ARE REAL ESTATE AGENTS ENTITLED TO PRACTICE A LITTLE LAW?†

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This question has been brought into sharp focus by the *State Bar v. Arizona Land Title & Trust Co.*[1] opinion handed down November 1, 1961, and supplemented May 31, 1962,[2] and by the effort of the Arizona Association of Realtors to nullify that decision, insofar as it affects real estate agents, through an initiative petition for amendment of the Arizona Constitution. Briefly stated, the amendment would authorize real estate agents to draft legal instruments in connection with transactions negotiated by them.

Whether real estate agents should be permitted to prepare legal instruments by filling in blanks on printed forms, or otherwise, has been a matter of controversy since the time, in reality not so long ago, when concurrently with the tightening of requirements for admission to the bar, the courts began to restrain the performance, by laymen and corporations, of acts constituting the practice of law.

The Movement to Prevent Unauthorized Practice

In a pioneer or frontier country there is little need for lawyers, and as a matter of fact, we are not far removed in point of time from that stage of civilization. At any rate, during the era between the American Revolution and the War Between the States, an exaggerated idea of democracy took hold, and with it the notion that any person should be allowed to earn a living in any way he himself felt qualified. As a consequence, state after state let down the bars and set up good moral character and voting age as sole requisites for a law license, with the result that, to quote Dean Roscoe Pound, "there had come to be, not a Bar, but so many hundred or so many thousand lawyers, each a law unto himself, accountable only to God and his

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† Editor's Note: This article was written and submitted for publication prior to the election of November 6, 1962, which resulted in the passage of the amendment, now ARIZ. CONST., art. 26.

* See Contributors' Section, p. 254, for biographical data.

[1] 90 Ariz. 76, 366 P.2d 1 (1961).

[2] State Bar v. Arizona Land Title & Trust Co., 91 Ariz. 293, 371 P.2d 1020 (1962).

conscience — if any."[3]

If anyone could get a law license, what difference did it make if anybody practiced law, short of trying a case? The fact is, during these times there was little law practice outside the courtroom.

However, in 1917 a New York court took notice of the extent of growth of office practice, when it announced:

> The 'practice of law,' as the term is now commonly used, embraces much more than the conduct of litigation. The greater, more responsible, and delicate part of a lawyer's work is in other directions. Drafting instruments creating trusts, formulating contracts, drawing wills and negotiations, all require legal knowledge and power of adaptation of the highest order. Besides these employments, mere skill in trying lawsuits, where ready wit and natural resources often prevail against profound knowledge of the law, is a relatively unimportant part of a lawyer's work.[4]

Since that time, one state after another has raised its standards for admission to the bar. Study in a law office has all but disappeared. Nearly everywhere, one must have four years of high school, plus two to four years of college, before even being permitted to enter law school; and law schools require a minimum of three years' residence study for graduation.

Moreover, the applicant for a law license must pass tests of character, and on admission to the bar, he must bind himself to observe strict rules of conduct, the violation of which may subject him to suspension or even disbarment. These rules forbid advertising and solicitation of employment, require undivided loyalty to his client, and demand that he place his client's interests above his own.

If these safeguards are placed around the practice of law in the public interest, it should follow that none but licensed attorneys should be permitted to perform acts which constitute law practice. As Chief Justice Alexander of the Supreme Court of Texas put it in *Hexter Title & Abstract Co. v. Grievance Comm.*:[5]

> It is readily apparent that it would serve no useful purpose to require high standards of efficiency for members of the legal profession if those who have not attained these standards of efficiency are to be permitted to practice the arts of the profession. . . . Again, it would be useless to establish high standards of morality for members of the profession if those who are not members, and therefore not bound by such canons, could practice the arts of the profession.

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[3] POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 248 (1953).

[4] People v. Title Guar. & Trust Co., 180 App. Div. 648, 168 N.Y. Supp. 278, 280 (1917).

[5] 142 Tex. 506, 179 S.W.2d 946, 948 (1944), 157 A.L.R. 268 (1945).

The Evolution of the Realtor

However, during the times that an individual could obtain a law license on the strength of voting age and good moral character and it was quite immaterial whether anyone was practicing law outside the courtroom, there was coming into being a new kind of agency, that of the real estate broker, one who brought vendor and purchaser together and was compensated for this service. Another development of that era was the use of printed forms of deeds and other legal instruments affecting real estate.

Doubtless in the early days, vendor and purchaser knew each other, worked out their own deals without benefit of intermediary, and presumably called upon the lawyer to put into effect what they had agreed upon. It is natural to assume that when the employment of a real estate agent became more common, that individual wanted something the parties could sign in order to comply with the Statute of Frauds; and since printed forms were readily available, he saw no reason why he should not make use of them for the earnest money contract, and for conveyances as well.

While the American Bar Association was founded in 1878, the National Association of Real Estate Boards was not organized until 1908. In 1917, it coined the name of "Realtor" for its members and adopted the *Realtor's Code of Ethics.* These are divided into three parts: I — Professional Relations; II — Relations to Clients; and III — Relations to Customers and the Public. A client, as distinguished from a customer, is the party who employs the Realtor.

The various state and local real estate boards have sponsored enactment of legislation for the licensing of real estate brokers and salesmen employed by them. These statutes vary in their requirements for a license. Some states, including Arizona, require that the applicant pass an examination.

In Arizona, it must be ascertained by a written examination that an applicant for a broker's or salesman's license in that state has:

> 1. A fair understanding of the rudimentary principles of real estate conveyancing.
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> 2. Sufficient understanding of the obligations between principal and agent, the principles of real estate practice and the canons of business ethics pertaining thereto, the provisions of the real estate laws of this state, and of other regulations the Commissioner deems necessary.[6]

There seem to be no requirements in Arizona with respect to formal education.

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[6] ARIZ. REV. STAT. ANN. § 32-2124 A (1956).

While all states now have Real Estate License Acts, it should be pointed out that although all Realtors hold licenses to engage in the real estate business, not all licensees are Realtors.

Incidental to the Business

Now, when the courts began to consider unauthorized practice cases, they announced in what seemed to be unequivocable terms that the preparation of instruments affecting title to land constituted the practice of law, and that this included selection of a printed form and filling in the blanks on that form. In none of these early cases, however, was the defendant a real estate agent, and when bar committees began to sue them, they were met with the defense that preparation of the papers was incidental to the business and hence could not be called the practice of law.

In 1934, in a suit against a real estate broker entitled *In re Abbey,* a trial court in Michigan wrote an opinion stating:

> The giving of advice by respondent as to the necessary documents and the preparation of such documents is unquestionably practice of the law by respondent and a violation of said section. The fact that respondent acts also as broker does not authorize him to so practice law.
> *Where one whose brokerage commission depends upon the successful consummation of a deal advises as to the legal documents and prepares the same the protection of 'undivided allegiance' is of course absent.*[7]

A few years later in the case *In re Gore,*[8] an Ohio appellate court held selection of the form and filling in the blanks to be the practice of law, even though the broker made no charge for such services. However, in 1940, the Supreme Court of Minnesota held to the contrary in *Cowern v. Nelson,*[9] and in 1941, the Supreme Court of Ohio, without mentioning *In re Gore,* held in *Gustafson v. Taylor*[10] that the filling in of a printed form of "Offer to Purchase" by supplying simple, factual material, such as the date, the price, the name of the purchaser, the location of the property, the date of giving possession and the duration of the offer required ordinary intelligence, rather than legal skill, and hence did not constitute the practice of law.

With the foregoing as a background, it may be stated that two

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[7] BRAND, UNAUTHORIZED PRACTICE DECISIONS 244, 247 (1937).
[8] 58 Ohio App. 79, 15 N.E.2d 968 (1937).
[9] 207 Minn. 642, 290 N.W. 795 (1940).
[10] 138 Ohio 392, 35 N.E.2d 435 (1941).

extreme views were developing. One was that when the broker had brought the two parties together and they had agreed upon the terms, he had completed his undertaking, and that it was the function of the lawyer to prepare the earnest money contract, contract of sale — or whatever else the preliminary contract might be called — and later, all additional papers required to complete the transaction. The other extreme was that the broker should prepare the contract and conveyances as incidental to his business.

The Memphis Resolution

In an attempt to reconcile the numerous divergent views, the National Conference of Lawyers and Realtors, a joint committee of the American Bar Association and the National Association of Real Estate Boards, after holding meetings in different parts of the country for more than ten years, adopted a *Statement of Principles* at Memphis, Tennessee, on May 5, 1942, the salient features of which were Sections 1 and 2 of Article I, which read as follows:[11]

> 1. The realtor shall not practice law or give legal advice directly or indirectly; he shall not act as a public conveyancer, nor give advice or opinions as to the legal effect of legal instruments, nor give opinions concerning the validity of title to real estate, and he shall not prevent or discourage any party to a real estate transaction from employing the services of a lawyer.
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> 2. The realtor shall not undertake to draw or prepare documents fixing and defining the legal rights of parties to a transaction. However, when acting as broker, a realtor may use an earnest money contract form for the protection of either party against unreasonable withdrawal from the transaction, provided that such earnest money contract form, as well as any other standard legal forms used by the broker in transacting such business, shall first have been approved and promulgated for such use by the Association and the Real Estate Board in the locality where the forms are to be used.

In the spring of 1943, the Chicago Bar Association launched a bitter attack upon this Statement of Principles, to which the American Bar Unauthorized Practice Committee made reply, in part as follows:[12]

> (a) The Chicago Resolution says paragraph 2 of Article I of the Memphis statement is inconsistent with paragraph 1, and that it cannot be reconciled with the legal restrictions upon the unauthorized practice of law clearly set forth in paragraph 1 of that Article.
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> This is simply an utter misunderstanding of the plain English

[11] 8 UNAUTHORIZED PRACTICE NEWS 31 (May-June 1942).
[12] 9 UNAUTHORIZED PRACTICE NEWS 27-28 (May-July 1943).

of the Memphis statement. The realtors have expressly agreed:

> '(1) The realtor shall not practice law or give legal advice directly or indirectly; he shall not act as a public conveyancer, nor give advice or opinions as to the legal effect of legal instruments, nor give opinions concerning the validity of title to real estate, and he shall not prevent or discourage any party to a real estate transaction from employing the services of a lawyer.'
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> The provisions of paragraph 2 are permissive only. Provided a bar association approves of the use of certain forms then only may they be used. If a bar association does not so approve, the affirmative provisions of Article I, Section 1, stand in full force. In jurisdictions where by law, custom or by agreement, forms are being used, then the permissive provision makes it possible for a bar association to see to it that the forms used are so worded that they protect the public, and to limit the use of them. In those jurisdictions where this is not deemed advisable no agreement will be made.

After debate on the floor of the House of Delegates during the 1943 Annual Meeting of the American Bar Association at Chicago, the House voted to approve the Memphis Resolution as amended by some changes which are immaterial to this discussion.

It is interesting to note that the Arizona Realtors in their campaign for adoption of the constitutional amendment have taken the same position as did the Chicago Bar Association in 1943; that is, they insist it was intended by the Memphis Resolution to compel state and local bar associations to join in the promulgation of printed forms for use by Realtors.

Since the Memphis Resolution

Since adoption of the Memphis Resolution, the appellate courts of a number of states have been called upon to deal with preparation of legal instruments by real estate brokers. Since all of them will doubtless be found in the annotations to *Ingham County Bar Ass'n v. Walter Neller Co.*,[13] no attempt will be made to analyze them here. It may be said with reference to conveyances, as distinguished from the earnest money contract, that some courts have held preparation thereof to be unauthorized practice while others have held to the contrary under the incidental to the business theory. Up to now, there appears to have been no appellate court case, other than *In re Gore*,[14]

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[13] 342 Mich. 214, 69 N.W.2d 713 (1955), 53 A.L.R.2d 777 (1957).

[14] 58 Ohio App. 79, 15 N.E.2d 968 (1937).

mentioned above, holding preparation of the earnest money contract to constitute unauthorized practice, except the Arizona case mentioned at the beginning of this article, which will be discussed at length hereinafter.

The opinion has often been expressed that the earnest money contract is the most important of all, since it fixes the rights of the contracting parties; and it has been pointed out that at least in some of the printed forms which have been used, the printed terms militate against the purchaser in favor of the vendor or broker.

In 1957 the Supreme Court of Colorado in *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n,*[15] introduced an innovation into this field of jurisprudence; it said that the preparation of the earnest money contract and other papers constituted the practice of law, but nevertheless it was not going to keep real estate brokers from preparing them.[16] The implication seemed to be that if they wanted to assume the risk of being sued for damages in event of faulty preparation of instruments, they could do so. In 1961, in *State v. Dinger,*[17] the Supreme Court of Wisconsin held substantially to the same effect, the majority opinion concluding, "When we consider that such practices should be discontinued it will be time for us to use our power. It is not required now."[18]

The Arizona Case — Original Opinion

This brings us down to the Arizona case referred to at the beginning of this article.[19] As it happened, two cases filed at different times were consolidated and tried together; and they were appealed together, and dealt with together by the Supreme Court. Both involved the preparation of legal instruments. The first to be filed was *Lohse v. Hoffman,* wherein the defendants were real estate brokers. The second was *State Bar v. Arizona Land Title & Trust Co.;* the defendants therein were six title insurance companies.

The trial court entered judgment generally in favor of the defendants in both suits, and the plaintiffs appealed. It is to be noted that the defendant real estate brokers filed no answering briefs and were not represented in the appeal. The title companies contended that the acts in question did not constitute law practice, and moreover, that they were incidental to the business.

A major part of the opinion, by Justice Lorna Lockwood, is de-

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[15] 135 Colo. 398, 312 P.2d 998 (1957).
[16] *Id.* at 1006.
[17] 14 Wis. 2d 193, 109 N.W.2d 685 (1961).
[18] *Id.* at 692.
[19] State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), *aff'd on rehearing,* 91 Ariz. 293, 371 P.2d 1020 (1962).

voted to a historical survey of the legal profession, as it now exists in this country, and the basic principles underlying the unauthorized practice movement.[20] On this account, the opinion should be made required reading for all law students.

Turning first to the title company case, the court reaffirmed certain principles enunciated by courts of other jurisdictions. These may well be listed here:

1. It is impossible to lay down an exhaustive definition of the practice of law. Generally speaking, it consists of those acts performed, either in court or in the law office, which lawyers have customarily carried on.

2. Whether a fee is charged is immaterial. Reliance by the client upon the advice or services is more decisive.

3. The Supreme Court, as an adjunct to its power to license attorneys, has the correlative power to govern their conduct. Through exercise of this power, it enforces observation of the high standards of conduct set forth in the Canons of Professional Ethics.

4. "Perhaps the most important applicable Canon states that 'the lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law legally applied'."[21]

5. Selecting the proper printed form and filling in the blanks involves the practice of law since "[b]y virtue of his training and professional role, the lawyer is able to question his client freely, advise him of the legal effect of various forms of conveyance or other instruments, and then use such legal documents and language as will best effect the objectives of the client."[22]

6. Corporations are not permitted to practice law. "The fundamental basis for the prohibition against a corporation practicing law is found in the extensive and rigid requirements which must be met

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[20] 90 Ariz. at 79-87, 366 P.2d at 3-8.

[21] *Id.* at 88, 366 P.2d at 9, citing from Canon 15 of the CANONS OF PROFESSIONAL ETHICS. The court then said:

> The relationship between title company employees and company customers bears none of the characteristics of the attorney-client relationship envisioned in this Canon. The evidence indicates unequivocally that the primary objective of the title companies is the business of insuring titles and that, therefore, the employees' concern with the legality of transactions leading to a policy of title insurance must be primarily from the point of view of the company's rights and obligations rather than that of the parties to the transaction.

[22] *Id.* at 88, 366 P.2d at 9. The court remarked:

> The title companies and their non-lawyer employees are, in most cases, completely unqualified to practice law; they are usually not trained to do so; they are not normally governed by the code of ethics to which lawyers are subject; their principal motivation is the business of the title company, not of the customer. *Id.* at 89, 366 P.2d at 10.

to hold a license to practice law."[23]

7. The fact that a title company might perform the acts in question through licensed attorneys does not alter the case. An attorney owes his client undivided allegiance. "The title company is confronted with at least three separate clients: the title company, and each of its customers involved in the transaction. It is difficult to conceive how the title company attorney can maintain the proper professional posture toward each, when at least some of their interests may conflict."[24]

8. Preparation of the instruments in question is not incidental to the business of insuring titles.

9. The title company was not a party to the instruments within the rule that any person may act as his own lawyer and draw his own contracts, since it was not named therein as a party. Merely having a pecuniary interest, direct or indirect, is not sufficient.

10. It was immaterial that the practices in question might be of "long-standing custom." To that argument the court replied:

> This is tantamount to saying 'We have been driving through red lights for so many years without a serious mishap that it is now lawful to do so.' The fact that these practices have continued for many years and have been acquiesced in by the bar does not make such activities any less the practice of law. . . . There is no prescriptive right to practice law and appellees have acted 'at their peril' since the time when the practices condemned here were initiated.[25]

11. The "declarations of principles" approved by the organized bar and the title companies could not operate to deprive the court of its duty to determine the qualifications necessary for the practice of law.

The court refused to follow the Supreme Court of Wisconsin, which in the *Dinger* case[26] had characterized the preparation of legal instruments by real estate brokers as the practice of law, but had declined to interfere. Instead, it quoted with approval from the dissenting opinion[27] in that case:

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[23] *Id.* at 89, 366 P.2d at 10.

[24] *Id.* at 90, 366 P.2d at 11. The court continued to say:
The evidence further shows that in some instances, the title companies, through advertising media, hold out to the public that they have lawyers on their staff, the implication being that the customers as well as the title company will have adequate legal representation in any business dealings. Under such circumstances, the title company lawyer should be aware of the limitations placed upon him and his corporate employer by reason of Canons 27, 35 and 47, which prohibit (a) a lawyer from advertising, (b) exploitation of his professional services by a lay agency, personal or corporate, as intermediary between him and a client, and (c) use of his name to make possible the unauthorized practice of law, respectively.

[25] *Id.* at 93, 366 P.2d at 13.

[26] State v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961).

[27] *Id.* at 693.

> What might have been overlooked in the early days of this state in the type of society which then existed should not be countenanced in a much more complex society which exists today. For example, 50 years ago — even 25 years ago, whether a husband ought to hold real estate in joint tenancy with his wife was a fairly simple question — not so today if one has any understanding of tax laws. The completion of forms by brokers may have some usefulness, but it is a dangerous usefulness today, primarily for the benefit of the brokers, not the public. . . .
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> If brokers may practice law 'a little bit,' there is nothing to stop them from advertising that fact and advising clients they need not hire a lawyer.[28]

The Arizona court then said that everything it had said with reference to the title companies applied with equal force to the real estate brokers, and it added that while the Legislature might impose additional restrictions affecting the licensing of attorneys, it could not infringe on the ultimate power of the courts to determine who may practice law.[29]

Rehearing and Supplemental Opinion in the Arizona Case[30]

The title companies filed motion for rehearing, and numerous real estate boards were permitted to file amicus curiae briefs.

It will be noted from the third paragraph of the original opinion that the relief prayed for in the suit against the real estate firms specifically excepted "preparation of the customary preliminary purchase agreement executed on printed forms prepared for such purpose." Nevertheless the court, in that part of its decree set forth in the final paragraph of the opinion, had limited preparation of papers by real estate brokers, agents, and salesmen to instruments relating to property in which they had or proposed to acquire an interest, and to memoranda for the receipt of money, and prohibited the preparation of instruments purporting to create legal rights or impose legal responsibilities as between third parties.[31]

The Realtors' amicus curiae briefs urged the court to include among the papers they were entitled to prepare, "the customary preliminary purchase agreement executed on printed forms prepared for the purpose."

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[28] State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 94, 366 P.2d 1, 13-14 (1961).

[29] *Id.* at 95, 366 P.2d at 14.

[30] State Bar v. Arizona Land Title & Trust Co., 91 Ariz. 293, 371 P.2d 1020 (1962).

[31] State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 97, 366 P.2d 1, 15 (1961).

The court could have replied that since the plintiff had not sought a ruling on the preliminary purchase agreement, that issue was not before it, and therefore it would not rule on that question until such time as it might be presented in a suit brought for the purpose. However, in its supplemental opinion in *State Bar v. Arizona Land Title & Trust Co.*,[32] the court said that the omission of the phrase was deliberate and not inadvertent; that it was vague and meaningless since such instrument was not specifically identified at the trial; that it did not speculate or pass upon the meaning of a completely unidentifiable document whose legal effect it could not and did not determine.[33]

The court added, however, that since the real estate dealer acted as agent, either for the buyer or seller, he had the right to draft, as his own contract, a contract of employment in which the terms on which his principal was willing to deal could be set forth, and to obtain from a third party his written acceptance of the offer embodied in that employment contract. Inferentially, it may be suggested that such might be an acceptance subject to certain modifications, in which case the principal might acquiesce or not, as he saw fit.[34]

The Constitutional Amendment

Notwithstanding the Arizona court's supplemental opinion, the Realtors' Association has waged a vigorous political campaign for adoption of the amendment, to which the State Bar has been obliged to take steps in opposition. It is therefore deemed appropriate to conclude this article with the text of the proposed amendment and a comment by the State Bar.

The text of the proposed amendment reads as follows:

> Any person holding a valid license as a real estate broker or a real estate salesman regularly issued by the Arizona State Real Estate Department when acting in such capacity as broker or salesman for the parties, or agent for one of the parties to a sale, exchange, or trade, or the renting and leasing of property, shall have the right to draft or fill out and complete without charge, any and all instruments incident thereto including, but not limited to, preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty, and bills of sale.[35]

In the pamphlet distributed by the Secretary of State of Arizona relative to all proposed amendments for the November 6, 1962, election the memorandum by the State Bar contains the following:

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[32] 91 Ariz. 293, 371 P.2d 1020 (1962).
[33] *Id.* at 294, 371 P.2d at 1021.
[34] *Id.* at 295, 371 P.2d at 1022.
[35] ARIZ. CONST. art. 26.

> The Constitution of the State of Arizona is a sacred document designed to preserve and protect the basic rights of all individuals. It was not designed to confer special rights and privileges upon any particular class or group of citizens. By the means of Proposition 103, an association of real estate agents seeks to amend the Constitution for the purpose of obtaining special rights and privileges beyond the restrictions and control of the Legislature. . . .
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> The real estate agents in their petition are asking for a constitutional guarantee of the right to engage in the practice of real estate law without the responsibility imposed upon lawyers by their education, canons of ethics, and court supervision. It is the public interest, and not that of lawyers, which is involved in this Proposition.

Of course, the passage of the proposed amendment to the Constitution of the State of Arizona will present a number of problems which are not dealt with in this article.[36]

[36] See, *e.g.*, Address by Hon. Charles C. Bernstein, Chief Justice, Supreme Court of Arizona, Arizona Association of Realtors convention, Dec. 1, 1962, reprinted Arizona Weekly Gazette, Dec. 4, 1962, p. 1.