Notes

ATTORNEY-CLIENT — UNAUTHORIZED PRACTICE OF LAW — ESTATE PLANNING BY A LAYMAN CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW.—

Oregon State Bar v. John H. Miller & Co. (Ore. 1963).

This was a case in the Oregon Supreme Court involving an insurance firm's preparation of estate plans embodying legal analysis. The trial court entered a decree enjoining defendants from engaging in certain of its estate planning activities, and the plaintiff appealed praying for a modification. On appeal, *held,* decree modified. The defendants were enjoined from preparing estate plans embodying legal analysis either as a separate service or as an incident to carrying on their insurance business. *Oregon State Bar v. John H. Miller & Co.,* 385 P.2d 181 (1963).

While one of the greatest problems facing the American Bar as a profession today is the unauthorized practice of law by laymen and corporations, one of the most vexatious aspects of suppressing it is the lack of a comprehensive definition of law practice.[1] As the late Justice Vanderbilt so ably explained it, the reason for prohibiting the practice of law by laymen is not to aid the legal profession but to safeguard the public from the disastrous results which are bound to flow from the activities of untrained and incompetent individuals, assuming to practice a learned profession which entails years of preparation.[2]

Of all the areas in which the unauthorized practice of law has been at issue, estate planning has been recognized as one of the most difficult.[3] This field has presented the greatest amount of unauthorized activity, perhaps because it offers the unauthorized practitioner the largest potential return.[4] The expression "estate planning" was invented about thirty years ago to promote sales of life insurance and now appears in the curricula of most respectable law schools.[5]

What is estate plannng? "Broadly speaking," says Professor Wilkinson,

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[1] Porter, *The Practice of Law—A Definition,* 25 U.P. NEWS 215 (1959); 82 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 309 (1957); 24 U.P. NEWS 29 (1959). See also Arkansas Bar Ass'n v. Block, 230 Ark. 430, 323 S.W.2d 912 (1959); State v. Chamberlain, 132 Wash. 520, 232 Pac. 337 (1925); Arkansas Bar Ass'n v. Washington Ass'n of Realtors, 41 Wash. 2d 697, 251 P.2d 619 (1952). In the State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), the Arizona Supreme Court, in approaching a definition of the practice of law, said it consists of "those acts which lawyers customarily have carried on." For an excellent historical treatment of what constitutes the practice of law see Rhode Island Bar Ass'n v. Automobile Serv. Ass'n, 55 R.I. 122, 179 Atl. 139 (1935), 100 A.L.R. 226. In general see 111 A.L.R. 19 (1937), 125 A.L.R. 1173 (1940), 151 A.L.R. 781 (1944).

[2] *In re* Baker, 8 N.J. 321, 85 A.2d 505 (1951) quoted in 25 U.P. NEWS 81, 85 (1959). It is interesting to note that the first unauthorized practice statute was enacted in 1292 under Edward I. For an excellent historical account of the practice of law see Von Baur, *An Historical Sketch of the Unauthorized Practice of Law,* U.P. NEWS 1 (1958).

[3] 29 U.P. NEWS 15 (1963); 49 A.B.A.J. 139 (1963).

[4] 29 U.P. NEWS 327 (1963).

[5] Trachtman, *A Credo For Estate Lawyers,* 27 U.P. NEWS 357 (1961).

"estate planning involves the consideration of the entire estate of the client, including all assets and prospective earnings, and of all liabilities, present and prospective, with a view to maximum conservation of his estate for himself and his beneficiaries."[6] An informative opinion dealing with estate planning and the unauthorized practice of law was drafted by the American Bar Association in response to many complaints charging an invasion by numerous laymen of the branch of law known as estate planning.[7] As might be expected, such invasion has led to litigation. The instant case was the first case by a state supreme court on the question of whether a corporation can engage in estate planning.[8]

The Oregon Bar filed suit against the defendant corporation in 1960 alleging that it was engaged in the unauthorized practice of law in connection with its insurance business. It offered services to aid in financial and estate planning of individuals, solicited business through salesmen and prepared reports to clients containing "suggestions" regarding the transfer of assets, the making of gifts, use of marital deduction, inter vivos and testamentary trusts, and other devices to minimize taxes. It even examined "clients," wills for possible tax savings. The trial court enjoined the corporation from engaging in most of its estate-planning activities, but did permit it to give advice concerning certain phases of its operation.[9] The Bar appealed asking for a modification of that part of the decree which permitted the defendant to estimate cash requirements for estate tax purposes and to advise on tax consequences of life insurance. In holding for the Bar, the court modified the trial court's decree and systematically disposed of the defendants various defenses.

The court found no merit in the standard defense that these services are incidental to selling life insurance, saying that Oregon had already rejected the "incidental theory."[10] Furthermore, the court found that

[6] Rollison, *The History of Estate Planning*, 37 NOTRE DAME LAW. 160 (1961); Wilkinson, *Life Insurance and Estate Planning Tax Aspects*, 38 TEXAS L. REV. 167 (1959).

[7] A.B.A. Opinion 1959-A found in 45 A.B.A.J. 1296 (1959) and 25 U.P. NEWS 210 (1959). The opinion is commented on in 32 N.Y.S. BULL. 10 (1960). In part, it states:

> In general, however, pursued to its proper conclusion, estate planning necessarily involves the application of legal principles of the law of wills and decedents' estates, the law of trusts and future interests, the law of real and personal property, the law of taxation, practice in the Probate and Chancery courts, or other fields of law. When such is the case, the work involved in estate planning includes legal research, the giving of legal advice or the drafting of legal instruments.
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> There can thus be no question that estate planning, . . . , involves legal work and constitutes the practice of law.

[8] Oregon State Bar v. John H. Miller & Co., 385 P.2d 181 (1963), commented on in 29 U.P. NEWS 298 (1963).

[9] See the trial court opinion of February 7, 1962 and the injunction issued March 15, 1962, found in 28 U.P. NEWS 77 (1962) or in the instant case which reviews the trial court's injunction at page 183.

[10] This view was rejected in Oregon State Bar v. Security Escrows, Inc., 377 P.2d 334 (1962); see also 27 U.P. NEWS 217, 219-228, for a review of the "Incidental Theory."

the legal element in order to fall outside the statute[11] must not only be incidental, it must be insubstantial,[12] and stated, "It cannot be said that one who plans another person's estate employs the law only in an insubstantial way."[13] The defendant had contended that its advice was given in terms of "suggestions" to be reviewed by a lawyer and therefore it was not engaged in the practice of law. In refuting this contention the court answered, "whether the report takes the form of suggestions . . . subjected to further scrutiny by a lawyer, the fact remains that the client received advice from defendants and the advice involves the application of legal principles. This constitutes the practice of law."[14]

The court concluded by indicating that the defendants could only "generally" explain alternative methods of disposing of assets, and only "generally" explain that life insurance may be an effective means of minimizing a customer's taxes. If it could not do so "without drawing upon the law to explain the basis for making the choice of alternatives," then even this was prohibited.[15] In other words, it would seem that the court curtailed the defendants' activities in this field to little or nothing—reasoning that without the right to point out specific tax advantages through the use of insurance, the defendants can take no action until such time as a lawyer has been consulted and performs the "legal analysis" necessary to formulate an estate plan. At this point insurance advice would be acceptable, if not necessary.

The unauthorized practice of law is practice by unqualified persons, and the bar itself actually arose out of a public demand for the exclusion of those who assumed to practice law without adequate qualifications.[16] It is interesting to note that every state has a licensing statute prohibiting unlawful practice to insure that only qualified people are engaged in the practice of law.[17] Traditionally, this prohibition has been enforced by injunctive relief, contempt proceedings, or misdemeanor convictions.[18]

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[11] ORE. REV. STAT. 9.160 (1953) "Except for the right reserved to litigants by O.R.S. 9.320 to prosecute or defend a cause in person, no person shall practice law or represent himself as qualified to practice law unless he is an active member of the Oregon State Bar."

[12] Oregon State Bar v. John H. Miller & Co., 385 P.2d 181 (1963).

[13] *Id.* at 182.

[14] *Ibid.*

[15] *Id.* at 183; the Oregon case cited Chicago Bar Ass'n v. Financial Planning, Inc. (Super. Ct., Cook County, Illinois), 24 U.P. NEWS 29 (1958); Opinion 1959-A, American Bar Association Standing Committee on Unauthorized Practice of Law; Eplin, *Unauthorized Practice and Estate Planning*, 26 U.P. NEWS 104 (1960). See also the Special Master's Report of the case in 25 U.P. NEWS 221 (1959).

[16] 24 U.P. NEWS 1 (1958).

[17] See 45 CORNELL L.Q. 128 n. 17 (1959) for an extensive list of state statutes and licensing requirements.

[18] For cases on injunctive relief: Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); Washington State Bar Ass'n v. Washington

If unlawful practice were limited to a few fields, the situation would not be so alarming. However, laymen and corporations have invaded every field of the practice of law.[19] "But it has been said 'What is wrong with that, if these laymen can produce legal services more cheaply and efficiently than the lawyer?' The answer is that the entire idea is false for they cannot in the nature of things give disinterested advice or undivided loyalty to the person whom they seek to represent."[20]

In this never-ending struggle to stop the unauthorized practice of law, it has been noted that it is really the public's fight, but only the Bar can conduct it effectively.[21] In view of this, the Standing Committee on the Unauthorized Practice of Law was created to deal with the problem on a national basis in 1930.[22] To facilitate its main objective, the committee jointly adopted a "Statement of Principles" with various lay groups.[23] In the area of estate planning, the principles adopted with the

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Ass'n of Realtors, 41 Wash. 2d 697, 251 P.2d 619 (1952). For cases on contempt proceedings: People ex rel. Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N.E.2d 941, 111 A.L.R. 1, *cert. denied*, 302 U.S. 728 (1937); Bumps v. Dist. Court, 232 Ia. 623, 5 N.W.2d 914 (1942); Rhode Island Bar Ass'n v. Automobile Serv. Ass'n, 55 R.I. 122, 179 A. 139, 100 A.L.R. 226 (1935). For statutes on misdemeanor violations: W. VA. CODE ANN. § 2853 (1961); ARIZ. REV. STAT. ANN. § 32-261 (1956):

> Practice of law by active members only; violation; penalty.
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> A. No person shall practice law in this state unless he is an active member of the state bar in good standing as defined in this chapter.
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> B. A person who, not being an active member of the state bar, or who after he has been disbarred, or while suspended from membership in the state bar, practices law, is guilty of a misdemeanor.

For a further collection of cases see 2 ARIZ. L. REV. 270 (1960) and West Virginia State Bar v. Early, 144 W.Va. 504, 109 S.E.2d 420 (1959).

[19] Buchignani, *The Practice of Law—Why Is It A Profession*, 24 U.P. NEWS 2 (1958). As an example of the invasion, he lists the following:

> Real estate brokers (now Realtors) have become "experts" on conveyancing; life insurance salesmen (now Certified Life Underwriters), have become "experts" on estate planning; bank employees (now Trust Officers), have become "experts" on wills and trusts, and generally handle all legal matters connected with estates; . . . .

[20] *Id.* at 6. In general see OTTERBOURG, A STUDY OF UNAUTHORIZED PRACTICE OF LAW (1951).

[21] Bumps v. District Court, 232 Ia. 623, 5 N.W.2d 914 (1942); see also 25 U.P. NEWS 199, 209 (1959). The decided cases make it clear that a lawyer who organizes or helps a lay group to practice law is subject to strict discipline by the courts. The Canons of Professional Ethics say that "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate." Canon 47, American Bar Association Canons of Professional and Judicial Ethics (1957); 26 A.B.A.J. 104 (1940); Marks, *Lawyer Conduct in Title Work*, 9 STATE BAR OF ARIZONA NEWS LETTER No. 4, at 3 (1962); State Bar of Ariz. v. Arizona Land & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961).

[22] Cedarquist, *The American Bar Association and Unauthorized Practice Today*, 27 U.P. NEWS 413 (1961).

[23] Adler, *A Review of the National Conference Groups and Statements of Principles*, 26 U.P. NEWS 261 (1960). Seven important competing businesses through their national associations have entered into written agreements with the American Bar Association concerning the unauthorized practice of law. They are the accountants,

trust and life insurance industries are the most significant. Fortunately for the public and the profession, good cooperation is being received from both.[24]

Under the conventional analysis, estate planners could be divided into roughly there categories: (1) trust companies; (2) life insurance agents; (3) "pure estate planners"—laymen whose primary business is the development of estate plans not connected with any other commercial service. One writer notes that the difficulties which the Bar as a whole may be having with trust companies or life insurance agents are minor compared to its difficulty with individuals in the third category mentioned above. The reason for this difficulty is that this group has no local or national association to negotiate with.[25]

In general it may be said that the Bar has three courses of action—it can educate, negotiate, or litigate.[26] The writers seem to prefer the first two alternatives and stress cooperation and team work in the estate-planning field.[27] To date, the Bar has been very successful in its attempt to curb unauthorized practice through the courts. Recent decisions in the area of estate planning indicate a definite trend toward sustaining the Bar's position.[28]

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banks with trust functions, collection agencies, insurance adjusters, life insurance underwriters, publishers, and realtors. See 3 MARTINDALE-HUBBELL LAW DIRECTORY 141-A (1962). Also noteworthy in this area are two articles entitled: (1) *Some Guideposts for Cooperation Between Lawyers and Life Insurance Representatives*, 29 U.P. NEWS 27 (1963); (2) *Guideposts Revisited*, NATIONAL LIFE UNDERWRITER, Dec. 22, 1962 issue. These articles purport to define the proper scope of operations between the two groups.

[24] Ells, *Estate Planning in the Light of Recent Decisions*, 29 U.P. NEWS 364, 367 (1963-64).

[25] *Id.* at 365, 367.

[26] In general see 24 U.P. NEWS 8 (1958); 44 A.B.A.J. 350 (1958); 25 U. P. NEWS 205 (1959). On the educational approach see 26 U.P. NEWS 11 (1960); on the conference approach see 28 U.P. NEWS 335 (1962-63). In the last-mentioned article, Mr. Resk of the New York Bar points out the various activities engaged in by the Unauthorized Practice Committee to curb such practice as follows: (1) litigation; (2) conference approach; (3) symposiums; (4) cooperation with state and local committees; (5) American Bar Foundation cooperation; (6) law school education programs; (7) encouraging state committees to seek assistance of the Attorney General and other public officials; (8) cooperation with law book companies, trust companies and life insurance companies.

[27] Shattuck, *The Estate Planning Team—Its Duties and Functions*, 18 U.P. NEWS 3 (1952); Candler, *Attorney-Trust Officer Relations*, 26 U.P. NEWS 109, 114 (1960).

[28] One of the earliest cases was the State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863, 69 A.L.R.2d 394 (1958); then the decision in Chicago Bar Ass'n v. Financial Planning Inc. (Super. Ct., Cook County, Illinois), 24 U.P. NEWS 29 (1958); and finally the most recent case of the Oregon State Bar v. John H. Miller & Co., 385 P.2d 181 (1963). As to cases presently pending see: Utah State Bar Ass'n v. Edgar, 26 U.P. NEWS 160 (1960) (as I understand, this is presently being disposed of by default judgment in favor of the bar); State Bar of Cal. v. Wifford (Super. Ct., San Diego County), Case No. 264503 (1962) (involved individuals offering "coordinated financial planning," including trusts and life insurance). These cases, along with *Guideposts*, *Guideposts Revisited*, and A.B.A.

Litigation should be avoided if possible; for it often fails to eliminate the basic problem and may lead to an even more disturbing development exemplified by the recent debacle in Arizona concerning realtors practicing law. The Bar's court victory over Arizona realtors was met head-on by the enactment of a constitutional amendment sponsored by the realtors; this allowed them to practice law in connection with real-estate transactions.[29] This action and counter-action has done little to solve the conflict between the two groups and has probably intensified the animosity between them. The Chief Justice of the Supreme Court of Arizona, in a speech made to the Arizona Association of Realtors said, "The amendment dispute, as is usually true when matters progress to such a point, was not productive of understanding or good will; but rather increased the difficulty of negotiation between the groups, and raised serious questions as to their future relationship."[30]

The question raised in the principal case seems to appear in only one Arizona case, which leaves the issue unanswered. In *Application of Guberman,* an attorney from another state sought admission to the Arizona Bar and was refused on the ground that his previous activities as an estate planner indicated a lack of good moral character. Finding that plaintiff's activities as an estate planner showed no lack of good moral character, the court found no need to rule on the basic question as to whether laymen engaged in estate planning are unlawfully practicing law, stating in part: "the matter has been so disputed . . . [that there is] no clear guideline on the subject . . . [none of] applicant's activities as an estate planner show he is wanting in good moral character even if the ultimate determination of the dispute resolves the issue on the side of unauthorized practice."[31]

Satisfactory solutions to these problems will not be found in words of criticism issuing either from lay groups or from lawyers, nor by litigation.[32] Arizona's recent experience in using litigation to solve its differences in the area of unauthorized practice by realtors indicates that

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Opinion 1959-A seem to establish some fairly definite principles with reference to lay activities in estate planning and should be helpful in the future.

[29] See State Bar of Ariz. v. Arizona Land & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), opinion on rehearing, 91 Ariz. 293, 371 P.2d 1020 (1962); Cedarquist, *The 1962 Arizona Constitutional Amendment,* 28 U.P. NEWS 252 (1962); Riggs, *Unauthorized Practice and the Public Interest: Arizona's Recent Constitutional Amendment,* 37 SO. CAL. L. REV. 1 (1964); Marks, *The Lawyers and the Realtors: Arizona's Experience,* 49 A.B.A.J. 139 (1963).

[30] Speech reprinted in 29 U.P. NEWS 169 (1963).

[31] Application of Guberman, 90 Ariz. 27, 363 P.2d 617 (1961). If the Arizona Supreme Court's decision in *State Bar of Ariz. v. Arizona Land Title & Trust Co.,* is indicative of the position it intends to maintain in the field of unauthorized practice of law by laymen, it would appear that Arizona would follow the principal case if the problem arose here.

[32] U.P. NEWS 413 (1961).

if the problem arises as to estate planning, there undoubtedly may be a better way to settle it. Utilization of the "conference approach" advocated by the majority of writers and by the American Bar Association would appear to be the most feasible solution.[33]

William H. Jury

CRIMINAL LAW — PROCEDURE — SUBSEQUENT HEARINGS NOT PRECLUDED BY DISMISSAL OF CHARGES AT INITIAL PRELIMINARY HEARING. — *State v. Byrd* (Ariz. 1963).

Felony charges against defendant were successively filed in three justice of the peace courts. The first two hearings resulted in dismissals of the charges; but, at the conclusion of the third hearing, defendant was bound over to the superior court and was subsequently convicted of burglary of the first degree. On appeal, *held,* affirmed. Dismissal of charges at the conclusion of a preliminary hearing by one justice of the peace does not preclude subsequent hearings on the same charges since the proceeding is not a judicial trial but a mere inquiry and therefore the issue of probable cause as to defendant's guilt is not res judicata. *State v. Byrd,* 94 Ariz. 139, 382 P.2d 555 (1963).

The rule of law expressed in the principal case has apparently been uniformly followed in both the state and federal courts.[1] The right to preliminary proceedings did not exist under the common law;[2] the right is conferred by constitutional or statutory provisions,[3] and compliance with the procedure as so established is requisite to jurisdiction at every step.[4] The statutory right to the preliminary hearing has been judicially denominated as substantial,[5] fundamental[6] and constitutional[7] but nonetheless is sometimes granted only when required by statute or constitution.[8] Under the Arizona constitution the hearing

[33] See notes 23, 26, 27 *supra.*

[1] United States *ex rel.* Wanner v. Levy, 268 U.S. 390 (1925).

[2] State v. Solomon, 158 Wis. 146, 147 N.W. 640 (1914); State *ex rel.* Durner v. Huegin, 110 Wis. 189, 85 N.W. 1046 (1901).

[3] State *ex rel.* Germain v. Ross, 39 N.D. 630, 170 N.W. 121 (1918); State v. Pay, 45 Utah 411, 146 Pac. 300 (1915); 14 AM. JUR. *Criminal Law* § 240 (1938).

[4] Whalen v. Cristell, 161 Kan. 747, 173 P.2d 252, 256 (1941).

[5] State v. Howland, 153 Kan. 352, 110 P.2d 801 (1941).

[6] *Ibid.*

[7] *Ex parte* Gregory, 86 Cal. App. 10, 260 Pac. 320 (Dist. Ct. 1927). *Contra,* United States *ex rel.* Dilling v. McDonnell, 130 F.2d 1012 (7th Cir. 1942), in which the court held that "the Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the court having jurisdiction of the charge."

[8] State v. Cutter, 318 Mo. 687, 1 S.W.2d 96 (1927); ARIZ. CONST. art. 2, § 30;

is necessary only when the crime charged is a felony.[9] *White v. Maryland*[10] indicates that a preliminary hearing in which a plea is entered before the magistrate is a "critical" stage in the proceeding and where a plea is taken at the hearing at a time when the accused is not represented by counsel, reversal of a subsequent conviction is required even though no prejudice was shown. The Supreme Court of the United States stated, ". . . the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently."[11]

When a person is entitled to a preliminary examination, he must be taken to a committing magistrate without unnecessary delay,[12] and the magistrate may not dismiss the charges until completion of the examination.[13] The examination is a judicial proceeding in that so far as the magistrate acts within his jurisdiction in determining whether an offense has been committed and whether there is probability that the accused is guilty thereof and should be placed on trial therefor his decision is binding for the purposes of the proceeding whether it is right or wrong. Should the accused bring a writ of habeas corpus, it becomes the duty of the court to examine the evidence and treat the decision of the examining magistrate as outside of his jurisdiction if no competent evidence is found upon which he could properly have acted and, if so found, to discharge the prisoner.[14]

Quite apparently, if the person charged with the commission of a crime in the criminal complaint could assert that the issue of probable cause determined by the first justice in his favor was res judicata, subsequent hearings would be precluded under the theory of former jeopardy. But even a cursory examination of the cases will show that jeopardy does not attach until some time during an actual trial.[15] Al-

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ARIZ. R. CRIM. P. 79. See State v. War, 38 N.J. Super. 201, 118 A.2d 553 (Super. Ct. 1955), wherein the court held that a person arrested had no constitutional right to a preliminary examination before indictment. Since New Jersey has no statute pertaining to preliminary examination of a defendant, this matter is governed by rule and is a matter of procedure.

[9] State v. Bennett, 74 Ariz. 6, 242 P.2d 840 (1952); Quen Guey v. State, 20 Ariz. 363, 181 Pac. 175 (1919).

ARIZ. CONST. art. 2, § 30 provides:

"No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination."

[10] 373 U.S. 59 (1963).

[11] Hamilton v. Alabama, 368 U.S. 52, 55 (1961).

[12] Mallory v. United States, 354 U.S. 449 (1957); FED. R. CRIM P. 5(a).

[13] State *ex rel.* Mahoney v. Stevens, 79 Ariz. 298, 288 P.2d 1077 (1955); 22 C.J.S. *Criminal* Law § 331 (1961).

[14] AM. JUR. *Criminal Law* § 241 (1938).

[15] Westover v. State, 66 Ariz. 145, 185 P.2d 315 (1947); Markiewicz v. Black,

though there is some conflict among the authorities as to when during the trial jeopardy attaches,[16] it is a general rule that the action of an examining magistrate never puts an accused in jeopardy.[17] This is to be distinguished from the situation where a justice of the peace (or trial magistrate) is required to try the case in his court,[18] in which case his judgment as to the determination of the accused's guilt or innocence may be pleaded as former jeopardy.[19]

The object of the preliminary hearing is chiefly to prevent innocent persons from being incarcerated for a considerable length of time while awaiting trial.[20] The purpose, as expressed in *State v. Pigg*,[21] is to ascertain if a crime has been committed and, if so, whether the evidence provides probable cause for believing that the arrested man is guilty of the crime, so that he may not be further deprived of his liberty if there is no cause for such belief.

The importance of this case lies not in the fact that a preliminary examination is deemed merely a preliminary inquiry, thus making the doctrine of res judicata inapplicable, but rather in the general impression such a rule of law makes upon the average layman. There appears to be an inherent inequality in the law when a prosecuting attorney is allowed to file his complaint repeatedly until he finds a justice of the peace willing to "lend a responsive ear . . . and

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138 Colo. 128, 330 P.2d 539 (1958); People *ex rel.* Mathias v. O'Hara, 200 N.Y.S.2d 173 (1960). See also People v. Colon, 184 N.Y.S.2d 537 (1959), in which are gathered cases distinguishing between double jeopardy in a criminal prosecution tried with the aid of a jury and in a prosecution without a jury; also listed are causes for and circumstances under which discharge of a jury is warranted prior to the rendering of its verdict.

The general rule, as stated in 22 C.J.S. *Criminal Law* § 241, at 637 (1961) is that, when a person has been placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned and pleaded, and a jury has been impaneled and sworn, he is in jeopardy, but that, until these things have been done, jeopardy does not attach. *But cf.* State v. Persons, 117 Vt. 556, 96 A.2d 818 (1953), in which the court stated that jeopardy does not attach until there is a final verdict of guilty or not guilty of one of the offenses charged and a rendering of a valid judgment thereon.

[16] State v. Lacklear, 16 N.J. 232, 108 A.2d 436 (1954).

[17] Struble v. Gnadt, 164 Kan. 587, 191 P.2d 179 (1948); State *ex rel.* Durner v. Huegin, 110 Wis. 189, 85 N.W. 1046 (1901), wherein the court said that the proceeding is not a judicial trial but a mere judicial inquiry. No plea or issue is necessary and no jury is demandable or proper.

[18] See ARIZ. R. CRIM. P. 32(c):

> If after hearing the evidence it appears that an offense has been committed which the magistrate has jurisdiction to try and determine, and there is cause to believe the defendant committed the offense, the defendant may be tried therefor in the manner provided by law for the trial of criminal actions in justice courts.

[19] Hazelton v. State, 13 Ala. App. 243, 68 So. 715 (1915).

[20] State v. Solomon, 158 Wis. 146, 147 N.W. 640 (1914).

[21] 80 Kan. 481, 484, 103 Pac. 121, 122 (1909).

bind over the person charged."[22] It is admitted that if the rule were otherwise the finding of the initial justice, no matter how capricious it might be, would be binding and would constitute a replacement of the trial jury's opinion with that of one man. But, in spite of the universality of this rule, it seems that, for the protection of the accused,[23] there ought to be some limit to the number of times a prosecuting attorney may refile the same criminal complaint without the support of new evidence.[24]

Leonard W. Copple

CRIMINAL LAW—SELF-DEFENSE—NO DUTY TO RETREAT IF DEFENDANT IN PLACE WHERE HE HAS A RIGHT TO BE.—*State v. Jackson* (Ariz. 1963).

Defendant had been shooting dice in a clubroom on the premises of the lumbercamp where he worked, when an argument developed between him and the deceased. Defendant left the clubroom, went to his place of business nearby, and obtained a revolver. He then returned to the clubroom, allegedly to talk to a friend and also to the deceased if he should happen to see him. As defendant entered, deceased pulled his gun and pointed it at the defendant, apparently trying to cock it. Defendant pulled his gun and fired. Deceased once again pointed his gun at defendant, and defendant again fired, killing the deceased. The superior court denied defendant's requested instruction that the law of Arizona does not require a person to retreat before he may lawfully act in self-defense and entered judgment against defendant. On appeal, *held,* reversed. In Arizona when a person is without fault and in a place he has a right to be (*i.e.* the clubroom), he may stand his ground when attacked and repel force with force in his defense, to the point of slaying his attacker. *State v. Jackson,* 94 Ariz. 117, 382 P.2d. 229 (1963).

The authorities appear to be in sharp conflict concerning the duty to retreat at common law,[1] ranging from the idea that it is necessary to retreat to the wall, in the face of a murderous assault, before being justified in using deadly force,[2] to the idea that there is a duty not to retreat and thereby leave a potential murderer at large.[3] The rule of retreat

[22] State v. McCombs, 164 Kan. 334, 188 P.2d 922 (1948).

[23] ARIZ. REV. STAT. ANN. § 13-106 (1956) provides, except for specified crimes, a five-year limitation on the finding of an indictment or filing of an information for felonies; a one-year limitation as to misdemeanors.

[24] Apparently the only relief now available to the harassed individual is to bring a civil suit against the arresting authority for unlawful arrest or the county attorney for malicious prosecution. For a discussion on malicious prosecution see PROSSER, TORTS § 98 (2d ed. 1955).

[1] See PERKINS, CRIMINAL LAW 888-894 (1957).

[2] See Beale, *Retreat from a Murderous Assault,* 16 HARV. L. REV. 567 (1903); 26 AM. JUR. *Homicide* §§ 149, 150 (1940).

[3] See 1 BISHOP, NEW CRIMINAL LAW § 851 (9th ed. 1923).

to the wall has proved itself more idealistic than realistic in application to the natural responses of men under many circumstances. Therefore, the majority of states and the federal courts follow the rule that allows a person who is subject to a deadly attack, and is in a place where he has a right to be, to stand his ground and use the force reasonably necessary to protect himself, even to killing his assailant, without any duty to retreat.[4]

In *Foster v. Territory*[5] this question was before the Arizona court for the first time. In this case the court reversed a judgment on the ground that the jury was instructed incorrectly that the defendant should have retreated if he could have withdrawn from the danger. The defendant was found to have been on his *own premises* at the time of the shooting, and the court said as to this, ". . . for this reason if for no other the instruction contained reversible error, and the judgment and order will therefore be reversed . . ."[6] Though the court in *Foster* stated the general rule, its holding was merely that a man in his *own dwelling* is relieved of the duty to retreat; this is in accord with all the common-law authorities.[7] The factual circumstances in which the rule will be applied in Arizona are now more liberal and the scope of the language "in a place where he has a right to be" has been broadened and illuminated. Even in the retreat states there is a trend to expand the meaning so ". . . that when a man [is] thus assaulted in his office or place of business, the same

[4] Brown v. U.S., 256 U.S. 335 (1921); Marshall v. U.S., 45 App. D.C. 373 (1916); State v. Jackson, 94 Ariz. 117, 382 P.2d. 229 (1963); LaRue v. State, 64 Ark. 144, 41 S.W. 53 (1897); People v. Hecker, 109 Cal. 451, 42 Pac. 307 (1895); Enyart v. People, 67 Colo. 434, 180 Pac. 722 (1919); Ragland v. State, 111 Ga. 211, 36 S.E. 682 (1900); People v. Bush, 414 Ill. 441, 111 N.E.2d 326 (1953); Runyon v. State, 57 Ind. 80, (1877); State v. Hatch, 57 Kan. 420, 46 Pac. 708 (1896); Caudill v. Commonwealth, 234 Ky. 142, 27 S.W.2d 705 (1930); State v. Boudreaux, 185 La. 434, 169 So. 459 (1936); Pond v. People, 8 Mich. 149 (1860); Long v. State, 52 Miss. 23 (1876); State v. Bartlett, 170 Mo. 658, 71 S.W. 148 (1902); State v. Merk, 53 Mont. 454, 164 Pac. 655 (1917); Willis v. State, 43 Neb. 102, 61 N.W. 254 (1894); State v. Grimmett, 33 Nev. 531, 112 Pac. 273 (1910); People v. Ligouri, 284 N.Y. 309, 31 N.E.2d 37 (1940); State v. Ellerbe, 223 N.C. 770, 28 S.E.2d 519 (1944); Graham v. State, 98 Ohio St. 77, 120 N.E. 232 (1918); Perez v. State, 51 Okla. Crim. 180, 300 Pac. 428 (1931); State v. Sherman, 16 R.I. 631, 18 Atl. 1040 (1889); State v. Jaukkuri, 41 S.D. 4, 168 N.W. 1047 (1918); Taylor v. State, 85 Tex. Crim. 468, 213 S.W. 985 (1919); Stoneham v. Commonwealth, 86 Va. 523, 10 S.E. 238 (1889); State v. Hiatt, 187 Wash. 226, 60 P.2d 71 (1936); Miller v. State, 139 Wis. 57, 119 N.W. 850 (1909); and see generally 26 AM. JUR. *Homicide* § 151 (1940); Annot., 18 A.L.R. 1279 (1922) on duty to retreat when not on one's own premises.

[5] 6 Ariz. 240, 56 Pac. 738 (1899), which cited *inter alia* Beard v. U.S., 158 U.S. 550 (1895).

[6] *Id.* at 245, 740.

[7] See 26 AM. JUR. *Homicide* §§ 155 (1940); PERKINS, CRIMINAL LAW 888-903 (1957); Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903). Beale maintains the split of authority over the retreat rule at present, is due partially to misinterpretation of the first Supreme Court ruling on the matter (Beard v. U.S., 158 U.S. 550 (1895)), and the subsequent ruling of Allen v. U.S., 164 U.S. 492 (1896).

rule applies."[8]

The no-retreat rule was still a part of Arizona law when the decisions for *Macias v. State*[9] and *Murphy v. State*[10] were handed down. But in both of those cases the defendant had gone to the *home of the deceased,* and was therefore a trespasser and in a place where he had no right to be. In *Macias* the court said as to this,

> . . . it is not and never has been the law, even in Arizona, that a man who is a trespasser and in a place where he has no right to be, may stand his ground and slay his assailant, and still claim self-defense, when by leaving such place he might avoid the conflict. . . . Under the undisputed evidence in this case, defendant was in a place where he had no right to be, that he had been warned by the owners to stay away from and at a time under circumstances which made his presence utterly inexcusable. . . .[11]

In the *Murphy* case the court restated this basic principle.

> . . . a person who voluntarily enters another's residence under circumstances and for a purpose which, according to his own statement will in all probability lead to a violent encounter, cannot, after the very affray which he had anticipated commences, remain on the invaded premises, and in the process of mutual combat slay the owner, and then successfully plead self-defense.[12]

The present case is significant not only as a clear statement of the retreat rule in Arizona, but also as an indication of what circumstances will warrant its application. In the earlier case of *Carter v. State,*[13] the defendant, being on neutral ground as in the principal case, was denied the plea of self-defense. There the defendant had become involved in a fight and had fled to his quarters when an officer was summoned. He obtained a gun and returned to the scene, where his companion was being held by the deceased, who had accompanied the officer. Defendant testified that deceased fired upon him first, and he returned the fire, killing the deceased. At his trial he tried unsuccessfully to plead self-defense. The court said,

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[8] See, *e.g.,* Askew v. State, 94 Ala. 5, 10 So. 657 (1891); State v. Baratta, 242 Iowa 1308, 49 N.W.2d 866 (1951); State v. Griggs, 218 S.C. 86, S.E.2d 653 (1950); Annot., 47 A.L.R. 418 (1927) (Duty to retreat as condition of self-defense when one is attacked at his office or place of business or employment); 26 AM. JUR. *Homicide* §§ 156, 157 (1940).

[9] 36 Ariz. 140, 283 Pac. 711 (1929).

[10] 33 Ariz. 336, 264 Pac. 685 (1928).

[11] 36 Ariz. 140, at 157-158.

[12] 33 Ariz. 336, at 341.

[13] 18 Ariz. 369, 161 Pac. 878 (1916).

> The plea of necessity is a shield for those who are without fault in occasioning it, and in acting under it.[14] Whenever an assault is brought upon a person by his own procurement or under an appearance of hostility which he himself creates, with a view of having his adversary act upon it, and he [the adversary] acts and is killed, the plea of self-defense under such circumstances is unavailing.[15]

In contrast to *Macias*,[16] *Murphy*,[17] and *Carter*,[18] in the present case the court said,

> Before an act may cause forfeiture of the fundamental right of self-defense it must be willingly and knowingly calculated to lead to conflict. Merely seeking an interview is not such an act. 45 L.R.A. 687, 700. One who merely does an act *which affords an opportunity* for conflict is not thereby precluded from claiming self-defense. Fault implies misconduct not lack of judgment. 53 Wyo. 304, 84 P.2d. 757. [Emphasis supplied.][19]

This case appears to involve the most extreme set of circumstances in which the Arizona court has justified the self-defense plea under its long-established retreat rule.[20] Here, in a situation quite similar to the *Carter* case, the defendant had left the place of the argument, gone to his place of business, obtained a revolver, then returned to the place of the argument with the intention of talking to the deceased if he saw him. The court has shown what is considers to be conduct too extreme and improper to allow the plea of self-defense;[21] and now in this case it gives an indi-

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[14] *Id.* at 375, quoting from People v. Hunt, 59 Cal. 430 (1881).

[15] *Id.* at 375, 880, from People v. Glover, 141 Cal. 233, 74 Pac. 745 (1903); Henry v. People, 198 Ill. 162, 65 N.E. 120 (1902); State v. Baleau, 20 R.I. 607, 40 Atl. 861 (1898).

[16] 36 Ariz. 140, 156, 283 Pac. 711, 717 (1929): "If a defendant, under certain circumstances at the time he kills is to blame for their existence, he is not justified in killing another on account of such circumstances, and then pleading self-defense."

[17] 33 Ariz. 336, 264 Pac. 685 (1928): "It is the rule that a defendant may not claim self-defense when he seeks deceased for the purpose of provoking or bringing on a difficulty, and where on meeting the latter he executes such purpose. 30 C.J. 52."

[18] 18 Ariz. 369, 375, 161 Pac. 878, 880 (1916), quoting from WHARTON, HOMICIDE § 323 (3d ed. 1907): "Where any pretext, design, contrivance, fraud, or excuse is resorted to, to bring on a difficulty, or to provoke the occasion for one, the person using it will be regarded as the aggressor therein. And any act of a person *by which he puts himself in the way of being assaulted*, in order that when hard pressed, he may have a pretext for taking the life of his assailant, amounts to bringing on a difficulty." [Emphasis supplied.]

[19] 94 Ariz. 117, 382 P.2d 229, at 232 (1963).

[20] Foster v. Territory, 6 Ariz. 240, 56 Pac. 738 (1899) (first Arizona case citing the no-retreat rule).

[21] Lepker v. State, 40 Ariz. 186, 11 P.2d 351 (1932); Machias v. State, 36 Ariz. 140, 283 Pac. 711 (1929); Murphy v. State, 33 Ariz. 336, 264 Pac. 685 (1928); Carter v. State, 18 Ariz. 369, 161 Pac. 878 (1916); Foster v. Territory, *supra* note 20.

cation of how far a person may go in protecting himself without becoming the aggressor, and still be allowed the plea of self-defense, under the Arizona case law and statute.[22]

G. Wayne McKellips, Jr.

DIVORCE — ALIMONY — EX-WIFE MAY RECOVER ALIMONY IN DOMICILARY STATE NOTWITHSTANDING HUSBAND'S FOREIGN UNCONTESTED DIVORCE. — *Schwarz v. Schwarz* (Ill. 1963).

Husband and wife were domiciled in Illinois until the husband acquired domicil in Nevada, where he filed suit for divorce. A divorce decree was granted which made no provision for the wife's financial support. Seven months later, the wife obtained personal service on the husband in Illinois under a complaint for divorce which she had previously filed. In defense, the husband specially pleaded his Nevada decree. Plaintiff argued that defendant had not established a bona fide domicil in Nevada, had not properly served her, and had not informed the Nevada court that she had already instituted divorce proceedings in Illinois. The trial court rendered a decree for the wife declaring the Nevada decree void, and made provision for the payment of alimony to the wife. On appeal, *held,* affirmed in part and reversed in part. It was found that the Nevada court had jurisdiction to grant the divorce and the dissolution of the marriage would be accorded full faith and credit, but that nevertheless the foreign divorce without in personam jurisdiction over the defendant spouse did not prevent a domestic court, which later acquired jurisdiction of both parties, from awarding alimony under a statutory provision permitting the granting of alimony after a divorce. *Schwarz v. Schwarz,* 27 Ill. 2d 140, 188 N.E.2d 673, (1963).

(In *Lepker* the court said, "Under the circumstances, he is in no position, having armed himself and voluntarily gone with deceased, even though deceased was the assailant, to invoke the natural and God-given right of self-defense.")

[22] Applicable portion of ARIZ. REV. STAT. ANN. 13-462 (1956): Justifiable Homicide by Person; bare fear as justification. Homicide is justifiable when committed by a person:

> In the lawful defense of the *person,* or a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished, but such person, or the person in whose behalf the defense was made, *if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed.* A bare fear of the commission of an offense mentioned in this paragraph is not sufficient to justify a homicide. The circumstances must be sufficient to justify a homicide. The circumstances must be sufficient to incite the fears of a reasonable person; the party killing must have acted under the influence of such fears alone. [Emphasis supplied.]

See also, construing the statute, Walker v. State, 52 Ariz. 480, 83 P.2d 994 (1938); Bryant v. Territory, 12 Ariz. 165, 100 Pac. 455 (1909).

The courts are divided[1] as to whether a wife's right to alimony, as an incident to the marriage relationship, survives a valid divorce decree obtained by the husband but rendered without personal jurisdiction over the wife.[2] The principles that control the wife's right to alimony are derived from the Full Faith and Credit Clause of the Federal Constitution,[3] the pertinent rules of res judicata,[4] and state statutes.[5]

The full-faith-and-credit and res judicata questions have been authoritatively settled by the Supreme Court of the United States.[6] After the *Williams* cases,[7] which dealt with the effect of full faith and credit in a divorce action, the question arose whether a divorce decree granted in the domicil of only one party to the marriage automatically terminated the wife's right to support. The survival of alimony was assured by the theory of divisible divorce[8] set forth in *Estin v. Estin*,[9] and perfected in *Vanderbilt v. Vanderbilt*.[10] In the *Vanderbilt* case, the United States

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[1] See generally Annot. A.L.R.2d 1378 (1953); EHRENZWEIG, CONFLICTS OF LAWS § 80-81, at 261 (1959); Note, *Divisible Divorce*, 76 HARV. L. REV. 1233 (1963); RESTATEMENT, CONFLICTS OF LAWS § 116 (1934), which states, "A state can exercise through its courts jurisdiction to grant alimony to one spouse if it has jurisdiction over the other spouse; or, if it has jurisdiction over his property, to the extent of such property."

[2] This fact situation should be distinguished from the case where the wife obtained an uncontested divorce in a jurisdiction in which the husband did not reside. The courts are also divided as to whether the wife may then return to the former domicil and maintain a suit for alimony. 28 A.L.R.2d 1378, 1414 (1953).

[3] U.S. CONST. art. IV, § 1. See also 28 U.S.C.A. § 1738 (1950); Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Armstrong v. Armstrong, 350 U.S. 568 (1956); Estin v. Estin, 334 U.S. 541 (1948); Esenwein v. Commonwealth *ex. rel.* Esenwein, 325 U.S. 279, 281 (1945) (concurring opinion).

[4] Griffin v. Griffin, 327 U.S. 220 (1946); Pennoyer v. Neff, 95 U.S. 714 (1877).

[5] KAN. GEN. STAT. ANN. § 60-1518 (1949); N.J. REV. STAT. § 2A:34-23 (1952); OKLA. STAT. tit. 12, § 1284 (1961).

[6] Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Griffin v. Griffin, 327 U.S. 220 (1946).

[7] Williams v. North Carolina, 317 U.S. 287 (1942), *overruling* Haddock v. Haddock, 201 U.S. 562 (1906); in *Williams* I, the Court held that the Nevada divorce decrees granted to the two domicilaries of North Carolina that left that state leaving respective spouses behind and subsequently married were entitled to full faith and credit in sister states and therefore constituted a defense to a North Carolina charge of bigamous cohabitation. In *Williams v. North Carolina*, 325 U.S. 226 (1945) *(Williams II)*, the Court held that Nevada's finding of a bona fide domicil could be relitigated in North Carolina, reasoning that domicil is essential to divorce jurisdiction, and that any judgment may be collaterally attacked for want of jurisdiction. See Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930 (1945); Strahorn & Reiblich, *The Haddock Case Overruled—The Future of Interstate Divorce*, 7 MD. L. REV. 29 (1942).

[8] The term "divisible divorce" is a misnomer, for the parties are divorced. The divorce is not divisible, but rather the cause of action is divided as to the termination of a status and the property settlement. Vanderbilt v. Vanderbilt, 354 U.S. 416, 419, 424, n.2 (1957) (dissenting opinion of Frankfurter, J.).

[9] 334 U.S. 541 (1948); Note, *And Now That You Have Your Divorce, Where Do You Stand?*, 10 MD. L. REV. 256 (1949).

[10] 354 U.S. 416 (1957).

Supreme Court held that although the wife's right to support had not been reduced to judgment before the divorce, the decree obtained without personal jurisdiction over her did not affect her support rights. The Court based its holding on the Due Process Clause of the Fourteenth Amendment of the United States Constitution: since the foreign state had no personal jurisdiction over the absent spouse, its decree ". . . to the extent it purported to affect the wife's right to support, was void and the Full Faith and Credit Clause did not obligate New York to give it recognition."

The res judicata question of alimony in a divorce decree rendered without personal service was considered by the United States Supreme Court in *Griffin v. Griffin*,[11] which held that a judgment for alimony in a divorce decree, because partaking of the nature of a judgment in personam, is invalid when rendered by a court having no jurisdiction over the person of the defendant. Therefore, in a later suit by the wife for alimony the matter is not res judicata.

The weight of authority supports the proposition that the wife's right to alimony, as an incident of the marriage relationship, survives a valid divorce obtained by the husband against the nonresident wife in another jurisdiction when the wife was not served personally.[12] Early decisions were based upon the theories of jurisdiction: that the court did not have personal jurisdiction over the wife, and therefore could not adjudicate the personal obligation of the husband to support her;[13] or that the divorce court had not decided the issue of alimony.[14] The divorce decree was recognized as effective to dissolve the marital status of the parties, but since "alimony is in personam and not in rem,"[15] the right of a wife to maintain an action for alimony filed after the divorce could not be barred.[16] Today, most of the cases accept the theory that severance

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[11] 327 U.S. 220 (1946).

[12] Twenty-four states and the District of Columbia, of the thirty-four jurisdictions that have passed on this question, have held that a wife may obtain support or alimony following the entry of a divorce decree rendered without in personam jurisdiction over her. For a listing see Hudson v. Hudson, 52 Cal. 2d 735, 344 P.2d 295 (1959), which expressly overruled Dimon v. Dimon, 40 Cal. 2d 516, 254 P.2d 528 (1953). See also Pollard v. Pollard, 330 S.W.2d 407 (Ct. App. Ky. 1959); Levert v. Levert, 156 So. 2d 284 (Ct. App. La. 1963); Daniel v. Daniel, 348 P.2d 185 (Okla. 1959).

[13] See, *e.g.*, Armstrong v. Armstrong, et. al. 162 Ohio St. 406, 123 N.E.2d 267 (1954), *aff'd*, 350 U.S. 568 (1956).

[14] *E.g.*, Malcolm v. Malcolm, 345 Mich. 720, 76 N.W.2d 831 (1956); Hicks v. Hicks, 69 Wash. 630, 125 Pac. 945 (1912).

[15] Davis v. Davis, 70 Colo. 37, 197 Pac. 241 (1921).

[16] Rice v. Rice, 213 Ark. 981, 214 S.W.2d 235 (1948); Pope v. Pope, 2 Ill. 2d 152, 117 N.E.2d 65 (1954); Melnyk v. Melnyk, 49 Ohio Op. 22, 107 N.E.2d 549 (1952); Nelson v. Nelson, 71 S.D. 342, 24 N.W.2d 327 (1946); Toncray v. Toncray, 123 Tenn. 476, 131 S.W. 977 (1910); Davis v. Davis, 165 Wash. 172, 8 P.2d 286 (1931); Ische v. Ische, 252 Wis. 250, 31 N.W.2d 607, 32 N.W.2d 70 (1948).

of the marital status does not terminate the wife's claim to alimony.[17] These cases usually emphasize the dominant concern of the wife's domiciliary state to protect her right of support so as to prevent her from becoming a public charge.

The opposing view holds that the right to alimony does not survive a valid uncontested divorce decree obtained by the husband without personal service on the wife. The reasoning of this minority view is that under the Federal Constitution full faith and credit must be given to the divorce decree of a sister state,[18] that alimony is an incident of the marital relation and cannot be ordered at any time after it ceases,[19] and that the prior divorce judgment is res judicata in respect to any question of granting alimony.[20] The result is that the right to support exists only before a decree of divorce is granted,[21] since the right to alimony depends on the woman's present status of wife.[22] However, these arguments have lost force since the majority decision in the *Vanderbilt* case.[23]

The law of alimony has been left to the states,[24] and a number of legislatures have enacted statutes for the survival or non-survival of the wife's support rights.[25] The trend of decisions in states which have such

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[17] Hopson v. Hopson, 221 F.2d 839 (D.C. Cir. 1955); White v. White, 83 Ariz. 305, 320 P.2d 702 (1958); Willoughby v. Willoughby, 178 Kan. 62, 283 P.2d 428 (1955); Davis v. Davis, 303 S.W.2d 256 (Ct. App. Ky. 1957); Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 153 N.Y.S.2d 1, 135 N.E.2d 553, *aff'd*, 354 U.S. 416 (1957). See also Krauskopf, *Divisible Divorce and Rights to Support, Property and Custody*, 24 OHIO ST. L.J. 346 (1963); Morris, *Divisible Divorce*, 64 HARV. L. REV. 1287 (1951); Paulsen, *Support Rights and an Out-of-State Divorce*, 38 MINN. L. REV. 709 (1954).

[18] Mr. Justice Frankfurter, dissenting in *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 419-28 (1957), gave a brief review of matrimonial law in the United States Supreme Court and concluded by saying, "For me, the rigorous commands of the Full Faith and Credit Clause are determinative. I cannot say that the Nevada judgment denying alimony is more 'obnoxious' to New York policy . . . than its judgment of divorce. Since New York is required to give full faith and credit to the one, it is to the other." See also McDonough, *Mr. Justice Jackson and Full Faith and Credit to Divorce Decrees: A Critique*, 56 COLUM. L. REV. 860 (1956).

[19] Ives v. Ives, 247 Ala. 689, 26 So. 2d 92 (1946); Pennamon v. Pennamon, 153 Ga. 647, 112 S.E. 829 (1922); Anglin v. Anglin, 211 Miss. 405, 51 So. 2d 781 (1951); Loeb v. Loeb, 118 Vt. 472, 114 A.2d 518 (1955).

[20] McCoy v. McCoy, 191 Iowa 973, 183 N.W. 377 (1921).

[21] Watson v. Watson, 168 Ga. 530, 148 S.E. 386 (1929); Commonwealth v. Petrosky, 168 Pa. Super. 232, 77 A.2d 647 (1951); Commonwealth *ex. rel.* McCormack v. McCormack, 164 Pa. Super. 553, 67 A.2d 603 (1949).

[22] Thome v. Thome, 218 Ga. 359, 127 S.E.2d 916 (1962).

[23] 354 U.S. 416 (1957).

[24] KAN. GEN. STAT. ANN. § 60-1518 (1949); N.J. REV. STAT. § 2A:34-23 (1952); OKLA. STAT. tit. 12, § 1284 (1961).

[25] See, *e.g.*, Smith v. Smith, 183 A.2d 848 (Conn. 1962) (dicta); Jelly v. Jelly, 327 Mass. 706, 100 N.E.2d 681 (1951); Rodda v. Rodda, 175 Ore. 140, 200 P.2d 616 (1948), where the Oregon Supreme Court decided in favor of termination of alimony, to be overruled by legislation subsequently, ORE. REV. STAT. § 107.310 (Supp. 1961).

statutes is to apply them so as to allow an award of alimony after a divorce decree as in the principal case.[26] The Supreme Court of Illinois had previously considered the problem of a foreign divorce that had effectively dissolved a marriage and its effect on a wife's right to support.[27] This case follows the previous decision that the wife's right to support survives a foreign divorce obtained by the husband without personal service on the wife. Before the principal case, the state legislature revised the Divorce Act of the state and specifically allowed the trial courts ". . . at any time after the entry of a decree of divorce, upon obtaining jurisdiction of the person of the defendant by service of summons or proper notice, [to] make such order for alimony and maintenance of the spouse . . . [as] shall be fit, reasonable and just."[28] The Supreme Court of Illinois in the instant case confirmed its view that this provision for granting alimony after a divorce is broad enough to cover a divorce granted in a foreign jurisdiction as well as in Illinois.[29]

Arizona would seem to follow the currently accepted majority view as illustrated by the principal case. In *White v. White*,[30] a separate maintenance action was started by the wife during the existence of a valid marriage before the husband obtained a divorce in Colorado without personal service on the wife. The Arizona Supreme Court held that the wife's action could be continued, and reasoned that the divorce decree obtained by the husband did not determine more than the in rem marital status of the parties, as this was the extent of Colorado's jurisdiction.[31] The opinion further stated that the Arizona courts will accord full faith and credit to the dissolution of the marriage, but the decree will not affect the economic and property rights of the spouses in Arizona because the individual states have the right to determine whether a divorce will end the right to support when the decree is silent.[32] In view of the language used in the *White* case,[33] it may be reasonably inferred that Arizona, as most states which follow this view, would allow recovery where the husband has obtained a divorce decree without personal service on the wife, even though the wife had not started divorce or separation proceedings prior to the husband's divorce action.

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[26] ILL. REV. STAT. ch. 40, § 19 (1959).

[27] Pope v. Pope, 2 Ill. 2d 152, 117 N.E.2d 65 (1954).

[28] ILL. REV. STAT. ch. 40, § 19 (1959).

[29] Darnell v. Darnell, 212 Ill. App. 601 (1918).

[30] White v. White, 83 Ariz. 305, 320 P.2d 702 (1958).

[31] *Id.* at 307, 320 P.2d at 703.

[32] *Id.* at 309, 320 P.2d at 703.

[33] 83 Ariz. 305, 320 P.2d 702 (1958).

Public policy requires the state of matrimonial domicil to permit the divorced wife to litigate in its own courts the question of support. As pointed out in Mr. Justice Harlan's dissenting opinion in the *Vanderbilt* case,[34] however, this decision could give the wife license to ". . . comb the country, after the divorce, in search of any state where the divorcing spouse has property and which has favorable support laws, in order there to obtain alimony." However, to prevent the abandoned wife from becoming a public charge by the husband's forum-shopping for a jurisdiction requiring a short period to establish a divorce domicil, it is wise to recognize that a wife's right to alimony under the law of the state where she is domiciled, or possibly of any other state with sufficient interest in protecting her, survives a divorce decree obtained in another state without personal jurisdiction over her.

David L. Haga, Jr.

EVIDENCE — CONSTITUTIONAL PRIVILEGE — COMPULSORY MENTAL EXAMINATION VIOLATES SELF-INCRIMINATION PRIVILEGE. — *Steward v Superior Court* (Ariz. 1963).

After a plea of not guilty by reason of having been insane at the time of the alleged commission of the crime, the State moved for a compulsory mental examination prior to trial pursuant to a 1939 Code provision.[1] The trial judge granted the motion "so that the State might have the benefit of the results of that examination to discredit the defense." On peremptory writ of prohibition, *held*, granted. In view of the repeal of the 1939 Code provision without adoption of any Rule of Criminal Procedure to replace it, a trial court does not have *inherent* power to compel a defendant in a criminal action, who has filed a plea of not guilty by reason of insanity, to submit to a compulsory mental examination before trial. *Steward v. Superior Court*, 94 Ariz. 279, 383 P.2d 191 (1963).

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[34] 354 U.S. 416, 428, 434 (1957).

[1] ARIZ. CODE ANN. § 44-1702 (1939) which provided:

> Whenever on a prosecution by indictment or information the existence of insanity or mental defect on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause, the court may appoint one [1] or more disinterested qualified experts, not exceeding three [3], to examine the defendant . . . .

This provision was taken word-for-word from ALI CODE OF CRIMINAL PROCEDURE § 308 (1930). Under ARIZ. REV. STAT. ANN. (1956), this section of the 1939 CODE was, as the "reviser's note" indicates, "omitted as unnecessary." Speculatively, ALI MODEL PENAL CODE § 4 (Proposed Official Draft 1962) on the particular subject of mental examination of a defendant could have been the reason the reviser omitted this 1939 CODE section. The commentary in the ALI MODEL PENAL CODE § 4.05 (Tent. Draft 1955) states: "This section avoids duplication on psychiatric examination with respect to responsibility and examination with respect to fitness to proceed." The statutory authorization, as to Arizona, for such examination used in the ALI MODEL PENAL CODE was ARIZ. CODE ANN. §§ 44-1701, 1702 (1939).

Under the present Rules of Criminal Procedure,[2] the court may, if it "has reasonable grounds to believe that the defendant is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to assist in his defense," set a time for a hearing to determine the defendant's mental condition and appoint "two disinterested qualified experts to examine the defendant with regard to his present condition."

In the present case, the defendant had already had a mental examination under Rule 250 and his capacity to stand trial was no longer in question. In view of the trial court's purpose[3] in granting the State's motion, the manifest intent of the court was to supply substantive evidence to the State, rather than to clarify any question as to the defendant's mental capacity to stand trial. This was the area in which it was held the trial court had "no inherent power."[4] By its order, the trial court was, in effect, compelling the defendant "to give evidence against himself" in contravention of his constitutional protection against self-incrimination,[5] especially in view of the fact that the defendant did not waive the protection,[6] but objected to the examination, since the State has the "burden

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[2] ARIZ. R. CRIM. P. 250, which was carried forward almost word-for-word by the 1956 revision from ARIZ. CODE ANN. § 44-1701 (1939), which was taken almost verbatim from the ALI CODE OF CRIMINAL PROCEDURE § 307 (1930). The ALI relied upon ARIZ. REV. STATS. PENAL CODE § 1265 (1913) for the Arizona provision used in making its ALI MODEL PENAL CODE (1930). The 1939 CODE provision was repealed by ARIZ. REV. STAT. ANN. § 1-102 (1956), the annotation to which indicates 1939 CODE is a compiled code, not a revised one. All sections of a new revised code are entirely new measures and not mere carrying forward of some previous legislation, and depend for their validity solely on the action of the legislature at that time and not on previous legislation. See 2 SUTHERLAND, STATUTORY CONSTRUCTION 3712 (1943).

[3] Steward v. Superior Court, 94 Ariz. 279, 280, 383 P.2d 191, 192 (1963).

[4] State v. McManus, 187 La. 9, 174 So. 91 (1937); Commonwealth v. DiStasio, 294 Mass. 273, 1 N.E.2d 189 (1936); People v. Esposito, 287 N.Y. 389, 39 N.E.2d 925 (1942). See also People v. Strong, 114 Cal. App. 522, 300 Pac. 84 (1931), from which, in the principal case, the Arizona Supreme Court quoted:

> Nothing in the section [comparable to Ariz. R. Crim. Proc. 250] compels him [the defendant] to submit to an examination. If he does so the action is purely voluntary. To assert his rights all that is required is for him to stand mute and possibly, also, to refuse to permit the examination, when the appointed expert undertakes to proceed; and whether he does so or not there is no compulsion.

[5] ARIZ. CONST. art. 2, § 10; U.S. CONST. amend. V. The U.S. CONST., however, applies the privilege of self-incrimination only to proceedings in federal courts. See, *e.g.*, Knapp v. Schweitzer, 357 U.S. 371 (1958); Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908). *But see* 32 U.S. L. WEEK 3309 (March 10, 1964), wherein Mr. Justice Brennan stated from the Bench that the defendant was assured of at least four votes in favor of defendant's request that the Supreme Court overrule Twining v. New Jersey. Even opposing counsel, although differing as to whether the Fourteenth Amendment made the full sweep of the constitutional privilege applicable to the states, agreed that the Fourteenth Amendment does bar the states from compelling self-incriminating testimony. (Malloy v. Hogan).

[6] See, *e.g.*, State v. Duguid, 50 Ariz. 276, 72 P.2d 435 (1937); Garcia v. State, 35 Ariz. 35, 274 Pac. 166 (1929); Clements v. State, 213 Ark. 460, 210 S.W.2d 912 (1948); Early v. People, 142 Colo. 462, 352 P.2d 112 (1960); Castro v.

of proof" or the "risk of non-persuasion" on the question of whether the defendant was so mentally disordered at the time the crime was committed as to be irresponsible for his criminal act.[7]

Approximately half the states[8] follow the rule that the defendant who relies upon insanity as a defense must prove his lack of responsibility at the time of the offense, either: (a) beyond a reasonable doubt,[9] (b) to the satisfaction of the jury,[10] or (c) by a preponderance of the evidence.[11] The remaining states require that the prosecution must prove, beyond a reasonable doubt, that the defendant, at the time of the commission of the offense, was sufficiently sane to be held criminally responsible.[12] In the states where the ultimate burden of convincing the jury is upon the prosecution, the presumption that all persons are sane[13] relieves the prosecution from introducing evidence on that subject until the issue of insanity is raised by the defendant; when evidence is introduced raising a reasonable doubt, however, the presumption is rebutted.[14]

In Arizona, the State has the burden of adducing all the necessary evidence;[15] but it must do so while observing the privilege of self-

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People, 140 Colo. 493, 346 P.2d 1020 (1959); State v. Nelson, 162 Ore. 430, 92 P.2d 182 (1939); McCORMICK, EVIDENCE §§ 130, 131 (1954); UDALL, ARIZONA LAW OF EVIDENCE § 98 (1960); 2 UNDERHILL, CRIMINAL EVIDENCE § 358 (5th ed. 1956); 8 WIGMORE, EVIDENCE §§ 2275, 2276 (McNaughton rev. 1961); ARIZ. REV. STAT. ANN. § 13-163 (1956).

[7] ARIZ. REV. STAT. ANN. § 13-162 (1956).

[8] WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 148 (1933).

[9] See, *e.g.*, State v. Grayson, 126 Ore. 560, 270 Pac. 404 (1928); State v. Butchek, 121 Ore. 141, 253 Pac. 367 (1927).

[10] See, *e.g.*, State v. Jack, 20 Del. 470, 58 Atl. 833 (1903); State v. Walker, 193 N.C. 489, 137 S.E. 429 (1927); Longly v. Commonwealth, 99 Va. 807, 37 S.E. 339 (1900); State v. Cook, 69 W.Va. 717, 72 S.E. 1025 (1911).

[11] See, *e.g.*, People v. Zari, 54 Cal. App. 133, 201 Pac. 345 (1921); Long v. State, 109 Ohio St. 77, 141 N.E. 691 (1923); Commonwealth v. Bryson, 276 Pa. 566, 120 Atl. 552 (1923); State v. Fenik, 45 R.I. 309, 121 Atl. 218 (1923); Davidson v. State, 109 Tex. Crim. 251, 4 S.W.2d 74 (1928); State v. Harris, 74 Wash. 60, 132 Pac. 735 (1913).

[12] See, *e.g.*, Battle v. United States, 209 U.S. 36 (1908); State v. Joseph, 96 Conn. 637, 115 Atl. 85 (1921); People v. Christensen, 336 Ill. 251, 168 N.E. 292 (1929); Commonwealth v. Spencer, 212 Mass. 438, 99 N.E. 266 (1912); People v. Eggleston, 186 Mich. 510, 152 N.W. 944 (1915); People v. Carlin, 194 N.Y. 448, 87 N.E. 805 (1909); Adams v. State, 49 Okla. Crim. 94, 292 Pac. 385 (1930); Oehler v. State, 202 Wis. 530, 232 N.W. 866 (1930).

[13] See, *e.g.*, Foster v. State, 37 Ariz. 281, 289, 294 Pac. 268, 271 (1930); State v. Livingston, 233 S.C. 400, 105 S.E.2d 73 (1958).

[14] Fralick v. State, 25 Ariz. 4, 212 Pac. 377 (1923); State v. Tharp, 48 Idaho 636, 284 Pac. 201 (1930); 2 UNDERHILL, CRIMINAL EVIDENCE § 452 (5th ed. 1956): "As to the quantum of evidence which the accused must introduce in order to make the prosecution meet the burden of proving insanity beyond a reasonable doubt, most courts hold that sufficient evidence must be produced to raise a reasonable doubt of the defendant's sanity."

[15] Lauterio v. State, 23 Ariz. 15, 201 Pac. 91 (1921); ARIZ. REV. STAT. ANN. § 13-162 (1956).

incrimination,[16] which protects the defendant.

The privilege, as it emerged in England[17] and as it was expressed in the U. S. Constitution,[18] was against being compelled to "be a witness" or "to give evidence" against oneself. The history of the privilege is said to suggest that the privilege is limited to *testimonial* disclosures.[19] The privilege was directed at the employment of legal processes[20] to extract from the person's own lips an admission of guilt, which would thus take the place of other evidence. That is, the privilege was intended to prevent the use of legal compulsion to extract from a person a sworn *communication* of his knowledge of facts which would incriminate him. The privilege applies to any fact which is relevant to a proceeding whose sole or essential object is to charge the privilege-claimant with a specific crime or to any fact which is relevant to an attempt, as a subordinate purpose of a proceeding, to charge the claimant with a crime,—qualified only to the extent that the evidence is "oral testimony from the lips of the accused."[21] From the general principle, as stated above, it follows that an inspection of the bodily features does not violate the privilege,[22] nor does the extraction of substances from the body of the suspect for purposes of evidence,[23] because such does not call upon the accused as a witness

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[16] UDALL, ARIZONA LAW OF EVIDENCE § 91 (1960), "Evidence excluded by rules of the privilege is largely reliable, valuable, relevant proof. It is excluded because protection and encouragement of certain relationships and interests is considered to be more important than the loss of evidence." See generally 8 WIGMORE, EVIDENCE §§ 2250-2284 (McNaughton rev. 1961).

[17] See, *e.g.*, Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); Wigmore, *The Privilege Against Self-Crimination; Its History*, 15 HARV. L. REV. 610 (1902):

> Two distinct and parallel lines of development must be kept in mind,—the one an outgrowth of the other, succeeding it, and yet beginning just before the other comes to an end. The first is the history of the opposition to the *ex officio* oath of the ecclesiastical courts; the second is the history of the opposition to the criminating question in the common law courts,—*i.e.*, of the present privilege in its modern shape.

[18] See, *e.g.*, Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 783 (1935):

> The real reson for the American insistence that the privilege against self-incrimination be made a constitutional privilege may possibly be traced to the proceeding of the prerogative courts of Governor and Council, which constituted the supreme colonial courts, and the proceedings instituted to enforce the laws of trade in the colonies.

[19] See MCCORMICK, EVIDENCE § 126 (1954); UDALL, ARIZONA LAW OF EVIDENCE § 98 (1960); 8 WIGMORE, EVIDENCE § 2263 (McNaughton rev. 1961).

[20] MCCORMICK, EVIDENCE § 126 (1954). Such writs as *Subpoena Ad Testificandum* and *Subpoena Duces Tecum* were used which forced a witness to appear and give testimony or to produce books and papers under pain of penalty.

[21] 8 WIGMORE, EVIDENCE § 2260 (McNaughton rev. 1961).

[22] See, *e.g.*, United States v. Townsend, 151 F. Supp. 378 (D.D.C. 1957) (examination of private parts in rape charge); Garcia v. State, 35 Ariz. 35, 274 Pac. 166 (1929) (examination for gonorrhea in rape charge); People v. Eberhard, 114 Cal. App. 2d 133, 249 P.2d 590 (1952) (needle marks on arm of narcotics possessor).

[23] See, *e.g.*, United States v. Nesmith, 121 F. Supp. 758 (D.D.C. 1954) (urinalysis

—unless all bodily action be synonymous with testimonial utterance; for compulsion alone is not the component idea, but testimonial compulsion.[24]

Dean Wigmore classifies the requiring of a suspect to submit to an examination for sanity as "without the privilege" since "evidence can be obtained only if the person cooperates," for even in this situation "no communication of knowledge is compelled." He qualifies this statement, however, by noting, "Unless some attempt is made to secure a communication—written, oral or otherwise—upon which reliance is to be based as involving his consciousness of the facts and the operation of his mind in expressing it, the demand made upon him is not a testimonial one."[25]

The compulsory sanity examination is among the borderline cases, as to which it may be debated whether the compelled conduct is communication used as evidence of its truth so as to bring it within the privilege. In the sanity examination, the questions are not designed to elicit admissions of guilt, but rather to test the coherence and rationality of the subject. The questions are not to be used testimonially, but as symptoms of normality or abnormality.[26] Courts on this ground rather uniformly hold that an order for a mental examination does not violate the privilege.[27] But they often condition the holding by the requirement that the accused should not be forced to answer questions,[28] or they hold that answers indicating guilt should not be put into evidence,[29] evincing the conclusion that such statutorily-provided examinations are to be used exclusively to determine the defendant's capacity to understand the proceedings against him and to assist in his defense, not as substantive evidence on the question of the guilt of the defendant. This

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to determine intoxication); State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1953) (forcible taking of defendant's breath for drunkometer test) (overruled in State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963), insofar as the case conflicts with Mapp v. Ohio, 367 U.S. 643 (1961), as to inadmissibility of evidence procured in unreasonable search and seizure in state court proceedings); State v. Duguid, 50 Ariz. 276, 72 P.2d 435 (1937) (urinalysis to determine intoxication); People v. Tucker, 105 Cal. App. 2d 333, 198 P.2d 941 (1948) (blood sample to determine intoxication taken while defendant was unconscious).

[24] 8 WIGMORE, EVIDENCE § 2265 (McNaughton rev. 1961).

[25] *Id.* § 2265.

[26] MCCORMICK, EVIDENCE § 126 (1954).

[27] See, *e.g.*, Fouquette v. Bernard, 198 F.2d 860 (9th Cir. 1952); Noelke v. State, 214 Ind. 427, 15 N.E.2d 950 (1938); Commonwealth v. Millen, 289 Mass. 441, 194 N.E. 463 (1935); Rogers v. State, 222 Miss. 690, 76 So.2d 831 (1955); *In re* Miller, 98 N.H. 107, 95 A.2d 116 (1953).

[28] See, *e.g.*, People v. Strong, 114 Cal. App. 522, 300 Pac. 84, 87 (1931); Commonwealth v. DiStasio, 294 Mass. 273, 1 N.E.2d 189 (1936); Commonwealth v. Musto, 348 Pa. 300, 35 A.2d 307 (1944); Commonwealth v. Statti, 166 Pa. Super. 577, 73 A.2d 688 (1950).

[29] See, *e.g.*, State v. Myers, 220 S.C. 309, 67 S.E.2d 506 (1951).

conclusion is fortified by the Model Penal Code[30] provision providing for admissibility of evidence obtained in a mental examination, and by the commentary to that provision,[31] which states:

> This section embodies the view that the important expert knowledge of the mental condition of a defendant acquired by examination or treatment on order of the court should be fully available in evidence in any proceeding where his mental condition may be properly in issue; but that to safeguard the defendant's rights . . . , the defendant's statements made for this purpose may not be put in evidence on any other issue.

The underlying intent of the above-mentioned Penal Code provision and comments is in keeping with the federal and state constitutional proscriptions of compulsory incriminating testimony as substantive evidence of guilt,[32] while at the same time preserving the important distinction between such testimony and testimony to establish the defendant's mental capacity to stand trial. Examinations of defendant's mental capacity should, indeed, be confined to the purposes and utilized within the bounds of the intent of these constitutional and Penal Code provisions.

Michael S. Milroy

MASTER AND SERVANT — RESPONDEAT SUPERIOR — SALESMAN AS SERVANT OR INDEPENDENT CONTRACTOR. — *Throop v. F. E. Young & Co.* (Ariz. 1963).

Plaintiff brought suit in the superior court to recover damages for the wrongful death of her husband, who was killed when the automobile he was driving collided with an automobile being driven by an employee of defendant. The issue of control or right of control was not submitted to the jury and the court directed a verdict for defendant. On appeal, *held*, affirmed. There being no evidence from which a jury could find control or right of control, the reason for imposing vicarious liability on defendant for the negligence of its employee under the doctrine of respondeat superior was wanting. *Throop v. F. E. Young & Co.*, 94 Ariz. 146, 382 P.2d 560 (1963).

The doctrine of respondeat superior[1] has been known to the law for centuries,[2] and has been the subject of both support[3] and criti-

[30] ALI MODEL PENAL CODE § 4.09 (Proposed Official Draft, 1962).
[31] ALI MODEL PENAL CODE § 4.09, comment (Tent. Draft. No. 4, 1955).
[32] See note 5 *supra*.

[1] Let the master respond (*i.e.*, in damages). MECHEM, OUTLINES OF THE LAW OF AGENCY § 349 (4th ed. 1952).

[2] The history of the doctrine has been traced back in the Germanic law, without a break, for at least two thousand years. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 383, 441 (1894).

[3] MECHEM, *op. cit. supra* note 1, § 351; Douglas, *Vicarious Liability and the*

cism.[4] Justifications for the doctrine have been many,[5] and its variations and limitations have also been numerous. The most important limitations on vicarious liability of the master are found in the exceptions from liability for torts committed outside the scope of employment[6] and those committed by independent contractors.[7] Where the employee is a servant acting outside the scope of his employment, or is an independent contractor, the employer generally cannot exercise control over the employee's conduct; consequently, the soundness of placing limitations on the vicarious liability of the employer for the torts of such persons becomes obvious.

The general rule may now be stated that where it is sought to hold one responsible in damages for the negligence of another under the principle of respondeat superior, it must be shown that, in the doing of the act causing injury, the wrongdoer was the servant of the one sought to be charged.[8] Determination of the true relation between the employer and his salesman is essential to a just resolution of a case brought under the doctrine of respondeat superior, but there has been little consistency in stating the tests to be applied in reaching that determination. The principal test is that of "right of control."[9]

In deciding the principal case, the Arizona court applied the test as outlined in *Restatement (Second), Agency* § 220 (1957).[10] This section and Arizona cases citing it indicate that the ultimate issue

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Administration of Risk, 38 YALE L.J. 584, 720 (1929); Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916).

[4] *Compare* MECHEM, AGENCY § 1877 (2d ed. 1914) *with* MECHEM, *op. cit. supra* note 1, § 351; Holmes, *Agency*, 4 HARV. L. REV. 345 (1891).

[5] MECHEM, *op. cit. supra* note 1, § 352.

[6] Laugher v. Pointer, 9 B. & C. 548 (1826).

[7] Milligan v. Wedge, 12 A. & E. 737 (1840); Quarman v. Burnett, 6 M. & W. 499 (1840). See generally Annot., 75 A.L.R. 725 (1931).

[8] LeeMoor Contracting Co. v. Blanton, 49 Ariz. 130, 65 P.2d 35 (1937); 35 AM. JUR. *Master and Servant* § 532 (1941); 57 C.J.S. *Master and Servant* § 562 (1948); RESTATEMENT (SECOND), AGENCY § 219 (1958) [hereinafter cited as RESTATEMENT]. The most frequently quoted definitions of servant and independent contractor are found in RESTATEMENT § 2:

> (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
>
> (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.

[9] Consolidated Motors, Inc. v. Ketcham, 49 Ariz. 295, 66 P.2d 246 (1937); LeeMoor Contracting Co. v. Blanton, *supra* note 8; RESTATEMENT § 220. For an extensive list of other tests used, see 17 CORNELL L.Q. 108 (1931).

[10] The Arizona court has announced many times that it will follow the RESTATEMENT when not bound by prior decisions to the contrary. *Cf.* Odekirk v. Austin,

in cases brought under respondeat superior is whether the alleged servant is subject to the employer's control or right of control as to the manner in which the service is performed.[11] In cases involving salesmen driving automobiles, the inquiry resolves itself further into a determination of whether the control may be exercised with respect to the salesman's mode of driving.[12] If such control is present, the salesman is generally deemed to be a servant for whose torts the employer will be held liable, if the torts are committed within the scope of employment.[13] If such control is lacking, the person so engaged is generally held to be an independent contractor, and his torts are not the responsibility of the employer.[14] All other indicia of a master-servant relationship are subordinated to the "control" factor, and are considered merely as matters of fact bearing on the right of control.[15]

In the *Throop* case, four of these subordinate matters of fact are cited as being applicable to a determination of the nature of the relationship between the salesman and the defendant employer, *i.e.*, (1) the extent of control over details of the work;[16] (2) whether or not the employee is engaged in a distinct occupation;[17] (3) whether the employer or the workman supplied the instrumentalities, tools and

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90 Ariz. 97, 366 P.2d 80 (1961); Ingalls v. Neidlinger, 70 Ariz. 40, 216 P.2d 387 (1950).

[11] Consolidated Motors, Inc. v. Ketcham, 49 Ariz. 295, 66 P.2d 246 (1937); LeeMoor Contracting Co. v. Blanton, 49 Ariz. 130, 65 P.2d 35 (1937). In the principal case, plaintiff relied extensively on cases brought under workmen's compensation acts to support her contention that the defendant had control or right of control over the salesman. However, since such social legislation is liberally construed in favor of employees to give effect to the legislative intent, such cases are not necessarily authority for the principles applicable to common law liability under the doctrine of respondeat superior. *Cf.* National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111, 122 (1944); Southwest Lumber Mills v. Employment Security Comm'n, 66 Ariz. 1, 182 P.2d 83, 85 (1947); *accord,* Beaman v. Superior Products, Inc., 89 Ariz. 119, 358 P.2d 997-98 (1961).

[12] Pyyny v. Loose-Wiles Biscuit Co., 253 Mass. 574, 149 N.E. 541 (1925); Stockwell v. Morris, 46 Wyo. 1, 22 P.2d 189 (1933). See generally Annots., 17 A.L.R. 621 (1922); 29 A.L.R. 470 (1924); 54 A.L.R. 627 (1928); and 107 A.L.R. 419 (1937).

[13] *E.g.,* Singer Mfg. Co. v. Rahn, 132 U.S. 518 (1889); May v. Farrell, 94 Cal. App. 703, 271 Pac. 789 (1928); Pickens & Plummer v. Diecker & Bro., 21 Ohio St. 212, 8 Am. Rep. 55 (1871); Gillespie v. Ford, 81 S.E.2d 44, (S.C. 1954); Woodward-Wanger Co. v. Nelson, 11 S.W.2d 371 (Tex. Civ. App. 1928).

[14] *E.g.,* Shedd Brown Mfg. Co. v. Tichenor, 257 S.W.2d 894 (Ky. 1953), McCarthy v. Souther, 83 N.H. 29, 137 Atl. 445 (1927); Romero v. Shelton, 70 N.M. 425, 374 P.2d 301 (1962); Nettleship v. Shipman, 161 Wash. 292, 296 Pac. 1056 (1931); Stockwell v. Morris, 46 Wyo. 1, 22 P.2d 189 (1933).

[15] Consolidated Motors, Inc. v. Ketcham, 49 Ariz. 295, 66 P.2d 246 (1937); Maxey v. Johnson, 29 Ariz. 452, 242 Pac. 866 (1926); McCarthy v. Souther, *supra* note 14; Stockwell v. Morris, *supra* note 14; RESTATEMENT § 220.

[16] RESTATEMENT § 220(2)(a).

[17] *Id.* (b).

place of work for the person doing the work;[18] and (4) the method of payment, whether by the time or by the job.[19]

Control over the physical activities of the employee in the methods used to do the work need not be exercised. It is only necessary that the right of control be available to the employer.[20] In cases involving salesmen, courts frequently deem control by the employer over selling methods of the salesman sufficient to hold the employer responsible for the negligence of the salesman in the operation of the automobile used in his employment.[21] This reasoning is justly criticized in a Wyoming case, the court stating:

> If, accordingly, the right of control is the test in connection with the question before us [of whether a salesman is a servant or an independent contractor], and the courts apparently agree that it is, then, it would seem, it ought to be directed to that portion of the employment directly connected with the factor by means of which liability is sought to be pursued.[22]

In making the distinction between control over selling methods and control over operation of the automobile, it is clear that one person may be a servant for some portions of his employment and an independent contractor for others.[23] The principal case recognizes and

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[18] *Id.* (e).

[19] *Id.* (g).

[20] Philabert v. Frazer, 35 Ala. App. 549, 51 So. 2d 381 (1950); Robinson v. George, 16 Cal. 2d 238, 105 P.2d 914 (1940); Khoury v. Edison Elec. Illuminating Co., 265 Mass. 236, 164 N.E. 77 (1928); Burgess v. Garvin, 219 Mo. App. 162, 272 S.W. 108 (1925); 35 AM. JUR., *op. cit. supra* note 8, § 539; 57 C.J.S. *op. cit. supra* note 8, § 563(b).

[21] *E.g.*, Williams v. National Cash Register Co., 157 Ky. 836, 164 S.W. 112 (1914); Burgess v. Garvin, *supra* note 20; Woodward-Wanger Co. v. Nelson, 11 S.W.2d 371 (Tex. Civ. App. 1928). These decisions seems to be based on a too broad interpretation of the phrase "control of methods of work." Logically they cannot be justified. Other doctrines have been developed to extend the master's liability. See, *e.g.*, Gallagher's Estate v. Battle, 209 Md. 592, 122 A.2d 93 (1956); Weslowski v. John Hancock Mut. Life Ins. Co., 308 Pa. 117, 162 Atl. 166, 87 A.L.R. 783 (1932), 32 DICK. L. REV. 129 (1932) (vital importance rule). Engel v. Davis, 256 Ala. 661, 57 So. 2d 76 (1952); Leuis v. National Cash Register Co., 84 N.J.L. 598, 87 Atl. 345 (1913) (employer's consent to or knowledge of employee's use of automobile). Silent Automatic Sales Corp. v. Stayton, 45 F.2d 471 (1930) (benefit to employer). See also 2 HARPER & JAMES, TORTS, 1400-1403 (1956) (regular part of employer's business).

[22] Stockwell v. Morris, 46 Wyo. 1, 22 P.2d 189 (1933). See also American Savings Life Ins. Co. v. Riplinger, 249 Ky. 8, 60 S.W.2d 115 (1933); Griffith v. Electrolux Corp., 176 Va. 378, 11 S.E.2d 644 (1940). *Contra,* Terry Dairy Co. v. Parker, 144 Ark. 401, 223 S.W. 6 (1920) (see also dissent).

[23] Wescott v. Young, 275 Mass. 82, 175 N.E. 153 (1931); McCarthy v. Souther, 83 N.H. 29, 137 Atl. 445 (1927).

applies this distinction.[24]

Whether the one employed is engaged in a distinct occupation or business is the second issue noted by the Arizona court in the principal case.[25] One carrying on an independent business is said to be an independent contractor who does not surrender control of his physical activities to the employer. Consequently, the employer should not be held responsible for torts committed by such person.[26] Cases involving persons engaged in distinct occupations ultimately resolve themselves into a consideration of the actual or potential control held by the employer.[27]

Whether the salesman or the employer supplies the instrumentalities utilized by the salesman often has a bearing on the servant-independent contractor determination.[28] The only instrumentality of concern in the principal case, and in most salesman cases, is the automobile used by the salesman as an essential accessory to his performance of the work.[29] It is logical that control should follow owner-

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[24] Throop v. F. E. Young & Co., 94 Ariz. 146, 382 P.2d 560, 564 (1963).

> Any right to control selling procedures . . . would not justify an inference of any right to control the time, method or manner of the operation of [the salesman's] . . . automobile. *Ibid.*

[25] RESTATEMENT § 220(2)(b). For a discussion of the primary characteristics of a distinct occupation, see Holloway v. Nassar, 276 Mich. 212, 267 N.W. 619 (1936).

[26] Miami Herald Publishing Co. v. Kendall, 88 So. 2d 276 (Fla. 1956); Bell v. State, 153 Md. 333, 138 Atl. 352 (1927); Potchasky v. Marshall, 211 App. Div. 236, 207 N.Y. Supp. 562 (Sup. Ct. 1925). See generally Leidy, *Salesmen as Independent Contractors*, 28 MICH. L. REV. 365 (1930).

[27] Simril v. Davis, 42 Ga. App. 277, 155 S.E. 790 (1930); Thurman v. Culberson, 22 S.W.2d 525 (Tex. Civ. App. 1929).

[28] RESTATEMENT § 220(2)(e). See also Aldrich v. Tyler Grocery Co., 206 Ala. 138, 89 So. 289 (1921); Fearn v. Ralph Hamlin, Inc., 215 Cal. 211, 8 P.2d 1015 (1932); Nettleship v. Shipman, 161 Wash. 292, 296 Pac. 1056 (1931). Ownership of the automobile has been held essential (along with control) to hold an employer liable under respondeat superior, *cf.*, Fearn v. Ralph Hamlin, Inc., *supra;* and wholly immaterial, *cf.*, Marchand v. Russell, 257 Mich. 96, 241 N.W. 209 (1932); Stevens v. Moore, 211 S.C. 498, 46 S.E.2d 73 (1948). See generally Annot., 52 A.L.R.2d 287 (1957).

[29] If the salesman owns the automobile, an inference of an independent contractor relationship is raised. See Counihan v. Lufstufka Bros. & Co., 118 Cal. App. 605, 5 P.2d 694 (1931); McCraner v. Nunn, 129 Kan. 802, 284 Pac. 603 (1930); Gladney v. Holland Furnace Co., 336 Mass. 366, 145 N.E.2d 694 (1957); Kassela v. Hoseth, 217 Wis. 115, 258 N.W. 340 (1935); RESTATEMENT § 220, illustration 7. *Contra,* Phillips v. Larrabee, 32 Cal. App. 2d 720, 90 P.2d 820 (1939); Brown v. Kremer, 124 N.J.L. 242, 11 A.2d 248 (1940); Auer v. Sinclair Refining Co., 103 N.J.L. 372, 137 Atl. 555 (1927); Buckley v. Harkens, 114 Wash. 468, 195 Pac. 250 (1921). If the employer owns the automobile, an inference of a master-servant relationship is raised. See Fearn v. Ralph Hamlin, Inc., *supra,* note 28; Nichols v. G. L. Hight Motor Co., 65 Ga. App. 397, 10 S.E.2d 439 (1940); Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931); RESTATEMENT § 220, illustration 6. *Contra,* Simril v. Davis, 42 Ga. App. 277, 155 S.E. 790 (1930); Magee v. Hargrove Motor Co., 50 Idaho 442, 296 Pac. 774 (1931); Thurman v. Culberson, 22 S.W.2d 525 (Tex. Civ. App. 1929).

ship;[30] however, ownership of the automobile would seem to be insignificant if a court deems control over selling methods sufficient to impose vicarious liability on a salesman's employer.

The method of payment, whether by the time or by the job, is another indicator of the existence or non-existence of control by the employer.[31] In cases involving salesmen, and brought under respondeat superior, the distinction is generally drawn between payment by salary and payment by commission, the former being indicative of a master-servant relationship[32] and the latter of an independent contractor relationship.[33]

The *Throop* case is the first "salesman" case in Arizona requiring a complete consideration of the right-of-control test. The trend in such cases is to hold salesmen not to be servants of their employers. At least where the relationship between salesman and home office is as tenuous as in the principal case, such trend seems to be sound.[34] Unless a court is willing to approach the imposition of absolute liability in such cases, it should not permit the doctrine of respondeat superior to be utilized as a crutch to impose any more liability on an employer than that for which he is reasonably responsible. If the employer had control or right of control over the salesman's method of driving, then it could fairly be said that he had control sufficient to impose vicarious liability for injuries resulting from the salesman's negligent driving. Even if a master-servant relationship is clearly shown by reference to a contract or to the course of employment, the ultimate issue must be the employer's control or right of control of the salesman in the doing of the very act causing the injury. No court should be satisfied with less than this when the employer is sought to be held vicariously liable under the doctrine of respondeat superior. This strict application of the doctrine is implicit in the decision by the Arizona court in the principal case.

John H. Lyons

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[30] Conversions & Surveys v. Roach, 204 F.2d 499 (1953).

[31] RESTATEMENT § 220(2)(g).

[32] Mitchem v. Shearman Concrete Pipe Co., 45 Ga. App. 809, 165 S.E. 889 (1932); Marchand v. Russell, 257 Mich. 96, 241 N.W. 209 (1932). *Contra,* Marquez v. LeBlanc, 143 So. 108 (La. App. 1932); Khoury v. Edison Elec. Illuminating Co., 265 Mass. 236, 164 N.E. 77 (1928).

[33] Aldrich v. Tyler Grocery Co., 206 Ala. 138, 89 So. 289 (1921); Premier Motor Mfg. Co. v. Tilford, 61 Ind. App. 164, 111 N.E. 645 (1916). *Contra,* Curran v. Earle C. Anthony, Inc., 77 Cal. App. 462, 247 Pac. 236 (1926); Leuis v. National Cash Register Co., 84 N.J.L. 598, 87 Atl. 345 (1913). See generally Annot., 61 A.L.R. 223 (1929). For cases involving payment by salary plus commission, see May v. Farrell, 94 Cal. App. 703, 271 Pac. 789 (1928); Pyyny v. Loose-Wiles Biscuit Co., 253 Mass. 574, 149 N.E. 541 (1925); Dishman v. Whitney, 121 Wash. 157, 209 Pac. 12 (1922).

[34] MECHEM, *op. cit. supra* note 1, §§ 446-449.

REAL PROPERTY—MORTGAGES—SECOND MORTGAGEE MAY NOT ACQUIRE TITLE TO MORTGAGED PROPERTY AS AGAINST FIRST MORTGAGEE THROUGH A TAX DEED.—*Moore v. Crisp* (Okla. 1963).

Plaintiff held a first mortgage on certain real property. Defendant held a second mortgage. The owner of the property failed to pay the taxes, and at the subsequent tax sale the property was sold and tax certificates issued which were later assigned to the defendant. A tax deed was issued to the defendant upon the surrender of the certificates. Plaintiff sought to have the deed canceled. The trial court ruled that defendant's title was good under the tax deed. On appeal, *held,* reversed. A second mortgagee may not purchase the mortgaged property at a tax sale and thereby acquire title as against the first mortgagee. *Moore v. Crisp,* 383 P.2d 221 (Okla. 1963).

There is an apparent conflict of authority as to whether a mortgagee can acquire good title to the mortgaged property at a tax sale, as against the mortgagor.[1] A somewhat related problem, that presented in the instant case, reflects a similar conflict of authority as to whether a junior mortgagee can acquire good title at a tax sale, as against the senior mortgagee.[2] The majority of jurisdictions have answered both questions in the negative.[3] The Oklahoma court, however, has answered affirmatively to the first question[4] and, as the instant case illustrates, negatively to the second.[5]

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[1] See generally 37 AM. JUR. *Mortgages* § 1163 (1941); Annot., 140 A.L.R. 294, 303 (1942); BLACK, A TREATISE ON THE LAW OF TAX TITLES §§ 274-75, 278 (1893); 59 C.J.S. *Mortgages* § 200 (1949); 5 TIFFANY, THE LAW OF REAL PROPERTY § 1425 (1939).

[2] See generally 37 AM. JUR. *Mortgages* § 1165 (1941); Annot., 140 A.L.R. 294, 322, (1942); BLACK, *op. cit. supra* note 1, § 279; 59 C.J.S. *Mortgages* §§ 200, 326, (1949).

It is generally agreed by most authorities that a mortgagor cannot acquire a tax title and set it up as against the mortgagee. See BLACK, *supra* § 277; Note, 42 HARV. L. REV. 583 (1929).

[3] *E.g.,* Stinson v. Connecticut Mut. Life Ins. Co., 174 Ill. 125, 51 N.E. 193, 66 Am. St. Rep. 262 (1898) (mortgagee-mortgagor); Koch v. Kiron State Bank, 230 Iowa 206, 297 N.W. 450, 140 A.L.R. 273 (1941) (successive mortgagees); Riley v. Bank of Commerce, 37 N.M. 338, 23 P.2d 362 (1933) (successive mortgagees); Crofts v. Johnson, 6 Utah 2d 350, 313 P.2d 808 (1957) (mortgagee-mortgagor). See also Allison v. Corson, 83 Fed. 752 (1897); Rives v. Anderson, 128 Fla. 794, 175 So. 897 (1937); Dean v. Kane, 106 Fla. 814, 143 So. 656 (1932); National Surety Co. v. Walker, 148 Iowa 157, 125 N.W. 338, 38 L.R.A. 333 (1910); Garrettson v. Scofield, 44 Iowa 35 (1876); Davis v. Evans, 174 Mo. 307, 73 S.W. 512 (1903); Chrisman v. Hough, 146 Mo. 102, 47 S.W. 941 (1898); Baird v. Fischer, 57 N.D. 167, 220 N.W. 892 (1928); Oregon Mortgage Co. v. Leavenworth, 197 Wash. 436, 86 P.2d 206 (1938).

[4] Stith v. Gidney, 193 Okla. 175, 141 P.2d 1003 (1943).

[5] "We therefore hold as between successive mortgagees, one holding a tax deed has merely a lien enforceable under his mortgage, and the tax deed puts him in no better position than would a tax receipt." Moore v. Crisp, 383 P.2d 221, 224 (Okla. 1963).

While the decision in the instant case is in accord with the majority of jurisdictions, it is interesting to note that two out of six members of the Oklahoma court

Those courts which have held to the majority rule that a mortgagee cannot purchase land at a tax sale and acquire good title as against the mortgagor base their decision upon the general proposition that one under a duty to pay property taxes cannot obtain good title at a tax sale, for to allow him to do so would be to permit him to benefit from his own neglect.[6]

But when is a mortgagee under a legal duty to pay the taxes? It is generally agreed that a mortgagee in possession, receiving rents and profits, is under such an obligation.[7] The same is said to be true of a mortgagee in a "title-theory" state, where the mortgagee is the holder of legal title to land, as opposed to being the mere possessor of a lien on the property.[8] In such a case, the mortgagee has an ownership interest in the land and his duty to pay the taxes is founded upon this interest. If, however, the mortgagee is not in possession, in a "lien-theory" jurisdiction, there is no basis for attaching to him such a duty in the absence of a specific covenant to the contrary.[9]

A number of courts, however, have disregarded this reasoning and have continued to apply the majority rule even though the mortgagee is

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felt compelled to disagree. See dissent, Moore v. Crisp, *supra* at 227, where it is said, ". . . since, in my judgment, a mortgagee owes no more duty to another mortgagee than he owes to a mortgagor, I am of the opinion that the mortgagee was a qualified purchaser of the tax deed and can assert her title against the world . . . which would include the senior mortgagee in the instant action." Obviously, the dissenters consider the instant decision to be inconsistent with the past decisions of the court, and such a position would seem to be well taken.

[6] A contrary rule would allow the mortgagee to take advantage of his own wrong by purchasing the property for delinquent taxes after having breached his duty to pay the taxes when they came due. See, *e.g.*, Security Inv. Co. v. Golz, 151 Neb. 172, 36 N.W.2d 862, 863 (1949), where the court, in its syllabus, says, "One who is under an obligation to pay the taxes on land, such as a mortgagee in possession thereof, cannot strengthen his title thereto by buying in the tax title when the property is sold *as a consequence of his omission to make such payment.* In such a case, the sale will merely operate as a payment of the taxes and the title will be the same as it was before the sale, except that the lien for taxes is discharged." (Emphasis supplied.)

[7] *E.g.*, Findley v. Tyler, 300 S.W.2d 598 (Ark. 1957); Pool v. Ellis, 64 Miss. 555, 1 So. 725 (1887); Security Inv. Co. v. Golz, *supra* note 6; Brown v. Simons, 44 N.H. 475 (1863); Ten Eyck v. Craig, 62 N.Y. 406 (1875); Elliott v. Moffett, 365 Pa. 247, 74 A.2d 164 (1950); DeLaine v. DeLaine, 211 S.C. 223, 44 S.E.2d 442 (1947).

[8] Cauley v. Sutton, 150 N.C. 327, 64 S.E. 3 (1909).

[9] In Jones v. Black, 18 Okla. 344, 345, 88 Pac. 1052, 1053 (1907), it is said, "Under the old rule, where the mortgagee held the legal title, he was held not to be able to acquire title through tax sale. . . . Under our statute, a mortgagee holds his mortgage as security for the debt only, and where there is no obligation in the contract . . . to pay the taxes . . . he may acquire title through tax sale. . . . The common law attributes of the mortgage have been wholly and entirely set aside." See also David Oil Co. v. Fogle, 354 Pa. 150, 47 A.2d 209 (1946); 1 JONES ON MORTGAGES § 441 (1928).

In Arizona, a mortgage does not convey title, but merely establishes a lien on the property. Steinfeld v. State, 37 Ariz. 389, 392, 294 Pac. 834, 835 (1930). See also ARIZ. REV. STAT. ANN. § 33-703A (1956), which begins with the words, "A mortgage is a *lien* . . ." (Emphasis supplied.)

not in possession and has merely a lien on the property.[10] These courts continue to find some kind of "duty" to pay the taxes which makes it inequitable to allow the mortgagee to set up a tax title as against the mortgagor. It would appear that this "duty" is fictional, and text writers and legal scholars have often been critical of these decisions.[11]

The Oklahoma court has in the past refused to rely upon the fiction of imposing a "duty" on the mortgagee to pay the property taxes. Recognizing that a mortgagee, not in possession and in a "lien-theory" jurisdiction, is under no obligation to pay taxes, the Oklahoma decisions have upheld the mortgagee's right to purchase at a tax sale as a stranger to the property, and set up this title as against the mortgagor.[12] But the Oklahoma court refuses to extend this right to purchase to a junior mortgagee as against a senior mortgagee, as the instant case illustrates.[13] What is perplexing is the fact that the court, in support of the instant decision, advances three separate lines of reasoning, each of which has been utilized by other courts in arriving at an identical result in similar litigation, and each of which conjures up a fictional "duty" to pay the taxes on the part of the mortgagee. The result is that after having refused to apply these fictional arguments in cases dealing with the mortgagee's right to set up a tax title as against the mortgagor, the Oklahoma court has advanced the very same arguments to deny the junior mortgagee that right as against the senior mortgagee. The distinction does not appear to be justifiable.

The first argument advanced by the court finds it inequitable to allow the junior mortgagee to cut off the rights of the senior mortgagee by purchase at a tax sale because the junior mortgagee "has the right to pay the taxes for the protection of his security" if the mortgagor fails

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[10] See, *e.g.*, Riley v. Bank of Commerce, 37 N.M. 338, 23 P.2d 362 (1933); Crofts v. Johnson, 6 Utah 2d 350, 313 P.2d 808 (1957). *Contra*, Poole v. Thompson, 186 Ark. 95, 52 S.W.2d 735 (1932).

It is interesting to note how many courts automatically apply the majority rule without considering whether the mortgagee is in possession, or the effect of the mortgage in a particular jurisdiction. See cases cited note 3 *supra*.

[11] 4 AMERICAN LAW OF PROPERTY § 16.106 J (1952); Note, 30 MISS. L.J. 87 (1958); Note, 6 UTAH L. REV. 138 (1959).

[12] "A mortgagee not in possession is neither legally nor morally bound to pay the taxes assessed against the mortgaged property and may acquire a tax sale certificate, obtain a tax deed to the property and assert the tax title against the mortgagor. A mortgagee is not disqualified to purchase the mortgaged property at a tax sale and may assert such tax title *against the world.*" Stith v. Gidney, 193 Okla. 175, 141 P.2d 1003, 1005 (1943). (Emphasis supplied.) *Compare* this statement *with* the statement of the court in the instant case cited in note 5 *supra*.

[13] It should be noted, however, that there is a possibility that the Oklahoma court suspected a conspiracy in the instant case, although it was not proved, because the junior mortgagee was the mortgagor's mother. This should be taken into account in evaluating the instant case. Moore v. Crisp, 383 P.2d 221, 224, 227 (Okla. 1963). *But see* Note, 58 Nw. U.L. REV. 685, 690 (1963), where it is pointed out that the opportunity for collusion or fraud in such a case would seem to be very limited.

to do so.[14] Furthermore, even where the property has already been sold at a tax sale, the junior mortgagee has the right to redeem it within the statutory period.[15] In either case, it is generally agreed that the mortgagee may add the amount thus paid to his mortgage debt.[16] It is said, therefore, that it would not be equitable for the junior mortgagee to cut off the rights of the senior mortgagee by purchasing the property for delinquent taxes, when he could just as well have fully protected his rights in the property by paying the taxes prior to sale or by redeeming after the sale, without destroying in either case the rights of his fellow mortgagee.[17]

Secondly, it is argued that equity considers the mortgaged land as a common fund for the payment of *both* the first and second mortgages, and therefore it is a fraudulent act on the part of the junior mortgagee to take advantage of the senior mortgagee by purchasing the land at a tax sale, thereby extinguishing the claim of the latter.[18]

Finally, the Oklahoma court seeks to compare junior and senior mortgagees with tenants in common, and upon the basis of this comparison the court applies the rule pertaining to tenants in common to the case of successive mortgagees.[19] That rule is that each party has the duty of paying the taxes on the property, and therefore it is fraudulent and inequitable to allow either one to obtain a valid tax title and set it up as against the other.[20] In other words, the junior mortgagee should not profit, at the expense of the senior mortgagee, by his failure to perform his obligation to pay the taxes.

It is doubtful that the above reasons are sound; yet the courts have

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[14] Moore v. Crisp, 383 P.2d 221, 223 (Okla. 1963).

[15] This right to redeem is granted by statute in most jurisdictions. See, *e.g.*, ARIZ. REV. STAT. ANN. § 42-421A (1956).

In Arizona, as in most jurisdictions, a tax deed conveys a fee simple estate free from encumbrances. ARIZ. REV. STAT. ANN. § 42-452 (1956).

[16] See, *e.g.*, South Amboy Trust Co. v. McMichael Holdings, 141 N.J. Eq. 12, 56 A.2d 437 (1947); People v. Pierce, 64 N.Y.S.2d 251 (N.Y. 1946); De Laine v. De Laine, 211 S.C. 223, 44 S.E.2d 442 (1947).

[17] *Accord*, Lane v. Wright, 121 Iowa 376, 96 N.W. 902, 100 Am. St. Rep. 362 (1903); Eck v. Swennenson, 73 Iowa 423, 35 N.W. 503, 5 Am. St. Rep. 690 (1887); Perkins v. White, 208 Miss. 157, 43 So.2d 897 (1950) (mortgagee-mortgagor).

[18] Moore v. Crisp, 383 P.2d 221, 223 (Okla. 1963). *Accord*, Quinby v. Meyer, 110 Fla. 445, 148 So. 869 (1933); Kane v. Eustis, 106 Fla. 817, 143 So. 655 (1932); Gorton v. Paine, 18 Fla. 117 (1881); Fair v. Brown, 40 Iowa 209 (1875); Hall v. Westcott, 15 R.I. 373, 5 Atl. 629 (1886).

[19] Moore v. Crisp, 383 P.2d 221, 223 (Okla. 1963). *Accord*, Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113, 7 N.W. 707 (1881); Des Moines Sav. Bank v. Eisenmenger, 183 Minn. 46, 235 N.W. 390 (1931); Norton v. Myers, 74 Minn. 484, 77 N.W. 298, 539 (1898); American Baptist Missionary Union v. Weeks, 72 Minn. 484, 75 N.W. 713, 77 N.W. 36 (1898).

[20] *E.g.*, Smith v. Smith, 210 Ark. 251, 195 S.W.2d 45 (1946); Ellis v. Williams, 297 P.2d 916 (Okla. 1956); Arthur v. Coyne, 32 Okla. 527, 122 Pac. 688 (1912); Perkins v. Johnson, 178 Tenn. 498, 160 S.W.2d 400 (1942).

continued to apply them. For example, the first of the above-mentioned arguments, that which seeks to justify the result of the instant case by reason of the mortgagee's right to pay the taxes, seems to confuse the concept of a *right* with that of a *duty*. It is true that a mortgagee has a right, by statute, to pay the taxes or to redeem the property should the mortgagor fail to do so. But it does not necessarily follow from this that he has the duty to do so, especially where, as in the instant case, the mortgagee is not in possession in a "lien-theory" jurisdiction and has not contracted to assume an obligation to pay the taxes.[21]

Then again, the "common fund" argument presented above would seem to impose some fiduciary duty upon successive mortgagees to protect each other's security from hostile third parties. But such a view disregards the realities of the situation, for in truth there is no fiduciary relationship between the parties. They are actually adverse parties, holding adverse interests in the same property.[22]

Finally, the analogy to tenants in common is unsound for the reason that tenants in common are actually owners of the land. They have estates in the land and upon this ownership interest rests the legal duty to pay taxes.[23] A mortgagee, on the other hand, merely has a lien upon the property and ordinarily is under no such duty.[24]

There would appear to be no sound reason why a junior mortgagee should not be allowed to purchase the mortgaged property as a stranger at a tax sale, and set up a valid title as against the senior mortgagee. As has been shown, this "duty" to pay the taxes upon the part of the mortgagee (junior or senior) is actually nonexistent. It is a mere fiction used by a majority of the courts to arrive at a desired result.

It has been suggested that the majority view is really grounded in public policy considerations, in that it seeks to encourage the prompt

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[21] Under such circumstances, it is fiction to fix a duty upon the mortgagee to pay the taxes, and he should be able to purchase good title at a tax sale and hold it as against the whole world. See Security Mortgage Co. v. Harrison, 176 Ark. 423, 3 S.W.2d 59 (1928); Security Mortgage Co. v. Herron, 174 Ark. 698, 296 S.W. 363 (1927); Gwinn v. Smith, 55 Ga. 145 (1875).

It should be noted that a first mortgagee has the same opportunity to pay the taxes for the protection of his security as does the second mortgagee. Likewise, he has the same right of redemption after a sale. Neither party possesses an advantage over the other in the exercise of these privileges. In the instant case, however, the first mortgagee made no effort to protect his rights in the property until after the statutory period for redemption had expired and tax deeds had been issued to the second mortgagee. Moore v. Crisp, 383 P.2d 221, 222 (Okla. 1963).

[22] "And the common derivation of their interests in the land does not create a common interest but rather antagonistic interests, certainly as between two mortgagees." 4 AMERICAN LAW OF PROPERTY § 16.106 J (1952). See also Note 46 YALE L.J. 334 (1936). A fiduciary relationship can be contractually imposed. But in the instant case, there was no contract. How, then, can there be a fiduciary duty upon one party to act for the benefit of the other?

[23] 4 AMERICAN LAW OF PROPERTY § 16.106J (1952); BLACK, A TREATISE ON THE LAW OF TAX TITLES § 282 (1893).

[24] See cases cited note 9 *supra*.

payment of taxes.[25] But public policy considerations do not seem sufficient to justify this illogical view which deprives the mortgagee of the right to purchase the mortgaged property at a tax sale, as a stranger to the title, and thereby acquire good title as against parties having adverse interests in the property.[26]

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TORTS — AUTOMOBILE DRIVERS — DUTY TO EXERCISE DUE CARE NOT DELEGABLE TO THIRD PERSON WHO SIGNALS TO DRIVER TO PROCEED. — *Mitchell v. Colquette* (Ariz. 1963).

Plaintiff automobile passenger brought action against the drivers and the owners of two colliding automobiles for injuries sustained as a result of the collision. The automobile in which plaintiff was riding was headed north on 2nd Street and stopped at a stop sign at the Roosevelt Street intersection in the city of Phoenix. A car on the outside lane in the eastbound traffic on Roosevelt stopped and its unidentified driver waved defendant Chance through. Chance testified that his view was obstructed by the heavy traffic and he was unable to stop in time to avoid the collision with defendant Colquette's westbound car which simultaneously approached the intersection. The lower court rendered judgment on a verdict in favor of the defendants. On appeal, *held*, reversed. The Supreme Court found reversible error in several instructions to the jury including one which submitted the question of whether the proximate cause of the accident was the third party's negligence in waving defendant Chance into the intersection. The appellate court concluded that whether Chance's conduct in entering the intersection upon a signal from a third person was negligence was a question for the jury, but that, even if the third person could be considered negligent, there was no indication in any of the evidence that the collision was caused by other than negligence on the part of one of the two defendant drivers involved. The duty of the driver of an automobile approaching an intersection to exercise due care cannot be delegated to a third person who signals the driver to "come on" even though the third person may also be negligent. *Mitchell v. Colquette*, 93 Ariz. 211, 379 P.2d 757 (1963).

The impositon of a duty upon a driver who signals the driver of another vehicle to pass ahead of, to turn in front of, or to cross at an intersection before the signaling driver borders on being a devious application of the doctrine of "shifting responsibility"—a negligence concept

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[25] "It would tend to the accumulation of arrears of taxes if mortgagees could stand by indifferently until a tax sale should be held at which they could acquire a valid tax title which in many cases would save the expense of a foreclosure suit." Farmer v. Ward, 75 N.J. Eq. 33, 71 Atl. 401, 403 (1908).

This public policy argument is criticized, however, in 4 AMERICAN LAW OF PROPERTY § 16.106 J (1952).

[26] The instant case is noted in 58 Nw. U.L. REV. 685 (1963).

used to express the relief of a defendant from taking precautions for the safety of a plaintiff, because he is either free to assume that someone else will do it or that someone else will be fully responsible in case the defendant does not.[1]

The doctrine has its genesis in the rather gray area where the duty of a particular person terminates and that same or similar duty is concurrently or subsequently assumed by another. Generally one who employs an independent contractor to do work on his premises is not liable for his negligence and the responsibility falls solely upon the independent contractor.[2] Similarly, where a third person becomes aware of a danger created by defendant's negligence, and is in a position to deal with it, it is said that the defendant is free to assume that he would act reasonably, and a failure to do so may be an "intervening cause" relieving defendant of all liability for his own negligence.[3] But where the risk is unduly great, in most situations, the reliance upon the responsibility of others is clearly not the exercise of reasonable care.[4] So also, where the defendant is under a duty to act reasonably for the protection of the plaintiff and he may anticipate that a third person may fail to use proper care if the responsibility is transferred to him, it cannot generally be said to be the exercise of reasonable care to place reliance upon him.[5]

To determine the appropriateness of applying the shifting responsibility theory to *Mitchell v. Colquette,* a closer examination should be made of the duty of the driver of an automobile upon entering an intersection, and the character of the duty of such third person who signals the driver to proceed. It has been stated that the duty of a motor vehicle operator generally is to exercise ordinary, reasonable or due care under th circumstances,[6] and this standard has been held applicable to the intersection situation even where one may possess the right of way.[7] Extra

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[1] PROSSER, TORTS 143 (2d ed. 1955).

[2] Atlanta & F.R.R. v. Kimberly, 87 Ga. 161, 13 S.E. 277 (1891); Engel v. Eureka Club, 137 N.Y. 100, 32 N.E. 1052 (1893); Kunan v. De Matteo, 308 Mass. 427, 32 N.E.2d 613 (1941); Persons v. Raven, 187 Ore. 1, 207 P.2d 1051 (1949).

[3] In Hinnant v. Atlantic Coast Line R.R., 202 N.C. 489, 163 S.E. 555 (1932), a passenger in an automobile was injured when the driver negligently drove into a freight train which had approached the crossing without signals. It was held that the negligence of the train engineer was insulated by that of the driver of the automobile since the "law did not impose upon the engineer the duty of foreseeing such negligent acts of the driver of the automobile." *Cf.* RESTATEMENT, TORTS § 442, §447, and § 452 (1934).

[4] Besner v. Central Trust Co., 230 N.Y. 357, 130 N.E. 577 (1921); Fisher v. Portland Ry. Light & Power Co., 74 Ore. 229, 137 P. 763, 143 P. 992 (1914). *Cf.* RESTATEMENT TORTS § 416, § 423 (1934).

[5] RESTATEMENT, TORTS § 390 (1934).

[6] Krauth v. Billar, 71 Ariz. 298, 226 P.2d 1012 (1951).

[7] Nichols v. City of Phoenix, 68 Ariz. 124, 133, 202 P.2d 201 (1949); Glatz v. Kroeger Bros. Co., 168 Wis. 635, 170 N.W. 934, 936 (1919); Lewis v. Quinn, 376 Pa. 109, 101 A.2d 382 (1954).

vigilance and caution are in order where the view of an intersection is obstructed and the presence therein of others may reasonably be anticipated.[8] There has been no suggestion that the driver who signals a direction or permission to enter is under any affirmative duty to make such signal.[9]

There have been relatively few cases considering the liability of the signaling driver, and this might be explained by the fact that in most situations the driver of the car thus approaching is in approximately as good a position to assess the traffic situation as is the driver meeting him.[10] The court is likely to consider liability only when the approaching driver is not in as good a position to observe as the one signaling. Thus, where possible injury is reasonably foreseeable, the giving of a signal to proceed may be held to be negligence, and a proximate cause of any injury which ensues. This follows the general rule stated by Justice Cardozo[11] that "it is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."

A recent Utah decision[12] suggested the possibility that under certain conditions, such as in the hills at nighttime, a driver of a motor vehicle on the highway in signaling a car following to proceed to pass, might, by such a signal or conduct, be responsible for an accident in which the relying driver became involved. But the overwhelming case law on the subject is to the effect that this is not the normal situation. When the driver who is signaled is in as good a position to observe and estimate as the one signaling, the latter will not be found guilty of negligence,[13] and the signaled driver who proceeds without proper lookout and without exercising due care remains as unabsolved of his obligation as if the signal had never taken place.[14] This would seem a good underlying rationale of the *Mitchell* case, although the court reaches the result from a determination of law that the accident could not have occurred without the negligence of some party to the lawsuit and does not concern itself with aspects, such as the parties' separate positions and understandings of the situation, which might lend plausibility to the shifting responsibility

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[8] Deputy v. Kimmell, 73 W. Va. 595, 80 S.E. 919 (1914).

[9] Van Jura v. Row, 175 Ohio St. 41, 191 N.E.2d 536 (1963).

[10] Annot., 90 A.L.R.2d 1431 (1963).

[11] Glanzer v. Shepard, 233 N.Y. 236, 239, 135 N.E. 275, 276, 23 A.L.R. 1425, 1427 (1922). See also RESTATEMENT, TORTS § 325 (1934); 38 AM. JUR., *Negligence* § 17 at 659; Sweet v. Ringwelski, 362 Mich. 138, 106 N.W.2d 742 (1961).

[12] Devine v. Cook, 3 Utah 2d 134, 279 P.2d 1073 (1955). See also Haralson v. Jones Truck Lines, 223 Ark. 813, 270 S.W.2d 892, 48 A.L.R.2d 248 (1954).

[13] Devine v. Cook, 3 Utah 2d 134, 279 P.2d 1073 (1955).

[14] Arnold v. Chupp, 93 Ga. App. 583, 92 S.E.2d 239 (1956).

argument. There are other factors which are used to determine delegable duties—the competence and reliability of the person on whom reliance is placed, the seriousness of the danger and number of persons likely to be affected, the likelihood that proper care will not be used, and the ease with which the actor himself may take precautions—but these weigh too heavily against delegability in this instance. Here, the driver relied on the judgment of a strange driver at a busy intersection to make a decision which involved the life and limb of all in the vicinity and which the signaled driver should have considered to be one requiring his own good sense and reasonable care, if not a higher standard.

The act of signaling the driver of another vehicle, be it in a passing,[15] turning,[16] or crossing situation,[17] is replete with ambiguities. Does the driver indicate a clear and safe roadway, or is he merely yielding a right of way? Does he assume a duty, or simply exercise a courtesy? In *Devine v. Cook*,[18] a signal to another driver who had as good an opportunity, or better, to observe the approach of a third vehicle was held to amount to merely a manifestation on the part of the signaler that, as far as he was concerned, he yielded the right of way. So also, where evidence showed that a motorcyclist was signaled by the driver of an automobile he was attempting to pass, a court held that at best the signal would be an invitation to pass when safe, and not a command to pass or an all-clear signal.[19] In a recent Ohio decision[20] which involved a driver who was "signaled" to make a left turn in front of the signaling driver, the court found no duty owed by the latter and held that his act was one of courtesy. But in *Sweet v. Ringwelski*,[21] plaintiff was a 10-year-old girl who stopped in a crosswalk to allow a truck to pass, was waved in front of the truck by the driver and was struck by an automobile. The central issue was whether the truck driver was negligent in waving the girl on without ascertaining her safety. The court held this raised questions of fact for a jury.

It cannot be said that under the varied circumstances of the cases the views are irreconcilable. It is possible that, given a hard-fact situation, the Arizona Supreme Court would permit a finding of a duty upon one who chooses to "wave another on" and even consider reliance by the

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[15] Thelen v. Spilman, 251 Minn. 89, 86 N.W.2d 700, 77 A.L.R.2d 1315 (1957). As to the duty and liability involved by signaling a driver proceeding in the same direction, see Annot., 48 A.L.R.2d 252 (1956).

[16] Van Jura v. Row, 175 Ohio St. 41, 191 N.E.2d 536 (1963).

[17] Devine v. Cook, 3 Utah 2d 134, 279 P.2d 1073 (1955).

[18] *Ibid.*

[19] Keating v. Belcher, 384 Pa. 129, 119 A.2d 535 (1956); Lewis v. Quinn, 376 Pa. 109, 101 A.2d 382 (1954).

[20] Van Jura v. Row, 175 Ohio St. 41, 191 N.E.2d 536 (1963).

[21] 62 Mich. 138, 106 N.W.2d 742 (1961).

person signaled to be due care. The courts, however, have wisely refused to extend the area of shifting responsibility broadly to the field of motor vehicle accidents where a "come-on" signal is given. The onerous responsibilities of automobile driving are not to be so easily lightened.

W. Michael Flood

TORTS—GOVERNMENTAL IMMUNITY—FEDERAL TORTS CLAIMS ACT—NEGLIGENCE AT THE OPERATIONAL LEVEL IS NOT WITHIN THE DISCRETIONARY FUNCTION EXEMPTION.—*White v. United States* (4th Cir. 1963).

Decedent, a veteran, was a patient in a Veteran's Administration Hospital, where he was undergoing treatment for mental illness. Decedent's medical history showed several suicide attempts. While decedent was classified as a privileged patient and thus allowed free access to the hospital grounds, he allegedly committed suicide by throwing himself in front of a moving train. Plaintiff administratrix brought suit in federal court under the Federal Tort Claims Act for the wrongful death of the decedent. The district court held that any negligence charged came within the discretionary function exemption of the Act and entered judgment in favor of the United States. On appeal, *held,* reversed. Allowing freedom of hospital grounds to decedent, who was being treated for mental illness at veteran's hospital when he allegedly committed suicide by throwing himself under a moving train, was not an exercise of discretionary function within the meaning of the Act but was a decision at the operational level, which if done negligently would render the United States liable. *White v. United States,* 317 F.2d 13 (1963).

Prior to 1946 the only way one could obtain relief in tort against the United States was through a private bill in Congress.[1] This relief proved to be inadequate,[2] and in 1946 the United States government waived its sovereign immunity to tort liability with the passage of the Federal Tort Claims Act.[3] The Act, however, did not completely abrogate the doctrine of sovereign immunity, for it provided certain specified

[1] Price v. U.S., 174 U.S. 373 (1899). The United States is immune from suit except where waived by expressed consent. See also Hill v. U.S., 50 U.S. 386, 389 (1850); PROSSER, THE LAW OF TORTS § 109 (2nd ed. 1955). For a good discussion on the Federal Tort Claims Act in general see DAVIS, ADMINISTRATIVE LAW TREATISE § 25.01-25.17 (1958, Supp. 1963). For a discussion of the law of governmental immunity as to the State of Arizona see Comment, 6 ARIZ. L. REV. 102 (1964).

[2] Gottleib, *Tort Claims Against the U.S.,* 30 GEO. L.J. 462 (1942).

[3] The original act was ch. 753, 60 Stat. 842 (1946). It is now codified in 28 U.S.C. § 1346 (b), 2671-2678, 2680 (1958).

> § 1346 (b) Subject to the provisions of Chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions or claims against the United States, for money damages, accruing on and after Jan. 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

exclusions.[4] One of the most important and frequently invoked exceptions (although confusing to the courts) has been the provision that the government shall not be subject to liability for claims arising out of the exercise or performance of, or failure to exercise or perform, a discretionary function or duty on the part of a federal agency or employee, whether or not the discretion involved has been abused.[5] The crux of the problem has been to define the meaning of the phrase "discretionary function."

In the application of this exemption the decisions have lacked uniformity. At first the courts, in keeping with the traditional view that legislation which relinquishes the immunity of a sovereign should receive strict and narrow construction,[6] held that the "rule of liberal construction should be applied to the exceptions contained in the Federal Tort Claims Act so as not to impose liability upon the federal government in instances where it is apparent that Congress saved or reserved governmental immunity."[7] The Act itself does not define the meaning of "discretionary function," and the legislative materials lend little aid.[8] The language of the exception does however exclude liability for the injurious consequences of decisions made pursuant to statutes, regulations and quasi-judicial rulings, and the courts have also construed the exception to include decisions and acts performed in connection with official or administrative decisions, projects and programs.[9] Some courts, however, have also construed the provisions to preserve governmental immunity in many areas that are not legislative or regulatory or political in nature but which discretion or judgment is nevertheless involved. The theory was that the phrase "discretionary function" included more than just the initiation of programs and activities. As one court expressed it, "where there was room for policy judgment or decision there was discre-

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[4] 28 U.S.C. § 2680 (1958).

[5] 28 U.S.C. § 2680 (a) (1958). Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute, or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.

[6] Uarte v. U.S., 7 F.R.D. 705 (S.D. Cal. 1948). All legislation which reduces immunity of a sovereign and gives the citizen relief as a matter of right should be strictly construed by the courts. See also U.S. v. Sherwood, 312 U.S. 584 (1941). *But see* U.S. v. Yellow Cab Co., 340 U.S. 543 (1951).

[7] Mid-Central Fish Co. v. U. S., 112 F. Supp. 792, 796 (W.D. Mo. 1953). In Kendrick v. U.S., 82 F. Supp. 430 (D.C. Ala. 1949), the court held that the act should be construed liberally in favor of the government. *But see* Somerset Seafood Co. v. U.S., 193 F.2d 631 (4th Cir. 1951), where the court took the position that the act should be construed liberally to afford relief since the purpose of the act was to avoid the frequent private bills enacted to compensate persons injured by government torts.

[8] See House Report Number 1287, 79th Congress, 1st Sess. (1945).

[9] For a collection of cases see 19 A.L.R.2d 845 (1951).

tion."[10] It appeared for a while that such narrow construction of the Act would be a judicial return to the era of sovereign tort immunity.[11] There was, however, a trend which made the distinction between discretion in making the judgment or decision and discretion in carrying out that decision. Such cases held that negligence by government agents or employees in carrying out or performing authorized function or duties after discretion had been exercised would render the government liable.[12]

This minority distinction found deeper roots when several cases began to make the distinction between discretionary function at the planning level and discretionary function at the operational level. Negligence was deemed to impose liability at the operational level even though some degree of discretion was exercised.[13] In other words, the exercise of discretion at the operational level was not considered that sort of discretion Congress sought to exempt from liability. With these

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[10] Dalehite v. U.S., 346 U.S. 15 (1953), noted in 66 HARV. L. REV. 488 (1953) and 52 MICH. L. REV. 733 (1954). This was a test case, representing 300 separate personal and property claims against the United States which arose out of the "Texas City Disaster." Pursuant to a plan to curtail food shortage overseas, the government loaded on board ships FGAN (a fertilizer composed of ammonium nitrate), which it had manufactured. An explosion occurred on board one of the ships on which the product was stored, fire accompanied the explosion, and as a result 560 persons were killed and 3000 injured. The amount of personal and property claims totaled over 200 million dollars. The district court held the explosion resulted from the government's negligence in adopting the export fertilizer plan, in controlling the manufacturing, handling and shipment of the product and in failing to police the loading and to fight the fire which resulted from the explosion. The decision was reversed by the Court of Appeals. The Supreme Court, in a 4-3 decision, affirmed the reversal, holding that the alleged negligent acts and omissions were discretionary functions and therefore within the exception to the waiver of sovereign immunity. The court noted that all the decisions held culpable were responsibly made at the planning level (the plan was devised at the cabinet level). The majority stated, "Discretionary function or duty includes more than initiation of programs and activities and embraces determinations by executives or administrators in establishing plans, specifications, or schedules of operations. Discretion is discretion of executive or administrator to act according to his judgment of best course."

[11] James, *The Federal Tort Claims Act and The Discretionary Function Exception: The Sluggish Retreat of An Ancient Immunity*, 10 U. FLA. L. REV. 184 (1957).

[12] 19 A.L.R.2d 845, 854 (1951), citing cases.

[13] This distinction was mentioned in the *Dalehite* case; see note 10 *supra*. But in *Dalehite* the court noted that the discretion deemed to be negligently exercised was in fact exercised at the planning level. In Indian Towing v. U.S., 350 U.S. 61 (1955), the government negligently maintained a lighthouse and as a result plaintiff's ship ran aground. The Supreme Court, drawing the distinction between discretion exercised at the planning and operational level, held that the government was liable, the Court holding that once the government had installed the lighthouse it was under a duty to exercise reasonable care to see that it was kept properly lighted. Though the government's defense was not based upon the discretionary function exception, but rather on the government's having waived its immunity only in those cases where there was analogous private activity, the Court approved the doctrine that once the discretion had been exercised any negligence in carrying out that discretion would render the government liable. It is worthwhile to note that the Court rejected the government's defense of its activity being a unique government activity. See also Rayonier v. U.S., 352 U.S. 315 (1957), where the government was held liable for the negligence of its firefighters, the Court again rejecting the uniquely governmental activity argument.

decisions then, a new test appeared: To determine where the discretionary exemption ends and liability begins, it must be determined where the planning level ends and the operational level begins. Whether or not the discretionary function or duty exemption is completely excluded from the operational level remains to be seen.[14]

In the principal case the government contended that the established policy, as expressed by the Veterans' Administration Regulations, was to allow each mental patient the maximum independence his condition would allow. Therefore the hospital's judgment and discretion in deciding whether or not the decedent should be allowed freedom and access to the hospital grounds was a discretionary function within the meaning of the Act, and therefore the government was exempt from liability. The court rejected this argument and held that even though the Veteran's Admiistration policy was a discretionary function, its application to a particular individual was not within the category of policy decisions exempt within the meaning of the Act. The application of that policy was held to be an administrative decision at the operational level, which if done negligently would render the government liable.

The government in the principal case had based its argument on two lines of cases dealing with patients and government hospitals. First, there were cases which have held that the decision of whether or not to extend medical services to patients was a discretionary function.[15] The court was not bound by these decisions, for the decedent had already been admitted. The second line of cases dealt with the release of mental patients from the custody of the government hospital.[16] The reasoning behind these latter cases has been that if the extension or withholding of medical services was a discretionary function exempting the government from liability, then by a parity of reasoning the decision to terminate such services would also be discretionary. To this the court in the principal case pointed out that the decedent had not been released; he was still under the care of the government, having been released only to the extent of having free access to the hospital grounds. The court also noted that in many such cases the government was relieved of liability not because of the discretionary function provision but simply because the

[14] See American Exch. Bank v. U.S., 257 F.2d 938 (7th Cir. 1958) at 941.

[15] Denny v. U.S., 171 F.2d 365 (5th Cir. 1948), also 19 A.L.R.2d 845 (1951).

[16] Smart v. U.S., 207 F.2d 841 (10th Cir. 1953), where a mental patient in a Veteran's Hospital was released by the hospital authorities, after his condition improved, for a trial visit home. On his way home he stole a car, negligently drove it and injured plaintiff. The plaintiff sued the government, alleging that the patient had been negligently released. The court held that the decision to release the patient on a trial visit was a discretionary function and therefore the government was not liable. The principal case noted, however, that the government in *Smart* was not liable because no negligence was shown. See also Kendrick v. U.S., 82 F. Supp. 430 (D.C. Ala. 1949).

agents or employees of the government were not negligent.[17] In short, the court had ample authority to support its holding that once a patient has been admitted, due care must be exercised in the treatment and care given.[18]

In reaffirming the now well-established doctrine that negligence at the operational level of government activity will render the government liable, and taking a liberal approach to what is operational, the court follows the modern approach of shrinking governmental immunity for tort.[19] The decision, however, gives little aid in showing where the line between the planning and operational level is to be drawn. The question of whether or not discretion within the meaning of the Act can ever exist at the operational level also remains unanswered. Another problem in this area which is left in doubt concerns those operational details that have been specifically approved at the higher policy-making levels. One author has observed that "(s)ince specifications as to operations are often approved in more or less detail at a quite high level, this is a serious limitation; and the government has it in its power to make it more serious by the simple device of requiring higher echelon approval of more details."[20] It is suggested that additional legislation is

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[17] Smart v. U.S., *supra* note 16; Dugan v. U.S., 147 F. Supp. 674 (D.D.C. 1956).

[18] U.S. v. Gray, 199 F.2d 239 (10th Cir. 1952); Dishman v. U.S., 93 F. Supp. 567 (D.C. Md. 1950) at 571:

> This is not a case in which in the exercise of discretion or judgment the officials of the veterans' hospital declined to give the plaintiff treatment, but it is a case where having exercised their discretion to give the treatment, in accordance with the applicable regulations, the treatment given was negligent.

See also Fair v. U.S., 234 F.2d 288 (5th Cir. 1956); Lange v. U.S., 179 F. Supp. 777 (N.D.N.Y. 1960); and Dugan v. U.S., 147 F. Supp. 674, 676 (D.D.C. 1956), a case heavily relied upon by the government in the principal case, wherein it was said:

> (t)he determination of where inmates were to be detained, and what provisions should be made for their supervision was a discretionary function of the doctors and officers of the hospital.

In the principal case, however, the court noted that in *Dugan* no negligence was found.

[19] In the most recent Supreme Court decision on the matter, the court by a unanimous opinion, allowed plaintiff, a federal prisoner, to recover for injuries sustained while he was serving his prison term in a federal prison, United States v. Muniz, 374 U.S. (1963), noted in 63 COLUM. L. REV. 144 (1963).

The first case in Arizona which held that the sovereign was immune for tort liability occasioned by the negligence of its agents was State v. Sharp, 21 Ariz. 424, 189 Pac. 631 (1920), which held that ARIZ. LAW 1912 c. 59 (now ARIZ. REV. STAT. 12-821) (1956), which conferred jurisdiction upon the state courts to hear suits against the state government for negligence, was not construed to mean a waiver of sovereign immunity. However, in Stone v. Arizona Highway Comm., 93 Ariz. 384, 381 P.2d 107 (1963), the court held that the doctrine of governmental immunity from tort liability was abolished. At page 390 the court traces the trend in other jurisdictions in restricting the doctrine of sovereign immunity. See Comment, 6 ARIZ. L. REV. 102 (1964).

[20] James, *The Federal Tort Claims Act and The Discretionary Function Exception: The Sluggish Retreat of An Ancient Immunity*, 10 U. FLA. L. REV. 184 (1957) at 190.

desirable in order to resolve these doubts and provide for more certainty and predictability.

Gerald D. McCafferty

TORTS—NEGLIGENCE—MOTORIST NOT OBLIGATED TO ANTICIPATE CROSS TRAFFIC AT BOULEVARD STOP—*Davis v. Weber* (Ariz. 1963).

While driving on a main highway, defendant was struck by a vehicle driven by plaintiff's wife, who had been approaching the highway. There was a stop sign at the intersection of the highway and the side road; the ensuing collision occurred in the intersection. The trial court directed a verdict for defendant on the ground that there was no evidence of negligence on his part proximately causing or contributing to the accident and the resulting injuries. On appeal, *held,* affirmed. A driver of a motor vehicle on a through highway is not under a duty to anticipate that other drivers will cross negligently in violation of the boulevard law;[1] and in the absence of evidence revealing that he could have anticipated or foreseen that the other motorist would not or could not stop, his failure to have seen the other motorist cannot impose liability. *Davis v. Weber,* 93 Ariz. 312, 380 P.2d 608 (1963).

The view taken by the great majority of jurisdictions faced with this question,[2] including Arizona,[3] is that it is the duty of every motorist at all times to keep and maintain a proper lookout for other vehicles upon the highway. This duty applies to all motorists, even those driving on a street approaching an intersection controlled by traffic lights[4] or stop signs.[5] The effect of this is that the obligation of a driver who has the right of way is twofold: (1) to maintain such a lookout for cross traffic as a reasonably prudent person would maintain in the same or similar

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[1] ARIZ. REV. STAT. ANN. 28-773B (1956):

> The driver of a vehicle shall likewise stop in obedience to a stop sign as required by this chapter at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway, and shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed.

[2] Trune v. Grahl, 337 Mich. 659, 60 N.W.2d 129 (1953); Kelly v. Ashburn, 256 N.C. 338, 123 S.E.2d 775 (1962); Glaser v. Dunlap, 52 Abs. 296, 83 N.E.2d 669 (1948); Johnson v. Short, 204 Okla. 656, 232 P.2d 944 (1951); Lieberman v. Philadelphia Transp. Co., 410 Pa. 179, 188 A.2d 719 (1963); Robinson v. Simard, 57 Wash. 2d 850, 360 P.2d 153 (1961); Ashley v. American Auto. Ins. Co., 19 Wis. 2d 17, 119 N.W.2d 359 (1963).

[3] Layne v. Hartung, 87 Ariz. 88, 348 P.2d 291 (1960); Henderson v. Breesman, 77 Ariz. 256, 269 P.2d 1059 (1954); Nichols v. City of Phoenix, 68 Ariz. 124, 202 P.2d 201 (1949); and see the principal case, 93 Ariz. 312, 317, 380 P.2d 608, 611 (1963).

[4] Beatty v. Bowden, 257 N.C. 736, 127 S.E.2d 504 (1962); Strawder v. Pantoja, 372 S.W.2d 246 (Tex. Civ. App. 1963).

[5] Graf v. Garcia, 117 Cal. App. 2d 792, 256 P.2d 995 (1953); Martin v. Gall, 70 Pa. 258, 87 A.2d 925 (1952).

circumstances,[6] and (2) to yield the right of way, when he can, to a crossing motorist when he discovers that the latter is not going to honor his right of way.[7]

A failure to (1) maintain a lookout or (2) yield the right of way is "negligence";[8] but the latter of the two duties is contingent upon first discovering that the other motorist is not going to yield.

In the principal case, specifically the court reviewed and confirmed these two duties, after asserting that "it is the settled law of this jurisdiction that the driver of a vehicle on a favored highway is not necessarily free from negligence in colliding with a vehicle entering from an intersection."[9] Then the court continued in its concluding paragraph: "Even assuming that [the defendant] had an unobstructed vision . . ., and assuming that he did not see [plaintiff's wife's] vehicle, still there is no evidence whatsoever upon which to predicate an assumption that [defendant] could have anticipated or foreseen that the [plaintiff's wife] would not or could not stop."[10]

This latter quotation may be susceptible of misconstruction unless read in the light of existing law as summarized in the immediately preceding portion of the court's opinion. It would be erroneous to construe the court's language to mean that no inference of negligence can arise from the failure to maintain a proper lookout, which construction might be reached under the language to Headnote 14.[11] Such a construction would be contrary to the law of previous Arizona cases, as restated in the principal case.[12] Under such erroneous construction, there would no

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[6] Pearson & Dickerson Contractors v. Harrington, 60 Ariz. 354, 137 P.2d 381 (1943).

[7] Edwards v. Gaston, 75 Ariz. 131, 252 P.2d 786 (1953); Goncalves v. Los Banos Mining Co., 26 Cal. Rptr 769, 376 P.2d 833 (1962); Dandurand v. Long, 41 Ill. App. 2d 327, 190 N.E.2d 860 (1963); Swinson v. Nance, 219 N.C. 772, 15 S.E.2d 284 (1941); Eberhardt v. Forrester, 241 S.C. 399, 128 S.E.2d 687 (1962).

[8] Henderson v. Breesman, 77 Ariz. 256, 269 P.2d 1059 (1954).

[9] Davis v. Weber, 93 Ariz. 312, 318, 380 P.2d 608, 612 (1963).

[10] *Ibid.*

[11] *Ibid:*

> Testimony of a defendant traveling on favored street that he was not sure whether he saw automobile traveling on intersecting street prior to collision *did not give rise to inference of negligence by defendant* in absence of evidence on which to predicate assumption that defendant could have anticipated or foreseen that automobile would not or could not be stopped. (Emphasis supplied.)

[12] *Ibid;* Layne v. Hartung, 87 Ariz. 88, 348 P.2d 291 (1960); Henderson v. Breesman, 77 Ariz. 256, 269 P.2d 1059 (1954); Nichols v. City of Phoenix, 68 Ariz. 124, 202 P.2d 201 (1949). In the *Hartung* case, the court declared: "An operator of a motor vehicle must maintain such a lookout as a reasonably prudent person would maintain in the same or similar circumstances . . . and the mere fact that the driver may have the right of way does not relieve him of the duty to keep a lookout."

longer be a duty to maintain a lookout for cross traffic such as is currently attributed to a reasonably prudent person under the circumstances and is accordingly required by the law.

It would be inappropriate to base the result in this case upon the premise that there was no evidence from which the jury could have judged that the defendant was negligent. The proper basis appears to be that, even though there may have been evidence from which the jury might have found that the defendant was negligent in failing to retain a proper lookout—nevertheless, there was no evidence that had he looked he could have prevented the accident from occurring, and that, hence, there was no evidence on which the jury could have found that the defendant's negligence in failing to keep a proper lookout, even if inferred, was a proximate cause of the accident.[13] Such a rationale is harmonious with the prior Arizona cases enforcing the reasonable-man duty of maintaining a lookout for cross traffic; and it would seem to be the only proper construction of the court's opinion.

Leonard I. Karp

[13] Nichols v. City of Phoenix, 68 Ariz. 124, 134, 202 P.2d 201, 207 (1949); Salt River Valley Water Users' Ass'n v. Cornum, 49 Ariz. 1, 11, 63 P.2d 639, 644 (1937); City of Douglas v. Burden, 24 Ariz. 95, 98, 206 P. 1085, 1087 (1922). These cases have defined "proximate cause" thusly: "The proximate cause of an event is that which, in a natural and continuous sequence unbroken by any new independent cause, produces the event, and without which the event would not have occurred."