:211-218 (1950).

[2] See 3 UNAUTHORIZED PRACTICE NEWS 35 (1937).

[3] See American Auto. Ass'n. v. Merrick, 117 F.2d 23 (App. D.C. 1940); 7 AM. JUR.2d *Attorneys at Law* § 80 (1963); 15 AM. JUR.2d *Collection and Credit Agencies* § 21 (1964).

[4] See Comment, 11 HASTINGS L.J. 301 (1960).

[5] See State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961); Comment, 11 HASTINGS L.J. 301 (1960).

[6] Berk v. State, 225 Ala. 324, 142 So. 832 (1932); State v. Merchant's and Mfr's. Ass'n., 1 Brand, *Unauthorized Practice Decisions* 710, 3 UNAUTHORIZED PRACTICE NEWS 45 (Ariz. Superior Ct. 1937); State Bar of Oklahoma v. Retail Credit Ass'n., 170 Okla. 246, 37 P.2d 954 (1934); *In re* Ripley, 109 Vt. 83, 191 Atl. 918 (1937); But one may threaten legal proceedings solely as the agent of the creditor and at his direction, *In re* Lyon, 301 Mass. 30. 16 N.E.2d 74 (1938).

simulated process,[7] sometimes by hired public officers,[8] and the use of form letters or documents signed by an attorney but prepared by the agency,[9] are among the techniques widely condemned by American courts. The courts have generally recognized their singular responsibility to determine the character of each act,[10] but have not attempted complete delineation of all improper practices, leaving the question to a case-by-case determination.[11]

Prime among those acts held to be the practice of law is the representation of creditors in court by the agency, along with the preparation and filing of legal papers prior to litigation. These practices are unauthorized whether before a court of record or not.[12] Aside from any question of a corporate body's ability to engage in the practice of law,[13] the agency is not the real party in interest,[14] and, not being licensed to practice law, it may not represent the creditor.[15] In an effort to avoid this rule, agencies frequently take assignments of claims, conditional upon collection, and bring suit in their own names.[16] Most courts, however, refuse to recognize assignments solely for the purpose of legal action,[17] where the real owner maintains an interest in the claim.[18] Such "sham assignments" are said

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[7] Bump v. Barnett, 235 Iowa 308, 16 N.W.2d 579 (1944); State Bar of Oklahoma v. Retail Credit Ass'n., *supra* note 6; WIS. REV. STAT. 1937 § 218.04; *Statement of Principles Concerning Collection Agencies*, para. 4, 3 UNAUTHORIZED PRACTICE NEWS 49 (1937).

[8] Bump v. Barnett, *supra* note 7.

[9] Canon 47, CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSN. (1937); Opinion No. 7 of the Committee on Rules of Professional Conduct, State Bar of Arizona (1955); Para. 9, *Statement of Principles in Reference to Collection Agencies*, 62 A.B.A. REPORTS 786, 3 UNAUTHORIZED PRACTICE NEWS 49 (1937).

[10] State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961); *In re* Greer, 52 Ariz. 385, 81 P.2d 96 (1938); State v. C.S. Dudley & Co., 340 Mo. 852, 102 S.W.2d 895 (1937).

[11] See State v. Merchant's and Mfr's. Ass'n., 1 Brand, *Unauthorized Practice Decisions* 710, 3 UNAUTHORIZED PRACTICE NEWS 45 (Ariz. Superior Ct. 1937); Nelson v. Smith, 107 Utah 382, 154 P.2d 634 (1944); For a discussion of some of these practices see Note, 8 WESTERN RES. L.REV. 492 (1957).

[12] 7 AM. JUR.2d *Attorneys at Law* § 80 (1963); "The salutary purpose of the statute (providing for lay representation in justice courts) may not thus be perverted to encourage the growth of a class of 'justice court lawyers' . . . without training in law and ethics." Bump v. Barnett, 235 Iowa 308, 16 N.W.2d 579 (1944); *but see*, United Securities Corp. v. Pantex Pressing Machines, 98 Colo. 79, 53 P.2d 653 (1936) where it was successfully contended that the representation of a creditor in a justice court was not unauthorized practice of law by a collection agent.

[13] For a discussion of the practice of law by corporate bodies, see, State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961).

[14] See Note, 41 MINN. L. REV. 475 (1957).

[15] See Buxton v. Leitz, 136 N.Y. Supp. 829 (Munic. Ct. N.Y. 1912).

[16] See State v. Retail Credit Men's Ass'n. of Chattanooga, 163 Tenn. 450, 43 S.W.2d 918 (1931) where 2198 suits were brought by one agency on such assignments within a two year period.

[17] State v. Merchant's and Mfr's. Ass'n., 1 Brand, *Unauthorized Practice Decisions* 710, 3 UNAUTHORIZED PRACTICE NEWS 45 (Ariz. Superior Ct. 1937) People v. Securities Discount Corp., 279 Ill. App. 70, *affirmed*, 361 Ill. 551, 198 N.E. 681 (1935); Annot., 157 A.L.R. 522 (1945).

[18] See Note, 33 CALIF. L. REV. 622 (1946).

to pervert the intention of the law,[19] especially where the agency holds itself out as desirous of taking such assignments.[20]

Other agency practices are subject to condemnation as giving unauthorized legal advice. An agent of the creditor can be empowered to make a friendly settlement with the debtor.[21] However, problems arise when the agency advises creditors concerning the legal aspects of their claims.[22] Few collection agents possess the requisite legal training to properly advise on the credibility or collectability of a claim through legal process.[23] Maintaining a staff attorney to give this advice, or hiring an attorney for that purpose, does not alter the unauthorized character of the practice.[24] Soliciting claims may also be unauthorized practice by collection agencies, usually because the collection impliedly calls for the services of an attorney. Examples include soliciting claims in bankruptcy,[25] soliciting claims while advertising capability to prosecute the claim through legal channels,[26] and soliciting claims with the tacit understanding that the agency will handle any necessary litigation.[27] In general, the agency cannot represent that it has the right, power or ability, alone or through a legal staff, to prosecute the client's claim or render other legal service.[28]

Referral of claims to an attorney chosen by the agency has been widely condemned because it creates a three party agreement between attorney, agency and client which is in violation of legal canons, and

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[19] Nelson v. Smith, 107 Utah 382, 154 P.2d 634 (1944).

[20] Bump v. Barnett, 235 Iowa 308, 16 N.W.2d 579 (1944).

[21] 7 AM. JUR.2d *Attorneys at Law* § 80 (1963); 15 AM. JUR.2d *Collection and Credit Agencies* § 21 (1964).

[22] Creditor's National Clearing House v. Bannwart, 227 Mass. 579, 116 N.E. 886 (1917); Nelson v. Smith, 107 Utah 382, 154 P.2d 634 (1944); *In re* Gill, 104 Wash. 160, 176 Pac. 11 (1918); 7 AM. JUR.2d *Attorneys at Law* § 80 (1963); *Cf.*, State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961).

[23] In Nelson v. Smith, *supra* note 22, at 637, the court stated:

> It is the attorney who first sits as judge of the merits of each case, who decides whether or not the suit should be commenced. The court and the public are interested in having that decision rendered by those qualified to do so to avoid, as much as possible, needless litigation and to have those cases upon which suits are deemed advisable properly prepared so that they will move through the process of trial with as few snarls as possible.

[24] Buxton v. Letiz, 136 N.Y. Supp. 829 (Munic. Ct. N.Y. 1912); *In re* Gill, 104 Wash. 160, 176 Pac. 11 (1918); "One cannot do through an employee or an agent that which he cannot do by himself." Nelson v. Smith, 107 Utah 382, 154 P.2d 634 at 640 (1944).

[25] State v. Merchant's and Mfr's. Ass'n., 1 Brand, *Unauthorized Practice Decisions* 710, 3 UNAUTHORIZED PRACTICE NEWS 45 (Ariz. Superior Ct. 1937); Depew v. Wichita Ass'n., 142 Kan. 403, 49 P.2d 1041 (1935).

[26] State v. Merchant's and Mfr's. Ass'n., *supra* note 25; Bump v. Barnett, 235 Iowa 308, 16 N.W.2d 579 (1944); Nelson v. Smith, 107 Utah 382, 154 P.2d 634 (1944).

[27] State v. Merchant's Credit Service, 104 Mont. 76, 66 P.2d 337 (1937); State v. Retail Credit Men's Ass'n., 163 Tenn. 450, 43 S.W.2d 918 (1931).

[28] See Annot., 157 A.L.R. 522 (1945); Comment, 11 HASTINGS L.J. 301 (1960).

often involves fee-splitting.[29] Furthermore, referral is conducive to control over the attorney by the agency rather than the client.[30] This is particularly apparent where the agency advertises to pay all costs of litigation if suit is necessary.[31] In the past, most courts have taken the position that if the claim is not collectable by extra-judicial means, it should be returned to the client to proceed with as he chooses.[32] In recent years, however, negotiations between lawyers and collection agencies have suggested a relaxation of this rule to the extent that the agency may refer the claim to counsel where specifically authorized by the client,[33] as long as the relationship is solely between the attorney and the client, and the agency does not maintain any degree of control or additional pecuniary interest.[34]

Despite legal obstacles, the collection agencies have grown rapidly,[35] which suggests they perform a useful function despite their conflict with existing legal norms. Productive efforts to solve the problems raised by their growth have come from committees of lawyers and collection agencies working together. In 1937 the American Bar Association Committee on Unauthorized Practice of Law released its "Statement of Principles With Reference to Collection Agencies."[36] This statement received surprisingly favorable reaction from the collection agencies, demonstrating the willingness of the reputable agencies to cooperate with lawyers in checking unauthorized practice.[37] After considerable disagreement as to the Bar's official position concerning referral of claims, the Bar finally organized, in 1962, an official conference to implement the 1937 Statement.[38] In 1964, this organization drafted the first model act concerning practices of collection agencies, which, at this early stage, appears to be a long step toward both

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[29] Canons 34 and 35, CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASS'N. (1937); 7 AM. JUR.2d *Attorneys at Law* § 80 (1963); cases are collected in 157 A.L.R. 522 at 523 (1945); see Opinion No. 4 of the Committee on Rules of Professional Conduct, State Bar of Arizona (1954); Note, 41 MINN. L. REV. 475 (1957).

[30] See Opinion No. 4 of the Committee on Rules of Professional Conduct, State Bar of Arizona (1954); Note, 33 CALIF. L.REV. 622 (1946).

[31] Bump v. Barnett, 235 Iowa 308, 16 N.W.2d 579 (1944) which referred to the practice as champertous.

[32] Depew v. Wichita Ass'n. 142 Kan. 403, 49 Pac. 1041 (1935); State v. C.S. Dudley & Co., 340 Mo. 852, 102 S.W.2d 895 (1937); 15 AM. JUR.2d *Collection and Credit Agencies* § 21 (1964).

[33] See Opinion 327 of the Committee on Unauthorized Practice of Law, American Bar Ass'n. (1962).

[34] State v. Retail Credit Men's Ass'n., 163 Tenn. 450, 43 S.W.2d 918 (1931).

[35] The industry grossed a quarter of a billion dollars in 1960. 11 HASTINGS L.J. 301 (1960). It has been suggested that agencies could not survive if restricted to mere 'dunning.' Note, 41 MINN. L.REV. 475(1957).

[36] 62 A.B.A. REPORTS 786, 3 UNAUTHORIZED PRACTICE NEWS 49 (1937).

[37] See Weisman, *The National Conference of Lawyers and Collection Agencies*, 29 UNAUTHORIZED PRACTICE NEWS 155 (1963).

[38] *Id.* at 164.

reduction of the instances of unauthorized practice by collection agencies, and better relations between agencies and lawyers.[39]

Charles D. Roush

ATTORNEYS AT LAW — ADMISSION TO PRACTICE IS A RIGHT WHICH MAY NOT BE DENIED WITHOUT COMPLYING WITH PROCEDURAL AND SUBSTANTIVE DUE PROCESS OF LAW — CRITICISM OF A PUBLIC OFFICIAL DOES NOT NEGATE GOOD MORAL CHARACTER. — *Application of Levine* (Ariz. 1964).

Applicant for admission to the State Bar of Arizona, who had previously been admitted to practice law in New York, was not recommended for admission by the Committee on Examinations and Admissions on the ground of failure on his part to demonstrate his good moral character as required. Applicant's request that information relative to his application be made available for his examination was not granted, although two hearings were held. The Committee, acting upon evidence which it withheld from the applicant, declined to recommend applicant's admission because of claimed unsupported criticism by him of public officials. On an original application to the Arizona Supreme Court for admission, *held*, application granted. For anyone having the necessary qualifications, the practice of law is not a privilege, but a right which cannot be denied without according rights of confrontation and cross examination guaranteed by due process of law; and, although the good moral character of the applicant must be established, criticism of public officials, even by means of uncertain and untrue statements, is not such conduct as will reasonably negative evidence of good moral character. *Application of Levine*, 397 P.2d 205 (Ariz. 1964).

Admission to the practice of law was, until recently, held to be a privilege[1] (sometimes a "peculiar privilege"),[2] or a franchise,[3] or by grace.[4] Courts specifically denied that it was a right,[5] either consti-

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[39] See Note, 30 UNAUTHORIZED PRACTICE NEWS 261 (1964).

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[1] *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866); *In re* Miller, 29 Ariz. 582, 244 Pac. 376 (1926). See also *In re* Greer, 52 Ariz. 385, 389, 81 P.2d 96, 98 (1938).

[2] *In re* Wilson, 76 Ariz. 49, 52, 258 P.2d 433, 435 (1953).

[3] 6 C.J. *Attorney and Client* § 11 (1916); *In re* Durant, 80 Conn. 140, 67 Atl. 497 (1907).

[4] *In re* Wilson, 76 Ariz. 49, 258 P.2d 433 (1953).

[5] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 384 (1867).

tutional,[6] natural,[7] or prescriptive.[8] The privilege or franchise was bestowed upon qualified applicants[9] by the courts, whose officers they became.[10] This procedure generally followed recommendations by specially appointed committees of the bars of those courts, which investigated the qualifications of the applicants.[11] The procedure has remained intact, but the United States Supreme Court in *Schware v. Board of Bar Examiners,*[12] reversed the language and the import of the proceedings.[13] In *Schware,* the practice of law was held to be a right which could not be denied without due process of law.[14] In agreement, the Arizona Supreme Court has broken with its own previous position[15] and held that the practice of law "cannot be treated as a

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[6] *In re* Gibbs, 35 Ariz. 346, 353, 378 Pac. 371, 374 (1929).

[7] *In re* Bailey, 30 Ariz. 407, 411, 248 Pac. 29, 30 (1926). See *In re* Greer, 52 Ariz. 385, 389, 81 P.2d 96, 98 (1938), where the court held: "The rights to practice law is not a natural or constitutional one, in the sense that the right to engage in the ordinary avocations of life, such as farming, the industrial trades, and the mercantile business is."

[8] State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961).

[9] Minimum qualifications are generally established by the state legislature, augmented by qualifications imposed by special committees of the state bar. For a survey of these qualifications, see WEST PUBLISHING CO., RULES FOR ADMISSION TO THE BAR (1961), which includes the rules of the Arizona Committee on Examinations and Admissions.

[10] Admission to the bar is a judicial function. ARIZ. SUP. CT. R. 28(a). ARIZ. CONST. art. 3, providing for the distribution of powers, precludes either the legislature or the State Bar from admitting anyone to practice. State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), *rehearing denied* 91 Ariz. 293, 371 P.2d 1020 (1962). Nevertheless, the Supreme Court of Arizona is without authority to admit one not meeting the minimum legislative requirements, *e.g.,* citizenship. Application of Skousen, 79 Ariz. 325, 289 P.2d 406 (1955). See generally, as to procedure, Application of Courtney, 83 Ariz. 231, 319 P.2d 991 (1957).

[11] Application of Courtney, 83 Ariz. 231, 319 P.2d 991 (1957). Some states follow the committee recommendations explicitly unless positively shown to be arbitrary or unreasonable. *In re* Stone, 75 Wyo. 389, 288 P.2d 767 (1955).

[12] 353 U.S. 232 (1957).

[13] *Id.* at 239, n. 5: "Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace."

[14] *Id.* at 238-39:

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet those standards, or when their action is invidiously discriminatory.

[15] See cases cited notes 1, 2, and 4 *supra.*

matter of grace or favor . . .,"[16] but ". . . for those who have the necessary qualifications, it is a right."[17] Since *Schware,* then, the right to practice law has been recognized, although it remains settled that the practice of law may be regulated in the public interest through the imposition of reasonable[18] qualification requirements on those who would exercise that right.[19]

Certain qualifications for admission to the practice of law are universally required,[20] whereas others are more localized.[21] All courts require that an applicant demonstrate "good moral character" before being admitted.[22] In Arizona, the applicant is required to provide the Committee on Examinations and Admissions with evidence of good moral character,[23] and if the Committee is satisfied that such character has been established, it recommends to the supreme court that the applicant be admitted.[24] The supreme court is not bound by

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[16] Application of Levine, 397 P.2d 205, 207 (Ariz. 1964).

[17] *Id.* at 206-07.

[18] Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957): "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." See, *e.g.*, ARIZ. REV. STAT. ANN. §§ 32-201-275 (1956). See also, ARIZONA WEEKLY GAZETTE, PRIVILEGES AND RESPONSIBILITIES OF LAWYERS IN ARIZONA (1958 pamphlet).

[19] Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-04 (1963); Dillon v. United States, 230 F. Supp. 487, 493 (D.C. Ore. 1964): "It needs only to be stated that today, if one holds the prescribed qualifications, he must be admitted to practice before that court as a matter of right, and the attorney, having once acquired that license, can only be deprived of it through the judicial exercise of due process."

[20] *E.g.*, age, citizenship, and legal training requirements are everywhere imposed, though the terms of the requirements are not identical.

[21] See generally, WEST PUBLISHING CO., RULES FOR ADMISSION TO THE BAR (1961).

[22] Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Application of Courtney, 83 Ariz. 231, 319 P.2d 991 (1957); Annot., 64 A.L.R.2d 301 (1959). See also the concurring opinion of Mr. Justice Frankfurter in Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957): "From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character'."

[23] The burden of proof is on the applicant. Application of Courtney, 83 Ariz. 231, 319 P.2d 991 (1957). ARIZ. SUP. CT. R. 28(a).

[24] Application of Courtney, *supra* note 23 at 233, 319 P.2d at 99:

> In the event the proof of good moral character falls short of convincing the Committee, it is its duty not to recommend an admission. . . . In this it has no discretion; if the members entertain any reservations whatsoever, as to the applicant's good moral character, it should not make a favorable recommendation to this court.

See also Application of Burke, 87 Ariz. 336, 351 P.2d 169 (1960).

the recommendation, or the Committee's failure to recommend.[25] If the applicant is dissatisfied with the action of the Committee, he may make an original application to the supreme court, which will consider for itself the applicant's qualifications.[26]

"Good moral character" has been variously defined, but still remains an ambiguous concept.[27] Applicants have been denied admission for lack of good moral character when it has been shown that they solicited cases (*i.e.*, ambulance chasing),[28] had been disbarred in another state,[29] were members of the Communist Party,[30] were generally irresponsible, turbulent, or intemperate,[31] engaged in unethical

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[25] Application of Courtney, 83 Ariz. 231, 319 P.2d 991 (1957); *In re* Sullivan, 64 Ariz. 337, 170 P.2d 614 (1946); *In re* Greer, 52 Ariz. 385, 81 P.2d 96 (1938); *In re* Bailey, 30 Ariz. 407, 248 Pac. 29 (1926).

[26] Application of Courtney, 83 Ariz. 231, 319 P.2d 991 (1957); see also Application of Burke, 87 Ariz. 336, 339, 351 P.2d 169, 171 (1960), where the court stated:

> The applicant may feel that any questions raised as to his character or qualifications are without substance. In such case, he may apply directly to this court for admission. In the final analysis — it being a judicial function — we have the duty of resolving those questions, one way or the other, on the basis of the *competent evidence* before us. And it should not be considered as any reflection on the members of the Committee if we fail to agree with them in a given case.

[27] Konigsberg v. State Bar of California, 353 U.S. 252, 262-63 (1957):

> The term "good moral character" has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adopted to fit personal views and predelictions, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

[28] Warbasse v. State Bar, 219 Cal. 566, 28 P.2d 19 (1933).

[29] *In re* Peters, 221 App. Div. 607, 225 N.Y. Supp. 144 (1927), *aff'd* 250 N.Y. 595, 166 N.E. 337 (1929), *reargument denied* 252 N.Y. 572, 170 N.E. 148 (1929).

[30] Konigsberg v. State Bar of California, 366 U.S. 36 (1961). But, it is believed that the decision and language of the first *Konigsberg* case, 353 U.S. 252, represents the position of the present court. See also the dissenting opinion of Mr. Justice Black in the second case, 366 U.S. 36, 56 (1961) for an extensive restatement and expansion of the positions asserted in the first case. See also the dissenting opinion of Traynor, J., in Konigsberg v. State Bar of California, 52 Cal. 2d 769, 344 P.2d 777 (1959). See also *In re* Anastaplo, 3 Ill. 2d 471, 121 N.E.2d 826 (1954), *cert. denied and appeal dismissed* 348 U.S. 946 (1955), rehearing denied 349 U.S. 908 (1955), and the Canadian case of Martin v. Law Society (Ontario) 3 DLR 173 (1950) which held absolutely and unequivocally that Communist Party membership was grounds for refusal of admission.

[31] *In re* Latimer, 11 Ill. 2d 327, 143 N.E.2d 20 (1957), *cert. denied and appeal dismissed* 355 U.S. 82 (1957).

business practices,[32] or were charged[33] or convicted of crimes.[34] The question of character remains a factual issue, which accounts for the recent emphasis on procedural safeguards.[35] The factual definition of good moral character must meet the requirements of substantive due process,[36] and rules for admission imposed by bar committees must not impose substantively unreasonable requirements.[37]

The Arizona Supreme Court, in the instant case, clearly stated its position: "The right to practice law is neither greater nor less than the right to engage in other occupations, businesses or trades, for the right to seek and retain employment is shared by all equally and to be equal must be upon the same conditions."[38] It further stated specific procedural requirements, in keeping with the Fourteenth Amendment of the United States Constitution, which must be recognized and followed in the process for admittance.[39] Although an applicant may be denied admission for failure to establish good moral character, such denial must be supported by evidence on an open record, with full opportunity for confrontation and refutation by the applicant.[40] Undisclosed information cannot discredit whatever evidence of good moral character the applicant has provided.[41]

In *Levine*, the Committee failed to recommend the applicant on the character issue. When required to show cause, the Committee produced letters, magazine articles, and a book review by Levine,

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[32] *In re* Wells, 174 Cal. 467, 163 Pac. 657 (1917); *In re* O'Brien's Petition, 79 Conn. 46, 63 Atl. 777 (1906).

[33] Spears v. State Bar, 211 Cal. 183, 294 Pac. 697 (1930). *But see* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), which held that mere arrest was without probative force on the issue of good moral character.

[34] *In re* Farmer, 191 N.C. 235, 131 S.E. 661 (1926).

[35] Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

[36] *Ibid.*

[37] *Ibid.*

[38] Application of Levine, 397 P.2d 205, 207 (Ariz. 1964).

[39] *Id.* at 207: ". . . due process means that there must be given notice of time and place of hearing, a reasonable statement of the charge or charges, the right to produce witnesses and to examine adverse witnesses and to have a full consideration and determination according to evidence before the body with whom the hearing is held."

[40] *Id.* at 207: "At *all stages* in the investigation, it is the applicant's right to produce witnesses and evidence on his own behalf and, if there are accusers and adverse witnesses, to be confronted by and to examine them." (Emphasis supplied.)

[41] *Ibid.* See also Application of Burke, 87 Ariz. 336, 340, 351 P.2d 169, 172 (1960): ". . . we cannot allow information of this nature to be used by the Committee for the purpose of denying a man due process. . . . To do so would be to open the door to the most noxious type of character assassination and guilt by innuendo."

all of which attacked the policies and practices of the Director of the Federal Bureau of Investigation, Mr. J. Edgar Hoover.[42] The Committee also produced testimony from two hearings which it held concerning Levine's application, in which the applicant admitted that the articles were "glamorized," and that some of the factual matters were "an educated guess." The supreme court excluded a "purported copy" of testimony by Mr. Hoover before a committee of Congress as hearsay.[43] On the basis of this evidence, the Committee decided that Levine had failed to prove his "good moral character." The supreme court disagreed, on the authority of *Willner v. Committee on Character and Fitness*[44] and *New York Times Company v. Sullivan*,[45] and admitted Levine to practice, concluding with a broad statement on free speech:

> Moreover, no rule or principle of law compels the critic of official conduct in his utterances, public or private, to guarantee absolutely the truth of all his factual expressions, certainly not on the chance that he will be barred from his profession or vocation in case the utterances are later found to be erroneous.[46]

While *Levine* does not answer all problems concerning an applicant's rights to admission to the Bar in Arizona, it does indicate close attention by the Supreme Court of Arizona to procedural and substantive requirements of Fourteenth Amendment due process of law, as established by recent decisions of the United States Supreme Court. It follows the ruling of *Willner* in that the applicant is entitled to be informed as to the specific information relied on as a basis for questioning his qualifications, and must be accorded the opportunity to meet such information and conclusions drawn therefrom.

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[42] Levine attacked employment practices, treatment of members of the Communist Party, and compared Mr. Hoover's practices with those of Joseph Stalin.

[43] Application of Levine, 397 P.2d 205, 208 (Ariz. 1964): "If Hoover's testimony . . . were used by the Committee on Examinations and Admissions for any purpose other than to suggest areas of investigation, it would, of course, be hearsay, and a denial of due process in that Levine would be denied the right of confrontation."

[44] 373 U.S. 96 (1963).

[45] 376 U.S. 254, 270 (1964):

> . . . we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

[46] Application of Levine, 397 P.2d 205, 211 (Ariz. 1964).

On the substantive side of due process, the case holds that good moral character cannot be so defined as to withhold admission because of the applicant's exercise of his right of free speech, protected by Fourteenth Amendment due process. More particularly, criticism of public officials, even though exaggerated or erroneous, cannot be the basis for exclusion from the bar any more than under *Sullivan* it could be the basis for a civil libel suit.

The procedural due process rule of *Willner*, applied in *Levine*, makes it more difficult for committees to screen applicants, but the supreme court makes it clear that this is an administrative difficulty that must be endured to protect private rights to engage in one's chosen profession without unreasonable procedural or substantive restrictions.[47]

Michael M. Sophy

CONSTITUTIONAL LAW — EVIDENCE — FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION APPLICABLE TO STATES THROUGH FOURTEENTH AMENDMENT. — *Malloy v. Hogan* (U.S. 1964).

Petitioner, on probation after a conviction for a gambling crime, was ordered to answer questions before a court-appointed referee concerning suspected gambling activities in Hartford County, Connecticut. He refused to answer six of the questions asked, fearing that the answers might tend to incriminate him. After being imprisoned for contempt he sought a writ of habeas corpus from the Connecticut Supreme Court of Errors, but it was denied on the grounds that the Fifth Amendment privilege against self-incrimination was not available to him in a state proceeding, that the Fourteenth Amendment extended no privilege to him, and that he had not properly invoked the privilege available under the state constitution.[1] On writ of certiorari to the United States Supreme Court, *held*, reversed, writ of

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[47] See Application of Burke, 87 Ariz. 336, 340, 351 P.2d 169, 172 (1960):

> Where it appears that something in the background of the applicant may disqualify him from admission to practice in Arizona then the Committee has the duty to follow up, to investigate any derogatory reports, and to verify or disprove them. By the use of means of discovery which will afford due process it may gather *competent evidence* bearing upon such defects of character that can be made a matter of record.

See also Konigsberg v. State Bar of California, 353 U.S. 252, 273 (1957):

> A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important that lawyers be unintimidated — free to think, speak, and act as members of an Independent Bar.

[1] 150 Conn. 220, 187 A.2d 744 (1963).

habeas corpus granted.[2] The privilege against self-incrimination guaranteed to the petitioner by the Fifth Amendment[3] is protected from abridgment by the states through the Fourteenth Amendment,[4] and under the applicable federal standard the state court should have held that the privilege was properly invoked because of the petitioner's apprehension that answers to the questions might connect him to a crime for which he could be prosecuted. *Malloy* v. *Hogan*, 378 U.S. 1 (1964).

By incorporating the Fifth Amendment into the Fourteenth Amendment,[5] the Supreme Court has taken another long step toward the complete equating of the federal substantive and procedural protections provided in the Bill of Rights with the rights guaranteed against state infringement by the Fourteenth Amendment.[6] In addition, *Malloy* is significant for its indication that henceforth the state procedural rules governing the privilege against self-incrimination must either conform to the federal standards or violate due process of law.[7] A review of the important aspects of the federal version of the protection should,

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[2] The majority opinion was written by Mr. Justice Brennan; separate dissents were written by Mr. Justice Harlan, Mr. Justice Clark concurring, and by Mr. Justice White, Mr. Justice Stewart concurring.

[3] No person ". . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. The privilege was first invoked in England in the Sixteenth Century and was a part of the early colonial constitutions. For histories, see Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1-27, 191-207 (1930); 8 WIGMORE, EVIDENCE § 2250, at 277 (McNaughton rev. 1961) [hereinafter cited as WIGMORE]; THE CONSTITUTION OF THE UNITED STATES OF AMERICA 841 (Corwin ed. 1953); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949). See generally GRISWOLD, THE FIFTH AMENDMENT TODAY (1955). All states but Iowa and New Jersey have constitutional provisions protecting the privilege, and they protect it by statute.

[4] ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV.

[5] Since 1833, the Fifth Amendment had been held inapplicable to the states. Cohen v. Hurley, 366 U.S. 117 (1961); Twining v. New Jersey, 211 U.S. 78 (1908); Barron v. Baltimore, 7 Pet. 242 (1833).

[6] The rights already incorporated into the Fourteenth Amendment are: The entire First Amendment, with the rights of speech and press, Near v. Minnesota, 283 U.S. 697 (1931) and Gitlow v. New York, 268 U.S. 652 (1925); religion, Cantwell v. Connecticut, 310 U.S. 296 (1940); assembly, DeJonge v. Oregon, 299 U.S. 353 (1937); association, Louisiana *ex. rel.* Gremillion v. N.A.A.C.P., 366 U.S. 293 (1961); and petition, Bridges v. California, 314 U.S. 252 (1941); the prohibition of unreasonable searches and seizures of the Fourth Amendment, Ker v. California, 374 U.S. 23 (1963) and Mapp v. Ohio, 367 U.S. 643 (1961); the right to counsel guaranteed by the Sixth Amendment, Gideon v. Wainwright, 372 U.S. 335 (1963) (see the majority opinion of Mr. Justice Goldgerg in Escobedo v. Illinois, 378 U.S. 478 (1964) and Comment, THE RIGHT TO COUNSEL FOR INDIGENTS IN STATE CRIMINAL TRIALS, 23 MD. L. REV. 332 (1963) for confirmation of the incorporation); and the Eighth Amendment ban on cruel and unusual punishments, Robinson v. California, 370 U.S. 660 (1962). The primary right not yet incorporated is the Fifth Amendment right not to be twice put in jeopardy for the same offense. See Palko v. Connecticut, 302 U.S. 319 (1937).

[7] See the majority opinion of Mr. Justice Brennan, 378 U.S. 1, 84 Sup. Ct. 1489, 1495 (1964).

therefore, be beneficial.[8]

The privilege against self-incrimination can be claimed in any type of proceeding,[9] and no special words are necessary for its invocation by a witness or the accused.[10] It is a personal right and cannot be claimed on behalf of anyone but the one testifying.[11] Hence, the privilege may not be invoked on behalf of a collective group such as a labor union or a corporation.[12]

The Fifth Amendment privilege includes the privilege of the *accused* to remain silent at his own trial, the privilege of the *suspect* to be free of sanctions applied to force him to confess, and the privilege of a *person unsuspected* of any crime to conceal guilt known only to himself.[13]

The primary differences between the rights of the accused and those of the ordinary witness are that the accused can refuse to take the stand, be sworn, or give any testimony,[14] whereas the witness must refuse to testify in each instance the privilege is invoked, and each time, the court must pass on the refusal.[15] If the accused takes the stand in his own behalf he waives the privilege.[16] Neither the accused nor a witness may invoke the privilege if immune from prosecution.[17]

The federal rule may differ most with the various state rules with respect to the kinds of facts protected from disclosure. The federal

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[8] It is beyond the scope of this note to enumerate and analyze state procedures conflicting with those federal rules discussed herein; but, perhaps the presentation of federal law will alert the lawyer knowledgeable in the state law to those aspects of federal law which will have to replace current conflicting practices.

[9] Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 84 Sup. Ct. 1594, 1611 (1964) (White and Stewart, J.J. concurring). See WIGMORE § 2252, at 325-29 for examples of various types of proceedings in which the privilege has been successfully claimed. And see Escobedo v. Illinois, 378 U.S. 478 (1964).

[10] Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955).

[11] Rogers v. United States, 340 U.S. 367 (1951); Hale v. Henkel, 201 U.S. 43 (1906).

[12] *Ibid.* See also United States v. White, 322 U.S. 694 (1944). Compare Curcio v. United States, 354 U.S. 118 (1957). The privilege cannot be invoked to refuse to deliver an organization's documents which might incriminate the organization, Burdeau v. McDowell, 256 U.S. 465 (1921); or their custodian, Rogers v. United States, 340 U.S. 367 (1951); or documents required to be kept by law, Shapiro v. United States, 335 U.S. 1 (1948), Davis v. United States, 328 U.S. 582 (1946).

[13] King, *The Fifth Amendment Privilege and Immunity Legislation*, 38 NOTRE DAME LAW., 641, 644 (1963).

[14] WIGMORE § 2268, at 406; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 191,199 (1930).

[15] See Smith v. United States, 337 U.S. 137 (1949); Brown v. United States, 276 U.S. 134 (1928); Landy v. United States, 283 F.2d 303 (5th Cir. 1960); Mulloney v. United States, 79 F.2d 567 (1st Cir. 1935).

[16] Singleton v. United States, 343 U.S. 944, *mem reversing* 193 F.2d 464 (3d Cir. 1952); Brown v. Walker, 161 U.S. 591 (1896); Reagan v. United States, 157 U.S. 301 (1895). A defendant in a civil case may be forced to take the stand, but he may invoke the Fifth Amendment. United States v. Matles, 247 F.2d 378 (2d Cir. 1957).

[17] Brown v. Walker, 161 U.S. 591 (1896) (by pardon or running of the statute of limitations, prior conviction or acquittal); WIGMORE § 2279, at 481 and § 2281 at 490 (by law of amnesty or abolition of the crime).

rule extends the privilege against self-incrimination beyond the testimony requested to disclosures which the claimant may reasonably apprehend could form a link in the chain of evidence needed to prosecute him,[18] and this has been held to include protection from disclosure of any fact tending to incriminate, even though that fact is not a constituent element of any crime.[19] However, if the testimony refused is innocuous, the witness must explain how it could lead to his incrimination.[20]

The judge, not the claimant, ultimately determines whether silence is justified,[21] although the judge is precluded from demanding an answer from the claimant, even in secret, because to force the claimant to reveal testimony to *anyone* would violate his Fifth Amendment privilege.[22] A question incriminatory on its face need not be answered.[23] In more questionable situations, however, for the judge to sustain the privilege it need only be evident from the implications of the question, in the setting in which it was asked, that a responsive answer might be dangerous to the claimant.[24]

The federal rule allows liberal invocations of the privilege, in that the judge cannot permit himself to be skeptical with regard to possible incrimination;[25] and before the witness can be required to answer a question, it must be *perfectly clear* to the judge, after a consideration of all of the circumstances, that the answer *cannot possibly* have a tendency to incriminate him.[26] Some federal decisions have been criticized for allowing the invocation of the privilege even though the witness would have been in no danger of prosecution,[27] and others

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[18] Hoffman v. United States, 341 U.S. 479 (1951); Mason v. United States, 244 U.S. 362 (1917). See Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964). In this connection it should be noted that a judge need not warn a witness of his right to the privilege, whereas the accused must be warned. Stanley v. United States, 245 F.2d 427 (6th Cir. 1957); United States v. Parker, 244 F.2d 943 (7th Cir. 1957).

[19] United States v. St. Pierre, 132 F.2d 837 (2d Cir. 1942). See Emspak v. United States, 349 U.S. 190 (1955) (witness need not furnish "clues" leading to his incrimination); Singleton v. United States, 343 U.S. 944, *mem reversing* 193 F.2d 464 (3d Cir. 1952) (witness need not answer questions which might reasonably be the foundation for further incriminatory questions).

[20] Singleton v. United States, 343 U.S. 944, *mem reversing* 193 F.2d 464 (3d Cir. 1952).

[21] See Hoffman v. United States, 341 U.S. 479 (1951); United States v. McCarthy, 18 Fed. 87 (S.D. N.Y. 1883).

[22] See Hoffman v. United States, 341 U.S. 479 (1951); United States v. Coffey, 198 F.2d 438 (3d Cir. 1952).

[23] See United States v. Di Carlo, 102 F. Supp. 597 (N.D. Ohio 1952).

[24] Hoffman v. United States, 341 U.S. 479 (1951); Alexander v. United States, 181 F.2d 480 (9th Cir. 1950). See Malloy v. Hogan, 378 U.S. 1 (1964).

[25] United States v. Coffey, 198 F.2d 438 (3d Cir. 1952), cited with approval in Emspak v. United States, 349 U.S. 190 (1955) and Malloy v. Hogan, 378 U.S. 1 (1964).

[26] Hoffman v. United States, 341 U.S. 479 (1951), cited for the proposition in Malloy v. Hogan, 378 U.S. 1, 84 Sup. Ct. 1489, 1495 (1964).

[27] See WIGMORE § 2260, at 376, n.9, citing Emspak v. United States, 349 U.S. 190 (1955); Greenburg v. United States, 343 U.S. 918 (1952); United States v. Singleton, 343 U.S. 944, *mem reversing* 193 F.2d 464 (3d Cir. 1952), and others.

have been questioned where the motive of the witness for successfully invoking the privilege was not clearly fear of incrimination.[28] The four dissenters in *Malloy* criticized the majority for imposing its assessment of the facts upon the state court which had found from the evidence that Malloy had not suggested any rational explanation of a real basis for his fear of federal prosecution.[29] In applying the federal standard, therefore, the states will undoubtedly have to grant the privilege more liberally than in the past.[30]

The federal rules are more *restrictive* than those of many states in the application of the amendment in at least one respect.[31] Under the federal rules the privilege against self-incrimination generally may not be claimed when a physical examination, movement, or demonstration is requested, even if it tends to connect the accused with the crime.[32] The theory for compelling disclosure of these physical examinations which the accused must perform or undergo in spite of the Fifth Amendment is that they are non-testimonial in nature, being evident physical facts rather than words from the lips of the claimant, and thus are not prohibited by the right of the claimant not to "testify" against himself.[33]

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[28] See WIGMORE § 2260, at 376-77, n.10, citing United States v. St. Pierre, 128 F.2d 979 (2d Cir. 1942) and Burdick v. United States, 236 U.S. 79 (1915).

[29] Malloy v. Hogan, 378 U.S. 1, 84 Sup. Ct. 1489, 1506 (1964) (Harlan and Clark, J.J. dissenting, citing 150 Conn. at 230-31, 187 A.2d at 750). See also the dissent of Mr. Justice White and Mr. Justice Stewart at 378 U.S. 1, 84 Sup. Ct. 1489, 1507 (1964).

[30] Malloy v. Hogan, 378 U.S. 1, 84 Sup. Ct. 1489, 1507 (1964) (dissent of White and Stewart, JJ.). For a recent application of Malloy v. Hogan, see Dean v. California, 33 U.S.L. WEEK 4382 (U.S., April 28, 1965), where the Supreme Court held that an instruction by a judge which permitted the jury to consider a defendant's failure to testify violated the defendant's Fifth Amendment right against self-incrimination as guaranteed to him by the Fourteenth Amendment. Though noting the diversity among the states on the question, the Court adhered to the *Malloy* rule, requiring the application of the federal rule to the states. Mr. Justice Harlan (concurring "reluctantly") warned that the "decision exemplifies the creeping paralysis with which the Court's recent adoption of the 'incorporation' doctrine is infecting the operation of the federal system." 33 U.S.L. WEEK at 4384.

[31] See Annot., 171 A.L.R. 1144, 1151 (1947); 13 MD. L. REV. 31 (1953), discussing state cases *contra* to the federal rules; 6 ARIZ. L. REV. 145 (1963), discussing Steward v. Superior Court, 94 Ariz. 279, 383 P.2d 191 (1963) (which probably conflicts with the federal rule in holding that a person can invoke the privilege in refusing to submit to a compulsory mental examination).

[32] Holt v. United States, 218 U.S. 245 (1910); Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination*, 10 VAND. L. REV. 485, 506-07 (1956-57). For examples of forced actions or examinations which have long been held by the federal courts not to be privileged under the Fifth Amendment, see WIGMORE § 2265, at 386-400; Annots., 171 A.L.R. 1144 (1947), 28 A.L.R.2d 1115 (1953), 32 A.L.R.2d 434 (1953), 87 A.L.R.2d 370 (1963), all citing other relevant annotations.

[33] WIGMORE § 2263, at 378-79. See Boyd v. United States, 116 U.S. 616, 634 (1886).

The Fifth Amendment privilege may be deemed waived if the witness[34] or accused[35] answers the first question in a related series.[36] The theory is that because of the first answers later admissions could not add to the already likely possibility of prosecution.[37]

A final facet of the privilege is that any sovereignty may preclude invocation of the amendment by granting the witness immunity from prosecution based on any of the evidence which the witness is then required to give.[38] The statutory immunity need not protect the claimant from disgrace but need only remove those sanctions which are the basis of his fear.[39] And it only prohibits the *use* of the testimony; it does not bar the claimant's prosecution.[40] However, it is thought by some that the federal law will allow a claim of the privilege if there is the most remote risk that the claimant might be prosecuted for a crime not covered by the immunity statute;[41] and the Court's latest pronouncement on this question, *Murphy v. Waterfront Commission*,[42] evidenced a trend toward this interpretation by holding that a state witness may not be compelled to give testimony which might incriminate him under federal law unless that testimony *and its fruits* can in no way be used against him in a federal criminal prosecution.[43]

The application of the Fifth Amendment and its entire body of law to the states will, in many instances, replace concepts of law

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[34] See Rogers v. United States, 340 U.S. 367 (1951); 3 WHARTON, CRIMINAL EVIDENCE, §§ 1141-46, at 1982-86 (11th ed. 1912).

[35] See Taylor v. United States, 279 F.2d 10 (5th Cir. 1960); United States v. Mullaney, 32 Fed. 370 (1887).

[36] See Malloy v. Hogan, 378 U.S. 1 (1964).

[37] See Rogers v. United States, 340 U.S. 367 (1951). See generally Comment, *The Privilege Against Self-Incrimination: The Doctrine of Waiver*, 61 YALE L.J. 105 (1952).

[38] Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964). For a thorough discussion of the doctrine of immunity, see WIGMORE § 2281, at 490. For a listing of Federal Witness Immunity Acts see Comment, 72 YALE L. J. 1568, 1611-12 (1962-63); the state acts may be found in WIGMORE § 2281, at 495, n.11. A statute granting immunity is applicable only to witnesses called by the prosecution, in order to prevent collusion between the accused and his witnesses who might be called only to obtain immunity to protect themselves from prosecution for crimes already committed. Brady v. United States, 39 F.2d 312 (8th Cir. 1930).

[39] Ullmann v. United States, 350 U.S. 422 (1956), citing Brown v. Walker, 161 U.S. 591 (1896).

[40] Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 84 Sup. Ct. 1594, 1610 (1964) (White and Stewart, JJ. concurring) and 1624, n.7 (Harlan and Clark, JJ. concurring). *Cf.*, ARIZ REV. STAT. ANN. § 44-1660 (1956), barring subsequent *prosecutions* for crimes evidenced by testimony given in gambling investigations. State v. Chitwood, 73 Ariz. 161, 239 P.2d 353 (1951), *modified*, 73 Ariz. 314, 240 P.2d 1202 (1952). See generally UDALL, ARIZONA LAW OF EVIDENCE § 99, at 163 (1960).

[41] See WIGMORE § 2282, at 511.

[42] 378 U.S. 52 (1964).

[43] 378 U.S. 52, 84 Sup. Ct. 1594, 1609 (1964). The Court, by dicta, extended the same rule to protect a federal witness from incrimination by the state, and also said that once the defendant demonstrates that he has testified under a state grant of immunity the federal authorities have the burden of showing that the witness's testimony was not the source of their evidence against him. *Id.*, n.18. For a critical appraisal, see Note, 73 YALE L. J. 1491 (1964).

enforcement which were developed to solve special problems unique to individual states. It would seem that most of these existing state policies could meet the test of "fundamental fairness"[44] and at the same time fulfill their role in local law enforcement. But in *Malloy* the majority of the Court has required mandatory uniformity of state and federal law, justifying it solely on the ground that it would be incongruous not to do so.[45] As Mr. Justice Harlan said in dissent, the powers and responsibilities of the state and federal governments were not intended to be congruent.[46] In applying standards developed in the context of federal law enforcement to the local problems of states, the decision, in Mr. Justice Harlan's words, "may in the end serve to weaken the very liberties which the Fourteenth Amendment safeguards by bringing us closer to the monolithic society which our federalism rejects."[47] In any event, the majority of the Court has again affirmed its apparent conviction that the rights of our citizens as individuals and as a society can better be protected by uniform procedures dictated by the federal courts,[48] than by honoring the federalism established by our forefathers.

Jon L. Kyl

CORPORATIONS — FIDUCIARY DUTY — SALE OF CONTROL. — *Goode v. Powers* (Ariz. 1964).

Plaintiff, president of a corporation engaged in selling insurance, contracted to sell his interest in the corporation, consisting of twenty shares with an option to purchase 450 additional shares, to defendant. The option, if exercised, together with the other shares, would constitute 25% of the corporate shares and provide effective control over the company. Following the contract's execution, plaintiff arranged for the resignation of the directors and delivered into escrow proxies of a majority of the shareholders then held by him. In plaintiff's action for the unpaid balance of the contract price, defendant claimed that the contract was void as against public policy, since plaintiff's acts

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[44] In order to meet the standards of due process, state procedures have in the past been tested by determining whether they violate any of the rights which have historically been considered fundamental to an ordered society. Palko v. Connecticut, 302 U.S. 319, 325 (1937). See Malinski v. New York, 324 U.S. 401, 416-17 (1945), and Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). For variations of the test, see Rochin v. California, 342 U.S. 165 (1952).

[45] 378 U.S. 1, 84 Sup. Ct. 1489, 1495 (1964).

[46] 378 U.S. 1, 84 Sup. Ct. 1489, 1504 (1964) (Harlan and Clark, JJ. dissenting).

[47] *Ibid.*

[48] For analysis and development of this approach during the last several terms of the Court, see *Summaries* of recent Supreme Court Terms, 80 Sup. Ct. 73, 81 Sup. Ct. 105, 82 Sup. Ct. 75, 83 Sup. Ct. 201, 84 Sup. Ct. 127.

constituted a breach of his fiduciary duty to the other shareholders, part of the purchase price allegedly being in payment for the delivery of the proxies, thus yielding plaintiff a profit not enjoyed by other shareholders. However, the evidence at the trial indicated that the contract price per share was well within the range of both the equity and market values thereof. Judgment for plaintiff. On appeal, *held*, affirmed. Where a buyer attempts to repudiate his contractual obligation to purchase stock, asserting that the arrangement illegally required the directors to resign and to deliver proxies to vote their shares, in breach of their fiduciary duties to other shareholders, he must show, clearly and unequivocally, that the seller made such an agreement; and where such showing is not made, the trial court is justified in finding the directors' resignations and the transfer of proxies to be merely incidental to the sale, and not part of the consideration given for the purchase price. *Goode v. Powers*, 397 P.2d 56 (Ariz. 1964).

Historically, the rule has been that a majority shareholder is privileged, equally as any other shareholder, to sell his shares at whatever price he is able to obtain for them, without being obligated to account to anyone for any profit or bonus received, provided he has acted in good faith.[1] Realistically, due to their control characteristic, shares of a majority shareholder generally bring a higher price than those of a minority shareholder.[2] This obvious power, inhering in a control block of shares, for which the majority shareholder or shareholder group receives a price in excess of that offered or paid to minority shareholders, has given rise to what has been termed an area of "utter confusion"[3] in the law. The dilemma presented "is that a controlling block of shares cannot be severed from its appurtenant control and the price realized from the sale of such block cannot readily be allocated between payment for such shares *per se* and any premium for appurtenant control."[4]

In selling corporate control, majority shareholders, of course, owe

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[1] Stanton v. Schenk, 140 Misc. 621, 251 N.Y. Supp. 221 (1931); Tryon v. Smith, 191 Ore. 172, 229 P.2d 251 (1951); 18 AM. JUR. 2d *Corporations* § 497 (1965); 13 AM. JUR. *Corporations* § 1010 (1938); Annot., 50 A.L.R.2d 1146 (1956); 19 C.J.S. *Corporations* § 793 (1940); 3 FLETCHER, CORPORATIONS § 900 (perm. ed. 1947).

[2] Stanton v. Schenck, 140 Misc. 621, 251 N.Y. Supp. 221 (1931); Tryon v. Smith, 191 Ore. 172, 229 F.2d 251 (1951); HENN, CORPORATIONS § 242 (1961).

[3] Hill, *The Sale of Controlling Shares*, 70 HARV. L. REV. 986 (1957).

[4] HENN, CORPORATIONS § 242 (1961).

to the corporation duties of due care[5] and fiduciary duties.[6] Also, it is well settled that majority shareholders occupy a fiduciary[7] or quasi-fiduciary[8] relationship to the minority shareholders. Yet, despite general recognition of these fiduciary duties in various other contexts, the courts, until relatively recently, have not questioned the privilege of majority shareholder interests to sell their shares, representing corporate control, without accountability for amounts received either to the corporation or to the minority interests.[9] The control feature, normally yielding an increment in the sale price of the controlling stock interest over that offered or paid to the minority, has customarily been regarded as the property of the selling majority shareholders, absent a showing of special abuse,[10] rather than as a "corporate asset" in which all shareholders should be entitled to share pro rata, as some more recent judicial utterances and commentators' views have indicated.[11] There is, as one court aptly put it, "no reason why the value of control would not be a lawful property right of the controlling stockholders, at least to the extent that it is reflected in the price they may obtain for their stock in an honest sale."[12]

Following this rationale, it has been held that the mere sale of a controlling stock interest gives rise to no duty in the selling shareholders to secure the same per share price for all shareholders, even

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[5] Insuranshares Corporation of Delaware v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa. 1940); Ryder v. Bamberger, 172 Cal. 791, 158 Pac. 753 (1916); Bart v. Pine Grove, Inc., 326 Ill. App. 426, 62 N.E.2d 127 (1945); Levy v. American Beverage Corp., 265 App. Div. 208, 38 N.Y.S.2d 517 (1942); Stanton v. Schenck, 140 Misc. 621, 251 N.Y. Supp. 221 (1931); HENN, *op. cit. supra* note 4, § 242.

[6] Perlman v. Feldmann, 219 F.2d 173, 50 A.L.R.2d 1134 (2d Cir. 1955); HENN, *op. cit. supra* note 4, § 242.

[7] Pepper v. Litton, 308 U.S. 295 (1939); Southern Pacific Co. v. Bogert, 250 U.S. 483 (1919); Perlman v. Feldmann, 219 F.2d 173, 50 A.L.R.2d 1134 (2d Cir. 1955); Steinfeld v. Nielson, 15 Ariz. 424, 139 Pac. 879 (1913) (director of a corporation); AM. JUR. 2d § 497 (1965). *But see* Tryon v. Smith, 191 Dre. 172, 229 P.2d 251 (1951); 13 AM. JUR. *Corporations* § 1010 (1938).

[8] Hornsby v. Lohmeyer, 364 Pa. 271, 72 A.2d 294 (1950).

[9] See authorities cited note 1 *supra.*

[10] Hill, *The Sale of Controlling Shares,* 70 HARV. L. REV. 986 (1957).

[11] Honigman v. Green Giant Co., 309 F.2d 667 (8th Cir. 1962); Perlman v. Feldmann, 219 F.2d 173, 50 A.L.R.2d 1134 (2d Cir. 1955); Hill, *supra* note 10; Jennings, *Trading in Corporate Control,* 44 CALIF. L. REV. 1 (1956); Katz, *The Sale of Corporate Control,* 38 CHI. BAR REC. 376 (1957).

[12] Levy v. American Beverage Corp., 265 App. Div. 208, 38 N.Y.S.2d 517 (1942). *But see* Perlman v. Feldmann, 219 F.2d 173, 50 A.L.R.2d 1134 (2d Cir. 1955), where the dominant shareholder failed to comply with his duty to reveal to the minority shareholders his private arrangement with an outside purchaser, whereby he received a profit, with consequent injury to minority shareholders, he was held accountable to minority shareholders for the profit, and this notwithstanding the absence of fraud or misuse of confidential information.

though the sellers hold managerial offices in the corporation.[13] Similarly, a shareholder, though he is also a director, vice-president, and treasurer of the corporation,[14] may sell his shares when and to whomever he pleases, though the buyers be persons of whose identity, integrity and responsibility he is unaware[15] — unless he is negligent in not inquiring[16] — even though the sale is of a majority stock interest and may adversely affect the value of shares owned by other shareholders.[17] If the sale of stock is coupled with a gratuitous agreement to aid in securing the resignation of directors, this will not invalidate the sale,[18] even if, as a condition to closing the sale, there is an agreement to deliver to the purchaser the resignation of a majority of the corporation's directors.[19]

The mere fact that the majority shareholders receive more per share for their holdings than do the minority, if they too sell out, is in itself no evidence of fraud[20] because it is generally recognized that the majority shares are worth more than the minority.[21] Usually, a director and dominant shareholder does not violate his fiduciary duty to the corporation by selling his personal shares, rather than giving the corporation the opportunity to dispose of its unissued shares.[22]

However, where a breach of fiduciary duty is found, directors, officers, or dominant shareholders may be compelled to account to the corporation for their improper sale of stock. Thus, if majority shareholders perpetrate a fraud on other shareholders by the sale,[23] negligently dispose of their interest to known irresponsible pur-

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[13] Schwamm v. Alpert, 29 Misc. 2d 711, 221 N.Y.S.2d 917 (1961).

[14] Insurance Agency Co. v. Blossom, 231 S.W. 636 (Mo. App. 1921).

[15] Levy v. American Beverage Corp., 265 App. Div. 208, 38 N.Y.S.2d 517 (1942); Gerdes v. Reynolds, 28 N.Y.S.2d 622 (1941).

[16] Insuranshares Corp. of Delaware v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa. 1940).

[17] Roby v. Dunnett, 88 F.2d 68 (10th Cir. 1937); Mayflower Hotel Stockholder's Protective Comm. v. Mayflower Hotel Corp., 73 F. Supp. 721 (D.D.C. 1947); Tryon v. Smith, 191 Ore. 172, 229 P.2d 251 (1951).

[18] Mitchell v. Dilbeck, 10 Cal. 2d 341, 74 P.2d 233 (1937).

[19] Essex Universal Corp. v. Yates, 305 F.2d 572 (2d Cir. 1962).

[20] Tryon v. Smith, 191 Ore. 172, 229 P.2d 251 (1951).

[21] Stanton v. Schenck, 140 Misc. 621, 251 N.Y. Supp. 221 (1931); Tryon v. Smith, 191 Ore. 172, 229 P.2d 251 (1951).

[22] Stanton v. Schenck, *supra* note 21.

[23] Levy v. Feinberg, 29 N.Y.S.2d 550 (1941); 19 C.J.S. *Corporations* § 793 (1940).

chasers,[24] make secret or undisclosed arrangements pertaining to price,[25] sell their shares to the foreseeable subsequent detriment of the minority shareholders,[26] or in any other manner breach their fiduciary obligations, they may be held liable to the corporation (or, perhaps, to minority shareholders) for resulting damages, or may be required to account to it for any "control premium" realized upon the sale of their majority holdings.[27]

In the principal case,[28] the trial court was held justified in finding that the agreed purchase price for plaintiff's shares and option was well within the range of the equity and market values of the stock established at the trial. And, since defendant had failed to prove that any part of the agreed purchase price was attributable to plaintiff's actions in arranging for the director resignations and delivering the proxies to the purchaser, the trial court was held justified in concluding that the sale price was reasonable, and that the transfer of proxies was a mere incident to the sale, not a part of the bargained for consideration moving to the purchaser. Accordingly, there was no breach of fiduciary duty on the part of the seller. The court noted, however, that "if the appellee had agreed for monetary consideration to cause the directors to resign and to deliver proxies, then such an agreement would be contrary to public policy."[29]

It would seem, from the language used in the opinion in the principal case, that the Arizona court has endorsed the accustomed view as to the free salability of controlling shares, so long as there is good faith and no breach of fiduciary duty,[30] making no reference to the so-called "corporate asset" theory.[31] This theory, first pro-

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[24] Insuranshares Corp. of Delaware v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa. 1940).

[25] Mayflower Hotel Stockholder's Protective Comm. v. Mayflower Hotel Corp., 193 F.2d 666 (D.C. Cir. 1951); Bart v. Pine Grove, Inc., 326 Ill. App. 426, 62 N.E.2d 127 (1945).

[26] Perlman v. Feldmann, 219 F.2d 173, 50 A.L.R.2d 1134 (2d Cir. 1955). *But see* Benson v. Braun, 8 Misc. 2d 67, 155 N.Y.S.2d 622 (1956), where the dominant shareholders' sale of stock at substantially above the market price, followed by their resignations to permit election of the purchasers to controlling offices, involved no fraud on the minority shareholders, as the stock subsequently went above the purchase price and no injury was sustained by minority shareholders.

[27] Horbach v. Coyle, 2 F.2d 702 (8th Cir. 1924).

[28] Goode v. Powers, 397 P.2d 56 (Ariz. 1964).

[29] Goode v. Powers, *supra* note 28, at 60.

[30] See authorities cited note 1 *supra*.

[31] BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 244 (1933). A. A. Berle, Jr., contended that any premium paid for a dominant shareholder's stock is paid because the shares carry "control," and that it is this which the purchaser is buying. He submitted that the power which accompanies corporate "control" should be regarded as a corporate asset. *Cf.* Honigman v. Green Giant Co., 309 F.2d 667 (8th Cir. 1962), which mentioned, but refused to follow, Berle's theory.

pounded by Professor A. A. Berle,[32] has not, as such, been endorsed by any court, although the 1955 decision of the Second Circuit in *Perlman v. Feldmann*[33] has been interpreted by some commentators as being essentially based upon that theory, and they have advocated its adoption.[34] Although, in the principal case, this theory was neither mentioned nor applied, the implications of *Perlman*[35] should be carefully considered by counsel, as that holding may portend a greater judicial inclination toward protecting minority shareholders against preferential treatment of majority shareholder interests in corporate sell-out situations. One writer has stated that the few decided cases on the point have created such legal uncertainty that cautious attorneys now commonly advise controlling insiders to insist that, in a corporate acquisition by purchase of shares, a uniform offer be made by the intending purchaser to all shareholders.[36]

G. Starr Rounds

CREDITORS' RIGHTS — JUDGMENT LIENS — FRAUDULENT CONVEYANCE OF DEBTOR'S PROPERTY DEFEATED PROPERLY RECORDED JUDGMENT — *Dempsey v. Oliver* (Ariz. 1963).

Defendant obtained and recorded a judgment in Maricopa County against a married woman as her separate obligation. The woman and her husband owned certain real estate as community property with the record title in both their names. The husband obtained an Ohio divorce, without property disposition, which was never recorded in Maricopa County. Plaintiffs bought the real estate, believing it to be community property, from the divorced wife who told them she was still married and was acting with power of attorney for her husband. Defendant subsequently learned of the divorce and obtained a writ of execution on the property to satisfy his lien. Plaintiffs were

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[32] Note 31 *supra.*

[33] 219 F.2d 173, 50 A.L.R.2d 1134 (2d Cir. 1955).

[34] Hill, *The Sale of Controlling Shares*, 70 HARV. L. REV. 986 (1957), disagreeing with the conclusions reached by Jennings, *Trading in Corporate Control*, 44 CALIF. L. REV. 1 (1956), and Leech, *Transactions in Corporate Control*, 104 U. PA. L. REV. 725 (1956), that corporate insiders should only sell on terms available to all. See also Katz, *The Sale of Corporate Control*, 38 CHI. BAR REC. 276 (1957) (disapproving Berle's theory).

[35] 219 F.2d 173, 50 A.L.R.2d 1134 (2d Cir. 1955).

[36] Hill, *The Sale of Controlling Shares*, 70 HARV. L. REV. 986 at 1038 (1957). See Buffalo, R. & P. Ry. Co. Control, 158 I.C.C. 779 (1930), for a similar approach by the Interstate Commerce Commission.

successful in enjoining enforcement of the lien and in a suit to quiet title. On appeal, *held,* affirmed. Plaintiff-purchasers should prevail over the judgment-creditor, even though the latter's judgment was properly recorded, because they were bona fide purchasers without actual or constructive notice of the divorce. *Dempsey v. Oliver,* 93 Ariz. 238, 379 P.2d 408 (1963).

Judgment liens that attach to real property are entirely creatures of statute.[1] At early common law a judgment obtained by a claimant other than the King did not give the creditor a lien on the land of his debtor.[2] An English statute enacted in 1285[3] was the beginning of the modern judgment creditor's lien.[4] Today, the nature of judgment liens varies widely from state to state depending on the statutory provisions.

The Arizona statutes covering the recording of judgments and judgment liens provide that when a judgment is recorded with the county recorder it becomes a lien in favor of the judgment creditor for a period of five years "upon all real property of the judgment debtor except real property exempt from execution . . . whether the property is then owned by the judgment debtor or is later acquired."[5] If the debtor sells real property to which the lien has attached, the general rule is that the vendee takes subject to the creditor's lien since the recorded judgment gives constructive notice of the lien.[6]

In the instant case, the defendant-creditor obtained a judgment against a married woman as her separate obligation. Under Arizona law this judgment subjected only her separate property to a lien; community property was not affected.[7] At the time the judgment was recorded, the real estate in question was held as community property. But when the divorce decree became final, and in the absence of a property disposition, the community ended and the wife became the owner of an undivided interest in the property as a tenant-in-common with her former husband.[8] As the court admitted,[9] the creditor's

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[1] Tway v. Payne, 55 Ariz. 343, 346, 101 P.2d 455, 456 (1940); 49 C.J.S. *Judgments* § 454 (1947).

[2] 3 POWELL, REAL PROPERTY § 477 (1952).

[3] Statute of Westminster II, 1285, 13 Edw. 1, c. 18.

[4] 3 POWELL, REAL PROPERTY § 477 (1952).

[5] ARIZ. REV. STAT. ANN. § 33-964(A) (1956). The judgment may be renewed for a subsequent five year period. ARIZ. REV. STAT. ANN §§ 12-1611 to -1613 (1956).

[6] 30A AM. JUR. *Judgments* § 537 (1958) (judgment debtor cannot destroy lien by subsequent alienation); 49 C.J.S. *Judgments* §§ 485, 488 (1947).

[7] Tway v. Payne, 55 Ariz. 343, 101 P.2d 455 (1940).

[8] ARIZ. REV. STAT. ANN. § 25-318(D) (1956). The foregoing statute was in force at the time of the divorce. It has since been amended as ARIZ. REV. STAT. ANN. § 25-318(G) (Supp. 1964), but the effect remains the same.

[9] Dempsey v. Oliver, 93 Ariz. 238, 241, 379 P.2d 908, 909 (1963): "The wife's interest in the property . . . became her separate property subject to her separate disposition and the judgment lien would have attached at that time so far as the judgment-creditor was concerned."

lien would normally attach to this after-acquired property when the decree became final.[10] This case, however, presented a novel problem. The judgment-creditor had done everything required by statute to perfect his lien, yet the plaintiff-purchasers bought the property from the wife who misrepresented it as community property,[11] and, since the divorce was never recorded, they had no actual or record notice that the wife held an undivided interest in the property. After stating that it could find no law on point in the instant question, the court held that, because the Maricopa County records showed no evidence of the divorce, the vendees were bona fide purchasers without notice that the property was subject to the defendant's lien and should, therefore, prevail.[12]

Admittedly the case was difficult in that it required a choice between two innocent parties, but it is at least questionable whether the court, in reaching a decision perhaps equitable because of the amounts involved (the opinion does not disclose if the amount of the purchase price greatly exceeded the amount of the judgment), was consistent with the theory of operation of the recording statutes. An earlier Arizona case described the recording statutes as providing a "place where any man who owns an interest in real estate can give notice of it to all the world with the assurance that his rights will be protected thereby. . ." as well as a place where a prospective purchaser can investigate "and be confident that no rights not disclosed therein are valid against him . . . ."[13] Although there is disagreement over whether the primary purpose of the statutes is to give notice or whether it is to protect subsequent purchasers against defective titles, it is generally agreed that the statutes, to be effective, must rely on the doctrine of constructive or record notice.[14] The Arizona Supreme Court has said, "public records are, of course, notice to all persons of the

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[10] ARIZ. REV. STAT. ANN. § 33-964 (1956).

[11] A conveyance of community real property is not valid unless executed by both husband and wife. ARIZ. REV. STAT. ANN. § 33-452 (1956). But either husband or wife may convey the community property if given power of attorney by the other. ARIZ. REV. STAT. ANN. § 33-454 (1956).

[12] The court referred to Ross v. Beall, 215 S.W.2d 225 (Tex. Civ. App. 1948) in support of its decision that plaintiffs were bona fide purchasers, inasmuch as they had no notice, actual or constructive, of the divorce. In that case the foreign divorce was never recorded in Texas and the vendee prevailed as an innocent purchaser. It should be noted, however, that the Texas case did not involve a judgment recorded prior to the sale and that is precisely the point which makes questionable the holding in the instant case that the vendees were bona fide purchasers.

[13] Phoenix Title & Trust Co. v. Old Dominion Co., 31 Ariz. 324, 335, 253 Pac. 435, 439 (1927).

[14] *E.g.*, 2 POMEROY, EQUITY JURISPRUDENCE § 665 (5th ed. 1941). (constructive notice arising from registration is the most important object of the legislation; Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L. REV. 125, 147 (1944) (disagrees with Pomeroy's emphasis on notice and stresses protection of the purchaser). Both writers discuss the theory of constructive or record notice in detail.

existence and contents of their properly recorded documents,"[15] and the Arizona Revised Statutes provide, in accordance with this theory, that the record of a grant, deed or instrument authorized or required to be recorded, which has been duly recorded, shall be "notice to all persons . . . of such grant, deed or instrument."[16]

In the instant case, the defendant's judgment was duly recorded under the statutes which expressly state that the lien attaches to later-acquired property of the debtor. Yet the court held that, because the divorce was never recorded, the lien did not attach to the after-acquired interest of the divorced wife and the defendants were bona fide purchasers. Can there be a bona fide purchaser once a judgment is duly recorded in the proper county? At least under the generally accepted theory of constructive notice the answer would be no. Once a judgment is duly recorded it is a public record providing constructive notice of the judgment-creditor's lien to prospective purchasers. That notice would prevent a vendee from becoming a bona fide purchaser and thereby defeating the lien.[17] The doctrine of constructive notice may work hardships at times but it is the alternative to the chaos which existed prior to the recording statutes.[18]

The importance of the instant case is that the court allowed a purchaser to overcome the lien of a judgment-creditor who had fully complied with the recording statutes. As long as the rights of the creditors and the real property title system depend so heavily upon the recording statutes, it is submitted that this case should, at most, be limited to its precise facts and not be extended to other situations where, because of the amounts involved or other hardship to the purchaser, it might be tempting to defeat a validly recorded interest.

Philip F. Schneider, Jr.

CRIMINAL LAW — EVIDENCE — CARBON COPY OF LETTER ADMISSIBLE WITHOUT DIRECT OR PRESUMPTIVE EVIDENCE OF RECEIPT BY DEFENDANT. *State v. Mays* (Ariz. 1964).

Defendant was convicted by a jury of drawing checks in September,

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[15] Butler v. Quinn, 40 Ariz. 446, 452, 14 P.2d 250, 252 (1932). The statement that the records are notice to "all" is modified in Mountain States Tel. & Tel. Co. v. Kelton, 79 Ariz. 126, 285 P.2d 168 (1955), where the court refused to apply constructive notice to a contractor working on the land and said that the records were notice only to those who had an interest in the title.

[16] ARIZ. REV. STAT. ANN. § 33-410 (1956).

[17] 30A AM. JUR. *Judgments* § 537 (1958).

[18] Phoenix Title & Trust Co. v. Old Dominion Co., 31 Ariz. 324, 334, 253 Pac. 435, 438 (1927) (describes the uncertainty of titles before the recording statutes).

1962, on no account, in violation of Arizona Revised Statutes § 13-316.[1] Over defendant's objection that no evidence had been introduced of his receipt of the original, the trial court admitted in evidence a carbon copy of a letter, found in the bank's files, dated August, 1961, and addressed to defendant, advising him that his account had been closed. On appeal, *held,* affirmed. The existence of the carbon inferred that an original letter also once existed, and, though the fact of the existence of the carbon was not alone sufficient to raise a presumption of receipt of the original by defendant, that fact raised an inference of receipt which, coupled with the inactivity of defendant's checking account for thirteen months, was sufficient to support the conclusion that defendant had received the original, and the carbon was admissible as tending to show defendant's knowledge of its contents. *State v. Mays,* 96 Ariz. 366, 395 P.2d 719 (1964).

Because of the provisions of the Fourth[2] and Fifth[3] Amendments to the United States Constitution, the trial court in a criminal case is without power to require the production of original papers allegedly in the possession of a defendant, and it is up to the prosecution to produce the best evidence possible under the circumstances of the case.[4] It is not permissible even to lay the foundation for the introduction of copies, as in civil cases, by making a demand for production, or by introducing in evidence notice of such demand.[5] Consequently, the rule is that, when the original is traced to the defendant's possession, the prosecution may offer secondary evidence of its contents.[6] As the defense pointed out in the instant case, the key to

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[1] ARIZ. REV. STAT. ANN. § 13-316A (1956), as amended, Laws 1958, Ch. 86; Laws 1960, Ch. 109, § 2:

> A person who, for himself or another, wilfully with intent to defraud makes, draws, utters or delivers to another person or persons a check or checks or draft or drafts on a bank or depositary for payment of money, knowing at the time of such making, drawing, uttering or delivering, that he or his principal does not have an account or does not have sufficient funds in, or credit with, such bank or depositary to meet the check or checks or draft or drafts in full upon presentation, shall be punished as follows: . . .

[2] U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[3] U.S. CONST. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

[4] Lisansky v. United States, 31 F.2d 846 (4th Cir. 1929).

[5] *Ibid.*

[6] Heller v. United States, 104 F.2d 446 (4th Cir. 1939).

the admissibility of such secondary evidence is the tracing of the original to the possession of the defendant.[7]

Naturally, the most direct method of accomplishing this is through the testimony of a witness who physically delivered the letter to the defendant,[8] or by introduction of a postal receipt.[9] In the absence of such direct evidence, one of the more common ways of achieving the same result is by means of the presumption of receipt by the addressee which arises from proof that a properly addressed and stamped letter was mailed.[10] The presumption of receipt of mail properly posted has been recognized in Arizona.[11] In the absence of evidence to the contrary, the presumption is sufficient to justify a finding of receipt;[12] and, the verdict of a jury or the findings of a judge in opposition to this presumption, when based on no evidence of nonreceipt, has been held to be against the weight of evidence and has not been allowed to stand.[13] Therefore, the showing of a mailing, unchallenged by any evidence of nonreceipt, would permit the introduction of a carbon copy of the original so mailed.

To raise a presumption of receipt of mail, there must be satisfactory proof of certain elements including the fact of proper mailing.[14] The proof need not consist of direct and positive testimony as to the ultimate fact of mailing,[15] and the presumption may be raised by evidence of the existence of an office practice in the mailing of letters, together with

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[7] State v. Mays, 96 Ariz. 366, 367, 395 P.2d 719, 720 (1964).

[8] Heller v. United States, 104 F.2d 446 (4th Cir. 1939).

[9] Nunlist v. Motter, 81 Ohio App. 506, 77 N.E.2d 369 (1947).

[10] Rosenthal v. Walker, 111 U.S. 185 (1884); Morse v. Pacific Gas & Electric Co., 152 Cal. 2d 854, 314 P.2d 192 (1957); Loving v. Allstate Ins. Co., 17 Ill. App. 2d 230, 149 N.E.2d 641 (1958); Manassas Park Dev. Co. v. Offutt, 203 Va. 382, 124 S.E.2d 29 (1962).

This presumption has been variously based upon the probability that postal employees in charge of receiving and transmitting mail have performed their duties in a proper manner, Selken v. Northland Ins. Co., 249 Iowa 1046, 90 N.W.2d 29 (1958); upon common experience which has shown the mails to be both regular and certain, Holiver v. Dept. of Public Works, 333 Mass. 18, 127 N.E.2d 790 (1955); or upon statute, Tremayne v. American SMW Corp., 125 Cal. App. 2d 852, 271 P.2d 229 (1954).

[11] Merchants' and Mfrs.' Ass'n v. First Nat'l Bank of Mesa, 40 Ariz. 531, 14 P.2d 717 (1932).

[12] Taylor v. Corning Bank & Trust Co., 183 Ark. 757, 38 S.W.2d 557 (1931); Crocker First Nat'l Bank of San Francisco v. Central Automotive Maintenance Co., 109 Cal. App. 2d 888, 242 P.2d 72 (1952).

[13] Merchants' and Mfrs.' Ass'n v. First Nat'l Bank of Mesa, 40 Ariz. 531, 14 P.2d 717 (1932).

[14] Other elements most commonly mentioned are proper address and correct postage.

[15] United States v. Rice, 281 Fed. 326 (S.D. Tex. 1922).

proof that the practice was followed in the particular instance.[16]

Where proof of an office routine or business practice is relied on to establish mailing, there must be corroborating circumstances to support the inference that the custom has been carried out. According to the majority rule, the person who is claimed to have mailed the letter must appear and testify that, invariably or on the day in question, he complied with the office procedure and performed his duty.[17] At least one case has been very specific in requiring that there be proof of an invariable practice in an office of depositing mail in a certain receptacle, and of the letter in question having been deposited in the receptacle, and that there be testimony of the employee, whose duty it was to deposit the mail, that it was his invariable practice to deposit in the mailbox or post office every letter placed in the usual receptacle.[18] Introduction of the carbon copy would be admissible only upon the showing of these elements.

A growing number of courts are relaxing their requirements for proving the office practice upon which the presumption of mailing is based.[19] Where there is proof that part of a standard office mailing routine was followed, these courts presume, in the absence of evidence to the contrary, that the rest was also followed.[20] Testimony that a particular piece of mail was put into the routine of being mailed is sufficient evidence that it was mailed without producing an employee who can testify that it was dropped into the mailbox.[21] These courts generally reason that such employee could only testify as to his invariable compliance with the office practice, and if another employee or officer of the company, for instance the writer of the letter, has personal knowledge of the office practice and testifies accordingly, testimony to the same effect by another would be merely cumulative.[22] Arizona has already adopted this growing point of view.[23] Therefore, in Arizona,

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[16] Avant v. United States, 165 F. Supp. 802 (E.D. Va. 1958); Kolker v. Biggs, 203 Md. 137, 99 A.2d 743 (1953); Start v. Shell Oil Co., 202 Ore. 99, 273 P.2d 225 (1954).

[17] Meyer v. Krug, 298 Ill. App. 625, 19 N.E.2d 111 (1939); Hitz v. Ohio Fuel Gas Co., 43 Ohio St. 484, 183 N.E. 768 (1932).

[18] United States v. Rice, 281 Fed. 326 (S.D. Tex. 1922).

[19] Myers v. Moore-Kile Co., 279 Fed. 233 (5th Cir. 1922); J. I. Case Co. v. Sinning Bros. Motor Co., 137 Kan. 581, 21 P.2d 328 (1933); Mohr v. Universal C.I.T. Credit Corp., 216 Md. 197, 140 A.2d 49 (1958); Prudential Trust Co. v. Hayes, 247 Mass. 311, 142 N.E. 73 (1924).

[20] Consol. Motors, Inc. v. Skousen, 56 Ariz. 481, 109 P.2d 41, 132 A.L.R. 1040 (1941).

[21] J. I. Case Co. v. Sinning Bros. Motor Co., 137 Kan. 581, 21 P.2d 328 (1933).

[22] Mohr v. Universal C.I.T. Credit Corp., 216 Md. 197, 140 A.2d 49 (1958).

[23] Consol. Motors, Inc. v. Skousen, 56 Ariz. 481, 109 P.2d 41, 132 A.L.R. 1040 (1941).

testimony as to the writing of the original and as to the office practice would permit introduction of the carbon in cases such as the instant one.

In the instant case, however, it appears that the Arizona court has not adhered even to the less exacting criteria of the new trend. The opinion alludes to the more liberal rule concerning proof of office practice,[24] but it makes no mention of any testimony by a bank employee or officer as to the bank's practice covering outgoing mail in general or notices in particular.[25] There was nothing, except the carbon copy, to indicate that notice had ever been sent to the defendant. Though the carbon may be evidence of the original, it is not evidence of the mailing or the receipt.[26] By itself it cannot tend to show the defendant's knowledge of the contents of the original, as was the contention of the prosecution, for there cannot be knowledge without receipt.

There was an absence of any direct or presumptive proof of mailing or receipt, and the carbon should not have been admitted as tending to show the defendant's knowledge of the contents of the original.[27] The carbon copy may have been admissible for other purposes, but it should have been made clear to the jury that it was not to be considered of probative value on the question of the defendant's knowledge of the account's having been closed.[28]

The ruling that in a criminal case a carbon copy of a letter may be introduced to show the defendant's knowledge of the contents of the original, even without any direct or presumptive evidence that the original was received, is an innovation of the Arizona court which finds no support in the authorities. Every one of the cases cited in the opinion as supporting this ruling was based at least in part on affirma-

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[24] State v. Mays, 96 Ariz. 366, 368, 395 P.2d 719, 721 (1964).

[25] The only testimony of the operations officer of the bank which is mentioned in the opinion was to the effect that the defendant had opened a checking account and that three weeks later the account had been closed by the bank. The record of the case may further show that the officer testified as to an established bank practice with respect to mailing out notices to delinquent account holders and that the carbon would not have been in the files unless the practice had been followed. Were such evidence actually presented, the ruling in this case would not be a departure from prior Arizona decisions. The opinion, however, does not mention that such evidence was presented at the trial, and this note is written on the assumption that, no mention of this significant testimony having been made by the court, it was not in fact found in the record. This position is taken because a practitioner using this case as authority generally must take its rulings at face value since he probably would not have convenient access to the trial record.

[26] United States v. Rice, 281 Fed. 326 (S.D. Tex. 1922).

[27] Patrick v. Cochise Hotels, 76 Ariz. 136, 259 P.2d 569 (1953).

[28] 1 WIGMORE, EVIDENCE § 13 (3d Ed. 1940).

tive evidence of an office mailing practice,[29] and deviation from the requirement of such evidence would seem to substantially reduce the quantum of proof which the prosecution must establish in a criminal trial. In the instant case, the ruling was not prejudicial to the defendant because there were other facts, especially the defendant's failure to write any checks for thirteen months, which circumstantially showed that he had knowledge that he could not write checks on the account. In the future, however, there may arise cases where there is no such additional evidence and in which the conviction must stand or fall on proof of the defendant's knowledge of the contents of a letter allegedly sent to him. Adherence to the ruling of the court in the instant case would seem to violate the American legal tradition of holding the prosecution in a criminal case to the strictest requirements of proof.

I. Douglas Dunipace

FEDERAL INCOME TAXATION — EXAMINATION OF RECORDS — GOVERNMENT MAY EXAMINE "CLOSED" YEARS FOR FRAUD WITHOUT SHOWING PROBABLE CAUSE FOR SUSPICION. — *United States v. Powell* (U.S. 1964).

The Internal Revenue Service summoned Powell, the president of a corporate taxpayer, to produce records relating to the taxpayer's returns for two years. Because the statute of limitations barred assessment for those years, except for fraud, Powell refused to produce the records. The Service petitioned a district court for enforcement of the summons and filed an affidavit which alleged suspicion of fraud but stated no evidentiary basis therefor. The district court enforced the summons. On appeal, the Third Circuit reversed,[1] holding that the Service was not entitled to enforcement of the summons without establishing a reasonable basis for suspecting fraud. On certiorari, *held,* reversed and remanded.[2] The government need make no show-

[29] United States v. Rice, 281 Fed. 326 (S.D. Tex. 1922); Consol. Motors, Inc. v. Skousen, 56 Ariz. 481, 109 P.2d 41, 132 A.L.R. 1040 (1941); J. I. Case Co. v. Sinning Bros. Motor Co., 137 Kan. 581, 21 P.2d 328 (1933); Mohr v. Universal C.I.T. Credit Corp., 216 Md. 197, 140 A.2d 49 (1958).

[1] United States v. Powell, 325 F.2d 914 (3d Cir. 1964), *rev'd and remanded,* 379 U.S. 48 (1964).

[2] United States v. Powell, *cert. granted,* 377 U.S. 929 (1964); Ryan v. United States, *cert. granted,* 376 U.S. 904 (1964) (companion case).

ing of probable cause to suspect fraud unless the taxpayer raises a substantial question as to whether judicial enforcement of the administrative summons would be an abusive use of the court's process, predicated on more than the fact of re-examination and the running of the statute of limitations on ordinary tax liability.[3] *United States v. Powell*, 379 U.S. 48 (1964).

The Internal Revenue Code of 1954 gives the Commissioner broad investigatory powers,[4] including the authority to summon any person to appear, produce records and give testimony which may be relevant or material to "the purpose of ascertaining the correctness of any return, . . . determining the liability of any person for any internal revenue tax . . ., or collecting any such liability. . . ."[5] Ordinarily, assessment of tax liability is limited to within three years after the return is filed.[6] After such period, assessment may not be made except "in the case of a false or fraudulent return with the intent to evade tax,"[7] or "a willful attempt in any manner to defeat or evade tax. . . ."[8] Section 7605(b) of the Code provides for the protection of the taxpayer against "unnecessary examination or investigations."[9]

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[3] United States v. Powell, 379 U.S. 48 (1964).

[4] Under INT. REV. CODE OF 1954, § 6201, the Commissioner is "required to make the inquiries" necessary to the determination and assessment of all taxes imposed by the revenue laws. Section 7601 directs him to "cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax. . . ."

[5] INT. REV. CODE OF 1954, § 7602. See generally BALTER, TAX FRAUD AND EVASION, ch. 5 (3d ed. 1963).

[6] INT. REV. CODE OF 1954, § 6501(a).

[7] INT. REV. CODE OF 1954, § 6501(c)(1).

[8] INT. REV. CODE OF 1954, § 6501(c)(2).
The instant case did not involve the two other exceptions, *viz.*, failure to file a return, § 6501(c)(3), and extension by agreement, § 6501(c)(4), nor did it involve the six-year statute of limitations, applicable in a case of omission of an amount in excess of 25 percent of the gross income reported, § 6501(e)(1).

Note that if inspection of a taxpayer's books and records is sought for use in an examination of an "open" year, access will not be denied even if the examination extends to "closed" years. Norda Essential Oil & Chemical Co. v. United States, 230 F.2d 764 (2d Cir. 1956), *cert. denied*, 351 U.S. 964 (1956); Falsone v. United States, 205 F.2d 734 (5th Cir. 1953).

[9] INT. REV. CODE OF 1954, § 7605(b):

> No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of the taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

If a summons is not complied with, the Commissioner may seek enforcement by applying to the proper federal district court.[10] The taxpayer is entitled to an adversary proceeding[11] at which he may challange the summons on any "appropriate ground."[12] The question whether one such appropriate ground is the Commissioner's failure to establish probable cause, where he alleges fraud in a barred year, has produced a divergence of views in the Circuits.

The First[13] and Third[14] Circuits refused to enforce summonses where the probable cause test was not met. The rationale of this line of cases was presented in *O'Connor v. O'Connell*,[15] where the First Circuit rejected the government's contention that to obtain enforcement as to a barred year, all that need be shown was the Secretary's good-faith belief of fraud. The government's position, declared the court, would relegate the statutory prohibition against "unnecessary examination"[16] to "hardly more than a pious exhortation directed to the tax authorities," and would, as a practical matter, reduce the court's function under § 7604 to "little more than that of summarily affixing its stamp of approval to administrative action."[17] Emphasizing the increasing burdens of the taxpayer as time passes, the court interpreted Congress' intent, in enacting the provision against "unnecessary examination," as requiring the establishment of probable

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[10] INT. REV. CODE OF 1954, § 7402(b) and § 7604(a).

[11] Reisman v. Caplin, 375 U.S. 440, 446 (1963); U.S. Aluminum Siding Corp. v. Eshleman, 170 F. Supp. 12 (N.D. Ill. 1958).

[12] Reisman v. Caplin, 375 U.S. 440, 449 (1963). The application may appropriately be resisted, *e.g.*, on the ground that enforcement of the summons would violate the constitutional rights of the witness, such as compelling him to incriminate himself or subjecting him to an unreasonable search and seizure, Bouscher v. United States, 316 F.2d 451, 457-59 (8th Cir. 1963); *In re* Turner, 309 F.2d 69 (2d Cir. 1962); Hubner v. Tucker, 245 F.2d 35 (9th Cir. 1957); or that the material is protected by the attorney-client privilege, Sale v. United States, 228 F.2d 682 (8th Cir. 1956), *cert. denied*, 350 U.S. 1006 (1956); or that the summons was issued for the improper purpose of obtaining evidence for use in a criminal prosecution, Boren v. Tucker, 239 F.2d 767, 772-73 (9th Cir. 1956); or that the investigation is not of the kind authorized by statute, Pacific Mills v. Kenefick, 99 F.2d 188 (1st Cir. 1938). See 8A MERTENS, LAW OF FEDERAL INCOME TAXATION § 47.47 at 132-33 (1964); Redlich, *Searches, Seizures and Self-Incrimination in Tax Cases*, 10 TAX L. REV. 191 (1955).

[13] Lash v. Nighosian, 273 F.2d 185 (1st Cir. 1959), *cert. denied*, 362 U.S. 904 (1960); O'Connor v. O'Connell, 253 F.2d 365 (1st Cir. 1958).

[14] United States v. Powell, 325 F.2d 914 (3d Cir. 1964), *rev'd and remanded*, 379 U.S. 48 (1964).

[15] 253 F.2d 365 (1st Cir. 1958).

[16] INT. REV. CODE OF 1954, § 7605(b).

[17] 253 F.2d 365, 360-70 (1st Cir. 1958).

cause for an investigation into a "closed" year.[18]

Dicta in cases arising in the Fourth,[19] Seventh[20] and Ninth[21] Circuits supported the probable cause test, although in each case the summons was enforced. The Fourth and Seventh Circuits, while declining to formulate a fixed standard, noted that the government's evidence met the probable cause test. The Ninth Circuit, in *De Masters v. Arend*,[22] spoke in terms of "rational judgment" rather than "probable cause," but appeared to require an equivalent level of proof.

The Second,[23] Fifth[24] and Sixth[25] Circuits rejected the taxpayers' arguments for the probable cause standard. In *United States v. Ryan*,[26] the Sixth Circuit upheld enforcement of a summons without requiring the government to establish probable cause in support of an allegation that "pursuant to a net worth estimate of the defendant [taxpayer's] assets . . . reasonable grounds exist for a strong suspicion that the defendant . . . has made a fraudulent understatement of income."[27]

The rationale of the Supreme Court's holdings in *Powell* and *Ryan* is contained in Mr. Justice Harlan's majority opinion in *Powell*. Rejecting the taxpayer's principal argument, that the § 7605(b) provision against "unnecessary examination" requires the government to establish probable cause, the Court stated:

> We do not equate necessity as contemplated by this provi-

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[18] *Id.* at 370:

> We think Congress intended to give taxpayers this much protection when the investigation of their returns may reach far back into the past . . . and that to require such a showing does not impose too heavy a burden upon the tax authorities or unduly restrict or hamper them in tax enforcement.

[19] Wall v. Mitchell, 287 F.2d 31 (4th Cir. 1961).

[20] McDermott v. John Baumgarth Co., 286 F.2d 864, 866 (7th Cir. 1961).

[21] De Masters v. Arend, 313 F.2d 79 (9th Cir. 1963); Boren v. Tucker, 239 F.2d 767 (9th Cir. 1956); Martin v. Chandis Sec. Co., 128 F.2d 731 (9th Cir. 1942).

[22] 313 F.2d 79 (9th Cir. 1963).

[23] Foster v. United States, 265 F.2d 183 (2d Cir. 1959), *cert. denied*, 360 U.S. 912 (1959). In United States v. United Distillers Prod. Corp., 156 F.2d 872 (2d Cir. 1946), the court asserted that the Commissioner, as a condition to the issuance of a summons and order under §§ 7602 and 7604, should not be required to prove grounds for belief that the liability was not time-barred "prior to the examination of the only records which provide the ultimate proof."

[24] Globe Constr. Co. v. Humphrey, 229 F.2d 148 (5th Cir. 1956).

[25] United States v. Ryan, 320 F.2d 500 (6th Cir. 1963), *aff'd* 379 U.S. 61 (1964); Corbin Deposit Bank v. United States, 244 F.2d 177 (6th Cir. 1957).

[26] 320 F.2d 500 (6th Cir. 1963).

[27] *Id.* at 501.

> sion with probable cause or any like notion. . . . If, in order to determine the existence or nonexistence of fraud in the taxpayer's returns, information in the taxpayer's records is needed . . . we think the examination is not "unnecessary" within the meaning of § 7605(b).[28]

The Court opposed a more stringent interpretation because it might seriously hamper the Service's responsibility in detecting frauds on the revenue and force the Commissioner "to litigate and prosecute appeals on the very subject which he desires to investigate."[29] Upon consideration of the legislative history of § 7605(b), the Court concluded that the section was intended only as a curb on the investigating powers of low-echelon revenue agents and that no probable cause standard was intended by the legislators.[30] Finally, the Court observed that other administrative agencies need not meet a probable cause test to obtain enforcement of summonses.[31]

In a dissenting opinion,[32] Mr. Justice Douglas asserted that he would accord more respect than the majority of the Court to the statute of limitations. He would require the district court to be satisfied that the Service is not acting capriciously in reopening the closed period. "Where the limitations period has expired, an examination is presumptively 'unnecessary' within the meaning of § 7605(b) — a presumption the Service must overcome."[33]

If courts become too liberal in stamping approval on unsupported determinations by the Commissioner, the statute of limitations will be frustrated by the increased vulnerability of taxpayers to investigations which may reach far into the past. It is submitted that an approach giving greater respect to the statute, as advocated by Mr. Justice Douglas, would achieve fair as well as practical results. When a taxpayer is accused of fraud, it seems reasonable, before lifting the

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[28] United States v. Powell, 379 U.S. 48, 52 (1964).

[29] *Id.* at 53.

[30] *Id.* at 53-55, wherein it is noted that § 7605(b) first appeared as § 1309 of the Revenue Act of 1921, 42 Stat. 310. See 61 CONG. REC. 5202, 5855 (1921). The section was re-enacted in 1939 and 1954 without substantial change.

[31] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 216 (1946). In United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950), involving the Federal Trade Commission, the Court noted that the administrative power of inquisition is "analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence, but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." See 1 DAVIS, ADMINISTRATIVE LAW § 3.12 (1958).

[32] United States v. Powell, 379 U.S. 48, 58-59 (1964). Mr. Justice Douglas dissented in *Ryan* also. Mr. Justice Stewart and Mr. Justice Goldberg joined in the *Powell* dissent but concurred in the *Ryan* decision because they felt that the Government was not proceeding capriciously in the *Ryan* case.

[33] United States v. Powell, 379 U.S. 48, 59 (1964).

statute and requiring him to produce records for "barred" years, to require the showing of some basis for the accusation, whether it be probable cause, lack of capriciousness, or simply a reasonable basis. When no reasonable basis exists, the requirement would safeguard against potential overreaching by revenue agents; when one exists, its required establishment should not materially hamper the Commissioner's investigatory powers. The public's interest in protecting the individual taxpayer from unwarranted governmental investigation of stale claims of fraud merits recognition; it should be balanced with, rather than subverted to, the objective of protecting the revenue system against fraud.

Robert H. Feldman

TORTS — INTERSPOUSAL NEGLIGENCE SUIT — ACTION BY WIFE'S ADMINISTRATOR AGAINST HUSBAND'S ESTATE NOT ALLOWED — *Saunders v. Hill* (Del. 1964).

Decedent husband was driving, with his wife as a passenger, when his car collided with another motor vehicle. Both the husband and the wife were killed. The wife's administrator brought an action for negligence against the husband's estate under Delaware's wrongful death and survival statutes.[1] The trial court, relying on the common-law rule of interspousal immunity, rendered judgment on the pleadings for the husband's estate. On appeal, *held*, affirmed. The common-law rule of interspousal immunity applies to an action brought under the wrongful death and survival statutes, so that the wife's administrator could not recover against the husband's estate for the husband's negligent act. *Saunders v. Hill*, 202 A.2d 807 (Del. 1964).

At common law, before the enactment of married women's acts, the concept of a marital unity between husband and wife made interspousal tort suits impossible.[2] Marriage was considered a legal catalyst which caused a wife's identity to merge into that of her husband.[3] A suit, therefore, by one spouse against the other during marriage was legally analogous to a situation where one man was suing himself for a

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[1] 10 DEL. CODE ANN. § 3704(b) (1953), and 10 DEL. CODE ANN. § 3701 (1953).

[2] See McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956).

[3] Thompson v. Thompson, 218 U.S. 611, 614-15 (1910), where the court said:

> At the common law the husband and wife were regarded as one. The legal existence of the wife during coverture was merged in that of the husband, and, generally speaking, the wife was incapable of making contracts, of acquiring property or disposing of same without her husband's consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other.

tort which he had committed against himself. This fictitious marital unity was only one of the many legal disabilities suffered by the married woman at common law.[4] It is one of the very few, however, that has survived.

Most of the wife's common-law disabilities were abolished by the enactment of England's married women's property act of 1882.[5] That statute gave the married woman the right to sue in her own name as though she were femme sole.[6] Unfortunately, the English statute expressly provided that no husband or wife would be entitled to sue the other for a tort.[7] This explicit retention of the interspousal immunity rule has undoubtedly influenced many American courts in their construction of married women's statutes enacted in the United States. Moreover, this influence has been felt even though most of the modern statutes are silent on the subject of tort suits between spouses.[8] Only two states appear to have included express prohibitions against such tort actions in their statutes.[9] In Illinois, the prohibition was added only after its courts had permitted a wife to recover from her husband for injuries resulting from his negligent operation of an automobile in which she was a passenger.[10]

Notwithstanding the general absence of a statutory bar against interspousal tort actions, a majority of American courts have refused to permit a wife to sue her husband for personal torts.[11] These courts allow the wife to sue her husband for his torts against her property interests;[12] but, ironical as it may seem, they do not allow her to sue for such torts as assault and battery,[13] false imprisonment,[14] malicious

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[4] See PROSSER, TORTS § 116, at 879-81 (3d ed. 1964).

[5] For a thorough discussion and criticism of the 1882 act, see generally Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife,* 15 MOD. L. REV. 133 (1952).

[6] *Ibid.*

[7] *Ibid.*

[8] The statutes of the individual states are collected in 3 VERNIER, AMERICAN FAMILY LAWS § 180, at 268 (1935).

[9] ILL. REV. STAT. Ch. 68, § 1 (1957); LA. REV. STAT. 9:291 (Cum. Supp. I, 1962).

[10] Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952).

[11] See Annot., 43 A.L.R.2d 632 (1955).

[12] See PROSSER, TORTS § 116, at 881 (3d ed. 1964).

[13] Thompson v. Thompson, 218 U.S. 611 (1910); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906).

[14] Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915); Lunt v. Lunt, 121 S.W.2d 445 (Tex. Civ. App. 1938).

prosecution,[15] defamation,[16] or injury resulting from negligence.[17] Two of the most frequent arguments given in support of the majority's position are: (1) that such suits, if allowed, would tend to disrupt marital harmony and tranquility,[18] and (2) that such suits, if allowed, would encourage illegal collusion between the spouses to defraud insurance companies.[19] Professor Prosser criticizes these arguments as being mere inventions to sustain the old common-law rule, and he states that such arguments were not found in the early cases.[20]

The modern trend, although still a minority view, is toward recognition of the married woman's right to sue her husband for all torts that he has committed against her.[21] In answer to the marital harmony and tranquility argument, the minority courts submit that this fear is empty, since, when one spouse assaults the other or decides to sue him, there is certainly little harmony and tranquility left to disrupt.[22] The risk of illegal collusion between the spouses for the purpose of defrauding insurance companies can be provided for by adjusting insurance rates, assuming that this has not already been done. Moreover, our courts are quite capable of separating fraudulent claims from those which are

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[15] Watson v. Watson, 39 Cal. 2d 305, 246 P.2d 19 (1952); Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945).

[16] Ewald v. Lane, 104 F.2d 222 (App. D.C. 1939).

[17] Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952); Kelly v. Williams, 94 Mont. 19, 21 P.2d 58 (1933).

[18] Corren v. Corren, 47 So. 2d 774, 776 (Fla. 1950), where the court said:

> When one ponders the effect upon the marriage relationship were each spouse free to sue the other for every real or fancied wrong springing even from pique or inconsequential domestic squabbles, one can imagine what the havoc would be to the tranquility of the home. Certainly the success of the sacred institution of marriage must depend in large degree upon harmony between the spouses, and the relationship could easily be disrupted and the lives of offspring blighted if bickerings blossomed into law suits and conjugal disputes into vexatious, if not expensive, litigation.

[19] Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927); Newton v. Weber, 119 Misc. 240, 196 N.Y. Supp. 113 (1922).

[20] See PROSSER, TORTS § 116, at 883 (3d ed. 1964).

[21] Cramer v. Cramer, 379 P.2d 95 (Alaska 1963); Self v. Self, 58 Cal. 2d 683, 376 P.2d 65 (1962) (Overruling Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909) which followed the old common law rule of interspousal immunity); See also comment, 36 So. CAL. L. REV. 456 (1963).

[22] In Brown v. Brown, 88 Conn. 42, 89 Atl. 889, 891-92 (1914), the court said:

> The danger that the domestic tranquillity may be disturbed if the husband and wife have rights of action against each other for torts, and that the courts will be filled with actions brought by them against each other for assault, slander, and libel, . . . we think is not serious. So long as there remains to the parties domestic tranquillity, while a remnant is left of that affection and respect without which there cannot have been a true marriage, such actions will be impossible.

bona fide.[23]

The precise question of whether a wife may sue her husband for a personal tort has not yet reached the Arizona Supreme Court; however, she has been permitted to sue him for his torts against her property interests.[24] Arizona's married women's statutes, like those in most of her sister states, are silent on the subject of interspousal tort suits.[25] In a fairly recent conflict of laws case involving an automobile accident in Arizona, the Supreme Court of Wisconsin concluded that the Arizona statutes do authorize the wife to sue her husband for personal injuries.[26] Although this decision must be regarded as being merely persuasive, it seems to have reached the more modern and socially desirable result.

The conclusion reached by the Delaware court in *Saunders v. Hill*[27] makes less sense analytically than most of the other decisions which have retained the common-law rule.[28] In those cases, both husband and wife were alive at the time the wife instituted suit.[29] In *Saunders*, both husband and wife were killed in the accident which occasioned the litigation. Practically speaking, therefore, there can be no valid objection to the suit on the grounds that it would disrupt marital harmony and tranquility. There was no marriage left to disrupt. Clearly, the wife's representative would have been permitted to sue a third party to the accident if that party was the one at fault. Yet, in the face of all reason and fact, the Delaware court held that the wife's representative could not sue the husband's estate for damages. *Saunders* illustrates how a rule of law can be perpetuated long after the sound reasons for its

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[23] Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953).

[24] See Eshom v. Eshom, 18 Ariz. 170, 157 Pac. 974 (1916); Hageman v. Vanderdoes, 15 Ariz. 312, 138 Pac. 1053 (1914). In the *Eshom* case, the wife was permitted to sue her husband for conversion, and in the *Vanderdoes* case, the court remarked that the unity of husband and wife had been severed.

[25] See, *e.g.*, ARIZ. REV. STAT. ANN. § 25-214(A) (1956):

> Married women of the age of twenty-one years and upwards have the same legal rights and are subject to the same legal liabilities as men of the age of twenty-one years and upwards except the right to make contracts binding the common property of the husband and wife.

See also ARIZ. R. CIV. P. 17(e):

> Married woman as a party; actions for necessaries. When a married woman is a party her husband shall be joined with her except when the action concerns her separate property, *or is between herself and her husband, in which she may sue or be sued alone.* If a husband and wife are sued together, the wife may defend in her own right. The husband and wife shall be sued jointly for all debts contracted by the wife for necessaries furnished herself or children. (Emphasis added)

[26] Jaeger v. Jaeger, 262 Wis. 14, 53 N.W.2d 740 (1952).

[27] 202 A.2d 807 (Del. 1964).

[28] See Annot., 43 A.L.R. 632 (1955).

[29] *Ibid.*

initial adoption have disappeared. Professor Pound might say that this is an example of "mechanical jurisprudence."[30] It can be hoped that Arizona will follow the sounder construction given its statutes by the Wisconsin court.[31]

Silas H. Shultz

TORTS — LIBEL — DELAYED PUBLICATION OF DIVORCE MAY BE LIBELOUS PER SE. — *Pitts v. Spokane Chronicle Co.* (Wash. 1964).

Plaintiff husband was divorced from his first wife on February 3, 1960, and in September, 1960, he married another woman, his present wife, also a plaintiff in this action. On April 21, 1961, the defendant newspaper erroneously and without malice printed an item in the public records section listing plaintiff's divorce from his first wife.[1] The trial judge concluded that the publication gave the impression that the husband had not been divorced from his first wife until April 21, 1961, and that the marriage to his present wife was illegal, and that he was a bigamist.[2] Plaintiffs asked general damages[3] sustained by way of proving humiliation and loss of association with friends. No special damages were alleged or proved.[4] The trial court gave judgment for plaintiffs in the amount of $2,000.00, denying defendant news-

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[30] See Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606 (1908), where Dean Pound writes:

> One of the obstacles to advance in every science is the domination of the ghosts of departed masters. Their sound methods are forgotten, while their unsound conclusions are held for gospel. Legal science is not exempt from this tendency. Legal systems have their periods in which science degenerates, in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence.

[31] See case cited note 26 *supra.*

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[1] Taken from the Spokane Chronicle of April 21, 1961:
"Brief City News — Records
"Divorce Granted
"Hazel M. Pitts [former wife] from Philip Pitts [plaintiff]."

[2] "A charge of bigamy is libelous or slanderous per se." Hand v. Hand, 23 N.J. Misc. 118, 41 A.2d 270 (1945); 53 C.J.S. *Libel and Slander* § 64 (1948).

[3] "Special damage in defamation cases must be pecuniary; humiliation, mental pain, even physical illness have been held insufficient." CLARK, SURVEY OF AMERICAN LAW, *Damages* § 11 (1960).

[4] Strict requirements of the common-law declaration for slander or libel included the following parts: (1) the inducement — the prefatory statement of extrinsic matter, (2) the colloquium, (3) the publication, (4) the innuendo, and (5) the consequent damages. See BROWN, VESTAL, LADD, CASES AND MATERIALS ON PLEADING AND PROCEDURE 165 (1953), citing SHIPMAN, COMMON-LAW PLEADING 219 (3d ed. 1923).

paper's claim that the words themselves were not defamatory per se and no special damage having been pleaded, no action would lie under the theory of libel per quod.[5] On appeal, *held,* affirmed. It is libelous per se for a newspaper erroneously to publish a record of divorce more than a year late and several months after the husband has remarried, and he and his new wife may recover without showing either malice or special damages. *Pitts v. Spokane Chronicle Co.,* 388 P.2d 976 (Wash. 1964).

Common-law libel, as distinguished from slander, was actionable without the necessity of pleading or proving that the plaintiff had suffered any damage.[6] This remains the rule in England[7] and in several American jurisdictions,[8] not only as to publications defamatory on their faces,[9] but also as to those requiring extrinsic facts to establish the defamatory meaning.[10] The Restatement of Torts adopts the common-law view.[11]

Some American courts, however, depart from the common law and draw a distinction between libel per se and libel per quod, by requiring proof of special damages for the latter. Words actionable in themselves are libelous per se. Words not actionable in themselves, but only when special damages are proved, are libelous per quod.[12] It has been held libelous per se to publish that one is a liar,[13] skunk,[14]

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[5] See BLACK'S LAW DICTIONARY 1062 (4th ed. 1951).

[6] PROSSER, TORTS 780 (3d ed. 1964).

[7] Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., 50 T.L.R. 581, 99 A.L.R. 864 (1934).

[8] Klein v. Sunbeam Corp., 47 Del. (8 Terry) 526, 94 A.2d 385 (1952); Hughes v. Samuels Bros., 179 Iowa 1077, 159 N.W. 589 (1916); Richmond v. Post, 69 Minn. 457, 27 N.W. 704 (1897); Hodges v. Cunningham, 160 Miss. 576, 135 So. 215 (1931); Harrimann v. Newark Morning Ledger Inc., 48 N.J. Super. 420, 138 A.2d 61 (1958); Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 113 N.W.2d 135 (1962).

[9] Cowper v. Vannier, 20 Ill. App. 2d 499, 156 N.E.2d 761 (1959).

[10] Penry v. Dozier, 161 Ala. 292, 49 So. 909 (1909); Kee v. Armstrong, Byrd & Co., 75 Okla. 84, 182 Pac. 494 (1919).

[11] RESTATEMENT, TORTS § 569 (1938): "One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom."

[12] THAYER, LEGAL CONTROL OF THE PRESS § 34 (1962).

[13] Paxton v. Woodward, 31 Mont. 195, 78 Pac. 215 (1904).

[14] Massuere v. Dickens, 70 Wis. 83, 35 N.W. 349 (1887).

humbug,[15] hog,[16] or murderer.[17] There is a twilight zone, however, between words clearly libelous in themselves (per se) and words ordinarily not defamatory that become actionable per quod when special damages are shown. In this middle ground are words that are defamatory when special extrinsic circumstances are shown. Some courts call this libel per se, and allow general damages, while other courts require special damages.

It has been held that an action would lie under the theory of libel per quod where it was reported that a man's divorcing wife was also his aunt,[18] that an insurance agency had been "suspended,"[19] that a public official was short in his accounts,[20] or, in an action by a wife, that her husband was a Negro.[21] In all of these situations, the courts said the words were not libelous when considered apart from innuendo and, no special damages having been alleged, no recovery would lie. In *Peabody v. Barham*,[22] the court said that special damages must be spelled out with particularity where the language is not clearly libelous per se.

It was considered, on the other hand, actionable libel even without proof of special damages where the defamatory matter merely stated that a certain store sold ham, and extrinsic facts showed that the owner was a dealer in Kosher products.[23]

Wide variations in case law make it difficult to outline a generally accepted position on libel.[24] The term libel per quod is some-

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[15] Ramharter v. Olson, 26 S.D. 499, 128 N.W. 806 (1910).

[16] Solverson v. Peterson, 64 Wis. 198, 25 N.W. 14 (1885); *Cf.*, Urban v. Helmick, 15 Wash. 155, 45 Pac. 747 (1896).

[17] Reid v. Sun Publishing Co., 158 Ky. 727, 166 S.W. 245 (1914).

[18] Peabody v. Barham, 52 Cal. App. 2d 581, 126 P.2d 668 (1942).

[19] Towles v. Travelers Inc. Co., 282 Ky. 147, 137 S.W.2d 1110 (1940).

[20] Thomas v. McShan, 99 Okla. 88, 225 Pac. 713 (1924).

[21] Hargrove v. Oklahoma Press Pub. Co., 130 Okla. 76, 265 Pac. 635 (1928).

[22] 52 Cal. App. 2d 581, 126 P.2d 668 (1942).

[23] Braun v. Armour & Co., 254 N.Y. 514, 173 N.E. 845 (1930).

[24] CAL. CIV. CODE § 45a:

> A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as inducement, innuendo or other extrinsic fact, is said to be libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof.

The California statute would appear to favor the position taken by publishers. See also New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (qualified protection of the press against damage claims for libel resulting from criticism of public officials); "An expression like 'poor white trash' might be mild comment in a Northern community, but it might be really damaging to one's reputation in the deep South." THAYER, LEGAL CONTROL OF THE PRESS § 34 (1962).

times applied to all libel other than libel per se.[25] Under this theory, any statement that can be made out defamatory with proof of special circumstances is libel per quod.[26] Another theory maintains that a statement cannot be libelous per quod without proof of special damages.[27]

In its determination of whether the publication was libelous per se,[28] the court in the instant case looked to the extrinsic facts and circumstances in the plaintiffs' complaint, and the results of the publication in question. This is an approach that has found both support[29] and rejection.[30] The line of reasoning that rejects innuendo and extrinsic circumstances in an action for libel per se may have branched from the generalization in *Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club*,[31] to the effect that words that are libelous per se do not need an innuendo and, conversely, words needing an innuendo are not libelous per se. The Arizona court, in *Broking v. Phoenix Newspapers*,[32] stated that if language charged to be libelous is unambiguous, it is the function of the court to say whether it is libelous per se; if it is ambiguous, it is then within the province of the jury, under a proper instruction, to determine whether it is defamatory.[33]

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[25] THAYER, LEGAL CONTROL OF THE PRESS § 34 (1962).

[26] *Ibid.*

[27] *Ibid.*

[28] "The only question to be determined is whether or not the publication was libelous per se, so that the plaintiffs can recover general damages without alleging or proving special damages." (Quoting from trial judge's memorandum). Pitts v. Spokane Chronicle Co., 388 P.2d 976, 977 (Wash. 1964).

[29] Sydney v. MacFadden Publishing Corp., 242 N.Y. 208, 151 N.E. 209 (1926); Morey v. Morning Journal Assn., 123 N.Y. 207, 25 N.E. 161 (1890); Purvis v. Bremers, 54 Wash. 2d 743, 344 P.2d 705 (1959).

[30] Landstrom v. Thorpe, 189 F.2d 46 (8th Cir. 1951).

[31] 215 Iowa 1130, 245 N.W. 231 (1932).

[32] 76 Ariz. 334, 264 P.2d 413 (1953). The RESTATEMENT, TORTS § 614 (1938) sets out the following view: "(1) The court determines whether a communication is capable of defamatory meaning. (2) The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient."

[33] Purvis v. Bremers, 54 Wash. 2d 743, 344 P.2d 705 (1959):

> There seems to be an erroneous impression that, to be libelous *per se*, the statements in a publication must be so clearly defamatory that it ceases to be a question of fact for the jury, and is a matter concerning which there can be no difference of opinion among reasonable men, and becomes a question of law . . . Where the definition of what is libelous *per se* goes far beyond the specifics of a charge of crime, or of unchastity in a woman, into the more nebulous area of what exposes a person to hatred, contempt, ridicule, or obloquy, or deprives him of public confidence or social intercourse, the matter of what constitutes libel *per se* becomes in many instances a question of fact for the jury. This is particularly true where the words . . . depend upon . . . extrinsic circumstances such as

The distinction between libel per se and libel per quod has been called wholly unsound[34] and a confusing problem of legal definition as interpreted by the American courts.[35] To make all potentially harmful language libelous without requiring proof of special damages, however, would open the doors of the courts to litigation over much trivial and harmless language. The court in the instant case enlarges the area of libel per se (potentially harmful language that is actionable without proving special damages) to include words published in a daily newspaper concerning such matters as betrothals, marriages, births, divorces and child custody.

George Ridge

TORTS — MALPRACTICE — STATUTE OF LIMITATIONS RUNS FROM THE DATE OF SURGEON'S NEGLIGENT ACT, NOT ITS SUBSEQUENT DISCOVERY. — *Vaughn v. Langmack* (Ore. 1963)

Plaintiff alleged that on July 7, 1958, the defendant, a licensed physician and surgeon, performed an operation to repair surgically the plaintiff's strangulated inguinal hernia. It was further alleged that upon completion of the operation and prior to closing the incision, the defendant negligently failed to remove a surgical needle from the plaintiff's abdomen. The presence of the needle caused bloating of plaintiff's abdomen, accompanied by severe pain and suffering, but it was not discovered until October 10, 1962. The plaintiff underwent a second operation to have the needle removed and shortly thereafter filed suit. The defendant's demurrer was sustained in the trial court on the ground that the action was barred under Oregon's statute of limitations.[1] On appeal, *held*, affirmed. The statute of limitations in a malpractice action against a physician runs from the time of the physician's allegedly negligent act, and not from the time the negligence is discovered. *Vaughn v. Langmack*, 236 Ore. 542, 390 P.2d 142 (1963).

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where they were published or who read them . . . .

The WASH. REV. CODE § 9.58.010 (1956) states:

> Every malicious publication . . . which shall tend: —
> (1) to expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or
> (2) . . .
> (3) to injure any person . . . in his or her occupation shall be libel.

[34] Carpenter, *Libel Per Se in California and Some Other States*, 17 So. CAL. L. REV. 347 (1957).

[35] THAYER, LEGAL CONTROL OF THE PRESS § 34 (1962).

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[1] ORE. REV. STAT. § 12.110 (1963).

Statutes of limitations are designed to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until the evidence has been lost, memories have faded, and witnesses have disappeared."[2] In the majority of jurisdictions, malpractice actions, including those involving a foreign object left in a patient's body, are governed by general tort statutes of limitations.[3] In recent years, though, seventeen states have enacted statutes dealing specifically with malpractice,[4] of which several allow the patient a designated period in which to file his claim after he discovers, or reasonably should discover, the negligence;[5] whereas others provide that the statute begins to run when the negligent act occurs.[6]

In states where there is no specific statutory provision, the courts have found difficulty resolving when the limitation period commences. Most courts have decided that the statute begins to run, not at the time when the patient discovers or has opportunity to discover the doctor's negligent act, but at the time the negligent act occurs.[7] Advocates of this view argue that a contrary doctrine would permit a

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[2] Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348 (1944).

[3] Alaska, Arizona, California, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. For a typical example, see ARIZ. REV. STAT. ANN. § 12-542 (1956), which provides for the action to be commenced and prosecuted within two years "after the cause of action accrues . . . for injuries to the person of another. . . ."

[4] Alabama, Arkansas, Colorado, Connecticut, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, New York, Ohio, Pennsylvania and South Dakota. See Lillick, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L. Q. 339 (1962).

[5] A plaintiff in Alabama has two years from the negligent act in which to sue, but if the negligence is not reasonably discovered within that period, he is given six months from discovery, or from knowledge of facts which would reasonably lead to discovery. CODE OF ALA. tit. 7, § 25(1) (1960). Connecticut allows one year from the date the injury is discovered or should have been discovered, with an outside limit of three years from the date of the negligent act. CONN. GEN. STAT. § 52-584 (1958). The Missouri statute, MO. STAT. ANN. § 516.140 (1952), requires the action to "be brought within two years from the date of the act of neglect complained of . . . ."; but, another statute, MO. STAT. ANN. § 516.100 (1952), tolls its running until the damage "is capable of ascertainment. . . ."

[6] See, *e.g.*, ARK. STAT. ANN. § 37-205 (1962); IND. STAT. ANN. § 2-627 (1946). An interesting varient appears in Pennsylvania, where the statute commences to run "from the time when the injury was done . . . ." 12 PA. STAT. ANN. § 34 (1953). Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959), held that where a physician negligently left a sponge in a patient's body during an operation, the "injury was done" when, nine years later, the patient discovered the sponge.

[7] *e.g.*, Becker v. Porter, 119 Kan. 626, 240 Pac. 584 (1925) (statute barred an action against a dentist for leaving portions of a drill in the plaintiff's jaw); Wilder v. St. Joseph Hosp., 225 Miss. 42, 82 So.2d 651 (1955) (sponges not discovered for ten years, action barred); Weinstein v. Blanchard, 109 N.J.L. 332, 162 Atl. 601 (1932) (action barred where drainage tube not discovered for seven years); 41 AM. JUR. *Physicians and Surgeons* § 123 (1942); 70 C.J.S. *Physicians and Surgeons* § 60 (1951); WOOD, LIMITATIONS § 179 (4th ed. 1916). See generally Annot., 80 A.L.R.2d 368 (1961); 15 VAND. L. REV. 657 (1962); 64 W. VA. L. REV. 103 (1961).

patient to trace an affliction to an original cause alleged to have happened years ago, with the result that no practicing physician would ever be safe from recurring claims,[8] and urge, as the principal case reasoned, that if the legislature had intended the statute to commence running upon discovery of the negligent act, it would have so provided therein.[9] The application of this doctrine has created shocking results. Thus, one court held that a two-year statute prevented an action where radium beads were negligently permitted to remain in the body of a patient, despite assurances by the physician to the contrary, ultimately resulting in the patient's death six years later, at which time the beads were discovered.[10] Another case in which the cause of action was barred involved forceps which were left in a patient and not discovered until thirty months later when one-half of the forceps was discharged from the plaintiff's bowels.[11]

The courts, in an effort to escape the severity of the majority rule, have developed several exceptions which allow the plaintiff's cause of action to be preserved.[12] One such exception is the "fraudulent concealment" rule, providing that if the practitioner fraudulently conceals his negligence, the statute of limitations is tolled until the patient discovers, or through reasonable diligence should discover, the presence of the foreign object.[13] The courts normally require that the practitioner have actual knowledge of his failure to remove the foreign substance from the patient's body.[14] Several courts have required an affirmative act of fraud,[15] while others have reasoned that silence achieves the same result.[16] In addition, the courts have adopted a

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[8] Albert v. Sherman, 167 Tenn. 133, 67 S.W.2d 140 (1934).

[9] Vaughn v. Langmack, 236 Ore. 542, 390 P.2d 142 (1963). Compare McIver v. Ragan, 15 U.S. (2 Wheat.) 12, 14 (1816), where Chief Justice Marshall similarly reasoned: "If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations an exception which the statute does not include."

[10] See Graham v. Updegraph, 144 Kan. 45, 58 P.2d 475 (1936).

[11] Carter v. Harlan Hosp. Ass'n, 265 Ky. 452, 97 S.W.2d 9 (1936).

[12] See generally Annot., 144 A.L.R. 209 (1943); Annot., 80 A.L.R.2d 368, 377 (1961).

[13] For an excellent definition, see DeHaan v. Winter, 258 Mich. 293, 241 N.W. 923 (1932). See also Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948); Bowan v. McPheeters, 77 Cal. App. 2d 795, 176 P.2d 745 (1947); Barnard v. Thompson, 138 Tex. 277, 158 S.W.2d 486 (1942). *Accord,* Hinkle v. Hargens, 76 S.D. 520, 81 N.W.2d 888 (1957), where the statute was tolled for twenty-one years until discovery when the defendant had fraudulently concealed his negligence in failing to remove a surgical needle from the plaintiff's body.

[14] See, *e.g.,* Hudson v. Moore, 239 Ala. 130, 194 So. 147 (1940); Silvertooth v. Shallenberger, 49 Ga. App. 133, 174 S.E. 365 (1934); Maloney v. Brackett, 275 Mass. 479, 176 N.E. 604 (1931); Albert v. Sherman, 167 Tenn. 133, 67 S.W.2d 140 (1934). *Contra,* Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944), where the court found fraudulent concealment by the defendant although, in so far as the opinion discloses, he was not aware of his negligence.

[15] Pickett v. Aglinsky, 110 F.2d 628 (4th Cir. 1940); Draws v. Levin, 332 Mich. 447, 52 N.W.2d 180 (1952); Bernath v. LeFever, 325 Pa. 43, 189 Atl. 342 (1937).

[16] Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503 (1934); Guy v. Schudlt, 236 Ind. 101, 138 N.E.2d 891 (1956).

second exception, the "continuous treatment" doctrine, which reasons that when the practitioner continues treating the patient following an operation, the extended breach of duty is regarded as such continuing negligence that the statute begins to run at the conclusion of such treatment, and not when the negligent act was committed.[17] Although these doctrines have been effective devices for preventing unjust results in certain situations, the occurrence of a case which satisfies the factual requirements for their application is relatively rare, and, therefore, the outgrowth of these exceptions has not substantially alleviated the harshness of the majority rule.

As a result, and in addition to statutory correction, a growing minority view has developed recently, subscribing to the notion that when an object has been negligently left in a patient's body during an operation, the limitation period does not begin until the patient discovers, or through reasonable diligence should have discovered, the presence of the foreign object.[18] The courts adopting this view have reasoned that although the general statute of limitations was enacted to discourage unnecessary delay and to forestall the prosecution of stale claims, its primary purpose is to promote justice, and not to protect and benefit the negligent practitioner.[19] As Justice Rossman so logically asserted in the dissent in the instant case:

> . . . who can explain why an individual who is anesthetized [during an operation] should be charged with knowledge that his surgeon failed to remove an object which he had placed in the incision. In fact, who can explain why a person should be charged with knowledge of anything that is unknown or unknowable?[20]

The Arizona Supreme Court was confronted with this problem in *Morrison v. Acton*.[21] In that case, a dentist's drill broke during an operation for the extraction of several wisdom teeth and became lodged in the plaintiff's jawbone. Subsequently the plaintiff suffered severe pain, but was assured by the defendant that his pain was a

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[17] Quinton v. United States, 304 F.2d 234 (5th Cir. 1962), in overruling Tessier v. United States, 269 F.2d 305 (1st Cir. 1959), adopted the "continuous treatment" rule. See also Thatcher v. DeTar, 351 Mo. 603, 173 S.W.2d 760 (1943); Budoff v. Kessler, 284 App. Div. 1049, 135 N.Y.S.2d 717 (1954).

[18] Huysman v. Kirsh, 6 Cal.2d 302, 57 P.2d 908 (1936); Hahn v. Claybrook, 130 Md. 179, 100 Atl. 83 (1917); Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961); 42 NEB. L. REV. 180 (1962). While the rule arose in a case involving foreign substance, it has since been applied in California to negligent treatment, *e.g.*, Stafford v. Schultz, 42 Cal.2d 767, 270 P.2d 1 (1954), and the negligent administration of drugs, *e.g.*, Agnew v. Larson, 82 Cal. App.2d 176, 185 P.2d 851 (1947).

[19] Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (1944).

[20] Vaughn v. Langmack, 236 Ore. 542, 390 P.2d 142, 155 (1963).

[21] 68 Ariz. 27, 198 P.2d 590 (1948)

natural result of the operation. Several years later the plaintiff again consulted the defendant regarding his continued pain and resulting aftereffects and, after X-rays were taken, was reassured of its normality. Three years thereafter, during which time the plaintiff remained in constant pain, he retained the services of a second dentist, who, after having X-rayed the jawbone, removed the broken drill, and later testified that the presence of the drill was easily discernable. The court, in affirming its previous decision in the plaintiff's favor,[22] concluded that since the defendant knew or should have known his drill had broken and lodged in the plaintiff's jawbone, and failed to disclose this fact, such constituted "constructive fraud" and that "fraudulent concealment . . . tolls the running of the statute of limitations until the other party discovers or is put upon reasonable notice of the breach of trust . . . ."[23]

The Arizona court has thus circumvented the harsh majority rule and aligned itself with those states which recognize the "fraudulent concealment" exception to that rule. However, a fact situation could easily arise which would not lend itself to the application of this doctrine. It would, therefore, be desirable for Arizona, or any state without a statute clearly directed at this problem, to adopt the so-called "discovery" rule by judicial proclamation, or preferably by the enactment of a malpractice statute providing that the limitation period be tolled until discovery, or such time that the negligence of the practitioner should have been discovered by the patient.

Charles L. Townsdin, Jr.

TORTS — NEGLIGENCE — EXTENT OF CONTRACTOR'S DUTY TO MAINTAIN WARNING SIGNS. — *J. H. Welch & Son Contracting Co. v. Gardner* (Ariz. 1964).

While installing a fire sprinkler system, defendant contractor dug a trench, piled the dirt on the north side of the excavation, and set up barriers with flashing red lights pursuant to a Phoenix ordinance[1] requiring "lights with red glass globes" to be "conspicuously displayed and maintained" from sunset to sunrise around excavations on or near the street. When the plaintiff ran into the dirt obstruction several hours later, there were neither barriers nor lights guarding the ob-

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[22] Acton v. Morrison, 62 Ariz. 139, 155 P.2d 782 (1945).
[23] 68 Ariz. 27, 36, 198 P.2d 590, 596 (1948).

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[1] J. H. Welch & Son Contracting Co. v. Gardner, 96 Ariz. 95, 392 P.2d 567, 569, n. 1 (1964).

struction; the disappearance of the barriers and lights was unexplained. An inspector had been hired by defendant to check on the maintenance of the barriers but had been delayed at another job. Judgment for plaintiff. On appeal, *held,* affirmed. Where a municipal ordinance so requires, the contractor has the duty not only to place warning signs at the street excavation, but also to make such inspections to see that they remain in place, and to take such action for the replacement of the barriers as a reasonable man would take under the circumstances. *J. H. Welch & Son Contracting Co. v. Gardner,* 96 Ariz. 95, 392 P.2d 567 (1964).

The duty to maintain streets and highways in a reasonably safe condition for the public's use did not exist at ancient common law.[2] Today, this duty is imposed on a municipal corporation by the state either expressly by statute,[3] or impliedly from the municipal corporation's charter,[4] or impliedly by a general statute whereby the municipal corporation is authorized to build and maintain streets together with the power to raise money for this purpose.[5]

Pursuant to its obligation to keep the streets and highways, if there is a probability of use, in a reasonably safe condition for the public while in the course of repairing or improving them,[6] and regardless of where the source of the duty is derived from in a particular jurisdiction, authorities generally agree that where a municipal corporation has contracted with another to repair or improve the streets and a dangerous condition has been created by an independent contractor in the course of such repair or improvement, the contractor has the duty to provide warning devices or to otherwise safeguard and warn the public of the potentially dangerous condition.[7] The de-

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[2] SHEARMAN AND REDFIELD, NEGLIGENCE § 342, at 846 (rev. ed. 1941). In Harlan v. City of Tucson, 82 Ariz. 111, 309 P.2d 244 (1957), there is a reference to a common law duty of a city to keep the streets reasonably safe for the traveling public.

[3] SHEARMAN AND REDFIELD, NEGLIGENCE, *supra* note 2, at 827.

[4] PHOENIX, ARIZ., CODE Ch. 4, § 2 (1951).

[5] Clayton v. State, 38 Ariz. 135, 297 Pac. 1037 (1931); ARIZ. REV. STAT. ANN. § 9-276 (Supp. 1964); ARIZ. REV. STAT. ANN. § 18-106 (Supp. 1964); see also McRoberts v. City of Phoenix, 25 Ariz. 466, 218 Pac. 994 (1923); ARIZ. REV. STAT. ANN. § 9-672 (Supp. 1964).

[6] City of Phoenix v. Mayfield, 41 Ariz. 537, 20 P.2d 296 (1933); City of Phoenix v. Clem, 28 Ariz. 315, 237 Pac. 168 (1925); 19 MCQUILLAN, MUNICIPAL CORPORATION § 54.90 (3d ed. 1950).

[7] Town of Flagstaff v. Gomez, 23 Ariz. 184, 202 Pac. 401 (1921); see Annot., 104 A.L.R. 955 (1936); Annot., 7 A.L.R. 1203 (1920).

vices utilized may be left to the contractor's discretion, subject to the exigencies of the particular hazard created, or certain minimal standards may be expressly delineated by statute or ordinance.[8]

Generally, when a dangerous condition has been created in a street or highway and the contractor has taken adequate precautions to warn the public against the danger, no liability will be incurred for an injury which may occur as a result of the unforeseeable removal of the safeguard by a third person.[9] Thus, one court has stated,

> the rule of decision seems to be quite uniform, that it is sufficient to show that proper signals and safeguards were placed about an excavation on quitting work; and neither the corporation nor the contractor is liable if a wrongdoer removes the signals or barricades during the night.[10]

However, this rule is subject to the qualification that when the one responsible for the dangerous condition has notice of the removal of the safeguard, or has reason to anticipate its removal, and it is subsequently removed, he may be liable for any injury resulting from his negligence in failing to put the safeguard back.[11] The duty is one of exercising reasonable care under the circumstances to see that the barricades and other warning devices, once properly placed, are maintained.[12]

The Phoenix ordinance stated this duty to "maintain" the protective lighting devices: "Danger Signals. Lights with red glass globes shall be conspicuously displayed and maintained during the time from sunset to sunrise whenever any excavation exists in or adjacent to

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[8] J. H. Welch & Son Contracting Co. v. Gardner, 96 Ariz. 95, 392 P.2d 567, 569, n. 1 (1964).

[9] Stockton Automobile Co. v. Carter, 154 Cal. 402, 97 Pac. 881 (1908), Annot., 62 A.L.R. 500 (1929); see *e.g.*, Myers v. City of Kansas, 108 Mo. 480, 18 S.W. 914 (1892), where it was held reversible error to refuse an instruction that if an excavation was properly guarded by barriers and lighted pursuant to a city ordinance the night before plaintiff fell, the city had not performed its duty relieving it of liability; Parker v. Cohoes, 10 Hun. 531 (N.Y. 1877), *aff'd* 74 N.Y. 610 (1878); Raymond v. Keseberg, 91 Wis. 191, 64 N.W. 861 (1895).

[10] Ball v. Independence, 41 Mo. App. 469, 475 (1890).

[11] Beck v. Hood, 185 Pa. 32, 39 Atl. 842 (1898); *e.g.*, Crawford v. Wilson & B. Mfg. Co., 8 Misc. 48, 28 N.Y. Supp. 514 (1894), *aff'd*, 144 N.Y. 705, 39 N.E. 857 (1895), where the defendant was bound to exercise care to see that the barriers were kept up all the time. The court in *Crawford*, 28 N.Y. Supp. at 516, stated that, "if the boys were in the habit of removing the guards, then the defendant was bound to be more vigilant." See also Myers v. Springfield, 112 Mass. 489 (1873) which concerned a crowded thoroughfare of a populous city.

[12] Stockton Auto Co. v. Carter, 154 Cal. 402, 97 Pac. 881 (1908); Crawford v. Wilson & B. Mfg. Co., 8 Misc. 48. 28 N.Y. Supp. 514 (1894), *aff'd*, 144 N.Y. 708, 39 N.E. 857 (1895); Beck v. Hood, 185 Pa. 32, 39 Atl. 842 (1898).

any street."[13] A violation of this type of ordinance is negligence per se.[14]

It would appear from the principal case that a contractor must go very far, indeed, reasonably to maintain barriers and other protective devices once set up. In holding that the four hour lapse between the installation of the safeguards at the end of work (4 p.m.) and the occurrence of the accident (approximately 8 p.m.) was of such prolonged duration that the failure to discover the protective devices' removal would support a jury verdict imposing liability for negligence, the court seems to impose a very high standard of reasonable care.

The authorities relied upon by the court in the instant case are distinguishable, in that they rested upon facts which were absent from the present case.[15] In those decisions, there either existed notice on the contractor's part that mischievous lads[16] or anonymous third parties[17] had in the past removed the barriers so as to require from the contractor a higher degree of vigilance, or the time factor between the setting up of the safeguards, or their last inspection, and the subsequent accident was of greater length than in the instant case.[18] Sometimes, both a past history of removal and a lengthy time period are

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[13] J. H. Welch & Son Contracting Co. v. Gardner, 96 Ariz. 95, 392 P.2d 567, 569, n. 1 (1964).

[14] Caldwell v. Tremper, 90 Ariz. 241, 367 P.2d 266 (1962); Campbell v. Brinson, 89 Ariz. 197, 360 P.2d 211 (1961); 19 McQUILLAN, MUNICIPAL CORPORATIONS § 54.92 (3d ed. 1950).

[15] Williams v. Wise, 255 Ala. 322, 51 So. 2d 1 (1951); Primus v. City of Hot Springs, 57 N.M. 190, 256 P.2d 1065 (1953); Smith v. Village of Pleasantville, 20 N.Y.S.2d 594 (1940); Crawford v. Wilson & B. Mfg. Co., 8 Misc. 48, 28 N.Y. Supp. 514 (1894), *aff'd*, 144 N.Y. 708, 39 N.E. 857 (1895); Walsh v. City of Pittsburgh, 379 Pa. 229, 108 A.2d 769 (1954); Beck v. Hood, 185 Pa. 32, 39 Atl. 842 (1898); Schrader v. Kentucky-Tennessee Light & Power Co., 157 Tenn. 391, 8 S.W.2d 495 (1928); Fletcher v. City of Aberdeen, 54 Wash. 2d 174, 338 P.2d 743 (1959).

[16] Smith v. Village of Pleasantville, 20 N.Y.S.2d 594 (1940); Crawford v. Wilson & B. Mfg. Co., 8 Misc. 48, 28 N.Y. Supp. 514 (1894), *aff'd*, 144 N.Y. 708, 39 N.E. 857 (1895).

[17] Collins v. New Orleans, 3 La. App. 299 (1925) (where passers-by removed barricades blocking passage over condemned bridge); Blessington v. Boston, 153 Mass. 409, 26 N.E. 1113 (1891); Primus v. City of Hot Springs, 57 N.M. 190, 256 P.2d 1065 (1953); Cox v. Nova Scotia Tel. Co., 35 N.S. 148 (1902) (where the barriers were removed while the watchman was engaged in driving boys away from the excavation); Schrader v. Kentucky-Tennessee Light & Power Co., 157 Tenn. 391, 8 S.W.2d 495 (1928); Fletcher v. City of Aberdeen, 54 Wash. 2d 174, 338 P.2d 743 (1959) (where barriers were put up but an employee removed them to facilitate his work and negligently forgot to replace them, the city was held liable).

[18] Williams v. Wise, 255 Ala. 322, 51 So. 2d 1 (1951) (involved a time period from December of 1948 to March of 1949); Myers v. City of Kansas, 108 Mo. 480, 18 S.W. 914 (1892) (where the barriers were put up the night before); Walsh v. City of Pittsburgh, 39 Pa. 229, 108 A.2d 769 (1954) (a period of 14 hours); Schrader v. Kentucky-Tennessee Light & Power Co., 157 Tenn. 391, 8 S.W.2d 495 (1928), 62 A.L.R. 495 (1929) (involved an 11 hour time element).

combined to constitute negligence on the contractor's part.[19] Other factors that have influenced the courts[20] in ascertaining just what was reasonable care are heavy rain, strong winds,[21] continuous traffic, and a populous area,[22] sometimes calling for greater precautions than just warning lights.

With the court failing to observe the presence of any of the above factors in the instant case[23] the decision seems to extend the contractor's liability further than any case of a similar nature which this research has revealed. To allow a four hour lapse of time without inspection of barriers and warning lights due to the improvident delay of an inspector to support a finding that a contractor has not conformed to the standard of reasonable care and is therefore liable for negligence seems to go far in the direction of imposing absolute liability while speaking in terms of reasonable care.

G. Starr Rounds

TORTS — NEGLIGENCE — STANDARD OF CARE REQUIRED OF COMMON CARRIER TOWARD PAYING PASSENGERS — *Frederick v. City of Detroit, Dep't of Street Rys.* (Mich. 1963).

In an action to recover for injuries caused by slipping and falling on loose rubber flooring, while alighting from a bus operated by defendant municipality, the jury returned a verdict for the defendant, and the plaintiff was denied a motion for a new trial. The plaintiff claimed that a common carrier owes its fare passengers a high degree of care, and that instructions of the trial court wrongfully advised the jury that the duty was to exercise only due care under the circumstances. On appeal, *held*, affirmed. Toward paying passengers, a common carrier has the duty to exercise the due care which a rea-

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[19] Primus v. City of Hot Springs, 57 N.M. 190, 256 P.2d 1065 (1953); Schrader v. Kentucky-Tennessee Light & Power Co., 157 Tenn. 391, 8 S.W.2d 495 (1928).

[20] Smith v. Village of Pleasantville, 20 N.Y.S.2d 594 (1940), where at p. 598, the court stated:

> There may be such undertakings, where the crowded character of travel, the peculiar uses of the highway at the particular point and various other conditions, would make the familiar method of warning by the use of red lanterns utterly inadequate as a safeguard, and might even require the constant presence of a watchman by night to constitute the exercise of reasonable care.

[21] City of Rome v. Alexander, 63 Ga. App. 301, 11 S.E.2d 52 (1940).

[22] Walsh v. City of Pittsburgh, 39 Pa. 229, 108 A.2d 769 (1954).

[23] The city of Phoenix is mentioned in the opinion and this may give rise to the question of whether the factor of a "populous area" was involved. However, there was no consideration of this in the opinion and it is impossible to tell what, if any, influence it may have exerted upon the court.

sonably prudent carrier would exercise under the circumstances. *Frederick v. City of Detroit, Dep't of Street Rys.*, 370 Mich. 425, 121 N.W.2d 918 (1963).

In 1809 the case of *Christie v. Griggs*[1] came before the English Court of Common Pleas. The plaintiff, while a passenger on defendant's stagecoach, had been injured by falling from the stage when an axle-tree broke. Although the duty of care required of the defendant as a carrier was not at issue, Chief Justice Sir James Mansfield stated that as a common carrier of passengers the defendant was required to provide transportation as safe as human care and foresight would permit.

The Christie case is one of two[2] which have been referred to as the beginning of the modern rule that a common carrier has the duty, for the welfare and protection of paying passengers, to exercise the highest degree of care that reasonably can be expected, in view of the mode and character of the conveyance and consistent with practical operation of its business.[3] This standard, requiring exercise of the highest or utmost degree of care, is accepted by most jurisdictions,[4] including Arizona.[5] A few states prescribe a duty of

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[1] 2 Campbell 79 (1809).

[2] The other case, also from the Court of Common Pleas, is Aston v. Heaven, 2 Espinasse 533 (1796).

[3] Green, *High Care and Gross Negligence*, 23 ILL. L. REV. 4 (1928-29).

[4] *E.g.*, McBride v. Atchison Topeka & Santa Fe Ry. Co., 44 Cal.2d 113, 279 P.2d 966 (1955); Publix Cab Co. v. Fessler, 138 Colo. 547, 335 P.2d 865 (1959); Fournier v. Central Taxi Co., 331 Mass. 248, 118 N.E.2d 767 (1954); Pruitt v. Lincoln City Lines Inc., 147 Neb. 204, 22 N.W.2d 651 (1946); Hoskins v. Albuquerque Bus Co., 72 N.M. 217, 382 P.2d 700 (1963); Simpson v. Grey Line Co., 226 Ore. 71, 358 P.2d 516 (1961); Skyline Cab Co. v. Bradley, 325 S.W.2d 176 (Tex. Civ. App. 1959); Torrez v. Peck, 57 Wash.2d 302, 356 P.2d 703 (1960); Spleas v. Milwaukee & Suburban Transp. Corp., 21 Wis.2d 635, 124 N.W.2d 593 (1963).

Additional cases and jurisdictions may be found in 10 C.J. *Carriers* § 1294 (1917); 13 C.J.S. *Carriers* § 677 (1939); 10 AM. JUR. *Carriers* § 1245 (1937); 14 AM. JUR. 2d *Carriers* § 916 (1964).

Annotations dealing with the care required and general liability of a carrier include 96 A.L.R. 727 (1935); 117 A.L.R. 522 (1938); 126 A.L.R. 461 (1940); 74 A.L.R.2d 1336 (1960); and especially 9 A.L.R.2d 938 (1950) concerning the liability of motorbus carriers for injuries sustained through falls while alighting from the vehicle.

Statements of the standard vary in use of terminology to denote the quantum of care required. The words "high," "highest," and "utmost" care, or degree of care, appear most frequently. Unless otherwise indicated in the text or notes, the phrase "high degree standard of care" will be used by the author to represent any terminology which requires an extraordinary quantum of care.

[5] Lansford v. Tucson Aviation Co., 73 Ariz. 277, 240 P.2d 545 (1952), Nichols v. City of Phoenix, 68 Ariz. 124, 202 P.2d 201 (1949); Atchison T.&S.F. Ry. Co. v. France, 54 Ariz. 140, 94 P.2d 434 (1939); Southern Pacific Co. v. Hogan, 13 Ariz. 34, 108 P. 240 (1910).

utmost care by statute.[6] In no jurisdiction does the standard require a carrier to insure the absolute safety of passengers.[7]

A small but adamant minority disapproves use of words such as "high degree" or "utmost care" in describing the duty of a common carrier. Indiana rejected the doctrine in 1919.[8] In the instant case Michigan condemned the use of terminology which imposes an extraordinary quantum of care upon a common carrier. The rationale and conclusions of the opinion may be summarized as follows: (1) the common law standard of care is constant, with the duty in all cases being to exercise due care appropriate to the circumstances; (2) the quantum of care required, regardless of the relationship between the parties, is a question of fact, and when a court instructs that a carrier must exercise a superlative degree of care or any quantum greater than due care it invades the province of the jury;[9] (3) the jury should be instructed that a carrier has the duty to do what a reasonably prudent carrier would do under the circumstances; and (4) it is the jury's function to determine the care which a reasonably prudent carrier would exercise and whether the defendant fulfilled

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Concerning the care required of a defendant municipality as a common carrier, the court stated in the *Nichols* case, *supra* at 130, 202 P.2d at 204, "The plaintiffs are entitled to rely upon the well settled law that the City of Phoenix, acting in its proprietary capacity as a common carrier of passengers for hire, is bound to exercise the highest degree of care practicable under the circumstances."

[6] CAL. CIV. CODE § 2100; REV. CODE MONT. 1947, ch. 4, § 8.405; OKLA. STAT. 1941, ch. 13, § 32; S.D. CODE 1934, ch. 8.02, § 8.0202.

[7] *E.g.*, Hardy v. Ingram, 257 N.C. 473, 126 S.E.2d 55 (1962); De Mezzes v. Raditz, 193 Pa. Super. 103, 164 A.2d 55 (1960); Burke v. United Elec. Rys., 79 R.I. 50, 83 A.2d 88 (1951).

In Arizona, this limitation on the carrier's duty, as stated in Alexander v. Pacific Greyhound Lines, 65 Ariz. 187, 177 P.2d 229 (1947), is reaffirmed in the case of Nichols v. City of Phoenix, 68 Ariz. 124, 202 P.2d 201 (1949).

[8] Union Traction Co. v. Berry, 188 Ind. 514, 121 N.E. 655, 658 (1919), in which the court stated that "The use of such terms as 'slight care,' 'great care,' 'highest degree of care,' or other like expressions in instructions as indicating the quantum of care the law exacts under special conditions and circumstances is misleading; and when so used they constitute an invasion of the province of the jury, whose function it is to determine what amount of care is required to measure up to the duty imposed by law under the facts of the particular case. The law imposes but one duty in such cases, and that is the duty to use due care; . . ."

[9] The court in the instant case specifically rejects the terms "high care," "higher care," "highest care," "highest degree of care," and "highest degree of care and caution." It should be noted that the trial court used the phrase "higher degree of care" to describe the defendant's duty. However, the Supreme Court of Michigan felt that the remainder of the instruction so qualified and explained the phrase that, in effect, due care under the circumstances was actually the duty imposed. Notwithstanding their approval of this particular instruction, the court observed that it ". . . lacks the clarity to be desired in jury instruction," 121 N.W.2d at 924. The clear implication of the whole opinion is that any terminology imposing an extraordinary quantum of care upon a carrier should be avoided in the future.

this duty.[10]

The Michigan opinion in the instant case and the similar attitude adopted earlier by Indiana are supported indirectly by other judicial criticism of the high degree standard of care. In *Hecht Co. Inc. v. Jacobsen*,[11] the United States Court of Appeals for the District of Columbia urged that classification of care into degrees be abandoned and that a carrier be held to use due care as required by the circumstances.[12] In 1950, the Court of Appeals of New York suggested ". . . re-examination of those decisions wherein this court has upheld instructions by trial judges to the effect that a common carrier does, in certain situations, owe a 'high,' a 'very high' or the 'utmost' degree of care in transporting its passengers."[13] There have been no cases since 1950 in which the New York Court of Appeals has had an opportunity to indicate whether it will, in a proper case, abandon the high degree standard of care.

Although judicial support for the position adopted by Michigan in the instant case remains limited, there is considerable condemnation of the high degree standard by legal scholars.[14] Criticism by the writers generally follows the reasoning of the Michigan and Indiana courts in declaring that there is but one standard of care, that being the care of a reasonably prudent man under the circumstances which may, as they vary, require greater or less diligence, a conclusion neatly summarized by Professor Harper when he wrote:

> This distinction (between degrees of care) . . . confuses the quantum of diligence with the standard by which a defendant's conduct is to be tested or the quality of the duty owed. Certainly highly hazardous situations will require greater pre-

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[10] The court observed that the case of Michigan Cent. R.R. Co. v. Coleman, 28 Mich. 440 (1874) correctly required a carrier to exercise due care under the circumstances and that later Marshall v. Wabash R.R., 184 Mich. 593, 151 N.W. 696 (1915) incorrectly imposed the highest degree of care upon a common carrier. The court felt that later cases had, though not always in unequivocal language, returned to the holding of the *Coleman* case, either by disregarding the *Marshall* case or by qualifying and explaining it in such a manner that due care was the standard being called for. The instant case clearly reaffirms *Coleman* and overrules cases inconsistent with it.

[11] 108 F.2d 13 (D.C. Cir. 1950).

[12] The suggestion was dictum and not followed later. See Schaller v. Capital City Transit Co., 239 F.2d 73 (D.C. Cir. 1956).

[13] McLean v. Triboro Coach Corp., 302 N.Y. 49, 96 N.E.2d 83, 84 (1950).

[14] Green, *High Care and Gross Negligence*, 23 ILL. L. REV. 4 (1928-29), a comprehensive article which well represents the gist of literary criticism of the high degree standard as well as of the related topic of the classification of negligence into degrees.

See also the following illustrative casenotes: 19 COLUM. L. REV. 166 (1919); 7 FORDHAM L. REV. 256 (1938); 39 N.C.L. REV. 294 (1961).

> cautions, not because the measure of duty is greater, but because "due care," that is the precautions which a reasonable man would take, are greater. . . . As Professor Smith has put it, there are no degrees of care as a matter of law; there are merely different amounts of care as a matter of fact.[15]

With regard to the meaning attached to the high degree standard of care as used by the courts, Professor Harper concluded that ". . . even modern courts although sometimes employing dubious language, usually show by the context that ordinary care, the care that the reasonable man would exercise under all the circumstances, is the measure of duty . . ."[16] Some of the cases support such a conclusion.[17] The language of one Arizona case could be so construed.[18] However, in a great many opinions no attempt is made to define or qualify the high degree standard in such a manner.[19] Nevertheless, Professor Harper's view is echoed more recently by another distinguished scholar, Dean Prosser, when he wrote that, "Although the language used by the courts sometimes seems to indicate that a special standard is being applied, it would appear that none of these cases should logically call for any departure from the usual formula."[20]

Notwithstanding the comments of legal writers, and however susceptible various statements of the high degree standard may be to different interpretations, the majority of courts have required its use.[21] When the standard of care is analyzed in terms consistent with the vast majority of judicial opinions, rather than the criticisms of legal writers, it seems that (1) the standard of care is *not* constant; (2) that there is "due care," a concept which adequately expresses the duty

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[15] HARPER, TORTS § 74 at 170-71 (1933).

[16] *Id.* at 171.

[17] See, *e.g.*, Hathaway v. Checker Taxi Co. Inc., 321 Mass. 406, 73 N.E.2d 603 (1947); Chicago R.I.&P. Ry. Co. v. Shelton, 135 Okla. 53, 273 Pac. 988 (1929).

[18] See Atchison T.&S.F. Ry. Co. v. France, 54 Ariz. 140, 94 P.2d 434 (1939).

[19] See, *e.g.*, Warner v. Capital Transit Co., 162 F. Supp. 253 (D.D.C. 1958); Nichols v. City of Phoenix, 68 Ariz. 124, 202 P.2d 201 (1949); O'Malley v. Laurel Line Bus Co., 311 Pa. 251, 166 Atl. 868 (1933).

[20] PROSSER, TORTS § 33 at 147-48 (2d ed. 1955).

[21] Michigan and Indiana appear to be the only states which have unequivocally rejected the standard. Professor Green, in his article on degrees of care and negligence, Green, *supra*, note 14, asserts that Maine repudiated the doctrine in Raymond v. Portland R.R. Co., 100 Me. 529, 62 Atl. 602 (1905). However, in later cases the Supreme Judicial Court of Maine continued to use language of the high degree standard in discussing the duty of a common carrier. See Gould v. Maine Cent. Transp. Co., 136 Me. 336, 9 A.2d 263 (1939) and Doughty v. Maine Cent. Transp. Co., 141 Me. 124, 39 A.2d 758 (1944). It seems that the rule in Maine needs the same clarification which the Michigan court accomplished in the instant case.

owed in most cases and for a minority of the courts in carrier cases; and (3) there is a high degree of care, a standard requiring the exercise of greater precaution and diligence than is required by the duty to exercise only due care, consequently, a measure of duty which is different from the duty to use due care. For those who would urge abandonment of the majority view upon other jurisdictions, the Michigan opinion in the instant case is an excellent source for the reasoning upon which the contrary view is predicated.

Russell G. Sheley, Jr.

WILLS — PERSONAL REPRESENTATIVES — OBLIGATION TO DISTRIBUTE THE REAL PROPERTY LEFT BY AN ESTATE. — *Burns v. Superior Court* (Ariz. 1964).

Petitioner brought this proceeding to compel the executor of an estate to deliver possession of the real property to her, as the devisee of said property, under § 14-651 of the Arizona Revised Statutes. In an earlier petition, she had filed for distribution before final settlement, pursuant to the provisions of § 14-652 of the Arizona Revised Statutes, and the court had denied her request. No appeal was taken on the original petition and the time therefor had expired. Respondents contended that the denial of the first petition was res judicata of the issues raised here. The Supreme Court of Arizona, on original proceeding, *held,* a writ of mandamus would lie to compel the superior court to order delivery of the property. The executor of an estate may be ordered to deliver possession of real property to the devisee when the executor has cash or cash equivalents to pay all debts and the time for presentation of claims against the estate has expired. *Burns v. Superior Court,* 397 P.2d 448 (Ariz. 1964).

At common law the real property of a decedent passed directly to his heirs or devisees without the intervention of a personal representative,[1] while the personal property passed directly into the hands of the representative.[2] Thus, as to realty, a will was regarded primarily as a conveyance, and no provisions for probate or administration were necessary to pass and vest title to the realty in the devisee or heir.[3] Nor was administration necessary to vest or clear title of the heirs of an intestate in and to his realty.[4] The heir was entitled to enter at

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[1] Aubuchon v. Lory, 23 Mo. 99 (1856); 3 AMERICAN LAW OF PROPERTY § 14.6, at 573 (Casner ed. 1952).

[2] TURRENTINE, CASES AND TEXT ON WILLS AND ADMINISTRATION 4 (2d ed. 1962) citing ATKINSON, WILLS 37, 41 (2d ed. 1953); 1 PAGE, WILLS § 1.4 (Bowe-Parker ed. 1960).

[3] *In re* Patterson's Estate, 155 Cal. 626, 102 Pac. 941 (1909); *In re* John's Will, 30 Ore. 494, 47 Pac. 341 (1896); *In re* Hoscheid's Estate, 78 Wash. 309, 139 Pac. 61 (1914).

[4] BANCROFT'S PROBATE PRACTICE 2d § 1 (1950).

once.[5] Not only was real property not subject to administration at common law, but it could not be liable for the decedent's debts unless it had been specifically made the security for payment of the creditor's claim, or unless the heir or devisee had become liable by the terms of an instrument on which the claim was based.[6]

Modern statutes have substantially changed this theory and now the title which heirs and devisees take, either in realty or personalty, is expressly made subject to administration, by which it may be used to satisfy the decedent's debts, family allowances, and the expenses of administration.[7] Administration is usually required whenever there is property, either real or personal, of sufficient value to be of any importance, and the person dies leaving unpaid debts.[8] The mere fact that there *may be* debts has been considered sufficient to render administration proper, and normally to determine whether there are debts of the estate, administration is necessary.[9] In some instances the courts have held it unnecessary that administration be carried out. Such is the case where nothing remains for a final disposition of the estate except the distribution, and thus persons entitled to the estate are allowed to take possession of the property without the necessity of administration.[10]

Statutes generally provide that the personal representative is entitled to possession of both the real and personal property of the decedent, although title thereto vests in the heirs and devisees, and is entitled to receive the rents and profits until the estate is settled or delivered over by a court order to those entitled thereto.[11] Administration or probate is not necessary to vest title, but it is essential to clear the title of the debts of decedent or the expenses of an administration afterward instituted.[12] When the owner of property dies, his estate, including both real and personal property, is immediately impressed with a trust for the benefit of his creditors, heirs and devisees.[13]

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[5] TURRENTINE, CASES AND TEXT ON WILLS AND ADMINISTRATION 4 (2d ed. 1962).

[6] ATKINSON, WILLS 13 (2d ed. 1953) citing 2 POLLACK AND MAITLAND, HISTORY OF ENGLISH LAW § 345 (1895).

[7] ARIZ. REV. STAT. ANN. §§ 14-472, 14-537 (1956); CAL. PROB. CODE ANN. §§ 571, 581. See also United States v. Boshart, 91 F.2d 264 (9th Cir. 1937); Stephens v. Comstock-Dexter Mines, 54 Ariz. 519, 97 P.2d 202 (1939); Hall v. Alexander, 18 Cal. App. 2d 660, 64 P.2d 767 (1937).

[8] Carson v. Blair, 32 Ga. App. 728, 124 S.E. 808 (1924); BANCROFT'S PROBATE PRACTICE 2d § 2 (1950).

[9] *In re* Collins' Estate, 102 Wash. 697, 173 Pac. 1016 (1913).

[10] Meyers v. Canton Nat'l Bank, 109 F.2d 31 (7th Cir. 1940); Moore v. Brandenberg, 248 Ill. 232, 93 N. E. 733 (1910); Cooper v. Hayward, 71 Minn. 374, 74 N. W. 152 (1898); Roberts v. Garbett, 54 R.I. 150, 171 Atl. 241 (1934); See Annot., 70 A. L. R. 386 (1931).

[11] ARIZ. REV. STAT. ANN. §§ 14-472, 14-537 (1956); CAL. PROB. CODE ANN. §§ 571, 581.

[12] Costello v. Cunningham, 16 Ariz. 447, 147 Pac. 701 (1915), ARIZ. REV. STAT. ANN. §§ 14-472, 14-537 (1956); CAL. PROB. CODE ANN. §§ 571, 581.

[13] Wilson v. Beard, 26 F.2d 860 (2d Cir. 1928); Madison v. Buhl, 51 Idaho 564, 8 P.2d 271 (1932); Moore v. Brandenberg. 248 Ill. 232, 93 N. E. 733 (1910).

It has been said that the representative represents primarily the interests of the creditors and secondarily the interests of the heirs and devisees.[14]

At common law, and under some earlier state statutes, the time for distribution of the estate was set at one year from the date of decedent's death.[15] Today the time for distribution is usually fixed by statute, and the general rule is that distribution should not be made until after payment of all debts and final settlement of the representative's account, or until after the expiration of the statutory period for the filing of claims and settling the estate.[16] Since the duties of the executor are limited to the winding up of the estate and are temporary in character,[17] it is the policy of the law that administration of the estate be had with dispatch and that distribution be made as soon as possible.[18]

This, then, presents a problem as to when the representative is obligated to distribute the real property of the estate to the heirs and devisees. The first and most usual time is when the debts of the estate have been discharged and the final settlement of the representative's account has been accomplished.[19] In addition to this, the representative is obligated to turn the property over to the heir or devisee where it is apparent that there are more assets on hand than will be necessary for the payment of the debts and expenses of administration, and the court has directed distribution.[20]

A third manner in which the representative is obligated to distribute the real property to the heirs or devisees is when the court, pursuant to a petition by the heir or devisee, orders a partial distribution. Partial distribution is purely a statutory power which allows the devisee under a will to acquire part of the property before the final settlement by giving bond for payment of his proportionate share of the estate.[21] Usually the statutes will also require a waiting period after the initial letters of administration are issued before a petition

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[14] Faulkner v. Faulkner, 23 Ariz. 313, 203 Pac. 560 (1922).

[15] Davis v. Harbaugh, 76 Colo. 73, 230 Pac. 103 (1924); Bartlett v. Slater, 53 Conn. 102, 22 Atl. 678 (1885); Smith v. Livermore, 298 Mass. 223, 10 N.E.2d 117 (1937); *In re* McGovern's Estate, 77 Mont. 182, 250 Pac. 812 (1926).

[16] ARIZ. REV. STAT. ANN. §§ 14-561, 14-681 (1956); CAL. PROB. CODE ANN. §§ 700, 701, 754.

[17] Pintek v. Superior Court, 84 Ariz. 279, 327 P.2d 292 (1958); RESTATEMENT (SECOND), TRUSTS § 6, comment *b* (1959).

[18] Pintek v. Superior Court, 84 Ariz. 279, 327 P.2d 292 (1958); ARIZ. REV. STAT. ANN. § 14-669 (1956).

[19] ARIZ. REV. STAT. ANN. §§ 14-703, 14-669 (1956); CAL. PROB. CODE ANN. § 1020.

[20] Burns v. Superior Court, 397 P.2d 448 (Ariz. 1964); ARIZ. REV. STAT. ANN. § 14-651 (1956); CAL. PROB. CODE ANN. § 582. It should be noted that in some jurisdictions there is a statutory order in which assets are consumed to pay debts, personality before realty. See generally, 1960 WISC. L. REV. 365.

[21] *In re* Brickell's Estate, 4 Cal. App. 2d 54, 40 P.2d 579 (1935); *In re* MacGregor's Estate, 168 Misc. 557, 6 N.Y. Supp. 280 (1938); United States Nat'l Bank of Portland v. Krautswashl, 221 Ore. 609, 351 P.2d 947 (1960); ARIZ. REV. STAT. ANN. § 14-652 (1956).

can be acted upon by the court.[22] Thus a representative may be allowed or ordered to make a partial distribution before final settlement of his accounts or the expiration of the statutory period, where it can be made without prejudice to other interested parties.[23] Where the amount which may be necessary to meet further demands on the estate cannot be determined with reasonable certainty, so as to fully protect the representative, a partial distribution will normally be denied.[24] From this the conclusion can be drawn that an heir or devisee is not normally entitled to immediate possession of the realty in an estate, and is entitled to possession prior to the final accounting and distribution only when the amount of the debts of the estate are certain and there is sufficient cash on hand to cover the debts, or where a partial distribution is ordered by the court.

James M. Sakrison

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[22] ARIZ. REV. STAT. ANN. § 14-652 (1956); CAL. PROB. CODE ANN. § 1000.
[23] ARIZ. REV. STAT. ANN. § 14-653 (1956); CAL. PROB. CODE ANN. § 1001.
[24] Fitzroy v. United States, 17 F. Supp. 503 (Ct. Cl. 1937); *In re* O'Dowd's Will, 248 App. Div. 472, 290 N.Y. Supp. 705 (1936).