

Notes

ABATEMENT AND REVIVAL — SURVIVAL OF ACTIONS — RIGHT TO VOID UN-AUTHORIZED GIFTS OF COMMUNITY PROPERTY SURVIVES WIFE'S DEATH.—*Harris v. Harris* (Cal. 1962).

The husband of plaintiff's incompetent testatrix made extensive gifts of the community personalty to defendant prior to the testatrix's death without testatrix's consent. California law gives the wife a right to void gifts of community personalty made by the husband without her consent. In an action to recover the property, the trial court held that this right survives the death of the wife and vests in her personal representative. On appeal, *held*, affirmed. The right to set aside gifts of the community personalty made by the husband without his wife's consent survives the death of the wife, and may be exercised by her personal representative. *Harris v. Harris*, 19 Cal. Rptr. 793, 369 P.2d 481 (1962).

In every community property state, of which there are eight,¹ the husband is given by statute the management and control of the community personal property, with a power of disposition thereover.² This power of the husband, however, is not absolute, for in all but two of these states,³ it is abridged, either by statute⁴ or by judicial interpretation,⁵ to the extent that he may not dispose of the community property in a manner inconsistent with the best interests of his wife.

Notwithstanding these judicial and statutory pronouncements of the law concerning transfers of the community property by a husband in fraud of his wife, relatively few courts have had the opportunity to determine precisely what remedies are available to a wife so defrauded.

¹ They are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

² ARIZ. REV. STAT. ANN. § 25-101 (1956); CAL. CIV. CODE § 172; IDAHO CODE ANN. § 2686 (1949); LA. CIV. CODE art. 2404 (Merrick 1924); NEV. COMP. LAWS § 3360 (1949); N.M. STAT. ANN. § 57-4-3 (1953); TEX. REV. CIV. STAT. ANN. art. 4619 (Vernon 1936); WASH. REV. CODE § 26.16.030 (1957).

³ They are Idaho and New Mexico.

⁴ CAL. CIV. CODE § 172; LA. CIV. CODE art. 2404 (Merrick 1924).

⁵ *Gristy v. Hudgens*, 23 Ariz. 339, 203 Pac. 569 (1922); *Nixon v. Brown*, 46 Nev. 439, 214 Pac. 524 (1923); *Moody v. Smoot*, 78 Tex. 119, 14 S.W. 285 (1890); *Jones v. Davis*, 15 Wash. 2d 567, 131 P.2d 433 (1942); *Occidental Life Ins. Co. v. Powers*, 192 Wash. 475, 74 P.2d 27 (1937). In the *Powers* case the recipient of the attempted gift was the husband's indigent mother to whom he owed a statutory duty to support. In a vigorous dissent it was argued that the mother's need far outweighed any consideration of the wife's interest in the amount of community property given to the mother.

In California, a wife whose community property rights have been violated may seek redress from the recipient of the property, or against her husband, depending upon which course of action will give her the most adequate relief.⁶ In Louisiana, the wife's interest in the community property is inchoate and only becomes vested upon the death of her husband;⁷ but upon his death, she has a statutory right to proceed against her husband's heirs for the value of the community property her husband has fraudulently disposed of.⁸ In a leading Texas case, where the husband bought a life insurance policy out of community funds naming his estate as the sole beneficiary, the court held the wife entitled to one-half of the proceeds of the policy upon his death.⁹ In Washington, the injured wife may sue for damages, or recover the thing itself from a fraudulent donee,¹⁰ the courts reasoning that the purpose of the statute in giving the husband control of the community personalty is to "facilitate the business of the community" for the mutual benefit of the parties thereto.

Arizona has not yet had the opportunity to decide what remedies a wife may pursue in the event her husband fraudulently disposes of the community personalty by gift. The Arizona Supreme Court has said by way of dicta that if a husband attempts to act in fraud of his wife's rights, "she has a remedy in the courts."¹¹ Since the Arizona Supreme Court has stated that the decisions handed down by the Supreme Court of Washington concerning community property matters will be given considerable weight in this state,¹² probably Arizona would give the wife the right to sue for damages or to recover the thing itself where her husband has disposed of community property in fraud of her rights as was held by the Supreme Court of Washington.¹³

The principal case was concerned with whether the right of the wife to pursue a remedy when her husband has made a fraudulent gift of the community personal property survives the wife's death. In California this type of property right is called a "thing in action."¹⁴

⁶ *Fields v. Michael*, 91 Cal. App. 2d 443, 205 P.2d 402 (Dist. Ct. App. 1949).

⁷ *Eustis v. Eustis*, 236 Fed. 726 (5th Cir. 1916).

⁸ LA. CIV. CODE art. 2404 (Merrick 1924).

⁹ *Martin v. Moran*, 11 Tex. Civ. App. 509, 32 S.W.2d 904 (Ct. Civ. App. 1895).
But see Shaw v. Shaw, 28 S.W.2d 173 (Tex. 1930) taking the position that during the lifetime of a husband he may give away community property if he does not do so with intent to defraud his wife.

¹⁰ *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111 (1916) an unusual case involving a gift of an automobile to the husband's mistress. See generally DE FUNIAK, COMMUNITY PROPERTY § 122 (1943).

¹¹ *In re Monaghan's Estate*, 65 Ariz. 9, 19, 173 P.2d 107, 117 (1946) (dictum).

¹² *Cosper v. The Valley Bank*, 28 Ariz. 373, 379, 237 Pac. 175, 181 (1925).

¹³ *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111 (1916).

¹⁴ CAL. CIV. CODE § 953.

Upon the death of the owner of a "thing in action," it passes to his personal representative.¹⁵ However, California adheres in part to the common-law doctrine that personal causes of action die with the person.¹⁶ Since, in California, causes of action arising out of a violation of a property right survive, whereas "personal" ones abate, the issue in the principal case resolved itself down to whether or not the right involved was property or a personal cause of action. The dissent in the principal case took the position that such a right is essentially a personal one since it cannot be assigned.¹⁷

In Arizona however, all causes of action, with certain designated exceptions, survive.¹⁸ Thus, the only probable question in this state concerning the right of a wife to set aside a fraudulent gift of community property would be whether or not such right constitutes a "cause of action." The phrase "cause of action" has probably best been defined as "an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons."¹⁹ It would certainly seem that this broad definition covers the situation discussed herein. Moreover, in the leading Arizona case of *Lawson v. Ridgway*,²⁰ the administrator of a deceased wife's estate was successful in her action against the husband's second wife to recover community funds used by the husband during the existence of the first marriage to improve his separate property. The issue as to whether the administrator had capacity to sue was not raised in this case, doubtless because there is no question but that the "right" that had accrued in the deceased wife was a "cause of action" and thus survived.

As a conclusion, it would seem that when a wife in Arizona has been wrongfully deprived of her community property interest in property fraudulently given away by her husband, she should be entitled to proceed against her husband for damages, or if the property can be traced, against the person to whom the property was given to recover the property in specie. Should such a wife die before commencement of the action, her personal representative should be able to pursue the same remedy.

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¹⁵ CAL. CIV. CODE § 954.

¹⁶ *In re Blair's Estate*, 42 Cal. 2d 728, 269 P.2d 612 (1954). The court in *Blair* used the "assignability" test stating that a right that cannot be assigned cannot survive. See also CAL. CIV. CODE § 956, enacted in 1949 whereby personal injury actions are the only type of personal action made to survive.

¹⁷ *Harris v. Harris*, 19 Cal. Rptr. 793, 796, 369 P.2d 481, 484 (1962) (dissent).

¹⁸ ARIZ. REV. STAT. ANN. § 14-477 (1956).

¹⁹ *Elliott v. Mosgrove*, 162 Ore. 507, 93 P.2d 1070 (1939).

²⁰ 72 Ariz. 253, 233 P.2d 459 (1951). See generally Annot., 29 A.L.R.2d 518 (1953).

CORPORATIONS — DOING BUSINESS — FOREIGN CORPORATION DOING BUSINESS WITHIN THE STATE THROUGH LOCAL FRANCHISE DEALER. — *Ranch House Supply Corp. v. Van Slyke* (Ariz. 1962).

A foreign corporation brought suit in the superior court to recover on a materialman's lien for materials furnished through its local dealer. A franchise dealer agreement existed between the corporation and the local dealer, the contract pursuant thereto having been executed in California. Payment for the material was also made in California. The superior court entered judgment against the corporation for failing to register in the state to do business.¹ On appeal, *held*, reversed. The sale of goods by a foreign corporation through a local dealer where the local dealer acts entirely on his own behalf and therefore is not the agent of the foreign corporation for the sale of such goods is not "doing business" within the state by the foreign corporation for purposes of qualification. *Ranch House Supply Corp. v. Van Slyke*, 91 Ariz. 177, 370 P.2d 661 (1962).

General principles of the law of foreign corporations, as well as the application of pertinent state statutes,² often render it necessary to determine whether a foreign corporation is doing business in the state. Generally, this is required in order to determine: 1) whether the corporation is required to qualify within the state; 2) if the state has civil jurisdiction over the corporation; or 3) whether the corporation is subject to state taxation. Generally, the phrases "doing business," or "transacting business" are applied to each of these situations. And yet, "doing business" for purposes of taxation, doing it within the meaning of a statute requiring licenses or qualification, and doing enough business to justify the service of process³ are quite different and distinct things. The use of the same phrase creates confusion.⁴ The distinction between the classes of cases is aptly summed up as follows:

The business which must be transacted by a foreign corporation to permit service of process must be such as to warrant the inference that the corporation is *present*. To subject such a corporation to taxation for doing business, the transactions must not only show that the corporation is present, but also that it is *active*. In order that qualification be rendered necessary, the corporation must not only be present and active, but its activity must be *continuous*.⁵

¹ ARIZ. REV. STAT. ANN. § 10-481 (1956) specifies the requirements which must be complied with by a foreign corporation to qualify to do business in Arizona.

² *E.g.*, ARIZ. REV. STAT. ANN. § 10-481 (1956).

³ See generally *International Shoe Corp. v. Washington*, 326 U.S. 310 (1945); Notes, 44 IOWA L. REV. 345 (1959); 12 W. RES. L. REV. 89 (1961).

⁴ 18 FLETCHER, PRIVATE CORPORATIONS § 8712 (perm. rev. ed. 1955).

⁵ Isaacs, *An Analysis of Doing Business*, 25 COLUM. L. REV. 1018, 1045 (1925) quoted with approval in *Hartstein v. Seidenbach's, Inc.*, 129 Misc. 687, 222 N.Y.S. 404, 407 (Sup. Ct. 1927). See also RESTATEMENT, CONFLICT OF LAWS § 167 (1934).

Unfortunately, except for a few cases,⁶ the distinction pointed out has not been explicitly recognized or, if implicitly recognized, has not been observed.⁷ This note is concerned only with determining what constitutes doing business sufficient to require a foreign corporation to qualify within the state.

Failure to register with the corporation commission causes acts done by the corporation in Arizona to be void,⁸ thereby resulting in a forfeiture. Thus it is apparent why the test for determining whether registration is necessary should be more stringent than that for determining whether the state has power to tax or has civil jurisdiction over the foreign corporation.

Whether a foreign corporation is doing business in the sense required by a particular statute must be tested by the facts and circumstances of each particular case,⁹ the construction of particular statutes, as pointed out above, and ultimately upon applicable provisions of the United States Constitution.¹⁰ Thus no definite rule can, from the nature of the test, be prescribed. However, as a general proposition, it is recognized that a foreign corporation, for purposes of qualification, is doing business in the state when it has entered the state by its agents and through them is there transacting some substantial part of its customary business which is continuous, as distinguished from merely casual, sporadic, or occasional transactions and isolated acts.¹¹

In instances when it is conceded that the acts in question are sufficient to constitute doing business, the decision of the case may then hinge upon the relationship of the foreign corporation to the

⁶ It was held in a Kansas case, *Toedman v. Nooter Corp.*, 180 Kan. 703, 308 P.2d 138 (1957), that an unqualified foreign corporation had been doing business in that state and was therefore amenable to process under a statute authorizing service of process on the Secretary of State, although it might not have been considered to have been doing business for qualification purposes under a statute similar to ARIZ. REV. STAT. ANN. § 10-481 (1956). Under ARIZ. R. Civ. P. 4(e)(2), it is probable that the Arizona courts would reach a conclusion similar to that reached in the *Nooter* case and take a more liberal view as to what constitutes doing business for purposes of personal jurisdiction than for foreign corporation qualification.

⁷ 18 FLETCHER, *op. cit. supra* note 4, § 8712 at 400.

⁸ ARIZ. REV. STAT. ANN. § 10-482 (1956) provides: "No foreign corporation shall transact business in this state until it has complied with the requirements of § 10-481, and every act done prior thereto is void."

⁹ Annot., 30 A.L.R. 255, 292 (1924).

¹⁰ *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961); *Davis v. Farmers Co-op Equity Co.*, 262 U.S. 312 (1923); *Interstate Amusement Co. v. Albert*, 239 U.S. 560 (1916); *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910); *Thurman v. Chicago, M. & St. P. Ry.*, 254 Mass. 569, 151 N.E. 63 (1926).

¹¹ *Wells Fargo & Co. v. McArthur Bros. Mercantile Co.*, 42 Ariz. 405, 26 P.2d 1021 (1933); *Nicolai v. Sugarman Iron & Metal Co.*, 23 Ariz. 230, 202 Pac. 1075 (1922); *Martin v. Banker's Trust Co.*, 18 Ariz. 55, 158 Pac. 87 (1916); *Home Lumber Co. v. Hopkins*, 107 Kan. 153, 190 Pac. 601 (1920); *State v. Second Judicial Dist. Ct.*, 48 Nev. 53, 226 Pac. 1106 (1924).

party doing the acts. The issue presented is when will the business of local firms be considered the business of the foreign corporation? According to the weight of present case law, the mere sale of goods to a local distributor will not of itself serve as a basis for determining that the business transacted was that of the foreign corporation.¹² Where the distributor becomes vested with title to the goods, the transaction is not one of agency but of purchase and sale, providing the local distributor or factor acts on his own behalf when he resells such goods.¹³ However, if the local distributor renders services for his foreign supplier similar to those customarily performed by employees, then, notwithstanding his purported status of independent contractor, a finding of agency may well be warranted. Thus, if the distributor collects the corporation's delinquent local accounts, adjusts the claims of its customers, or supplies it with credit information on new customers, the corporation may be doing business within the state.¹⁴

When a subsidiary or affiliate of the foreign corporation is conducting business within the state, the general rule is that this does not constitute doing business by the foreign corporation if corporate separation between the two is maintained, and if the affiliate is not determined to be the agent of the foreign corporation.¹⁵

The Arizona Supreme Court has interpreted what constitutes doing business in Arizona by foreign corporations on several occasions. The court's first interpretation came in *Babbitt v. Field*¹⁶ in which it was said, "[t]he doing of a single act of business in the territory by a foreign corporation does not constitute the carrying on of business. . . ."¹⁷ In several subsequent cases the court reaffirmed the position that to come within the meaning of Arizona Revised Statutes § 10-481, a corporation must be engaged in an enterprise of some permanence and durability, and must transact within the state some substantial part of its ordinary business.¹⁸ Thus, the cases in

¹² 18 FLETCHER, *op. cit. supra* note 4, § 8726.

¹³ *City of Atlanta v. York Mfg. Co.*, 155 Ga. 33, 116 S.E. 195 (1923); *Yarborough v. W. A. Gage & Co.*, 334 Mo. 1145, 70 S.W.2d 1055 (1934); *Southwest Gen. Elec. Co. v. Nunn Elec. Co.*, 283 S.W. 731 (Tex. Civ. App. 1926).

¹⁴ *Dennis v. Perfect Parts, Inc.*, 142 F. Supp. 259 (D. Mass. 1956).

¹⁵ *E.g.*, *Consolidated Textile Corp. v. Gregory*, 289 U.S. 85 (1933); *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925); *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79 (1918); *Philadelphia & R. Ry. v. McKibbin*, 243 U.S. 264 (1917); *Peterson v. Chicago, R.I. & Pac. Ry.*, 205 U.S. 364 (1907).

¹⁶ 6 Ariz. 6, 52 Pac. 775 (1898).

¹⁷ *Id.* at 12, 52 Pac. at 776.

¹⁸ *Sandia Dev. Corp. v. Allen*, 86 Ariz. 40, 340 P.2d 193 (1959); *National Union Indem. Co. v. Bruce Bros. Mercantile Co.*, 44 Ariz. 454, 38 P.2d 648 (1934); *Monaghan & Murphy Bank v. Davis*, 27 Ariz. 532, 234 Pac. 818 (1925); *Nicolai v. Sugarman Iron & Metal Co.*, 23 Ariz. 230, 202 Pac. 1075 (1922); *Martin v. Banker's Trust Co.*, 18 Ariz. 55, 156 Pac. 87 (1916).

Arizona are in accord with the prevailing view on this aspect of doing business in the state by a foreign corporation. The case of *Read v. Real Detective Publishing Co.*¹⁹ is the only Arizona case with a fact situation comparable to that of the principal case, and it found that the foreign corporation was not doing business in the state where the local merchant acted entirely on his own behalf in selling the goods of the foreign corporation.

While the decision of the principal case did not expressly distinguish the different criteria necessary for the determination of whether a foreign corporation is doing business under a particular set of facts, the conclusion reached indicates that the court applied the more stringent test for registration in accord with the majority of the cases which have recognized the distinction. Since the question of what acts and relationships will require a foreign corporation to register has not had clearly defined judicial interpretation in Arizona, this decision will be of aid to out-of-state corporations which may desire to market their products in Arizona. They may now proceed fully aware that substantially more than minimal contacts will be necessary before they will be required to qualify. This should tend to encourage business relationships similar to the one in the principal case.

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CRIMINAL LAW — HABEAS CORPUS — EXCLUSIONARY RULE RELATING TO ILLEGALLY SEIZED EVIDENCE NOT RETROACTIVE. — *Hall v. Warden, Md. Penitentiary* (D. Md. 1962).

Petitioner was convicted of murder and sentenced to death on evidence claimed to have been illegally obtained. Petitioner's conviction had been affirmed by the highest state court and certiorari denied by the Supreme Court¹ before the *Mapp v. Ohio*² decision. In that case,

¹⁹ 63 Ariz. 294, 162 P.2d 133 (1945). The court declared in this case: "Sales on consignment, factorage agreements, or sales on commission, by a foreign corporation to a dealer within the state, of products from without the state, do not constitute doing business within the state, where the local merchant or factor acts entirely in his own behalf in making sales or contracts for the sale of such goods." *Id.* at 308, 162 P.2d at 140.

¹ 368 U.S. 867 (1961).

² 367 U.S. 643 (1961). See 3 ARIZ. L. REV. 291 (1962).

the United States Supreme Court held that state courts must exclude evidence obtained by illegal search and seizure. Petitioner then sought his release on a writ of habeas corpus. On return of writ, *held*, petition denied. Supreme Court decision holding all illegally-obtained evidence inadmissible does not retroactively apply to those convicted on illegally-obtained evidence. *Hall v. Warden, Md. Penitentiary*, 201 F. Supp. 639 (D. Md. 1962).

The question of the retroactivity of court decisions has been spotlighted recently due to the *Mapp* decision and other rulings³ which changed longstanding criminal practices. The importance of this issue is that there are many persons in state prisons who were convicted prior to the *Mapp* ruling on illegally-seized evidence. The question is whether such persons can now secure their release by writ of habeas corpus, a coram nobis writ, or similar devices.

There are several rules that govern the retroactive effect of change of statutory or case law. Generally, a legislative change in a non-criminal statute can apply retroactively,⁴ unless prohibited by the state constitution.⁵ In regard to criminal statutes, such a change any time before the final decision on a case will result in abatement of the proceedings.⁶ But once the decision has become final, it seems that a later statutory change provides no basis for renewed attack on the conviction.⁷

If a court decision changes a previous construction of a statute, the common law, or a rule of evidence, the effects also vary. A change in a ruling on a civil question, such as the application of taxes, is generally retroactive,⁸ unless such would inequitably interfere with contracts or other vested rights.⁹

The issue in point here involves the effect of a new court-declared principle of constitutional law on a criminal conviction prosecuted under the former rule now regarded as an invalid infringement of due

³ See, e.g., *Robinson v. California*, 370 U.S. 660 (1962), which invalidated state laws punishing narcotics addiction, and *Gideon v. Wainwright*, 383 U.S. 792 (1963), which declared that all suspected felons have a constitutional right to state-appointed counsel at trial.

⁴ 50 Am. Jur. Statutes § 475 (1944).

⁵ *Id.* at § 478.

⁶ Annot., 89 A.L.R. 1514 (1934).

⁷ *Warrings v. Colpoys*, 122 F.2d 642, 646 (D.C. Cir.), cert. denied, 314 U.S. 678 (1941).

⁸ E.g., *O'Malley v. Sims*, 51 Ariz. 155, 75 P.2d 50 (1938); *People ex rel. Rice v. Graves*, 242 App. Div. 128, 273 N.Y.S. 582 (App. Div. 1934). But see *Southern Pac. Co. v. Cochise County*, 377 P.2d 770 (Ariz. 1963), for the Arizona practice of avoiding the general rule by expressly making new rules prospective when they are promulgated.

⁹ E.g., *Great No. Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932); *O'Malley v. Sims*, *supra* note 8.

process. If the case is on appeal when the new rule is adopted, the decision will generally be reversed.¹⁰ If the conviction has become final, and then the statute under which defendant was convicted is declared unconstitutional, the defendant will be released on the ground that the statute was void ab initio.¹¹ However, if, as in the principal case, a rule of evidence is changed, or a constitutional guarantee is reinterpreted, there is a split of authority as to whether the defendant must be released.¹²

The majority view appears to be that the defendant cannot be released.¹³ Both majority and minority courts agree that only where constitutional rights are involved will defendants convicted under old

¹⁰ *Belton v. State*, 228 Md. 17, 178 A.2d 409 (1962); *Commonwealth v. Spoford*, 180 N.E.2d 673 (Mass. 1962); *State v. Valentin*, 36 N.J. 41, 174 A.2d 737 (1961); *People v. Loria*, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961). See also *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941) for a similar ruling in a civil case.

¹¹ *E.g.*, *Ex parte Siebold*, 100 U.S. 371 (1879); *Ex parte Rose*, 122 N.J.L. 507, 6 A.2d 388 (1939). See also *State v. Longino*, 109 Miss. 125, 67 So. 902 (1915), in which it was ruled that a harsher interpretation of a criminal law will not apply retroactively because of the ex post facto prohibition. *Contra*, *Frank v. Mangum*, 237 U.S. 309 (1915); *Ross v. Oregon*, 227 U.S. 150 (1913).

¹² For cases holding defendant can secure his release, see, *e.g.*, *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214 (1958); *People v. Howard*, 15 App. Div. 2d 863, 224 N.Y.S.2d 886 (App. Div. 1962); *People v. Stevenson*, 13 App. Div. 2d 717, 213 N.Y.S.2d 930 (App. Div. 1961).

For cases holding defendant can not secure release by post-conviction remedy, see, *e.g.*, *Sumal v. Large*, 332 U.S. 174 (1947); *Gaitan v. U.S.*, 295 F.2d 277 (10th Cir.), *cert. denied*, 369 U.S. 857 (1961); *Meyers v. Welch*, 179 F.2d 707 (4th Cir. 1950); *Warrings v. Colpoys*, 122 F.2d 642 (D.C. Cir.), *cert. denied*, 314 U.S. 678 (1941); *In re Harris*, 16 Cal. Rptr. 889, 366 P.2d 305, 306 (1961) (concurring opinion); *State v. Long*, 71 N.J. Super. 583, 177 A.2d 609 (Essex County Ct. 1962); *People v. Hyde*, 16 App. Div. 2d 942, 229 N.Y.S.2d 658 (App. Div. 1962); *People v. Morrison*, 14 App. Div. 2d 887, 221 N.Y.S.2d 382 (App. Div. 1961); *People v. Woodbury*, 13 App. Div. 2d 522, 212 N.Y.S.2d 140 (App. Div. 1961); *People v. Eastman*, 33 Misc. 2d 583, 228 N.Y.S.2d 156 (Kings County Ct. 1962); *People v. Angelet*, 221 N.Y.S.2d 834 (County Ct. Gen. Sess. 1961); *People v. Figueroa*, 220 N.Y.S.2d 131 (Kings County Ct. 1961).

¹³ *Ibid.* See review of post-*Mapp* decisions in *Bender*, *The Retroactive Effect of an Overruling Constitutional Decision*; *Mapp v. Ohio*, 110 U. PA. L. REV. 650, 680-83 (1962).

In *Gaitan v. U.S.*, *supra* note 12, the court based its decision on the principle of res judicata — a point not expressly mentioned in many of the other decisions. In *Gaitan*, the court said that the res judicata rule in both civil and criminal cases is that any "right, fact, or matter in issue and directly adjudicated . . . is conclusively settled by such judgment and cannot be again litigated between the same parties. . . ." *Id.* at 279. The court said that when the judgment was final, it fell within the doctrine of res judicata as to the admissibility of the evidence, "and a change thereafter in the rule relating to the admissibility of evidence . . . did not arrest or suspend application of the principle of res judicata to such judgments and sentences." *Id.* at 280. This case is especially important because it involved an attempt by a prisoner to secure his release, three years after the affirmation of his conviction, because of the new Supreme Court rule in *Elkins v. U.S.*, 364 U.S. 206 (1960), outlawing the silver platter doctrine.

rules be released when a new rule is promulgated.¹⁴ The majority of decided cases hold against release, but almost all these courts say that cases involving involuntary confession¹⁵ or lack of counsel¹⁶ would justify release. The distinction is that the latter cases are said to be violations of fundamental rights, while illegal search and seizure, for example, is not such a fundamental violation of the right to a fair trial as to justify voiding a conviction *ab initio*.¹⁷

Finally, in ruling on this question, courts often say that effect must be given to the opinion of the court promulgating the new rule if such court indicates the rule is to be retroactive or only prospective.¹⁸ Courts construing the *Mapp* decision have almost uniformly held that it was intended to apply prospectively only.¹⁹ These same courts often comment, however, that the language of the case is not completely clear on this point.²⁰

It is difficult to analyze the principal case in light of these factors because of doubt as to the decisive point in the case. The court says the facts do not show an illegal search and seizure, which would seem to dispose of the matter. But it then dwells at length on the point that the *Mapp* decision was intended to be prospective only. The discussion on this point is confused by continued references to the fact that defendant's failure to raise the evidence point at the trial or on appeal bars any possible habeas corpus relief.²¹ But then the

¹⁴ See, e.g., *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214 (1958); *Norton v. Shelby County*, 118 U.S. 425 (1886) (involving a statutory matter rather than a rule of evidence); *People v. Howard*, 15 App. Div. 2d 863, 224 N.Y.S.2d 886 (App. Div. 1962); *People v. Stevenson*, 13 App. Div. 2d 717, 213 N.Y.S.2d 930 (App. Div. 1961).

¹⁵ E.g., *U.S. ex rel. Noia v. Fay*, 300 F.2d 345 (2d Cir. 1962); *In re Harris*, 16 Cal. Rptr. 889, 366 P.2d 305, 306 (1961) (concurring opinion); *People v. Eastman*, 33 Misc. 2d 583, 228 N.Y.S.2d 156 (Kings County Ct. 1962).

¹⁶ E.g., *Whitley v. Steiner*, 293 F.2d 895 (4th Cir. 1961); *State v. Smith*, 37 N.J. 481, 181 A.2d 761 (1962).

¹⁷ E.g., *In re Harris*, 16 Cal. Rptr. 889, 366 P.2d 305, 306 (1961) (concurring opinion); *State v. Smith*, *supra* note 16; *People v. Eastman*, 33 Misc. 2d 583, 228 N.Y.S.2d 156 (Kings County Ct. 1962).

¹⁸ See, e.g., *Warrings v. Colpoys*, 122 F.2d 642 (D.C. Cir.), *cert. denied*, 314 U.S. 678 (1941); *People v. Eastman*, *supra* note 17.

¹⁹ *In re Harris*, 16 Cal. Rptr. 889, 366 P.2d 305, 306 (1961) (concurring opinion); *State v. Smith*, 37 N.J. 481, 181 A.2d 761 (1962); *State v. Long*, 71 N.J. Super. 583, 177 A.2d 609 (Essex County Ct. 1962); *People v. Eastman*, 33 Misc. 2d 583, 228 N.Y.S.2d 156 (Kings County Ct. 1962); *People v. Angelet*, 221 N.Y.S.2d 834 (County Ct. Gen. Sess. 1961); *People v. Figueroa*, 220 N.Y.S.2d 131 (Kings County Ct. 1961). *Contra*, *Commonwealth v. Spofford*, 180 N.E.2d 673 (Mass. 1962).

²⁰ *But cf.*, *People v. Figueroa*, *supra* note 19.

²¹ The failure-to-raise-the-point-at-trial issue seemingly recurs in case after case in this field. Whenever the courts are not sure they are correct about a new ruling being only prospective, they fall back on the argument that the issue is no longer available anyway for failure to preserve it in the record. See, e.g., *State v. Long*, 71 N.J. Super. 583, 177 A.2d 609 (Essex County Ct. 1962); *People v. Eastman*, 33 Misc. 2d 583, 228 N.Y.S.2d 156 (Kings County Ct. 1962); *People v. Angelet*, 221 N.Y.S.2d 834 (County Ct. Gen. Sessions 1961).

court says that even this last rule is waived in "exceptional" cases. The court then ends up at the beginning by saying that since the search was not illegal, there are no "exceptional circumstances" justifying waiver of the rule. Thus, the court does not make clear whether, if the point was raised at the trial, relief would now be given, especially since this is a capital case. Since *Mapp* is held only prospective, it would seem that no relief could be given in any case, but the court finds it necessary to interpose the failure-to-raise-the-point-at-trial objection throughout its discussion.

To the extent that the decision deals with retroactivity, it seems to be in accord with the majority rule, but much will depend on what the Supreme Court does when it considers the flood of post-*Mapp* habeas corpus petitions.²² While one Supreme Court case²³ indicates the Court is in accord with denial of relief in change-of-law cases,

The following language in the *Mapp* case, 367 U.S. 643, 659 n.9, is often cited as supporting this procedural requirement: "As is always the case, however, state procedural requirements governing assertion of direct and collateral constitutional challenges to criminal prosecutions must be respected."

Some courts have even applied this rule to bar the reversing of cases that are still on appeal when the new constitutional ruling is promulgated. See, e.g., *People v. Farrara*, 46 Cal. 2d 265, 294 P.2d 21 (1956); *Shorey v. State*, 227 Md. 385, 177 A.2d 245 (1962); *State v. Smith*, 37 N.J. 481, 181 A.2d 761 (1962); *People v. Friola*, 11 N.Y.2d 157, 182 N.E.2d 100, 227 N.Y.S.2d 423 (1962). *Contra*, *Hayward v. Richardson Constr. Co.*, 136 Mont. 241, 347 P.2d 475 (1959). See also dissent in *People v. Friola*, *supra*, in which Judge Desmond said that the purpose of a trial objection is to call attention to a point of existing law; since the new rule justifying an objection to the evidence was not adopted until after the trial, there is no reason why a trial objection should be required.

However, there is some authority to the effect that exceptional circumstances — such as the fact that the new rule involves constitutional rights, e.g., *Williams v. Georgia*, 349 U.S. 375 (1955); *Sumal v. Large*, 332 U.S. 174 (1947); *U.S. ex rel. Noia v. Fay*, 300 F.2d 845 (2d Cir. 1962); *Whitley v. Steiner*, 293 F.2d 895 (4th Cir. 1961); or the fact that the crime involved is a capital one, e.g., *Williams v. Georgia*, *supra*; *People v. Rosario*, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961) — will waive the rule that the point must be raised at the trial to get state habeas corpus relief. But *People v. Eastman*, *supra*, and *Sumal v. Large*, *supra*, state that a change of law is not in itself such an exceptional circumstance as to justify waiver of the rule that evidentiary objections cannot be pursued by habeas corpus, but must be raised on appeal.

²²The Court has not yet acted directly on such cases, but see *Winkle v. Bonnan*, 368 U.S. 34 (1961), in which the Supreme Court, in a per curiam decision, vacated state judgment (on recommendation of the state's Attorney General), and remanded it for consideration in light of the *Mapp* ruling. The case apparently involved a collateral attack on a state conviction.

²³*Sumal v. Large*, 332 U.S. 174 (1947). In this decision, however, the Court said the case was not one where the law was changed after disposition of petitioner's case; rather, the law had not crystallized either way at the time of the original trial. Therefore, the petitioner should have appealed his conviction, and lost his right to collateral attack by failing to appeal — even if the stated reason for such failure was belief in the futility of an appeal. The Court thus hints that if there had been an appeal, and it was rejected because the Court was not yet ready to promulgate the new rule, there might be relief available by collateral attack after the new rule was handed down. The change of law here involved was a change in the type of evidence defendants were allowed to present in a trial for failure to report for military service.

a later decision²⁴ did grant relief following promulgation of the rule in *Griffin v. Illinois*²⁵ that states are required to furnish transcripts to indigent defendants wishing to appeal. However, that case might be distinguished on the ground that the *Griffin* rule did not change the requirements for conviction, or the evidence admissible at the trial, but just the availability of the opportunity to appeal the conviction. This is shown by the fact that the Court did not reverse the decision but just ordered that the state must now furnish the transcript and allow the appeal.

The *Mapp* decision is quite important to Arizona since we had refused to adopt the exclusionary rule before *Mapp*.²⁶ There are no Arizona decisions in regard to the possible retroactive effect of a change in criminal law rulings.²⁷ However, a clue might be gained from the way Arizona usually rules on habeas corpus petitions. Arizona has a strict rule that habeas corpus can be used to review only matters affecting the jurisdiction of the court—not mere errors and irregularities in the trial.²⁸ It might be argued that a court has exceeded its jurisdiction in convicting a person on the basis of illegal evidence. However, the only analogous case²⁹ held that a claim of illegal search and seizure (under the pre-*Mapp* standards) could not be considered on habeas corpus because it was not remotely related to the question of jurisdiction.

It is submitted that the old question of retroactivity must be studied anew in light of the *Mapp* decision. It seems reasonable to adopt the dichotomy used in a New York case,³⁰ that where the overturned rule was one going directly to the validity of the conviction, the new rule should apply retroactively; but where such is not the case, the new rule should apply only prospectively. Since the *Mapp* rule is designed to check overzealous law enforcement, rather than safeguard the basic fairness of the trial, it appears that the principal

²⁴ *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214 (1958).

²⁵ 351 U.S. 12 (1956). In this opinion, it is interesting to note that the majority opinion (by four Justices) ignored the obvious retroactivity problem. But concurring Justice Frankfurter mentioned the issue in his opinion and said he felt the ruling should apply only prospectively. Dissenting Justices Burton, Reed, Minton, and Harlan, taking Frankfurter's cue, said the decision *would* apply retroactively under the majority opinion, and that was one of the dangers of the new rule.

²⁶ *State v. Frye*, 58 Ariz. 409, 120 P.2d 793 (1942). See also *State v. Berg*, 76 Ariz. 96, 259 P.2d 261 (1953); *State v. Pelosi*, 68 Ariz. 51, 199 P.2d 125 (1948).

²⁷ *But see O'Malley v. Sims*, 51 Ariz. 155, 75 P.2d 50 (1938); *Arizona State Tax Comm'n v. Ensign*, 75 Ariz. 376, 257 P.2d 392 (1953); and *Duhamé v. State Tax Comm'n*, 65 Ariz. 268, 179 P.2d 252 (1947), for a discussion of the Arizona rules as to the effect of retroactivity in civil cases.

²⁸ See, e.g., *State v. Morales*, 90 Ariz. 11, 363 P.2d 606 (1961); *State ex rel. Jones v. Superior Court*, 78 Ariz. 367, 280 P.2d 691 (1955); 5 ARIZ. L. REV. 124 (1963).

²⁹ *State ex rel. Jones v. Superior Court*, *supra* note 28.

³⁰ *People v. Eastman*, 33 Misc. 2d 583, 228 N.Y.S.2d 156 (Kings County Ct. 1962).

case is correct in denying post-conviction relief to one convicted by use of illegally-seized evidence. As a practical matter, this view is necessary; because of the improbability of retrial, a contra view would release many prisoners who might have been convicted even if only legal evidence was used. The curtailment of future convictions by the use of illegally-seized evidence should provide a sufficient deterrent to overzealous police.

It is hoped that the Supreme Court itself will make its position clear on the retroactivity question when it rules on post-*Mapp* habeas corpus petitions. In the meantime, considering Arizona's long opposition to the exclusionary rule, it would seem that our court would not be inclined to release the defendants convicted on illegally-seized evidence.

Gary Peter Klahr

CRIMINAL LAW — JURISDICTION — PREVIOUS ACQUITTAL OF ONE OF TWO CO-CONSPIRATORS REMOVES JURISDICTION TO CONVICT OTHER CO-CONSPIRATOR. — *Eyman v. Deutsch* (Ariz. 1962).

The petitioner was sentenced to the state prison upon a plea of guilty to the crime of conspiracy after his co-conspirator had been tried and acquitted for the same conspiracy. The trial court had full knowledge of the acquittal of the co-conspirator before imposing the sentence upon the defendant. The superior court granted the petitioner's writ of habeas corpus and ordered him to be released. On appeal, *held*, affirmed. Where a defendant enters a guilty plea after his alleged co-conspirator is found not guilty of the same conspiracy, acquittal of the co-conspirator operates to deprive the court of jurisdiction to render a judgment of conviction on defendant's guilty plea. *Eyman v. Deutsch*, 92 Ariz. 82, 373 P.2d 716 (1962).

Conspiracy is a combination between two or more persons, by concerted action to accomplish a criminal purpose, or some purpose not in itself criminal by unlawful means.¹ By the nature of the crime of conspiracy, it is well settled that if there are only two co-conspirators and if one is acquitted, the conviction of the other co-conspirator may not stand.² Due to the rather unique fact situation

¹ 15 C.J.S. *Conspiracy* § 35 (1939). See also ARIZ. REV. STAT. ANN. § 13-331 (1956).

² *E.g.*, U.S. v. Wray, 8 F.2d 429 (D. Ga. 1925); *People v. Regan*, 351 Ill. App. 550, 115 N.E.2d 817 (1953); *Delaney v. State*, 164 Tenn. 432, 51 S.W.2d 485 (1932). See generally *Annotts.*, 72 A.L.R. 1180 (1931), and 97 A.L.R. 1312 (1935).

in the principal case the defendant was confined in the state prison for the crime of conspiracy while his co-conspirator was free after acquittal. This result was totally inconsistent with the nature of the crime of conspiracy.³ The question upon which the court in the principal case was divided was whether habeas corpus was the proper remedy.

A writ of habeas corpus may be used only to review matters affecting the jurisdiction of the court.⁴ The Arizona court has held⁵ that jurisdiction has three elements: (1) jurisdiction of the person; (2) jurisdiction of the subject matter; and (3) jurisdiction to render the particular judgment which was given, and that all three of these elements must occur to keep the judgment immune from collateral attack.⁶ Applying these requirements, the majority of the court in the principal case reasoned that, although the granting of the writ of habeas corpus constitutes a collateral attack upon the judgment of the trial court, it was the proper remedy because the trial court did not have one necessary element of jurisdiction, to wit, the power to render the particular judgment which was given because of the acquittal of the co-conspirator. In effect the court said that this rule of law or defense was jurisdictional in nature.

Jurisdiction is a matter of power and covers wrong as well as right decisions,⁷ or, as it has been broadly stated, it includes the power to determine rightfully or wrongfully.⁸ The dissent in the principal case points out that the power to render a particular judgment and sentence is normally present when the judgment and sentence are within the limits authorized by law, that is, within the statutory limits of place, time and method of punishment.⁹ The

³ *Ibid.*

⁴ 25 AM. JUR. *Habeas Corpus* § 26 (1940). See, e.g., *State ex rel. Jones v. Superior Court*, 78 Ariz. 367, 280 P.2d 691 (1955). In the case of *Ex parte Long*, 26 Okl. Cr. 259, 223 Pac. 710, 711 (1924), it is stated that: "It is undoubtedly the law that upon habeas corpus cognizances can be taken only of defects of a jurisdictional character, which render the proceedings under which the petitioner is imprisoned not merely erroneous, but absolutely void." See also *Oswald v. Martin*, 70 Ariz. 392, 222 P.2d 632 (1950); *State ex rel. La Prade v. Grantham*, 30 Ariz. 591, 249 Pac. 758 (1926); *State ex rel. Murphy v. Superior Court*, 25 Ariz. 226, 215 Pac. 538 (1923); *Application of Silvas*, 16 Ariz. 41, 140 Pac. 988 (1914).

⁵ *Wall v. Superior Court*, 53 Ariz. 344, 89 P.2d 624 (1939); *Collins v. Superior Court*, 48 Ariz. 381, 62 P.2d 131 (1936); *City of Phoenix v. Greer*, 43 Ariz. 214, 29 P.2d 1062 (1934); *Tube City Mining & Milling Co. v. Otterson*, 16 Ariz. 305, 146 Pac. 203 (1914).

⁶ *Ibid.*

⁷ *Lamar v. U.S.*, 240 U.S. 60 (1916).

⁸ *Dockweiler v. Superior Court*, 106 Cal. App. 2d 744, 236 P.2d 20 (1951); *Gossett v. Hensley*, 94 S.W.2d 903 (Tex. Civ. App. 1936); *Snell v. Knowles*, 87 S.W.2d 871 (Tex. Civ. App. 1935).

⁹ The dissent cited *In re Bonner*, 151 U.S. 242 (1894).

element of the jurisdiction referred to as the power to render the particular judgment generally arises when the court imposes an excessive or deficient sentence or a sentence of indefinite duration or one designating improper place of imprisonment. Under such circumstances the prisoner will be discharged at least from imprisonment under that particular judgment by means of a writ of habeas corpus.¹⁰ In the principal case the trial court acted within statutory limitations in sentencing the defendant.¹¹

Perhaps an analogy can be drawn here to a situation in which the defendant pleads guilty to a crime to which the statute of limitations for prosecution has run. The question arises whether the statute of limitations is jurisdictional in nature or an affirmative defense. This problem, whether regarded as one of pleading or substantive law, has long divided the various jurisdictions of the country.¹² In another analogy, it is generally held that habeas corpus cannot be used to review the validity of a judgment on the ground of double jeopardy.¹³ The Arizona court recently took this view in *State v. Morales*.¹⁴ This means that a violation of the double jeopardy principle does not deprive the court of its jurisdiction. Since safeguards against double jeopardy are so clearly expressed in the federal¹⁵ and state¹⁶ constitutions and it is only an affirmative defense, a fortiori, the rule of law regarding conspiracy in the principal case should be an affirmative defense also rather than jurisdictional in nature.

The Arizona court has apparently made an exception, in this case, to the general rule that the failure to raise a valid defense before final judgment, not relating to a deprivation of basic constitutional rights, constitutes a waiver of such defense and that such failure does not deprive the trial court of its jurisdiction. On the

¹⁰ See Annot., 76 A.L.R. 468, 495 (1932).

¹¹ ARIZ. REV. STAT. ANN. § 13-331 (1956).

¹² For cases holding that statute of limitations is jurisdictional in nature, see, e.g., *U.S. v. Harris*, 133 F. Supp. 796 (W.D. Mo. 1955); *People v. Hoffman*, 132 Cal. App. 60, 22 P.2d 229 (1933); *State v. Tennyson*, 73 N.D. 259, 14 N.W.2d 171 (1944). *Contra*, e.g., *U.S. v. Parrino*, 212 F.2d 919 (2d Cir. 1954); *State v. Brinkley*, 193 N.C. 747, 138 S.E. 138 (1927); *Commonwealth v. Ashe*, 154 Pa. Super. 397, 36 A.2d 249 (1944). See generally Annot., 37 A.L.R. 1116 (1925).

¹³ "Frequently the refusal of the habeas corpus court to relieve a petitioner after a trial in which the question of double jeopardy was not raised has been based on the argument that the failure to plead the defense had waived it." Annot, 8 A.L.R.2d 285, 296 (1949), and cases cited therein.

¹⁴ 90 Ariz. 11, 363 P.2d 606 (1961).

¹⁵ U.S. CONST. amend. V.

¹⁶ ARIZ. CONST. art. 2, § 10.

other hand, if the court had held the other way in the principal case, a completely illogical precedent repugnant to the nature of the crime of conspiracy would have resulted. Perhaps in the final analysis what is needed to solve this dilemma is legislation in the area of post conviction remedies so the Arizona court would not have to stretch the principles of jurisdiction in order to effectuate a logical and just result.

Craig R. Kepner

CRIMINAL LAW — PRESENTENCE INVESTIGATION — DEFENDANT DOES NOT HAVE RIGHT OF ACCESS TO CONFIDENTIAL DOCUMENTS USED IN DETERMINING SENTENCE. — *Morgan v. State* (Fla. 1962).

The defendant pleaded guilty to a charge of grand larceny and was sentenced to a prison term, after being denied access to a presentence investigation report prepared by the Florida Parole Commission.¹ The defendant had claimed that such denial violated his right under the due process clause of the fourteenth amendment to confront witnesses and rebut adverse testimony. On appeal, *held*, affirmed. Due process of law is not denied by refusing a guilty person awaiting sentence access to a presentence investigation report. *Morgan v. State*, 142 So. 2d 308 (Dist. Ct. App.), *cert. denied*, 146 So. 2d 751 (Fla. 1962).

Numerous courts have considered the problem of whether or not a defendant, following a determination of guilt, should be allowed access to a presentence investigation report² utilized by the court in exercising its sentencing discretion. It is generally conceded that sentencing is, within statutory limits, a discretionary matter for trial

¹ FLA. STAT. ANN. § 948.01 (1956) authorizes the use of a presentence investigation report.

² A presentence investigation report is normally made by the probation service of the court following a plea or adjudication of guilt, and prior to the imposition of sentence. It contains information concerning the defendant's character; any prior criminal record; his financial condition; circumstances affecting his behavior which may be helpful in imposing sentence, in granting probation or in the correctional treatment of the defendant; and such other information as may be required by the court. Such a report is used in federal courts pursuant to FED. R. CRIM. P. 32(c). Most state courts have rules allowing the court to request such a report from the probation authorities. *E.g.*, COLO. REV. STAT. ANN. § 39-16-2 (1953); MINN. STAT. ANN. § 610.37 (1947); N.C. GEN. STAT. § 15-198 (1953). By Arizona statute, the report is made by the probation department acting as an arm of the court and at the court's discretion. ARIZ. REV. STAT. ANN. § 13-1657 (1956).

judges.³ In addition, in the leading case of *Williams v. New York*,⁴ the Supreme Court stated that it is not a denial of due process of law to refuse to a defendant access to such a report.⁵ Speaking for the Court, Mr. Justice Black stated the principle that constitutional safeguards which apply to the determination of guilt or innocence do not apply to such post-trial procedures as sentencing, since the issue of guilt has been resolved.⁶

However, there is a considerable difference of opinion as to whether or not access should be allowed, in the discretion of the court, as a matter of policy⁷ to safeguard against the possibility that erroneous information⁸ might be utilized in arriving at the sentencing decision. In the *Williams* case, the fear was expressed that allow-

³ See generally 23 C.J.S. *Criminal Law* §§ 1980a&b, 1983(1)a&b (1961). Ariz. Rev. STAT. ANN. § 13-1657a (1956) provides in part: "If it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be subserved thereby, the court may, in its discretion, place the defendant on probation. . . ."

An extreme example was in the case of *State v. Reeder*, 79 S.C. 139, 60 S.E. 434 (1908), when it was held that discretion in a trial judge is necessarily implied by a statute providing a sentence ranging from 2 to 30 years.

⁴ 337 U.S. 241 (1948).

⁵ While *In re Oliver*, 333 U.S. 257 (1947) and *Snyder v. Massachusetts*, 291 U.S. 97 (1933) held that the fourteenth amendment guarantees the right to confront witnesses and rebut adverse testimony, the Court drew a distinction between trial and post-trial procedures in applying constitutional safeguards. However, such is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due process clause. See *Townsend v. Burke*, 334 U.S. 736 (1948), discussed in 49 COLUM. L. REV. 567 (1949).

⁶ Similar views have been expressed in several state cases. For example, it was said in *People v. Riley*, 376 Ill. 364, 33 N.E.2d 872, 875 (1941):

Any person indicted stands before the bar of justice clothed with a presumption of innocence and, as such, is tenderly regarded by the law. . . . After a plea of guilty . . . they are felons. Instead of being clothed with a presumption of innocence, they are naked criminals, hoping for mercy but entitled only to justice. What might, at their own choice, have been an issue to be determined by a jury has been changed into an inquiry by the result of which the discretion of the trial judge is to be exercised in determining their punishment.

In *State v. Carli*, 2 Wis. 2d 429, 87 N.W.2d 830 (1958), it was held that once an accused has been found guilty he is subject to whatever loss of liberty the legislature has prescribed for his crime, and consideration by the court of a presentence investigation, after a determination of the accused's guilt, does not violate his constitutional right to meet witnesses face to face. *People v. Butler*, 203 N.Y.S.2d 127 (Kings County Ct. 1960) held that the lack of an opportunity to cross-examine individuals who supplied information for the report did not violate the defendant's constitutional rights. See also *Solesbee v. Balksom*, 339 U.S. 9 (1950).

⁷ See Note, 58 COLUM. L. REV. 702 (1958) containing a discussion of the conflicts between those advocating such access to the defendant and those advocating its denial.

⁸ See *Taylor v. United States*, 179 F.2d 640 (9th Cir.), cert. denied, 339 U.S. 988 (1950), which held that due process of law does not limit the contents of a presentence investigation report to information which would be available under rules of evidence applicable to the trial.

ing the defendant an opportunity to confront those supplying information for the report would result in a retrial of collateral issues. In addition, it has been held that to be of assistance to the court, the presentence investigation report must necessarily contain a certain amount of information obtained in confidence.⁹ Courts which deny access to the defendant on policy grounds feels that abandonment of this confidential aspect of the report would seriously hamper the probation investigative system.¹⁰ Among those courts whose practice it is to deny access to the defendant are the great majority of federal courts.¹¹

Other federal courts have, however, taken the view that it is the better practice to apprise the defendant of the contents of the report.¹² State courts of a similar disposition have furnished the defendant's counsel with a copy of the report.¹³ Courts which apply such safeguards feel that such conduct is most consistent with modern concepts of punishment,¹⁴ which stress individualized sentencing and rehabilitation¹⁵ based upon accurate information concerning each individual. Such concern for fairness has led some states to require by statute that the defendant be allowed to inspect the report.¹⁶

Other states have sought to allow the defendant an opportunity to discover and refute serious mistakes in the report, while preserving some degree of confidentiality. To achieve this purpose, courts have employed such practices as calling adverse information contained

⁹ *United States v. Durham*, 181 F. Supp. 503 (D.D.C. 1960).

¹⁰ *United States v. Greathouse*, 188 F. Supp. 765 (N.D. Ala. 1960).

¹¹ *Pilot Institute on Sentencing*, 26 F.R.D. 231, 329 (1959). This report was prepared under the auspices of the Judicial Conference of the United States held at the University of Colorado, July 16 & 17, 1959. It contains the results of a survey of federal district courts concerning the confidential nature of the presentence investigation report. It was found that in 65 districts, the report was available to the judge only; in 30 districts, it was available to other interested parties, including the United States Attorney in 28 of these districts; and in eleven districts it was available to the defense counsel. The case for confidentiality of the report has been strengthened in federal courts by the fact that a provision providing for disclosure was stricken from the final draft of the rule governing the use of the report. *Compare* REPORT OF THE ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE APPOINTED BY THE UNITED STATES SUPREME COURT 33 (1944) (concerning Rule 34c) *with* FED. R. CRIM. P. 32(c).

¹² *E.g.*, *Smith v. United States*, 223 F.2d 750 (5th Cir. 1955); *Stephan v. United States*, 133 F.2d 87 (6th Cir. 1943).

¹³ *E.g.*, *State v. Harmon*, 147 Conn. 125, 157 A.2d 594 (1960).

¹⁴ See ADVISORY COUNCIL OF JUDGES OF NATIONAL PROBATION AND PAROLE ASSOCIATION, GUIDES FOR SENTENCING 69-94 (1957).

¹⁵ Kennedy, *The Presentence Investigation Report Is Indispensable to the Court*, FED. PROB. 3 (Apr.-June 1941).

¹⁶ *E.g.*, ALA. CODE § 42-23 (1940); CAL. PEN. CODE § 1203 (1960); and VA. CODE ANN. § 53-278.1 (1957). The Virginia statute limits access to those cases in which the defendant pleads guilty or is tried by the court in felony cases involving at least the possible sentence of ten years.

in the report to the defendant's attention without revealing the source,¹⁷ listening to the defendant and his counsel after having stated to them the adverse features used in reaching the sentencing decision,¹⁸ or granting the defendant an opportunity to question the probation officer making the report.¹⁹

The court in the principal case adhered strictly to the constitutional rule of the *Williams* case. It avoided the possibility of a retrial of collateral issues by refusing to the defendant any information concerning the presentence investigation report.

The Arizona court has not been called upon to speak on this problem. However, the Arizona court has said that it is the duty of the court to inquire into the defendant's background.²⁰ The court may consider information extending beyond the principal crime,²¹ explore the defendant's past criminal record,²² and investigate his moral background.²³ While Arizona has rules providing for proceedings for the presentation of circumstances of aggravation or mitigation in determining punishment,²⁴ the rules do not make the report a part of the record of such proceedings, and such reports have been held by other courts not to be a part of the record.²⁵ However, the Arizona legislature could follow the lead of California, which has by statute expressly made the report a part of the record of such proceedings.²⁶

A preferable middle ground between denying and allowing access can be achieved by disclosing the contents of the report and the conclusions drawn therefrom, without allowing access to the report.²⁷ Under this method the persons supplying the information remain unknown, and the contents of the report would be subject only to the defendant's complaints concerning their factual validity. The anonymity of the informants would preserve the effectiveness of the probation investigative system, and the limitation of the defendant's complaints to factual errors would reduce the scope of any feared retrial of collateral issues. The right to challenge the validity of facts would virtually eliminate the danger of sentencing a man on the strength of information which is untrue.

Richard J. Woods

¹⁷ *Zeff v. Sanford*, 31 F. Supp. 736 (D.D.C. 1940); *Driver v. State*, 201 Md. 25, 92 A.2d 570 (1952).

¹⁸ *State v. Moore*, 49 Del. 29, 108 A.2d 675 (1954).

¹⁹ *Linton v. Commonwealth*, 192 Va. 437, 65 S.E.2d 534 (1951).

²⁰ *State v. James*, 53 Ariz. 42, 84 P.2d 1081 (1938).

²¹ *State v. James*, 53 Ariz. 42, 84 P.2d 1081 (1938).

²² *Chee v. State*, 65 Ariz. 147, 176 P.2d 366 (1947).

²³ *State v. Smith*, 66 Ariz. 376, 189 P.2d 205 (1948).

²⁴ ARIZ. R. CRIM. P. 336, which is used in cases where a defendant is found guilty by a jury or by the court; ARIZ. R. CRIM. P. 187, which is used when the defendant pleads guilty.

²⁵ *People v. Giles*, 70 Cal. App. 2d 872, 161 P.2d 623 (App. Div. 1945); *In re Holmes*, 379 Pa. 599, 109 A.2d 523 (1954), cert. denied, 348 U.S. 973 (1955).

²⁶ CAL. PEN. CODE § 1203 (1960).

²⁷ MODEL PENAL CODE, PROPOSED FINAL DRAFT NO. 1, § 7.07(5) (1961).

INDIANS — RESERVATIONS — FEDERAL JURISDICTION ENDED ONLY BY EXPRESS PROVISION OF CONGRESS. — *Seymour v. Superintendent, Wash. State Penitentiary* (Sup. Ct. 1962).

A member of the Colville Indian Tribe was convicted of attempted burglary and sentenced by a state court of Washington, which held that, though the land on which the crime occurred was once part of an Indian reservation, the reservation had been dissolved by a 1906 act of Congress.¹ The patent in fee to the particular area in which the attempted burglary took place was held by a non-Indian under the 1906 act, which had provided for the sale of mineral lands on the reservation and the settlement of the remaining surplus under the homestead laws after allotments were made to the reservation Indians. The Supreme Court of Washington denied defendant's petition for habeas corpus. On certiorari, *held*, reversed. An Indian reservation once established by Congress is not dissolved unless Congress expressly provides that it be so vacated, and therefore all land within it remains part of the reservation and thus under federal jurisdiction. *Seymour v. Superintendent, Wash. State Penitentiary*, 368 U.S. 351 (1962).

An Indian reservation is a portion of the public domain set apart by act of Congress, by treaty, or by executive order for the use and occupation of a tribe or tribes of Indians.² No non-Indian preferential rights can be acquired in it except as provided by Congress.³ So long as the reservation is unextinguished, the United States holds the land in trust for the Indians.⁴ It rests entirely with Congress to determine when federal guardianship over the Indians should

¹ 34 Stat. 80 (1906).

² *In re Forty-Three Cases Cognac Brandy*, 14 Fed. 539 (C.C. Minn. 1882); *United States v. Parton*, 46 F. Supp. 843 (W.D.N.C. 1942); *United States v. Certain Property*, 1 Ariz. 31, 25 Pac. 517 (1871); *Peters v. Pauma School Dist.*, 91 Cal. App. 792, 267 Pac. 576 (2d Dist. Ct. App. 1928).

³ *Brown v. Smathers*, 188 N.C. 166, 126 S.E. 22 (1924); *Sowards v. Meagher*, 37 Utah 212, 108 Pac. 1112 (1910). *Cf. King v. McAndrews*, 111 Fed. 860 (8th Cir. 1901), *reversing* 104 Fed. 430 (C.C.S.D. 1900), holding that the federal government's power to dispose of the land is complete. That the reservation ceases to be part of the public domain is stated in *Spalding v. Chandler*, 160 U.S. 394 (1896); *Buttz v. Northern Pac. R.R.*, 119 U.S. 55 (1886); *Beecher v. Wetherby*, 95 U.S. 517 (1877). For a discussion of the extent of an Indian's rights in land allotted to him see *Arenas v. Preston*, 181 F.2d 62 (9th Cir.), *cert. denied*, 340 U.S. 819 (1950).

⁴ *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942). See also *Heckman v. United States*, 224 U.S. 413 (1912), holding that where lands allotted to Indians have been made inalienable, the United States can sue to cancel a conveyance of the lands even though the government has no pecuniary interest in the suit. See generally 42 C.J.S. *Indians* § 29 (1944); *Wise, Indian Law and Needed Reforms*, 12 A.B.A.J. 37 (1926).

be curtailed or ended.⁵ Congress has plenary power over Indian affairs and property,⁶ and over tribal lands and funds.⁷ Thus, as to Indian reservations, the federal will is supreme over that of the state within whose limits the Indians may be.⁸

Federal jurisdiction over Indians while the Indians are on reservations cannot ordinarily be shared by the state courts.⁹ Distribu-

⁵ *United States v. Ramsey*, 271 U.S. 467 (1926); *United States v. Waller*, 243 U.S. 452 (1917); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Celestine*, 215 U.S. 278 (1909); *Matter of Heff*, 197 U.S. 488 (1905). See also *Ruggles v. Illinois*, 108 U.S. 526, 531 (1883), stating the general principle that grants of immunity from governmental control are never presumed in the absence of clear legislative intent. See generally 27 AM. JUR. *Indians* § 46 (1940).

⁶ *Bond v. Thom*, 25 F. Supp. 157 (N.D. Okla. 1938), *aff'd sub nom. United States v. Bond*, 108 F.2d 504 (10th Cir. 1939). Cf. *Winton v. Amos*, 255 U.S. 373 (1921); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Creek Nation v. United States*, 78 Ct. Cl. 474 (1933). For a definition of "plenary power" in this regard, see SNOW, *THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS* 58-59 (1921).

⁷ *Sizemore v. Brady*, 235 U.S. 441 (1914).

⁸ *United States v. Sandoval*, 231 U.S. 28 (1913); *Dick v. United States*, 208 U.S. 340 (1908); *United States v. Charles*, 23 F. Supp. 346 (W.D.N.Y. 1938); *Owens v. Kitchens*, 105 Okla. 130, 232 Pac. 797 (1924); *State ex rel. Miller v. Huser*, 76 Okla. 130, 184 Pac. 113 (1919). Cf. *Roff v. Burney*, 168 U.S. 218 (1897); *United States v. Ahtanum Irrigation Dist.*, 124 F. Supp. 818 (E.D. Wash. 1954); *Neah Bay Fish Co. v. Krummel*, 3 Wash. 2d 570, 101 P.2d 600 (1940). In *Milne v. Leiphart*, 119 Mont. 263, 174 P.2d 805 (1946), it was held that a state may tax an Indian's land. *But cf. Jaybird Mining Co. v. Weir*, 271 U.S. 609 (1926) (ore extracted from Indian reservation not taxable by state), adversely criticized in 36 YALE L.J. 142 (1926). *Porter v. Hall*, 34 Ariz. 308, 271 Pac. 411 (1928), held that a state may consider Indian reservations as within its political borders for purposes of establishing voting rights.

Among the cases holding that a state may not prevent application of an act of Congress to the Indian tribes are *Sperry Oil & Gas Co. v. Chisholm*, 264 U.S. 488 (1924); *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866). Cf. *Foster v. Pryor*, 189 U.S. 325 (1903); *Thomas v. Gay*, 169 U.S. 264 (1898); *Langford v. Monteith*, 102 U.S. 145 (1880); *State v. Campbell*, 53 Minn. 354, 55 N.W. 553 (1893); *Buck v. Branson*, 34 Okla. 807, 127 Pac. 436 (1912). For a discussion of the reasons for federal supremacy, see *United States v. Kagama*, 118 U.S. 375, 383 (1886); *United States v. Ewing*, 47 Fed. 809, 813 (D.S.D. 1891).

⁹ *Toy Toy v. Hopkins*, 212 U.S. 542 (1909); *United States v. Kagama*, *supra* note 8; *State v. Jackson*, 218 Minn. 429, 16 N.W.2d 752 (1944); *State ex rel. Bokas v. District Court*, 128 Mont. 37, 270 P.2d 396 (1954); *State v. Youpee*, 103 Mont. 86, 61 P.2d 832 (1936) (dictum); *People ex rel. Cusick v. Daly*, 212 N.Y. 183, 105 N.E. 1048 (1914). Cf. *State v. Lohnes*, 69 N.W.2d 508 (N.D. 1955) (holding North Dakota lacks jurisdiction over reservation Indians in criminal cases). *Contra*, *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957) (holding that North Dakota has jurisdiction over reservation Indians in civil cases). See generally *Crosse, Criminal and Civil Jurisdiction in Indian Country*, 4 ARIZ. L. REV. 57 (1962). *Donnelly v. United States*, 228 U.S. 243 (1913), holds that federal jurisdiction lies as to crimes committed on a reservation by a white person against an Indian; *Williams v. Lee*, 358 U.S. 217 (1959), *reversing* 83 Ariz. 241, 319 P.2d 998 (1958), holds that federal jurisdiction also lies over a civil suit by a non-Indian against an Indian where the cause of action arises on a reservation. But it has been held that state not federal jurisdiction lies where a non-Indian commits a crime against another non-Indian on a reservation. *New York v. Martin*, 326 U.S. 496 (1946); *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881).

tion of Indian property does not terminate federal jurisdiction,¹⁰ even when an Indian receives a patent for land within a reservation.¹¹ Nonetheless, it is well established that the federal government may surrender to a state or territory jurisdiction over certain crimes committed on a reservation,¹² or may completely terminate its guardianship over the Indians, thereby subjecting them to the laws and proceedings of the state in which they reside.¹³ Furthermore, reservation Indians are always amenable to the laws of the state when they are off the reservation.¹⁴

Thus, the Court in the instant case followed existing law in so far as it provides for plenary Congressional authority over Indian reservations and grants the federal courts exclusive jurisdiction over acts committed there. The holding that the 1906 act did not terminate

The fact that an Indian involved in a legal action is a citizen of the United States, or of a state, is immaterial in this regard. *Apapas v. United States*, 233 U.S. 587 (1914); *Hallowell v. United States*, 221 U.S. 317 (1911); *United States v. Celestine*, 215 U.S. 278 (1909); *Browning v. United States*, 6 F.2d 801 (8th Cir. 1925). *Cf.* *United States v. Sandoval*, *supra* note 8; *Porter v. Hall*, *supra* note 8. Nor is it material that the Indian has received the right to vote, according to *United States v. Rickert*, 188 U.S. 432 (1903); *United States v. Holliday*, *supra* note 8.

For a discussion of who is considered an "Indian," see Richards, *Federal Jurisdiction Over Criminal Matters Involving Indian*, 2 S.D.L. Rev. 48-50 (1957).

¹⁰ *United States v. Wright*, 53 F.2d 300 (4th Cir. 1931), *cert. denied*, 285 U.S. 539 (1932); *United States v. Logan*, 105 Fed. 240 (C.C. Ore. 1900) (allotment of land had been made to defendant); *State v. Phelps*, 93 Mont. 277, 19 P.2d 319 (1933).

¹¹ *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Celestine*, 215 U.S. 278 (1909); *State ex rel. Irvine v. District Court*, 125 Mont. 398, 239 P.2d 272 (1951). *Cf.* *United States v. Wright*, *supra* note 10; *United States v. Flourmoy Live-Stock & Real-Estate Co.*, 71 Fed. 576 (C.C. Neb. 1896); *Application of Denetclaw*, 83 Ariz. 299, 320 P.2d 697 (1958) (state had been granted easement to reservation land where misdemeanor occurred). *Contra*, *People v. Pratt*, 26 Cal. App. 2d 618, 80 P.2d 87 (3d Dist. Ct. App. 1938); *State v. Johnson*, 212 Wis. 301, 249 N.W. 284, 289 (1933).

¹² *Ex parte Gon-shay-ee*, 130 U.S. 343 (1889) (Territory of Arizona given jurisdiction).

¹³ *United States v. Waller*, 243 U.S. 452 (1917); *Matter of Heff*, 197 U.S. 488 (1905). *Cf.* *Louie v. United States*, 274 Fed. 47 (9th Cir. 1921), in which a majority of the court found that federal jurisdiction terminated and an Indian became subject to state law when he received a patent in fee to reservation land. The holding was based on a statutory provision that such allottees became subject to the laws of the state or territory in which they resided. The dissent of Judge Gilbert maintained that federal jurisdiction continued so long as the allotted land remained within an Indian reservation, even though state jurisdiction existed also. *Id.* at 51. *Accord* with majority view that there is state but not federal jurisdiction, *State v. Big Sheep*, 75 Mont. 219, 243 Pac. 1067, 1071 (1926).

See also *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946), holding that Congress, having plenary authority over interstate commerce, may surrender to the states a part of its control of such commerce.

¹⁴ *State v. Little Whirlwind*, 22 Mont. 425, 56 Pac. 820 (1899); *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026 (1899), holding also that indictment need not show that the crime was not committed within limits of an Indian reservation; *Ex parte Moore*, 28 S.D. 339, 133 N.W. 817 (1911).

the reservation may at first glance seem extreme. But this holding applies the view that once an Indian reservation is established, all land within it remains part of the reservation until expressly separated therefrom by Congress.¹⁵ Thus, allotment of lands within the area, even to non-Indians, does not necessarily disestablish or diminish the reservation.¹⁶

This strict view and its application in the instant case have a sound basis in reasoning. The fact that the government is willing to allow reservation land to be used for other purposes as well as for the use of the Indians does not indicate a belief that the protection of the Indians afforded by federal jurisdiction should be surrendered. Decrease in the population of a tribe or economic motives may make it practical to allow portions of a reservation to be used for mining or homesteading. But the land may also still be needed by some Indians as a reservation. So long as such need exists, Congress undoubtedly finds it more convenient to treat the entire area as still being under federal jurisdiction rather than to treat each lot separately.

It must be noted, however, that this Congressional policy creates problems not only where a few tracts of reservation land are allotted to non-Indians, as in the instant case, but also where towns grow up on Indian reservations. For example, Parker, Arizona, a largely non-Indian community of 1,642 persons,¹⁷ is Indian country within the holding of the instant case.¹⁸ Thus, non-Indians committing major crimes in the town are subject to local jurisdiction while Indians committing such crimes are subject to federal jurisdiction only. It is probable that Indians committing even misdemeanors in the town are subject to exclusive federal jurisdiction.¹⁹ Such a situation creates obvious problems of local law enforcement, though the problems could be extinguished by Congressional separation of the town from the reservation.

It has been stated that the general legal policy of federal control over Indian affairs is necessary for the protection of both Indians and non-Indians.²⁰ While the need for special protection of non-

¹⁵ *Tooisgah v. United States*, 186 F.2d 93 (10th Cir. 1950). Cf. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941). *Contra*, *State v. Johnson*, 212 Wis. 301, 249 N.W. 284 (1933).

¹⁶ *Tooisgah v. United States*, *supra* note 15. Cf. *United States v. Celestine*, 215 U.S. 278 (1909); *State v. Lohnes*, 69 N.W.2d 508 (N.D. 1955). *Contra*, *State v. Big Sheep*, 75 Mont. 219, 243 Pac. 1067 (1926).

¹⁷ 1960 BUR. OF CENSUS DECENNIAL REP. 2.

¹⁸ The statute establishing the Townsite of Parker, 35 Stat. 77 (1908), does not remove the Townsite from the reservation.

¹⁹ *In re Fredenberg*, 65 F. Supp. 4 (E.D. Wis. 1946); *Application of Denet-claw*, 83 Ariz. 299, 320 P.2d 697 (1958). Both of these cases involved traffic misdemeanors. See generally Davis, *Criminal Jurisdiction Over Indian Country in Arizona*, 1 ARIZ. L. REV. 62 (1959).

²⁰ *United States v. Sandoval*, 231 U.S. 28 (1913).

Indians from acts of Indians is now slight at most, the Indians who remain ignorant of the modern world, living on the reservations and therefore apart from that world, do still require protection. Some progress has been made toward the education of the Indians and toward their eventual assimilation into the mass of society. It seems advisable that this process of education be continued but that, for the Indians' own benefit, the mantle of federal protection not be raised from around the reservations until the process is relatively complete.²¹

Since the policy toward Indians has developed largely as a legislative one, there is no doubt that changes in the status of the Indians and their lands must be made by Congress, not the courts.²² Thus, within this judicial limitation and within the bounds of the circle of protection that both Congressional legislation and practical considerations require be maintained around Indian reservations, the instant case reaffirms the necessary law.

Osborne M. Reynolds

LABOR RELATIONS — VIOLATION OF ANTITRUST LAWS — INJUNCTIONS AGAINST LABOR UNIONS MAY PROPERLY INCLUDE DIVESTITURE OF MEMBERSHIP. — *Los Angeles Meat & Provision Drivers Union v. United States* (Sup. Ct. 1962).

Defendant union fixed the purchase and sale price of restaurant grease trafficked in by member peddlers. In a civil antitrust action,

²¹ For a general discussion of the developments necessary before the Indians can be assimilated into the rest of society and the role the Indians themselves should play in these developments, see FEY & McNICKLE, *INDIANS AND OTHER AMERICANS* 189-200 (1959).

The view that Indians should cease to be wards of the government and should be given all rights of citizenship as rapidly as possible is expressed in H.R. Con. Res. 108, 83d Cong., 1st Sess. (1953). This policy is called "termination" and is adversely criticized in *AMERICAN INDIAN CHICAGO CONFERENCE, DECLARATION OF INDIAN PURPOSE* 31-32 (1962); FEY & McNICKLE, *op. cit. supra*, at 186-187.

²² *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). Cf. *McKay v. Kalyton*, 204 U.S. 458, 468 (1907), holding that, except as provided by Congress, disputes over title to and right to possession of Indian allotments held in trust by the United States are not primarily cognizable by any court, state or federal.

the union stipulated¹ that these acts were antitrust violations; that the members involved were independent contractors; and that a broad injunction should be issued. The district court enjoined the acts and, going beyond the stipulation, decreed that the union divest all self-employed grease peddlers of their membership.² On appeal, *held*, affirmed.³ An injunction, otherwise properly decreed against a labor union, may include an order divesting the membership of those who have no economic interrelationship with other, and properly affiliated, members. *Los Angeles Meat & Provision Drivers Union v. United States*, 83 Sup. Ct. 162 (1962).

A union is not exempt from suit under the antitrust laws when engaged in acts that are not the lawful carrying out of a legitimate objective,⁴ and such acts may be enjoined.⁵ On the other hand, in a case growing out of a labor dispute⁶ under the Norris-LaGuardia Act, an injunction may not be issued prohibiting any person from

¹ The importance of the stipulations in the instant case should be emphasized. The dissent points out at 83 Sup. Ct. 162, 172, that the court is not bound to accept, as controlling, stipulations as to questions of law, citing *Estate of Sanford v. Commissioner*, 308 U.S. 39 (1939). Such questions, in the present case, included the existence of a "labor dispute" within the meaning of the Norris-LaGuardia Act, § 13, 47 Stat. 73 (1932), 29 U.S.C. § 113 (1956); the designation of the grease peddlers as "independent contractors;" and the commission of an antitrust violation. The majority opinion, in finding the grease peddlers to be an "association of businessmen," said that "the circumstances stipulated and found in the present case provided ample support, we think, for a decree of dissolution, as a matter of the discreet exercise of equitable power." 83 Sup. Ct. 162, 165. The concurring opinion emphasizes that the stipulation to an antitrust violation and to issuance of injunctive relief was tantamount to concessions that necessarily forfeited "any antitrust exemption which might otherwise have been claimed to attach," and negated "the existence of any exonerating legitimate union interest. . . ." *Id.* at 168.

² *United States v. Los Angeles Meat & Provision Drivers Union*, 196 F. Supp. 12 (S.D. Cal. 1961).

³ The appeal was brought directly to the United States Supreme Court under the provisions of the Expediting Act, 32 Stat. 823 (1903), as amended, 15 U.S.C. § 29 (1963).

⁴ Clayton Act §§ 6 & 20, 38 Stat. 131 (1914), 15 U.S.C. § 17 (1963), & 38 Stat. 738 (1914), 29 U.S.C. § 52 (1956). The latter section sets forth certain specific acts not to be considered violations of the antitrust laws. The former exempts properly constituted labor organizations from restraint in lawfully carrying out their legitimate objectives.

⁵ *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1945); *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942). In the *Bradley* case a union combined with non-labor groups to enforce a boycott in restraint of trade. In the *Packers* case the act in violation was price-fixing as opposed to wage fixing. The group involved was found to be a group of businessmen calling themselves a union.

⁶ Norris-LaGuardia Act § 13, 47 Stat. 73 (1932), 29 U.S.C. § 113 (1956). This section broadly defines "labor dispute" to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." An Arizona statute likewise restricts its courts from issuing injunctions in cases involving or arising

becoming or remaining a member of any labor organization.⁷ However, a labor dispute within the meaning of that act does not include disputes among businessmen over prices or controversies upon which the employer-employee relationship has no bearing.⁸ Therefore, under such circumstances, the prohibition against enjoining a person from remaining a union member does not apply. Neither does it have any application where unions aid non-labor groups in controlling the marketing of goods in restraint of trade.⁹ A federal court, moreover, may enjoin acts of a corporation or of an employer group in violation of the antitrust laws and such an injunction may include a decree of dissolution as to the entity involved.¹⁰

In the instant case, appeal from the judgment was taken only as to the decree ordering divestiture of the peddlers' union membership. This aspect of the judgment is unusual and no case has been

from disputes concerning terms or conditions of employment. ARIZ. REV. STAT. ANN. § 12-1808 (1956). This statute is virtually unchanged from REV. STAT. OF ARIZ. § 1464 (1913) which was found to be unconstitutional by the United States Supreme Court in *Truax v. Corrigan*, 257 U.S. 312 (1921). On the strength, however, of that Court's more recent decision in *AFL v. Swing*, 312 U.S. 321 (1941), the Arizona Supreme Court later inferred the statute's constitutionality in *Culinary Workers v. Busy Bee Cafe*, 57 Ariz. 514, 115 P.2d 246 (1941). The statute as it now reads is probably constitutional.

⁷Norris-LaGuardia Act § 4, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1956). This section provides that:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts: . . .

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act. . . .

⁸ *Colorado River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942).

⁹ *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1945).

¹⁰ It has long been established that this power is authorized by the antitrust laws. *United States v. Corn Prods. Refining Co.*, 234 Fed. 964 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1919). The decree, in that instance, ordered dissolution of the defendant corporation into several constituent parts. Other decrees have ordered divestiture of an illegally acquired business, *United States v. General Elec. Co.*, 115 F. Supp. 835 (D.N.J. 1953); divestiture of certain stock owned by defendants, *United States v. International Boxing Club, Inc.*, 171 F. Supp. 841 (S.D.N.Y. 1957), *aff'd*, 358 U.S. 242 (1959), *amendment denied*, 178 F. Supp. 469 (S.D.N.Y. 1959); and dissolution of a trade association, *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945). In the latter case, a decree of dissolution was directed against a trade association of employers in violation of the antitrust laws. The Court found that, the association's acts having been enjoined, its function was practically destroyed even as an innocent association for lawful ends, and therefore to leave it in existence would permit it again to become an instrument for restraint of trade. The association was ordered to dissolve with opportunity for later reformation upon a showing to the Court that the purposes and activities of the proposed body would not be violative of law.

found in which a federal court has previously issued an injunction against a labor union including such a decree. The underlying dispute was looked upon by the majority of the Court, in affirming the district court's decision, as one between the grease peddler members and the processors who purchased from them, and as a dispute over prices rather than wages. Such a dispute in restraint of trade, although joined in by the union as an entity in combination with the peddler members, was found not to be a labor dispute within the meaning of the Norris-LaGuardia Act.¹¹ The peddlers were found to be a group of businessmen on the strength of the stipulation that they were independent contractors and on evidence that within the union the peddlers were treated as a separate entity. Affairs of the group were not administered by regular union officers. Thus the Norris-LaGuardia Act's prohibition from enjoining against "remaining a member of any labor organization" was found inapplicable.

With this prohibition removed, the peddlers might be enjoined from remaining union members if they were not otherwise rightfully affiliated. The Court held there was not such a rightful affiliation without a showing of wage or job competition between the peddlers and other members or a showing of any other economic interrelationship.¹² A lack of such showing was found by the Court in the union's stipulations that no employer processor had ever substituted peddlers for employee drivers in picking up restaurant grease or threatened so to do, and that the processors had basically different sources of supply and different classes of customers than the peddlers. The Court concluded that there was no competition or economic interrelationship between employee union members and the grease peddlers because each was engaged in a different line of work. Thus, the peddlers were not proper subjects for membership solicitation and a divestiture order might issue.¹³ The opinion emphasizes that,

¹¹ *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1945); *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942). See note 5 *supra*.

¹² The National Labor Relations Act as amended precludes any individual having the status of an independent contractor from being an "employee" within the meaning of that statute. National Labor Relations Act § 2(3), as amended, 61 Stat. 137 (1947), 29 U.S.C. § 152 (1956). The independent contractor status referred to in the statute has been interpreted to be the same as it was defined at common law. *NLRB v. Steinberg*, 182 F.2d 850 (5th Cir. 1950). The Supreme Court has held, however, as it emphasized in the present case, that a labor organization may have a legitimate interest in soliciting self-employed entrepreneurs as members. *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959). There must, however, be some economic interrelationship and that interest will presumably be legitimate, even then, only in the absence of common law independent contractor status, which in the instant case was present by stipulation.

¹³ The Court supported this conclusion by analogy to *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945). See note 10 *supra*.

upon a later showing of some economic interrelationship, the decree may be amended to permit the peddlers to reaffiliate.¹⁴

Justice Douglas, speaking alone in dissent, found the facts to present a labor dispute within the meaning of the Norris-LaGuardia Act. From the same facts he found wage and job competition between the peddlers and the other union members who were employees of the processors. Specifically, this competition was found in the stipulation's reference to the mere fact that both employee members and peddlers were engaged in the work of picking up and transporting grease. Thus there existed, in his view, the necessary economic interrelationship to support membership of the peddlers. In dry and tenuous logic, this conclusion can be supported. It embodies reasoning, however, that seems to look insufficiently at the need to accomplish a practical task and would preserve logic by a thread for a seemingly empty reason. The divestiture order is prejudicial to no discernible interest nor right, yet it may most effectively accomplish the task of terminating the acts found to be in violation of the antitrust laws.

Charles F. McCoy

MUNICIPAL CORPORATIONS — EMINENT DOMAIN AND ZONING — RELATIVE RIGHTS AS ASSERTED BY TWO MUNICIPALITIES. — *City of Scottsdale v. Municipal Court* (Ariz. 1962).

The city of Scottsdale purchased land outside its corporate limits for a site to expand its existing sewage disposal plant. Before construction commenced, the city of Tempe annexed an area which included the site of the proposed plant and zoned it for residential use only. After its application for a use permit had been denied by Tempe, Scottsdale commenced construction in violation of both Tempe's zoning ordinance and building code. An action was brought in the Municipal Court of Tempe to enforce its ordinances. Scottsdale sought a writ of prohibition against the action in the supreme court on the ground that Tempe's ordinances were invalid as applied to Scottsdale's property. Tempe did not contend that the proposed

¹⁴ United States v. Swift & Co., 286 U.S. 106 (1932).

use would be a nuisance¹ or that Scottsdale was acting arbitrarily and capriciously.² *Held*, alternative writ of prohibition made permanent. The property acquired by a municipality through purchase, with an alternate right of eminent domain, is not subject to another municipality's zoning ordinance when used in the performance of a governmental function. *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 368 P.2d 637 (1962).

The general rule would seem to be that a municipal corporation is exempt from the operation of zoning ordinances when acting in its governmental capacity,³ but is subject to such ordinances if its activities are of a proprietary or corporate nature.⁴ This is said to be the historical approach⁵ and has been labeled the *limited immunity rule*.⁶ This rule also applies where the activities of one municipal corporation conflict with zoning regulations of another municipal corporation.⁷ In this regard, superior governmental status is often the determinative factor.⁸ The rule is often difficult to apply for it involves delineation of governmental and proprietary functions.⁹ It

¹ For the effect of nuisance resulting from public uses for which the land is acquired see Annot., 40 A.L.R.2d 1177 (1955).

² For the effect of arbitrary and capricious action in acquiring land for sewage purpose see 64 C.J.S. *Municipal Corporations* § 1803 (1950).

³ *City of Birmingham v. Scogin*, 269 Ala. 679, 115 So. 2d 505 (1959); *Sunny Slope Water Co. v. City of Pasadena*, 1 Cal. 2d 87, 33 P.2d 672 (1934); *Nichols Eng'r & Research Corp. v. State*, 59 So. 2d 874 (Fla. 1952); *Nehrbas v. Incorporated Village of Lloyd Harbor*, 2 N.Y.2d 190, 140 N.E.2d. 241 (1957); *McKinney v. City of High Point*, 237 N.C. 66, 74 S.E.2d 440 (1953); *Charleston v. Southeastern Constr. Co.*, 134 W. Va. 666, 64 S.E.2d 676 (1950). See also 2 METZENBAUM, *LAW OF ZONING* 1280 (1955).

⁴ *Jefferson County v. City of Birmingham*, 256 Ala. 436, 55 So. 2d 196 (1951); *Hunke v. Foote*, 373 P.2d 322 (Idaho 1962); *Baltis v. Village of Westchester*, 3 Ill. 2d 388, 121 N.E.2d 495 (1954); *Taber v. City of Benton Harbor*, 280 Mich. 522, 274 N.W. 324 (1937); *Township of Washington v. Village of Ridgewood*, 46 N.J. Super. 152, 134 A.2d 345 (1957); *O'Brien v. Town of Greenburgh*, 239 App. Div. 555, 268 N.Y.S. 173 (App. Div.), *aff'd*, 266 N.Y. 582, 195 N.E. 210 (1933).

⁵ See 1 RATHKOFF, *LAW OF ZONING AND PLANNING* ch. 53-3 (1960).

⁶ Annot., 61 A.L.R.2d 973 (1958).

⁷ *Jefferson County v. Birmingham*, 256 Ala. 436, 55 So. 2d 196 (1951); *Township of Washington v. Village of Ridgewood*, 46 N.J. Super. 152, 134 A.2d 345 (1957); *Village of Larchmont v. Town of Mamaroneck*, 239 N.Y. 551, 147 N.E. 191, *modifying* 208 App. Div. 812, 203 N.Y.S. 957 (App. Div. 1924).

⁸ *Board of Regents v. City of Tempe*, 88 Ariz. 299, 356 P.2d 399 (1960); *Aviation Services, Inc. v. Board of Adjustment*, 20 N.J. 318, 119 A.2d 761 (1956); *State ex rel. Helsel v. Board of County Comm'rs*, 37 Ohio App. 58, 79 N.E.2d 698 (1947); *Davidson County v. Harmon*, 200 Tenn. 575, 292 S.W.2d 777 (1956). See also 8 McQUILLAN, *MUNICIPAL CORPORATIONS* § 25.15 (1950).

⁹ 101 C.J.S. *Zoning* § 135 (1959); 58 AM. JUR. *Zoning* § 120 (1948); Annot., 61 A.L.R.2d 988 (1958), regarding classification of particular uses and structures; 18 McQUILLAN, *op. cit. supra* note 8, at 185.

presupposes a lack of express declaration regarding exemptions by statute or the applicable ordinance.¹⁰

There appears to be a trend on the part of some courts to hold that where the power of eminent domain exists, zoning regulations are inapplicable to public projects in the absence of an express statutory declaration to the contrary.¹¹ This is significant in light of the present case for it has been applied to inter-jurisdictional disputes where no superior governmental status is involved as well as intra-jurisdictional issues.¹² Such an approach was first seen in church and school cases,¹³ but has since been expanded to include many other public projects. Essentially it involves a presumption in favor of immunity, thus eliminating the problem of distinguishing between governmental and proprietary functions.¹⁴ In inter-jurisdictional disputes, the question is one of statutory construction based upon considerations of public health, safety and general welfare.

The instant case appears to be the first Arizona decision on the question of inter-jurisdictional conflict involving the powers of eminent domain and zoning where no superior governmental status is present.¹⁵

In the principal case, the court appears to have followed the general rule of limited immunity. The court reasoned that the applicable statutes¹⁶ have, in absolute and unconditional terms,¹⁷ granted a municipality the right to acquire property outside its corporate limits for the operation of a sewage disposal plant; that the right conferred includes the power of eminent domain. The court then determined that the use to which the property was to be subjected was of a governmental nature and hence was exempt from zoning restrictions.

¹⁰ Annot., 61 A.L.R.2d 979 (1958), regarding exemptions based on statute and zoning regulation.

¹¹ *Mayor of Savannah v. Collins*, 211 Ga. 191, 84 S.E.2d 454 (1954); *Petition of City of Detroit*, 308 Mich. 480, 14 N.W.2d 140 (1944); *State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960); *Township of Washington v. Ridgewood Village*, 26 N.J. 578, 141 A.2d 308 (1958); *Village of Lloyd Harbor v. Town of Huntington*, 3 Misc. 2d 849, 157 N.Y.S.2d 442 (Sup. Ct.), *aff'd*, 165 N.Y.S.2d 705 (App. Div.), *rev'd*, 173 N.Y.S.2d 553, 149 N.E.2d 851 (1958). See 1 RATHKOFF, *op. cit. supra* note 5, at ch. 53-11, and Annot., 61 A.L.R.2d 978 (1958), exemptions based upon the power of eminent domain.

¹² *Petition of City of Detroit*, *supra* note 11.

¹³ 1 RATHKOFF, *op. cit. supra* note 5, at ch. 53-14.

¹⁴ *State ex rel. Askew v. Kopp*, 330 S.W.2d 882, 889 (Mo. 1960).

¹⁵ There is little Arizona law on this subject generally and it is doubted that the Supreme Court of Arizona has rendered a definite decision on intra-jurisdictional conflict either. See *Board of Regents v. City of Tempe*, 88 Ariz. 299, 356 P.2d 399 (1960), 3 ARIZ. L. REV. 297 (1961).

¹⁶ ARIZ. REV. STAT. ANN. §§ 9-521 & 522 (1956).

¹⁷ *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 395, 368 P.2d 637, 638 (1962).

The court refused to find a distinction in that the land was purchased rather than acquired by eminent domain, holding that the important fact was that the power was there if needed.¹⁸

The reasoning by which the court reached its decision seems more consistent with the modern trend than with cases holding to the limited immunity rule. The court cites with favor *State ex rel. Askew v. Kopp*,¹⁹ a recent trend case which stated that the distinction between governmental and proprietary functions is illusory where there is conflict with zoning ordinances.²⁰ Further, the court emphasized the nature of eminent domain as an inherent attribute to sovereignty while skimming lightly over the nature of the police power from which stems the zoning authority.²¹ After such an approach, the court returns to the limited immunity rule and distinguishes the particular activity. Even here, its emphasis seems inconsistent with the general rule since it appears to conclude that the activity is of "stark necessity"²² to public health, which perhaps is broader than necessary to distinguish between governmental and proprietary functions.²³ It is to be admitted, however, that there is division of authority as to whether the operation of a sewage disposal plant is governmental or proprietary²⁴ and indeed there is little law on the subject. It should be noted that the court does not discuss whether the language of the statute conferring the power of eminent domain is of a mandatory or permissive nature. This would seem to be an important consideration for courts adhering to the limited immunity rule.

It is perhaps significant to note that the dissenting opinion²⁵ in the instant case stresses the point that a statute granting a municipality the right to acquire land by eminent domain for a particular use does not ipso facto constitute such use an exclusive govern-

¹⁸ This would seem to be the general rule. See *Mayor of Savannah v. Collins*, 211 Ga. 191, 84 S.E.2d 454 (1954); *State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960); *Township of Washington v. Ridgewood Village*, 26 N.J. 578, 141 A.2d 308 (1958).

¹⁹ *Supra* note 18. See *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 398, 368 P.2d 637, 639 (1962).

²⁰ *State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960).

²¹ *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 399, 368 P.2d 637, 641 (1962) (dissenting opinion).

²² *Id.* at 398, 368 P.2d at 640.

²³ I RATHKOFF, *op. cit. supra* note 5, at ch. 53-14.

²⁴ *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 398, 368 P.2d 637, 639 (1962). See 63 C.J.S. *Municipal Corporations* § 873 (1950).

²⁵ The opinion of the court was written by Justice Struckmeyer and concurred in by Bernstein, C.J. and Udall, V.C.J. The dissenting opinion was written by Justice Lockwood and concurred in by Jennings, J.

mental function.²⁶ The dissent adheres to the limited immunity rule and one might question whether such a vigorous dissent would have been made had the point of difference been merely whether the particular use was governmental or proprietary.

In the instant case, one might well differ with the reasoning that the power was conferred in absolute and unconditional terms. It could be argued that since the statutes relied upon appear under Article III of Chapter 5²⁷ their purpose was to allow such projects to be financed by municipal bond rather than confer the power of eminent domain. In any event, it would seem that more positive legislation is needed before the trend position could be accepted safely. The result might well be one of retaliation, as the dissent points out,²⁸ were it otherwise. However, with appropriate legislation, courts would no longer have to struggle with the problem of delineating between governmental and proprietary functions with which they have had only varying degrees of success in the past. It is suggested that perhaps a more uniform result would be achieved if the responsibility for establishing proper lines of demarcation were placed on the legislature.

Charles E. Foster

REAL PROPERTY — BOUNDARIES — CONVEYANCE OF LAND ABUTTING VACATED PUBLIC WAY PASSES NO INTEREST IN WAY. — *Torrey v. Pearce* (Ariz. 1962).

By deeds describing land by lot number the plaintiff was granted land abutting a vacated alley unmentioned in the deeds. By a subsequent deed the same grantor conveyed to the defendant the alley and the land adjoining it. In an action by plaintiff against defendant to quiet title to the alley running between their lands, judgment was for the defendant. On appeal, *held*, affirmed. The grantee of land abutting a public way acquires no rights therein when the way has been vacated prior to the conveyance and his deed does not mention the way. *Torrey v. Pearce*, 92 Ariz. 12, 373 P.2d 9 (1962).

²⁶ *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 401, 368 P.2d 637, 642 (1962) (dissenting opinion).

²⁷ ARIZ. REV. STAT. ANN., Article III of Chapter 5, "Municipal Bonds for Financing Utilities."

²⁸ *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 404, 368 P.2d 637, 644 (1962) (dissenting opinion).

Where land conveyed is described as abutting on an *existing* public way such as a street or highway, the universal "rule of construction" is that title to one-half of the way passes with the conveyance if the grantor owns the underlying fee, even though the description does not specifically include any part of the way.¹ The courts have applied this "rule of construction" in order to ascertain the grantor's intent to pass title to the way.² Although there is not complete agreement, there seem to be three basic reasons for the rule. Some courts state that it is unreasonable to suppose the grantor intended to reserve a small strip of land since it would be of no practical value to him while it would be of considerable value to the grantee.³ Others base the rule on the public policy consideration favoring the prevention of private disputes, litigation, and public disturbances.⁴ Finally, some courts say that the way is a monument and when a monument having width is called for as a boundary, the center of the monument is the boundary line.⁵

Real controversy arises as in the principal case where the way has been vacated prior to the time of conveyance.⁶ The earlier cases, deciding that no interest passes in the way where there had been a prior vacation,⁷ state that the "rule of construction" applies only to

¹ 3 HALSBURY'S LAWS OF ENGLAND, *Boundaries* § 695 (1953); Annots., 2 A.L.R. 6, 7 (1919), and 49 A.L.R.2d 982, 984 (1956).

² Annot., 49 A.L.R.2d 982, 984 (1956). A few courts have said the rule is a presumption resulting from failure to expressly exclude the way from the conveyance. But the result is the same whether the method employed to reach such a result be labeled a presumption or "rule of construction." *Buel v. Mathes*, 186 Ore. 160, 205 P.2d 551 (1949). By the former, intention is presumed; while by the latter, the grantor's intention is sought from all the facts as they relate to the language in the conveyance. *Faulks v. Schrider*, 69 App. D.C. 137, 99 F.2d 370 (1938).

³ *Machado v. Title Guar. & Trust Co.*, 15 Cal. 2d 180, 99 P.2d 245 (1940); *Brown v. Bachelder*, 214 Cal. 753, 7 P.2d 1027 (1932); *Erickson v. Ames*, 264 Mass. 436, 163 N.E. 70 (1928); *Cantley v. Gulf Prods. Co.*, 118 S.W.2d 448 (Tex. Civ. App. 1938). In such cases, a practical effect is given to the grantor's intent.

⁴ *Bowers v. Atchison, T. & S.F. Ry.*, 119 Kan. 202, 237 Pac. 913 (1925), 42 A.L.R. 228 (1926); *Thomas v. Hunt*, 134 Mo. 392, 35 S.W. 581, 32 L.R.A. 857 (1896); *Greenberg v. L. I. Snodgrass Co.*, 161 Ohio St. 351, 119 N.E.2d 292 (1954), 49 A.L.R.2d 974 (1956); *Nelson v. State*, 324 S.W.2d 898 (Tex. Civ. App. 1959); *Cantley v. Gulf Prods. Co.*, *supra* note 3; *Texas Bitulithic Co. v. Warwick*, 293 S.W. 160 (Tex. Com. App. 1927).

⁵ *Paine v. Consumers' Forwarding & Storage Co.*, 71 Fed. 626 (6th Cir. 1895); *Finlaw v. Hunter*, 87 Ohio App. 543, 96 N.E.2d 319 (1949); *Rahn v. Hess*, 378 Pa. 264, 106 A.2d 461 (1954).

⁶ For cases and discussion on the *nonexistence* of a public way, as distinguished from a vacated way, see Annot., 49 A.L.R.2d 982, 1001 (1956).

⁷ Vacation is the relinquishment of the public easement. *Sanchez v. Grace Methodist Episcopal Church*, 114 Cal. 295, 46 Pac. 2 (1896); *Brown v. Taber*, 103 Iowa 1, 72 N.W. 416 (1897); *White v. Jefferson*, 110 Minn. 276, 124 N.W. 373 (1910), 32 L.R.A.N.S. 778, 784 (1911). A series of Washington cases distinguishes vacation through non-user or some other informal mode, from formal vacation, applying the "rule of construction" to the former but not the latter. *Compare Lewis v. Seattle*, 174 Wash. 219, 24 P.2d 427 (1933), with *Hagen v. Bolcom Mills*, 74 Wash. 462, 133 Pac. 1000 (1913), and *Raleigh-*

actual public ways and not to mere "paper highways."⁸ Upon an abandonment or vacation, the land which would have been a public way is said to assume the same legal status as any other land unburdened with a public easement.⁹ Therefore, no reason remains to presume that the grantor intended to pass title to any part of the way;¹⁰ this being especially true where there is an existing map or plat showing the land conveyed as separate from the way.¹¹ If the description fails to express the parties' intent with regard to the vacated way, it has been said that reformation is the proper remedy.¹²

But the more recent cases, apparently indicative of a trend, apply the "rule of construction" making no distinction between an existing and a vacated way.¹³ These cases reason that it is no more logical to presume an intention to reserve the fee in the abutting strip after a vacation than before a vacation.¹⁴ The underlying fee in the abutting way is held to be *in fact* a part of the land conveyed so that one-half thereof, by operation of the "rule of construction," is conveyed along with the land.¹⁵ Furthermore, it is immaterial that no way actually exists because between the grantor and grantee one is held to constructively exist.¹⁶

As the opinion in the *Torrey* case states, the question presented is "not novel, although it is one of first impression"¹⁷ before the Arizona court. The significance of the case lies in the fact that while the court has reached the result of the older cases,¹⁸ refusing to join

Hayward Co. v. Hull, 167 Wash. 39, 8 P.2d 988 (1932). For a good summary of these cases see *Turner v. Davisson*, 47 Wash. 2d 375, 287 P.2d 726 (1955).

⁸ *Plumer v. Johnston*, 63 Mich. 165, 29 N.W. 687, 690 (1886).

⁹ The land becomes taxable as such and descends as such. *Sanchez v. Grace Methodist Episcopal Church*, 114 Cal. 295, 46 Pac. 2 (1896); *White v. Jefferson*, 110 Minn. 276, 124 N.W. 373 (1910). It is sometimes stated that "land is not appurtenant to land" in reference to the fact that the way becomes a separate tract of land. *Overland Mach. Co. v. Alpenfels*, 30 Colo. 163, 69 Pac. 574 (1902); *Hagen v. Bolcom Mills*, 74 Wash. 462, 133 Pac. 1000, 1003 (1913).

¹⁰ *White v. Jefferson*, *supra* note 9.

¹¹ *Anderson v. Citizens' Savings & Trust Co.*, 185 Cal. 386, 197 Pac. 113, 119 (1921) (dissent).

¹² *Morrissey v. Achziger*, 364 P.2d 187 (Colo. 1961).

¹³ *Anderson v. Citizens' Savings & Trust Co.*, 185 Cal. 386, 197 Pac. 113 (1921); *Rothwell v. Veail*, 129 Kan. 679, 284 Pac. 359 (1930); *Greenberg v. L. I. Snodgrass Co.*, 161 Ohio St. 351, 119 N.E.2d 292 (1954), 49 A.L.R.2d 974 (1956); *Askins v. British-American Oil Producing Co.*, 201 Okla. 209, 203 P.2d 877 (1949).

¹⁴ See, e.g., *Faulks v. Schrider*, 69 App. D.C. 137, 99 F.2d 370 (1938); *Hensley v. Lewis*, 278 Ky. 510, 128 S.W.2d 917, 123 A.L.R. 537 (1939); *Loud v. Brooks*, 241 Mich. 452, 217 N.W. 34 (1928).

¹⁵ *Anderson v. Citizens' Savings & Trust Co.*, 185 Cal. 386, 197 Pac. 113 (1921). The general rule where the grantor owns the fee to the entire way but owns none of the land on the opposite side of the way is that title to the whole way passes. *Torrey v. Pearce*, 92 Ariz. 12, 373 P.2d 9 (1962).

¹⁶ *Neff v. Ernst*, 48 Cal. 2d 628, 311 P.2d 849 (1957); *Pinsky v. Sloat*, 130 Cal. App. 2d 579, 279 P.2d 584 (1955); *Anderson v. Citizens' Savings & Trust Co.*, *supra* note 15 (also suggesting a different rule where conveyance describes way as abandoned).

¹⁷ *Torrey v. Pearce*, 92 Ariz. 12, 373 P.2d 9, 12 (1962).

¹⁸ The court impliedly favored the result reached in the earlier cases and per-

the bandwagon of modern authority, it has done so for unique reasons.

The court's decision is apparently based on a recognition that land speculation in Arizona has flourished.¹⁹ With the influx of people to our state many undeveloped areas are mapped and platted as residential and commercial tracts. "When the expectations of the developers of these tracts fail to reach fruition, dedicated public ways may be vacated and the land put to a different use."²⁰ In light of this situation, application of the "rule of construction" to arrive at the grantor's supposedly "real" intention is stated to be unreasonable because it would result in the imposition of "an intolerable burden"²¹ upon the grantor, who might use the vacated lands for other purposes. Such application, it is said, would also result in unsettlement and confusion of property titles. So in its opinion, the court refuses to impute to the grantor the intent to convey part of the way, which the modern cases do without hesitation.

Intention is a state of mind about which courts can only speculate in absence of express evidence. The reasoning of the court in the principal case seems to be quite well founded in its speculation as to the grantor's intent. It seems only logical and reasonable, where express evidence to the contrary is unavailable, to presume that the owner of land entertains intentions as to its use if no more than the penumbra of future speculation. When one set of plans fails the grantor would seemingly regard the land as if those plans never existed. Consequently it cannot rationally be presumed that in subsequent dealings with the land the grantor still regards the public way as existing or as an incident to his other lots. Instead, the reasonable presumption would seem to be that he thought of the vacated way on a par with the rest of his land. A conveyance which did not describe this "new land" could not therefore pass title to it as an incident to the main tract conveyed. And it is this separate status of land created by the vacation which the court has judicially recognized in refusing to apply the "rule of construction."²²

Not only does the court's decision recognize what is probably the grantor's true intent, but it leaves the land available for more useful and diverse purposes.

Harry Mark Beggs

haps their reasoning too when it stated: "We are not persuaded by the reasoning of the [modern] cases." *Torrey v. Pearce*, 92 Ariz. 12, 373 P.2d 9, 13 (1962).

¹⁹ *Torrey v. Pearce*, *supra* note 18.

²⁰ *Ibid.*

²¹ *Ibid.*

²² In quoting from *White v. Jefferson*, 110 Minn. 276, 124 N.W. 373 (1910), the court in the *Torrey* case recognizes that "[t]here is neither mystery nor magic in the word 'street,'" and that where this is no *actual* way in existence the "rule of construction" will not be applied. *Torrey v. Pearce*, 92 Ariz. 12, 373 P.2d 9, 12-13 (1962).