

Notes

ATTORNEY AND CLIENT—UNAUTHORIZED PRACTICE OF LAW—COMPLETION OF PREPARED LEGAL FORMS BY REAL ESTATE BROKERS.—The Arkansas Bar Association sought to enjoin a licensed real estate broker from selecting and completing certain prepared forms, including warranty deeds, options, mortgages, contracts for sale, and offers and acceptances, as well as other forms often used in the real estate business. It alleged that even though no separate charge was made for such acts, they constituted illegal practice of law. The trial court denied the injunction. On appeal, *held*, reversed. While offers and acceptances merely looked forward to preparation of other documents, the other instruments determined real property rights of other parties. Their preparation by anyone except licensed attorneys constituted unauthorized practice of law. *Arkansas Bar Ass'n v. Block*, 323 S.W.2d 912 (Ark. 1959), *cert. denied*, 361 U.S. 836 (1959).

The right of a county or state bar association to bring an unauthorized practice action has long been established,¹ and in some jurisdictions it may even be brought by an individual attorney.² The essence of the action is protection of the public against unauthorized practitioners of law,³ and not the elimination of competition with lawyers.⁴ Because decisions in these cases tend to establish the boundaries of permissible and forbidden conduct in a particular jurisdiction, both plaintiffs and defendants are often joined by their respective organized business or professional groups.⁵

¹ *State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co.*, 145 Conn. 222, 140 A.2d 863 (1958); *Auerbacher v. Wood*, 139 N.J. Eq. 599, 53 A.2d 800 (1947), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863 (1948).

² See, e.g., *Hobson v. Ky. Trust Co. of Louisville*, 303 Ky. 493, 197 S.W.2d 454 (1946) (licensed lawyer vested with a franchise or a property right which he may protect).

Arizona considers the license to practice law as a privilege bestowed upon certain persons primarily for the benefit of society. *In re Greer*, 52 Ariz. 385, 81 P.2d 96 (1938). Those states which take the "privilege" view will only permit the action as a class action, brought for the benefit of the general public. See also *Hulbert v. Mybeck*, 220 Ind. 530, 44 N.E.2d 830 (1942); *Paul v. Stanley*, 168 Wash. 371, 12 P.2d 401 (1932); *Dworken v. Apartment House Owners Ass'n*, 38 Ohio App. 265, 176 N.E. 577 (1931). For textual discussion see *DRINKER, LEGAL ETHICS* 59 (1953).

³ *Chicago Bar Ass'n v. Kellogg*, 401 Ill. 375, 82 N.E.2d 639 (1948), *appeal transferred*, 338 Ill. App. 618, 88 N.E.2d 519 (1949); *People v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901 (1931).

⁴ *West Virginia State Bar v. Earley*, 109 S.E.2d 420 (W. Va. 1959).

⁵ In *Arkansas Bar Ass'n v. Block*, 323 S.W.2d 912 (Ark. 1959), *cert. denied*, 361 U.S. 836 (1959), the action was brought by the state bar association, which was

It is generally conceded that the practice of law, if unlicensed, is illegal,⁶ and the statutes of all states provide requirements for licensing.⁷ The difficulty lies in defining "practice of law" itself.⁸ Courts seldom attempt detailed descriptions, but prefer to deal with and rule on specific fact patterns.⁹ Legislative definitions have been drafted,¹⁰ but are so general in nature¹¹ that they cannot be applied without interpretation by the courts. Courts and legislatures agree, however, that the practice of law includes more than just court appearances and preparations,¹² and that the nature of the acts must be examined rather than the place where the acts are performed.¹³

A real estate broker may prepare instruments when he himself is a party to the transaction¹⁴ just as one can always act as his own counsel in court.¹⁵ An extension of this principle has resulted in some courts allowing practices which are not usually authorized, if they are necessary and incidental to a lawful business.¹⁶ Some broker's activities which admittedly cross the line into the legal field are permitted if no separate charge is made, but are otherwise prohibited.¹⁷ The type of representations made by a business to the public has also been held to determine the nature of the services performed.¹⁸ Courts have examined

joined by the county bar association, against defendant, an individual real estate broker. Defendant was later joined by the state real estate association.

⁶ See, e.g., *People v. Newer*, 125 Colo. 304, 242 P.2d 615 (1952); *In re Root*, 178 Kan. 512, 249 P.2d 628 (1952); *Hardy v. San Fernando Valley Chamber of Commerce*, 99 Cal. App. 2d 572, 222 P.2d 314 (1950). *Contra*, *Bar Ass'n of Tenn. v. Union Planters Title Guaranty Co.*, 326 S.W.2d 767 (Tenn. App. 1959). The Tennessee court held that certain practices do constitute practice of law, and are not licensed, but are nevertheless legal as they are all incidental to the title insurance business.

⁷ See 45 CORNELL L.Q. 128 n. 17 (1959).

⁸ Lack of authoritative definition is judicially noted in the case of *State v. Chamberlain*, 132 Wash. 520, 232 Pac. 337, 338 (1925).

For various attempts to define see 33 WORDS AND PHRASES, *Practice of Law* 193 (Perm. Ed. 1940).

⁹ *Gardner v. Conway*, 234 Minn. 468, 48 N.W.2d 788 (1951).

¹⁰ At least eight states have statutory definitions of practice of law: CA. CODE § 9-401 (1935); LA. REV. STAT. tit. 37, § 212 (1950); MO. ANN. STAT. ch. 484, § 010 (1949); MONT. REV. CODE ANN. tit. 93, § 2009 (1947); N.C. GEN. STAT. ch. 84, § 2.1 (1958); R.I. GEN. LAWS tit. 11, § 27-2 (1956); TENN. CODE ANN. tit. 29, § 302 (1956); WIS. STAT. ch. 256, § 30 (1951).

¹¹ See, e.g., R.I. GEN. LAWS tit. 11, § 27-2 (1956), which states: "The term 'practice of law' . . . shall be deemed to mean the doing of any act for another person usually done by attorneys at law in the course of their profession. . . ."

¹² *Grand Rapids Bar Ass'n v. Denkema*, 290 Mich. 56, 287 N.W. 377 (1939); *People ex rel Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937).

¹³ *State ex rel Hunter v. Kirk*, 133 Neb. 625, 276 N.W. 380 (1937).

¹⁴ *Cooperman v. West Coast Title Co.*, 75 So. 2d 818 (Fla. 1954).

¹⁵ *Biggs v. Plebanek*, 343 Ill. App. 466, 99 N.E.2d 363 (1951), *appeal transferred*, 407 Ill. 562, *cert. denied*, 343 U.S. 912 (1952); *State ex rel Frohmiller v. Hendrix*, 59 Ariz. 184, 124 P.2d 768 (1942).

¹⁶ *Bar Ass'n of Tenn. v. Union Planters Title Guaranty Co.*, 326 S.W.2d 767 (Tenn. App. 1959).

¹⁷ *Hulse v. Criger*, 363 Mo. 26, 247 S.W.2d 855 (1952).

¹⁸ *People v. Title Guarantee & Trust Co.*, 227 N.Y. 366, 125 N.E. 666 (1919), *rehearing denied*, 228 N.Y. 585, 127 N.E. 919 (1920).

the complexity of the documents,¹⁹ the scarcity of lawyers in the area,²⁰ or have decided the question purely by judicial "common sense."

The Arkansas court has taken the rather strict view of the real estate broker problem, favoring a maximum of public protection even at the loss of a certain amount of public convenience. In so doing, it also has eliminated for the lawyers all competition from the conveyancing field. This follows the pattern of a previous decision which rid the field of competition in trust administration.²² As no instances of actual damage were brought to the attention of the court in either Arkansas case, the decisions illustrate the court's extreme concern with the possibility of future harm. The American Bar Association, on the other hand, recognizes present actual harm as the primary concern.²³

A better solution than a technical interpretation of "practice of law" might be found by determining what kind of protection the public actually needs. Surely alerting the public to the true complexity of real estate transactions would put it on guard to a certain extent. Bar associations could educate the public regarding the differences between broker-customer and lawyer-client²⁴ relationships, so it would realize that a broker is in fact serving two masters. Other aids are voluntary agreements between bar and real estate associations,²⁵ and stricter real estate licensing requirements. Only where there is a clear present potential injury, and restriction is in truth necessary for public protection, should recourse be made to court action.²⁶

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¹⁹ *Blair v. Motor Carriers Service Bureau*, 40 Pa. D. & C. 413 (1939). *But see* *People v. Title Guarantee & Trust Co.*, note 18 *supra*, 125 N.E. at 670, in which Judge Pound states in the concurring opinion: "I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simplest offer trouble for the inexperienced."

²⁰ *Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n*, 135 Colo. 398, 312 P.2d 998 (1957).

²¹ *Cowern v. Nelson*, 207 Minn. 642, 290 N.W. 795, 797 (1940).

²² *Arkansas Bar Ass'n v. Union Nat'l Bank of Little Rock*, 224 Ark. 48, 273 S.W.2d 408, 9 ARK. L. REV. 67 (1954). For a later decision see *Beach Abstract & Guaranty Co. v. Bar Ass'n of Ark.*, 326 S.W.2d 900 (Ark. 1959).

²³ 26 A.B.A.J. 104 (1940). Two principles announced by the Committee on Unauthorized Practices were:

"1. No prosecution of any form of unauthorized practice should be undertaken by a bar committee unless it can be clearly shown that such practice in the given case is resulting in injury to the public.

"2. No proceeding should be instituted based solely on the economic interests of the bar."

²⁴ ABA, CANONS OF PROFESSIONAL ETHICS, No. 6 (1957). See also discussion, 1 THORNTON, ATTORNEYS AT LAW 307 (1914).

²⁵ Text of such an agreement, adopted by the National Conference of Realtors and Lawyers in 1942, appears in 3 MARTINDALE-HUBBELL LAW DIRECTORY 128A (1960).

²⁶ *Lohse v. Ford Hoffman Realty*, appeal docketed, No. 6724, Sup. Ct. of Ariz., March 1959, in which the American Bar Association filed as *amicus curiae*.

CIVIL PROCEDURE—NEW TRIAL—PRESENCE OF SPECTATOR DURING JURY TRIAL.—During a jury trial of a negligence case for the loss of the plaintiff's eye, a blind man, carrying a white cane and cigar box, was escorted into the courtroom by a guide and eventually took a seat immediately behind the plaintiff. Although the blind man was a friend of plaintiff's attorney, the court negated any inference that he was present at the insistence of the latter.¹ The defendant's motion for a new trial was overruled by the trial court. On appeal, *held*, reversed. Grounds for a new trial are established if the presence of a spectator during a jury trial is likely to arouse sympathy for the plaintiff or cause prejudice to the defendant. *Fitzpatrick v. St. Louis-S.F. Ry.*, 327 S.W.2d 801 (Mo. 1959).

Most appellate courts have found it difficult to formulate any specific rule as to what conduct on the part of a spectator will be grounds for granting a new trial,² other than to say that incidents which are inconsistent with a fair trial shall demand a retrial.³ When the presence or conduct of a spectator actually creates prejudice against the losing party, or arouses undue sympathy for the successful party, there can be little doubt that a new trial should be had.⁴ In some jurisdictions there is a requirement that an actual intent to influence the jury be shown.⁵ In others, it is immaterial whether or not the jury was influenced as long as there was such conduct as to justify a conclusion that undue sympathy was a likely result.⁶ In any case, affidavits by jurors that they were or were not influenced in their verdict generally will not be admitted to impeach their decision.⁷

In substance, spectators fall within the same general principles applicable to parties and counsel in that their conduct during trial may

¹ *Fitzpatrick v. St. Louis-S.F. Ry.*, 327 S.W.2d 801 (Mo. 1959).

² BOWERS, JUDICIAL DISCRETION OF TRIAL COURTS § 531 (1931). See *Guedon v. Rooney*, 160 Ore. 621, 87 P.2d 209 (1939).

³ *Accord*, *Calder v. Levi*, 168 Md. 260, 177 Atl. 392 (1935); *Cameron v. Howerton*, 174 S.W.2d 206, 211 (Mo. 1943) (dictum).

⁴ See *D. F. Jones Constr. Co. v. Fooks*, 199 Ark. 861, 136 S.W.2d 487 (1940). *Cf. York v. Wyman*, 115 Me. 353, 98 Atl. 1024 (1916).

Where the children of the plaintiff in a personal injury case have been present as spectators, a new trial has been granted. *Western Truck Lines Ltd. v. Berry*, 53 Ariz. 216, 87 P.2d 484 (1939). On the other hand, where spectators have engaged in applause and laughter a new trial has been denied. *Vogt v. Guidry*, 229 S.W. 656 (Tex. Civ. App. 1921). Likewise, where the spectator-mother of the plaintiff has fainted, a new trial has not been deemed necessary. *Graves v. Rivers*, 3 Ga. 510, 60 S.E. 274 (1908).

⁵ *Sugg v. Sugg*, 152 S.W.2d 446 (Tex. Civ. App. 1941). See, e.g., *Exchange Nat'l Bank of Polo v. Darrow*, 154 Ill. 107, 39 N.E. 974 (1894).

⁶ *Accord*, *Benjamin v. Metropolitan St. Ry.*, 245 Mo. 598, 151 S.W. 91 (1912). E.g., *Western Truck Lines Ltd. v. Berry*, 53 Ariz. 216, 87 P.2d 484 (1939).

⁷ *Department of Water & Power v. Anderson*, 95 F.2d 577 (9th Cir. 1938), *cert. denied*, 305 U.S. 607 (1938); *Wilson v. Wiggins*, 54 Ariz. 240, 94 P.2d 870 (1939); *Lambrech v. Archibald*, 119 Colo. 356, 203 P.2d 897 (1949).

interfere with the deliberative process by arousing undue sympathy or by creating prejudice. When one of the parties has so misconducted himself by weeping,⁸ or by fainting or collapsing,⁹ a new trial is generally not granted. Misconduct on the part of counsel through prejudicial argument has been a frequent point raised upon appeal. In such cases, the courts seem more inclined to grant a retrial.¹⁰

In *Fitzpatrick v. St. Louis-S.F. Ry.*, the court was confronted with an innocent spectator who happened to have a disability resembling that of the plaintiff's. No affirmative action was taken by the blind man, nor was he there to induce the jury to find for the plaintiff.¹¹ These factors were not considered important by the court. The very fact that the blind man's presence was likely to create sympathy for a plaintiff who had lost one eye was considered a sufficient ground to grant a new trial, for in those circumstances it appeared doubtful to the court whether the cause would have been tried on its merits. The plaintiff was thus subjected to the hazards of a new trial and with no guarantee that some other disabled spectator might again upset his verdict.

The conduct of the trial generally is within the sound discretion of the trial court,¹² and appellate courts will not review matters within the trial court's discretion unless there has been a clear abuse.¹³ But when conduct by third persons has materially prejudiced the rights of either party, appellate courts will grant a new trial even though such matters are said to be within the trial court's sound discretion.¹⁴ While the determination of the trial court must be given weight, its decision is not absolute.¹⁵ Although in the present case, the appellate tribunal substituted its judgment for that of the trial court in a matter peculiarly within the trial court's discretion, it may be argued that the trial court failed in its duty to develop the facts at the time the incident occurred.

⁸ *E.g.*, *Reynolds v. Donoho*, 39 Wash. 2d 451, 236 P.2d 552 (1951).

In *Tom Reed Gold Mines Co. v. Berd*, 32 Ariz. 479, 260 Pac. 191 (1927), the court indicated that weeping alone on the part of the plaintiff would not necessitate a retrial. But his additional conduct consisting of constant protestations of nervousness and reclining on the floor made a new trial imperative.

⁹ *E.g.*, *Hatton v. Stott*, 220 Mich. 262, 189 N.W. 850 (1922); *Fonts v. Southern Pac. Co.*, 30 Cal. App. 633, 159 Pac. 215 (1916).

¹⁰ *E.g.*, *Blank v. National Cas. Co.*, 262 Wis. 150, 54 N.W.2d 185 (1952); *Bandoni v. Walston*, 79 Cal. App. 178, 179 P.2d 365 (1947).

¹¹ 327 S.W.2d at 807.

¹² *Vanderbilt, Judges and Jurors*, 36 B.U.L. Rev. 1 (1956). See *Garrison v. Ryno*, 328 S.W.2d 557 (Mo. 1959); *Cincinnati, H. & D. Ry. v. Tafelski*, 83 Ohio St. 477, 94 N.E. 1103, affirming 31 Ohio C.C.R. 643 (1910). Cf. *Boese v. Love*, 300 S.W.2d 453 (Mo. 1957).

¹³ *Koepfel v. Koepfel*, 208 S.W.2d 929 (Mo. 1948); *Kunin, The Duty or Discretion of the Trial Court to Declare Mistrial*, 10 N.Y.U. INTRA. L. REV. 228 (1955). Cf. *Priestly v. State*, 19 Ariz. 371, 171 Pac. 137 (1918).

¹⁴ See *Stevenson v. Pennsylvania Sports & Enterprises*, 372 Pa. 157, 93 A.2d 236 (1952).

¹⁵ See *Faught v. Washam*, 329 S.W.2d 538 (Mo. 1959).

It may very well be that the decision in *Fitzpatrick v. St. Louis-S.F. Ry.* has increased the hazards of litigation. There is a common law tradition that civil trials are to be conducted in public,¹⁶ and there is no general rule allowing the court to exclude members of the public when their only interests are those of spectators.¹⁷ Of course, when their presence disturbs the orderly conduct of the trial, or when a fair trial cannot be had when spectators are present, they may be excluded.¹⁸ But if a spectator has not created a disturbance nor drawn attention to himself, a motion to have him excluded would inadvertently achieve these results. Thus, short of closing our courts entirely, there seems little that the parties may do to protect themselves from an occurrence such as this with its consequent retrial.

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CONTRACTS—USURY—PRETENDED SALE OF CONTRACT FOR SALE OF REAL PROPERTY.—The plaintiff owned an executory contract for sale of real property which represented a sum due her of \$63,200 at four per cent interest, and on which the periodic payments included both interest and principal. Needing immediate cash, she “sold” this contract to the defendant for \$12,000 and received (1) that amount of cash, (2) an option to buy back the contract by reducing the principal balance by \$12,000 and paying current interest, and (3) assurance through an escrow agreement that the contract would revert to her if her obligor reduced the principal sum by that amount. The plaintiff exercised her option in seven months by paying the \$12,000 plus 7/12 of one year’s interest on \$63,200. She then charged the defendant with making a usurious loan and recovered in judgment all the interest she had paid.¹ On appeal, *held*, affirmed. The “sale” of a chose in action, absolute on its face, may be treated as a loan if the intention of the parties so indicates. *Britz v. Kinsvater*, 87 Ariz. 385, 351 P.2d 986 (1960).

At an early date it was recognized that excessive interest charges

¹⁶ See 2 BLACKSTONE, COMMENTARIES *373. Cf. ARIZ. R. CIV. P. 77(e).

¹⁷ *Louisville & N. Ry. Co. v. Foard*, 104 Ky. 456, 47 S.W. 342 (1898).

¹⁸ *Accord*, *Kirstowsky v. Superior Court*, 143 Cal. App. 2d 745, 300 P.2d 163 (1956).

¹ Forfeiture of all interest is the penalty set by ARIZ. REV. STAT. § 44-1202 (1956). However, if the loan falls within the scope of the Small Loan Act, ARIZ. REV. STAT. §§ 6-601 to -640 (1956), the penalty is forfeiture of both principal and interest, and the making of such a loan is a misdemeanor. ARIZ. REV. STAT. § 44-1624 (1956) applies still a different penalty to usurious pawnbrokers; they too are guilty of a misdemeanor but only forfeit the excessive interest. See *Ferguson v. Rubin*, 85 Ariz. 351, 339 P.2d 387 (1959), for judicial interpretation of the latter statute.

were detrimental to good morals and to good commercial practice,² but no effective restriction on the interest rate was imposed by English statute until 1713.³ This statute was later adopted by many American states,⁴ some of which retain almost the identical wording at the present time.⁵ With statutory restrictions came a rather uniform acceptance of the elements of a usurious transaction; (1) there must be a loan or forbearance, (2) it must involve money or its equivalent, (3) the loan must be absolutely repayable and (4) it must have been made with the intent of exacting an unlawfully large return for the use of the money.⁶ As unlawful intent is found to arise presumptively from any loan contract which, if performed according to its terms, will yield a greater amount of return than is statutorily set,⁷ and as that amount may be determined by a cursory examination of local loan laws,⁸ these elements seldom require consideration by the courts. Far greater difficulty is encountered in establishing the existence of a loan.

The number of forms a usurious loan may take is limited only by the ingenuity of the contracting parties,⁹ thus many types of contracts are given close judicial scrutiny.¹⁰ These have included pretended sales,¹¹

² "Usury" was once synonymous with "interest," which was referred to as early as 2270 B. C. in the CODE OF HAMMURABI. See COOK, LAWS OF MOSES 231 (1903). Biblical references may be found in *Ex.* 22:25; *Deut.* 23:19; *Neh.* 5:7; *Psalms* 15:5; *Ezek.* 22:12; *Matt.* 25:27. See also I KOCOUREK & WIGMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW 108, 132, 401 (1915); 2 *id.* at 534-35.

For an excellent judicial summary of the development of usury, see *Dunham v. Gould*, 16 Johns. 367, 8 Am. Dec. 323 (N.Y. 1819).

³ Usury Act, 1713, 12 Anne 2, c. 16.

⁴ Earliest state statutes are discussed in TYLER, LAW OF USURY 49-56 (1873), and a compilation of all state usury statutes in effect in 1873 appears *id.* at 64-78.

⁵ Compare, e.g., the wording of the English Usury Act, *supra* note 3, "[T]hat no person or persons . . . [shall] take, directly or indirectly for loan of any monies, wares, merchandise, or other commodities whatsoever, above the value of five pounds for the forbearance of one hundred pounds for a year . . .," with ARIZ. REV. STAT. § 44-1202 (1956): "No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum or any greater value for the loan or forbearance of any money . . . than eight dollars on one hundred dollars for one year."

⁶ *Britz v. Kinsvater*, 87 Ariz. 385, 351 P.2d 986 (1960); *Sergeant v. Smith*, 63 Ariz. 466, 163 P.2d 680 (1945); *Blaisdell v. Steinfeld*, 15 Ariz. 155, 137 Pac. 555 (1914); RESTATEMENT, CONTRACTS § 526, comment *b* (1932).

⁷ *Community Credit Union Inc. v. Connors*, 141 Conn. 301, 105 A.2d 772 (1954); *Independent Foods Inc. v. Lucas County Savings Bank*, 70 N.E.2d 139 (N.Y. 1946); RESTATEMENT, CONTRACTS § 526, special note at 1021 (1932).

⁸ Various types of loans are allowed different interest rates. See ARIZ. REV. STAT. §§ 44-1201, 44-1624, 6-622 (1956).

⁹ See discussion in HUBACHEK, ANNOTATIONS ON SMALL LOAN LAWS 145-78 (1938).

¹⁰ *Tribble v. State*, 89 Ga. App. 593, 80 S.E.2d 711 (1954); *State v. Sargent*, 241 Mo. App. 1085, 256 S.W.2d 265 (1953).

¹¹ *Home Bond Co. v. McChesney*, 239 U.S. 568 (1915); *Sparks v. Robinson*, 66 Ark. 460, 51 S.W. 460 (1899).

However, a bona fide sale is not usurious even if the price is very small in relation to the worth. See *Webster v. Sterling Finance Co.*, 355 Mo. 193, 195 S.W.2d 509 (1946); *General Motors Acceptance Corp. v. Weinrich*, 218 Mo. App. 68, 262 S.W. 425 (1924). See also *Usury—Distinction Between Sale And Loan*, 8 Mo. L. REV. 144-50 (1943); *Sales As Cover For Usury*, 46 CENT. L.J. 65 (1898).

discounts of choses in action,¹² loans of credit,¹³ agreements for leasing,¹⁴ and contracts for conditional sales.¹⁵ Courts are agreed that they must look to the substance rather than the form of these transactions.¹⁶

The word "loan" has been judicially defined as involving an absolute agreement to return the sum borrowed at a future time.¹⁷ Whether a transaction is a sale or a loan depends on the understanding between the parties regarding the absolute passing of title on the one hand or the promise of repayment on the other.¹⁸ In a few cases where the "purchaser" could force the "seller" to exercise a re-purchase option, the agreement was held to be a loan per se.¹⁹ However, most challenged sales of choses in action are merely colored with the suspicion of usury,²⁰ and require inquiry into the surrounding circumstances to determine the purpose of the parties.

In examining the principal case, a factual pattern of first impression in Arizona,²¹ the court found a number of factors which indicated a loan. The purchaser had no familiarity with what he had "bought," was unable to assert dominion over his purchase without consent of the seller, and by his own testimony had been looking for the best security he

¹² *Gibson v. Alexander*, 231 Ala. 77, 163 So. 601 (1935); *Castorina v. Herrmann*, 340 Mo. 1026, 104 S.W.2d 297 (1937); *Keahey v. Craig*, 186 Okla. 162, 96 P.2d 521 (1939). *But see* *Dunn v. Midland Loan Finance Corp.*, 206 Minn. 550, 289 N.W. 411 (1939).

¹³ Annot., 104 A.L.R. 245 (1936).

However, a true sale of credit is not usurious. See *Murphy v. Leiber*, 76 Ariz. 79, 259 P.2d 249 (1953); *Rosberg v. Holesapple*, 123 Utah 544, 260 P.2d 563 (1953).

¹⁴ *Banks v. Walters*, 95 Ark. 501, 130 S.W. 519 (1910); *Gaither v. Clarke*, 67 Md. 18, 8 Atl. 740 (1887).

¹⁵ See e.g., *Seebold v. Eustermann*, 216 Minn. 566, 13 N.W.2d 739 (1944); Annot., 152 A.L.R. 598 (1944).

¹⁶ *Thomas v. Hunt Mfg.*, 42 Cal. 2d 734, 269 P.2d 12 (1954); *Virginia Hotel v. Dusenberry*, 218 S.C. 524, 63 S.E.2d 483 (1951).

¹⁷ *General Motors Acceptance Corp. v. Mid-West Chevrolet Co.*, 66 F.2d 1, 5 (10th Cir. 1933) (dictum).

¹⁸ *Coast Finance Corp. v. Ira F. Powers Furniture Co.*, 105 Ore. 339, 209 Pac. 614 (1922).

¹⁹ See, e.g., *Saunders v. Resnick*, 142 Pa. Super. 457, 16 A.2d 676 (1940).

²⁰ Annot., 165 A.L.R. 626 (1946).

²¹ Other Arizona usury cases have included: *Blaisdell v. Steinfeld*, *supra* note 6 (excess interest charges in the guise of "commissions"); *Shute v. Fidelity Savings and Loan Ass'n*, 21 Ariz. 111, 185 Pac. 646 (1919) (premiums paid for obtaining a loan); *Walker v. Peoples Finance*, 45 Ariz. 226, 42 P.2d 405 (1935) (application of small loan statutes); *Greer v. Greer*, 56 Ariz. 394, 108 P.2d 398 (1940) (compounding of interest); *Fagerberg v. Denny*, 57 Ariz. 179, 112 P.2d 578 (1941) and *Houchard v. Berman*, 79 Ariz. 381, 290 P.2d 735 (1955) (collection of interest in advance); *Daily Mines Co. v. Catalina Consol. Copper Co.*, 59 Ariz. 149, 124 P.2d 320 (1942) (giving up rights of unknown value for the promise of a loan); *Seargeant v. Smith*, *supra* note 6 (option to buy used automobiles); *De Wulf v. Bissell*, 83 Ariz. 68, 316 P.2d 492 (1957) (sale, lease-back, and option to repurchase real property).

In *Ferguson v. Rubin*, *supra* note 1, the transaction involved sale with option to repurchase at a higher price, but the article sold was a piece of personal property. The alleged sale was held to be a usurious pledge.

could get.²² The plaintiff not only had the ability to re-acquire the "sold" property by making necessary payment, but if she failed to do so the property reverted when the obligor reduced the balance according to his contract terms. In the latter instance the interest on the full principal balance simply went directly to the defendant without passing through the hands of the plaintiff. After a consideration of these circumstances the court correctly found the transaction to be a usurious loan, thus bearing out the words of Lord Mansfield: "Where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute."²³

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COURTS—CONTINGENT FEES—POWER TO REGULATE THE AMOUNT OF CONTINGENT FEES BY RULE OF COURT.—A New York Appellate Division Court promulgated a rule scheduling the amount of attorneys' contingent fees in wrongful death and personal injury actions. Any sum exceeding that scheduled would not be approved by the court, unless the attorney filed an affidavit and demonstrated to the court's satisfaction reasons entitling him to additional compensation. In an action instituted by bar associations, the trial court determined that the Appellate Division lacked power to make or enforce such a rule. On appeal, *held*, reversed. The Appellate Division has power to regulate the size of contingent fees in personal injury and wrongful death suits through rule of court. *Gair v. Peck*, 6 N.Y.2d 97, 160 N.E.2d 43 (1959), *cert. denied*, 361 U.S. 374 (1960).

Attorney's contingent fee contracts have been supervised by statutory enactment, *ad hoc* judicial action, and court-promulgated rule. In the early nineteenth century payment for services rendered by New York attorneys was strictly regulated by statute, and the amounts allowed were far from adequate.¹ If lawyers attempted to charge more than the statute provided, they were subject to criminal prosecution.² The legislature in the Field Code of 1848 recognized the difficulties it had imposed upon the legal profession and abolished the system of

²² "Q. Was it your entire effort to make a legal transaction with as good security as you could get for the loan of your money? A. Yes." *Britz v. Kinsvater*, *supra* note 6 at 990.

²³ *Floyer v. Edwards*, Cowp. 112, 114, 98 Eng. Rep. 995 (1774).

¹ For example, upon arguing a case on appeal one could receive only \$3.75, and anything resembling a contingent fee was illegal. 2 N.Y. REV. STAT. ch. 83, § 1 (1813).

² 2 N.Y. REV. STAT., ch. 83, § 5 (1813). For a history of statutory fee see, Contiguglia & Sorapure, *Lawyer's Tightrope—Use and Abuse of Fees*, 41 CORNELL L.Q. 683 (1956).

statutory fees.³ Once the restrictions were removed, the contingent fee became a respectable device enabling a plaintiff with little money and a good cause of action to secure legal counsel. But some members of the profession so misused their power to make contingent fee contracts, by charging amounts bearing little relation to the services rendered,⁴ that as early as 1908 many observers of the New York scene felt that the contingent fee had been abused by lawyers.⁵

Judicial control of contingent fees usually has been asserted in cases in which attorneys have sued to recover for legal services rendered.⁶ In such actions, courts frequently have had to determine whether or not the contingent fees sought were reasonable,⁷ because unreasonable contingent fee contracts are illegal contracts, and therefore unenforceable.⁸ The courts usually either allowed the total fee agreed upon by the attorney and his client prior to performance or completely disallowed it as an unconscionable misuse of superior bargaining power by the attorney;⁹ they have not taken the additional step, in the latter event, of establishing what would have been a reasonable fee.¹⁰ However, in 1958 a federal court in New Jersey broke tradition by awarding an attorney, who was suing on a contingent fee contract, only that amount which the court felt he had earned. The result was that the court, relying on its own knowledge of what constituted a reasonable fee, re-wrote the contract for the parties.¹¹ This illustrates the present judicial trend toward closer court regulation of contingent fee agreements.¹²

The courts are legally justified in supervising attorney's compensation. First, since lawyers are officers of the court,¹³ and are thereby subject to court regulation, they have not only a moral but also a legal

³ N.Y. SESS. LAWS 1848, ch. 379, § 258 as amended by N.Y. CODE CIV. PROC. § 303 (1849).

⁴ See, e.g., *Morehouse v. Brooklyn Heights R.R.*, 185 N.Y. 520, 78 N.E. 179 (1906).

In a California case an attorney charged, under a contingent fee contract, \$68,000 and it was later admitted by another person involved in the transaction that the services were worth less than \$500. *Blattman v. Gadd*, 112 Cal. App. 76, 296 P. 681 (1931).

⁵ In 1908 an investigation was launched by the New York State Bar to determine what could be done about controlling attorneys who were resorting to unethical practices. *Contiguglia & Sorapure*, *supra* note 2.

⁶ See, e.g., *Youngblood v. Higgins*, 146 Cal. App. 2d 350, 303 P.2d 637 (1956).

⁷ *Muller v. Kelly*, 125 Fed. 212, 215 (3d Cir. 1903); *In re Quinn*, 25 N.J. 284, 135 A.2d 869 (1957).

⁸ *Gruskay v. Simenaukas*, 107 Conn. 380, 140 Atl. 724 (1928).

⁹ *Hollister v. Ulvi*, 199 Minn. 269, 271 N.W. 493 (1937).

¹⁰ See, e.g., *Gruskay v. Simenaukas*, 107 Conn. 380, 140 Atl. 724 (1928).

¹¹ This was a case where an attorney's compensation was dependent on the success of certain litigation before the Federal Housing Authority. The United States District Court of New Jersey said it could sustain a contingent fee agreement to the amount which would give the attorney reasonable compensation. *Gray v. Brunetti Const. Corp.*, 161 F. Supp. 151, 154 (D.N.J. 1958).

¹² See, *Tonn v. Reuter*, 6 Wis. 2d 498, 95 N.W.2d 261 (1959); *National Bank v. Holland*, 190 Pa. Super. 501, 154 A.2d 252 (1959).

¹³ *State v. Superior Court*, 39 Ariz. 242, 5 P.2d 192 (1931).

obligation to conduct their activities with the utmost of good faith and a sense of responsibility.¹⁴ Secondly, judges possess power to do such "judicial housecleaning" they deem necessary;¹⁵ this includes judicial power to control the members of the bar.¹⁶ In fact, Canon 11 of the *Canons of Judicial Ethics* states it is the *duty* of the judges to criticize and correct unprofessional conduct by lawyers.¹⁷ Statutory enactment in Arizona placed upon the supreme court this duty which embraces a regulation of contingent fees.¹⁸ In accordance with this the *Canons of Professional Ethics* of the American Bar Association states:

A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.¹⁹

Once it is conceded that the courts have the power to regulate contingent fees, because of their power to control attorneys, the problem arises concerning which method of regulation will be used. It is quite difficult to restrict judicial regulation to the consideration of one case at a time when the enactment of a schedule, such as the Appellate Division used in *Gair v. Peck*, makes the program practically self-operating.

The New York bar admitted in this case that courts may judge the reasonableness of a contingent fee contract, but it expressed two main objections to the rule here involved which should be considered. The New York Judiciary Law provides that legal fees shall be determined by agreement by attorney and client,²⁰ but the lawyers argued this is changed under the new rule.²¹ That is not true, however, unless it is assumed attorneys always charge the highest possible fee without regard to the work involved. Another argument put forth was that the Judiciary Law was enacted to prevent just this type of court action.²² But a survey of events leading to the passage of the Judiciary Law reveals that it was instead intended to remove the harshness of the previous system of statute controlled fees.²³

The trend of decisions in past years indicates the courts are losing

¹⁴ See *e.g.*, *In re Wilson*, 76 Ariz. 49, 258 P.2d 433 (1953).

¹⁵ *People ex rel. Karlin v. Culklin*, 248 N.Y. 465, 162 N.E. 487 (1928).

¹⁶ ARIZ. REV. STAT. § 32-267(8) (1956).

¹⁷ DRINKER, LEGAL ETHICS 276 (1953).

¹⁸ ARIZ. REV. STAT. § 32-267(8) (1956). The Arizona Supreme Court has on numerous occasions disbarred attorneys for violating the Canons of Professional Ethics. See, *e.g.*, *In re Sweeney*, 77 Ariz. 137, 267 P.2d 1074 (1954); *In re Shelley*, 56 Ariz. 303, 107 P.2d 508 (1940); *In re Lewkowitz*, 70 Ariz. 325, 220 P.2d 229 (1950).

¹⁹ ABA, CANONS OF PROFESSIONAL ETHICS, NO. 13 (1957).

²⁰ N.Y. JUDICIARY LAW § 474 (1957).

²¹ *Gair v. Peck*, 6 N.Y.2d 97, 104, 160 N.E.2d 43, 47 (1959).

²² Case cited note 21 *supra*.

²³ Contiguglia & Sorapure, *supra* note 2.

their patience with attorneys who consistently charge unreasonable fees.²⁴ Apparently the judiciary is giving notice to the American bar that if the lawyers can't control the practices of their own brethren, then the courts are going to take action to correct these practices which are greatly hindering the honest use of the contingent fee.

Robert L. Johnson

CRIMINAL LAW—ADMISSION OF CONFESSIONS—NECESSITY OF INSTRUCTIONS.—In criminal proceedings the trial court admitted in evidence the defendant's written confession after deciding, in a hearing without the jury, that the defense counsel's objections that it was not freely given could not be sustained. Defense counsel made no request for instructions concerning the confession in evidence and the trial court in its instructions to the jury failed to make mention of this matter. On appeal, *held*, reversed. It is the duty of the trial court to instruct the jury that it is within their province to determine whether a disputed confession was freely made, regardless of a failure by defense counsel to request such an instruction. *State v. Pulliam*, 87 Ariz. 216, 349 P.2d 781 (1960).

In most jurisdictions the trial court in a criminal case has the duty to instruct the jury on its own motion, as to the general principles of law to be applied in determining the fundamental and controlling questions developed through the evidence.¹ This, however, does not mean the trial court has the duty to conduct the defense.² It is not ordinarily deemed an error for a trial court to fail to give, on its own motion, an instruction on the rules regulating the admission or exclusion of evidence or the significance and validity of it.³ In most cases, it is felt that these questions on evidence are matters of a particular phase of the proceedings and require definite, requested instructions from either or both counsel. The court is not bound to give any instruction unless sought.⁴

A confession is a particular type of evidence introduced by the prosecution to show an acknowledgment by defendant of the crime of which he is charged.⁵ An involuntary confession, one that was acquired by

²⁴ Cases cited note 12 *supra*.

¹ *E.g.*, *Samuel v. United States*, 169 F.2d 787 (9th Cir. 1948); *People v. Baker*, 42 Cal. 2d 550, 268 P.2d 705 (1954).

² *State v. Lee*, 80 Ariz. 213, 295 P.2d 380 (1956); *People v. Maertz*, 375 Ill. 478, 32 N.E.2d 169 (1941).

³ *E.g.*, *United States v. Bookie*, 229 F.2d 130 (7th Cir. 1956); *State v. Polan*, 80 Ariz. 129, 293 P.2d 931 (1956); *Commonwealth v. Torrealba*, 316 Mass. 24, 54 N.E.2d 939 (1944).

⁴ *Skiskowski v. United States*, 158 F.2d 177 (D.C. Cir. 1946); *Gray v. United States*, 9 F.2d 337 (9th Cir. 1925); *State v. Polan*, *supra* note 3; *Williams v. State*, 196 Ga. 503, 26 S.E.2d 926 (1943).

⁵ UDALL, ARIZONA LAW OF EVIDENCE 168 (1960); MCCORMICK, EVIDENCE 234 (1954).

threat, promise or force, is usually inadmissible.⁶ Such a confession is excluded not only because it is inherently untrustworthy but also because it violates the constitutional requirement of due process and the privilege of protection from self-incrimination.⁷

There are several procedural variations in the state courts relating to the admission in evidence of a confession.⁸ Some jurisdictions say that it is a matter solely for the court.⁹ The view which prevails in most jurisdictions, including Arizona and the federal courts, is that the judge alone has wide discretion in determining whether the confession was voluntarily made. If he concludes that it is involuntary, he excludes it; if he finds it was voluntary, he submits it to the jury under proper instructions.¹⁰ The question remains, however, as to whether the trial court has a duty to instruct the jury on how to consider a confession admitted in evidence when defense counsel fails to make such a request.

Many jurisdictions do not consider it the duty of the trial judge to instruct on matters of voluntariness.¹¹ Michigan held this view through construction of a statute that does not allow setting aside a verdict on grounds of failure to instruct when no instruction was requested.¹² In other jurisdictions the courts have held flatly that "where evidence on the question of whether a confession was voluntarily made was not positive and certain, failure to instruct the jury that they might reconsider evidence on the point was not a reversible error, in absence of a request for such an instruction."¹³ Several other jurisdictions have stated

⁶ *People v. Perry*, 195 Cal. 623, 234 Pac. 890 (1925).

⁷ For a good discussion of these points, see UDALL, *op. cit. supra* note 5, at 168, 170. See also *Brown v. Mississippi*, 297 U.S. 278 (1936), which holds that admission of a forced confession is a violation of the due process clause of the federal constitution. U.S. CONST. amend. XIV, § 1. See *Galas v. State*, 32 Ariz. 195, 256 Pac. 1053 (1927), which relies upon the self-incrimination clause of the U.S. CONST., amend. V, and the self-incrimination clause of the ARIZ. CONST. art. II § 10. *But see Wood v. United States*, 128 F.2d 265 (D.C. Cir. 1942), which holds that the basis for exclusion is on grounds of untrustworthiness separate and distinct from the privilege against self-incrimination.

⁸ For a good review of these practices, see Meltzer, *Involuntary Confessions: The Allocation of Responsibility between Judge and Jury*, 21 U. CHI. L. REV. 317 (1954). See also Annot., 85 A.L.R. 870 (1933), 170 A.L.R. 567 (1947).

⁹ *People v. Hurry*, 385 Ill. 486, 52 N.E.2d 173 (1944); *Humphries v. State*, 181 Miss. 325, 179 So. 561 (1938).

¹⁰ For a good discussion of the procedure in Arizona, see UDALL, *op. cit. supra* note 5, at 176, 179 (1960). For a good discussion of the federal view, as well as positions adopted in other states, see 3 WIGMORE, EVIDENCE § 861 (3rd ed. 1940).

There is a division of opinion in those jurisdictions which follow the majority practice of allowing the jury to consider the voluntariness of a confession as to what instructions are proper. In some jurisdictions, the jury is instructed to disregard the confession completely if they find it involuntary. *State v. Hood*, 69 Ariz. 294, 213 P.2d 368 (1950); *People v. Perry*, *supra* note 6. Other jurisdictions allow the jury to weigh the confession along with the other evidence as they deem best in light of whether or not it was freely given. *Wood v. State*, 72 Okla. Crim. 364, 116 P.2d 728 (1941); see also 3 WIGMORE, EVIDENCE § 861 (3rd ed. 1940).

¹¹ *State v. Aitkens*, 352 Mo. 746, 179 S.W.2d 84 (1944).

¹² *People v. Thomas*, 333 Mich. 496, 53 N.W.2d 349 (1952); *State v. Aitkens*, *Ibid.*

¹³ *People v. Fowler*, 178 Cal. 657, 174 Pac. 892, 894 (1918); *cf. Burton v. State*,

that such an error will not be sufficient for reversal of a verdict "where evidence, without testimony relating to the confession, was sufficient to sustain the conviction."¹⁴

Arizona, in this instance, held that it is a fundamental error for the trial court to fail to instruct the jury on how to consider a confession, the voluntariness of which is disputed, even though not requested. The Arizona Supreme Court in part relied upon Rule 274 of the Arizona Rules of Criminal Procedure which it cited as authority for the proposition that the trial judge must instruct the jury "upon matters vital to a proper consideration of the evidence."¹⁵ The opinion went on to say it was entirely conceivable that the jury could have concluded from the absence of such an instruction that there was no merit to defendant's claim that the confession was not freely given.¹⁶

The Arizona Supreme Court, in the instant case, made no mention of a possible lack of independent evidence to justify the jury's verdict; the holding thus appears to impose an absolute duty upon the trial judge to instruct the jury on how to consider a confession when the issue of involuntariness is raised during the trial. Arizona thus seems to have adopted a minority position. A better rule might be that although failure to instruct the jury in this matter is error, it would not be deemed reversible error if the appellate court finds that the jury's verdict was justified on substantial independent evidence and the trial court's instructions were otherwise complete. Thus such an error would be prejudicial only in those cases where the confession plays a dominant role in the prosecution's case and where it is likely, in view of the record, that a different verdict could have been returned if the instruction was given.¹⁷ Such a rule would prevent multiplicity of trials on technicalities while preserving fundamental rights essential to the very concept of justice.

Ralph W. Bushnell

204 Ark. 548, 163 S.W.2d 160 (1942); *Reagan v. People*, 49 Colo. 316, 112 Pac. 785 (1911).

¹⁴ *Brunke v. State*, 160 Fla. 43, 33 So. 2d 226, 227 (1948); *cf. Lindsay v. State*, 138 Ga. 818, 76 S.E. 369 (1912).

By statute in California the court is required to instruct that oral confessions are to be received with caution. California decisions, while holding failure to so instruct to be error, do not invariably find such error reversible. *People v. Riley*, 35 Cal. 2d 279, 217 P.2d 625 (1950); *People v. Koenig*, 29 Cal. 2d 87, 173 P.2d 1 (1946). In Florida the rule of decisions is like that in California. *Compare Harrison v. State*, 149 Fla. 365, 5 So. 2d 703 (1942), *with Boston v. State*, 153 Fla. 698, 15 So. 2d 607 (1943).

¹⁵ *State v. Pulliam*, 87 Ariz. 216, 349 P.2d 781, 785 (1960) (dictum).

The rule does not necessarily so provide. It states: "Either party may request the giving of particular instructions. Such request may be oral unless the court directs it to be in writing." ARIZ. R. CRIM. P. 274. Rule 276A seems more closely related to the matter. It provides: "The court shall instruct the jury regarding the law applicable to the action." ARIZ. R. CRIM. P. 276A.

¹⁶ *State v. Pulliam, Ibid.*

¹⁷ For an application of such a procedure, see *Ruker v. State*, 2 Ga. App. 140, 58 S.E. 295 (1907); *cf. Jackson v. United States*, 198 F.2d 497 (D.C. Cir. 1951), *cert. denied*, 344 U.S. 858 (1952).

EVIDENCE — DEAD MAN'S STATUTE — NEED FOR CORROBORATIVE TESTIMONY.—In an action to recover money held by the defendant which the administrator claimed belonged to the decedent at time of his death, third party evidence was introduced substantiating the defendant's assertion of gift, thus laying foundation for the defendant's testimony concerning the transaction with the decedent. The plaintiff unsuccessfully contended that allowance of the defendant's testimony contravened the "Dead Man's Statute."¹ On appeal, *held*, affirmed. Whether one coming under provisions of the "Dead Man's Statute" should be allowed to testify to transactions or statements of the decedent is within the sound discretion of the trial court, and it is only where it clearly appears that such discretion has been abused that the appellate court will interfere. *Goff v. Guyton*, 86 Ariz. 349, 346 P.2d 286 (1959).

In cases where judgment may be given for or against the decedent's representatives, the "Dead Man's Statute" disqualifies certain parties from testifying to transactions with the deceased.² Its objective is to place the parties on a parity and to prevent one of them, to the detriment of the other, from taking unfair advantage of the fact that the lips of the deceased have been sealed by death.³ The statute creates an exception to the general statutory rule that a person shall not be incompetent to testify because he is a party to the action.⁴ It does not preclude all testimony of transactions with deceased persons, but renders incompetent as witnesses persons who might gain from inaccurate

¹ ARIZ. REV. STAT. § 12-2251 (1956).

In an action by or against executors, administrators or guardians in which judgment may be given for or against them as such, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward unless called to testify thereto by the opposite party, or required to testify thereto by the court. The provisions of this section shall extend to and include all actions by or against the heirs, devisees, legatees or legal representatives of a decedent arising out of any transaction with the decedent.

² "Most states have a dead man's statute. . . ." *Cox v. Williamson*, 124 Mont. 512, 227 P.2d 614, 619 (1951); UDALL, ARIZONA LAW OF EVIDENCE § 103 (1960); WIGMORE, EVIDENCE § 578 (3rd ed. 1940).

³ "The object of this statute is to prevent the living from testifying against the dead. Death having silenced the one, the law silences the other, the theory being that both or neither must be competent to testify." *Kurn v. Weaver*, 25 Tenn. App. 556, 161 S.W.2d 1005, 1020 (1940).

See also *Lindner v. First National Bank & Trust Co.*, 9 N.J. Super. 569, 76 A.2d 49 (1950); Ray, *The Dead Man's Statute—A Relic of the Past*, 10 Sw. L.J. 390 (1956).

⁴ "The statute is an exception to the general rule of competency, having been originally a proviso in an act having for its object the removal and not the creation of disqualification." *Proulx v. Parrow*, 115 Vt. 232, 56 A.2d 623, 626 (1948).

In reference to REV. STAT. § 2536 (1901), now substantially contained in ARIZ. REV. STAT. § 12-2251 (1956), the Arizona court in *Johnson v. Moilanen*, 23 Ariz. 86, 90, 201 Pac. 634, 636 (1921), said: "The general rule is that all parties are competent witnesses in their own behalf, but this statute makes an exception to the rule where one of the parties is an administrator, executor or guardian. . . ."

distortions of transactions with the decedent, where interests in issue affect certain representatives of the decedent.⁵

Courts have permitted surviving interested parties to testify as to transactions with and statements by the decedent after a prima facie case has been made by other evidence of all the surrounding facts and circumstances.⁶ The trial court, however, should not admit the testimony of a party until sufficient other testimony has been admitted to warrant the court, in the exercise of its discretion, to render a ruling in favor of the questionable testimony.⁷ Courts have indicated that the required foundation testimony must itself be corroborative of the offered testimony of the witness.⁸

Arizona's statute⁹ provides that an interested party will not be permitted to testify to transactions with the deceased unless called to testify thereto by the opposite party,¹⁰ or required to testify thereto by the court. The trial court has the power to admit testimony otherwise barred by the "Dead Man's Statute." In effect, the court may require a party to testify concerning transactions with the decedent by overruling objections to such testimony.¹¹ This power, however, is not without reasonable limitations. Although the action of a trial court in requiring or permitting a witness to testify is discretionary, it should be exercised with caution.¹² Because the possibility of fraud or perjury is so great, the court must act with extreme precaution and cannot be too careful in exercising the discretion given it.¹³ The trial court abuses its discretion whenever it fails to exercise it in a manner warranted by law and in accordance with established precedent.¹⁴ Nevertheless, the trial judge occupies a better position to make that decision,¹⁵ and abuse must clearly appear before the appellate court will interfere.¹⁶

Other states have held that the testimony of the claimant alone, without corroboration, is insufficient evidence within the meaning of

⁵ Carrillo v. Taylor, 81 Ariz. 14, 299 P.2d 188 (1956).

⁶ E.g., Phelps v. Union Central Life Ins. Co., 105 Mont. 195, 71 P.2d 887 (1937); Pincus v. Pincus' Estate, 95 Mont. 375, 26 P.2d 986 (1933).

⁷ Wunderlich v. Hold, 86 Mont. 260, 283 Pac. 423 (1930).

⁸ Pincus v. Pincus' Estate, 95 Mont. 375, 26 P.2d 986 (1933).

⁹ ARIZ. REV. STAT. § 12-2251 (1956).

¹⁰ This result has been reached by the Mississippi court without an express statutory exception. Manning v. Hammond, 234 Miss. 299, 106 So. 2d 51 (1958).

¹¹ Remele v. Hamilton, 78 Ariz. 45, 275 P.2d 403 (1954); Davey v. Janson, 62 Ariz. 39, 153 P.2d 158 (1944).

¹² Stewart v. Schnepf, 62 Ariz. 440, 158 P.2d 529 (1945).

¹³ Southwest Metals Co. v. Snedaker, 59 Ariz. 374, 129 P.2d 314 (1942).

¹⁴ Rothman v. Rumbeck, 54 Ariz. 443, 96 P.2d 755 (1939); Sharpsteen v. Sanguinetti, 33 Ariz. 110, 262 Pac. 609 (1928).

¹⁵ Stewart v. Schnepf, 62 Ariz. 440, 158 P.2d 529 (1945).

¹⁶ Davey v. Janson, 62 Ariz. 39, 153 P.2d 158 (1944).

the statute.¹⁷ The interpretation given to the Montana Statute,¹⁸ which is similar to the Arizona Statute, is that the trial court should not admit the testimony of a party until sufficient other testimony has been admitted which will corroborate the testimony of the witness.

In *Goldman v. Sotelo*,¹⁹ the Arizona Supreme Court sustained the exercise of discretion by the trial court upon the ground that the same facts were testified to by other witnesses. Consistent therewith, in *Johnson v. Moilanen*,²⁰ it cited without disapproval the ruling of the trial court that other witnesses should testify first in order that it might then be determined whether it could exercise its discretion, relieving the plaintiff from the bar of the statute. The court in this case stated:

. . . the possibilities of fraud and perjury are so great, if the bars are thrown down, that it is incumbent on the trial court to act with the greatest precaution in order that estates of deceased persons may be protected against unjust claims.²¹

Yet, most Arizona cases have held that the admission of testimony regarding transactions with the decedent is within the discretion of the trial court.²² No case has been found in Arizona in which a trial court has been reversed for abusing its discretion. However, in the instant case, the defendants, during the presentation of their defense, were permitted by the trial court, over the objection of the plaintiff to testify as to transactions with and statements by the decedent. Overruling the objection to such testimony was equivalent to requiring the party to testify.²³

It is readily apparent that Arizona favors the trial court's full discretion in admitting or excluding a claimant's testimony under the "Dead Man's Statute." Undoubtedly, the trial judge is in a better position to rule whether the offered testimony should be allowed, but absent the logical foundation of corroboration, an unwarranted tower of fraud, deception, and injustice might cast its shadow upon the grave of truth.

C. WEBB CROCKETT
RALPH HUNSAKER

¹⁷ For a collection of cases so holding, see Annot., 21 A.L.R.2d 1013, 1041 (1950) (Ill., N.M., Ore., Va.).

¹⁸ MONT. REV. CODE ANN. tit. 93, § 701-3 (1947); *Wunderlich v. Hold*, 86 Mont. 260, 283 Pac. 423 (1930).

¹⁹ 7 Ariz. 23, 60 Pac. 696 (1900).

²⁰ 23 Ariz. 86, 201 Pac. 634 (1921).

²¹ *Id.* at 92, 201 Pac. at 636.

²² *Stewart v. Schnepf*, 62 Ariz. 440, 158 P.2d 529 (1945); *Johnson v. Moilanen*, *supra* note 20; *Gleeson v. Costello*, 15 Ariz. 280, 138 Pac. 544 (1914).

²³ *Remele v. Hamilton*, 78 Ariz. 45, 275 P.2d 403 (1954); *Davey v. Janson*, 62 Ariz. 39, 153 P.2d 158 (1944).

LABOR LAW—BREACH OF CONTRACT—UNION LIABLE FOR FAILURE TO PROVIDE QUALIFIED COMPETENT WORKMEN.—The plaintiff brought an action against a labor union and an employee furnished by the union based on breach of contract to supply the plaintiff with qualified and competent workmen. Although represented to have the requisite skill and competence for the work contemplated, the defendant employee was unskilled and the work was improperly done. On default the court granted judgment against the employee, but not against the union. On appeal, *held*, reversed as to the union. A union can be held liable for breach of contract to supply qualified and competent workmen when the employee is incompetent and the work is improperly done. *Csordas v. United States Tile & Composition Roofers*, 2 Cal. Rptr. 133 (Ct. App. 1960).

The fact that a labor union is a voluntary unincorporated association does not excuse it from liability for its acts.¹ As in the case of unincorporated associations generally,² in the absence of statute, an unincorporated labor union is not a legal entity apart from its members and therefore cannot sue or be sued as such.³ However, this situation has been altered in most states by explicit legislation permitting labor organizations to sue or be sued as an entity in their proper or common names.⁴ This rule has also been adopted by the federal courts with reference to substantive rights existing under the Constitution or Laws of the United States.⁵

Labor unions may negotiate and enter into written agreements with

¹ *Maywood Farms Co. v. Milk Wagon Drivers Union of Chicago Local 753*, 316 Ill. App. 47, 43 N.E.2d 700 (1942).

RESTATEMENT (SECOND), AGENCY §§ 20, comment e, 21A (1958).

² *Busby v. Elec. Util. Employees Union*, 147 F.2d 865 (D.C. Cir. 1945).

³ *Ibid*; *Williams v. United Mine Workers*, 294 Ky. 520, 172 S.W.2d 202 (1943).

⁴ *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1920); *Busby v. Elec. Util. Employees Union*, *supra* note 2; *Williams v. United Mine Workers*, *Ibid*.; *Mountain State Div. 17 v. Mountain States Tel. Co.*, 15 CCH Lab. Cas. 64, 724 (1948).

ARIZ. REV. STAT. § 23-1306 (1956). “. . . any labor organization, subdivision or local thereof . . . may sue or be sued in its common name.”

Furthermore, under the LABOR MANAGEMENT RELATIONS ACT (TAFT-HARTLEY ACT) § 301(a), (b), 61 Stat. 136 (1947), 29 U.S.C. § 185(a), (b) (1950), if a union's activities have even a slight effect upon interstate commerce, it is amenable to suit in the federal courts for breach of a collective bargaining agreement. *Shirley-Herman Co. v. Int'l Hodcarriers, Bldg. & Common Laborers Union of America, Local 210*, 182 F.2d 806 (2d Cir. 1950); *Int'l Bd. of Elec. Workers, Local 501 v. N.L.R.B.*, 181 F.2d 84 (2d Cir. 1950).

⁵ FED. R. CIV. P. 17(b).

Under Rule 17(b) of the FED. R. CIV. P., in an action where a substantive federal right as distinguished from a right arising under local state law is involved, the capacity of an unincorporated association to sue or be sued will be governed by federal law, but where no federal right is involved the capacity of such an association to sue or be sued is governed by local law. *Oskoian v. Canuel*, 264 F.2d 591 (1st Cir. 1959).

employers.⁶ Such contracts give rise to valid, contractual obligations⁷ which are enforceable at law or in equity.⁸ An agreement under which a union obligates itself to furnish workmen at the request of the employer is not a contract making it compulsory for the workman furnished to go to work or for the employer to hire the worker.⁹ If a union fails or refuses to supply labor as required by the contract, an actionable breach results, and the employer may recover damages.¹⁰ But the failure to furnish workers does not violate the contract where no workers are available.¹¹

*Columbia Casualty Co. v. Mertin*¹² appears to be the first decision imposing a "standard" upon a union undertaking to furnish personnel pursuant to an agreement.¹³ In that case, the employer-union agreement required the union to supply "competent" workers, and the court held that the failure of the union to use reasonable diligence and care in furnishing such workers was actionable. Thus, the decision obligated the union to act in good faith and to exercise care in performing the agreement. A prior New York case had held a labor union officer not liable on the theory of implied warranty when an employee, furnished by the union, proved dishonest since no warranty of fitness or honesty of employees could be implied from the agreement.¹⁴

Although a union could argue that its agreement with the employer to supply workmen was not intended to impose duties upon the union with respect to employee qualifications, it is well settled that one who undertakes a voluntary performance is bound to exercise a certain degree of skill and care even where there is no contractual duty.¹⁵ How-

⁶ *Corpez v. Hotel & Restaurant Employees Int'l Alliance & Bartenders Int'l League of Am.* Local 631, 61 Ariz. 483, 151 P.2d 705 (1944).

⁷ *Christiansen v. Local 680 of Milk Drivers & Dairy Employees of N.J.*, 126 N.J. Eq. 508, 19 A.2d 168 (1940).

⁸ *Gates v. Arizona Brewing Co.*, 54 Ariz. 266, 95 P.2d 49 (1939); *Montaldo v. Hires Bottling Co.*, 59 Cal. App. 2d 642, 139 P.2d 666 (1943); *Accord*, *Henderson v. Ugalde*, 61 Ariz. 221, 147 P.2d 490 (1944).

CAL. LAB. CODE § 1126. "Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity. . . ." See also ROTHENBERG, *LABOR RELATIONS* 645 (1949).

⁹ *Meyers Bros. v. United Bd. of Carpenters*, 15 CCH Lab. Cas. 64, 568 (1948).

¹⁰ *Plumbers & Steamfitters Union, Local 598 v. Dillion*, 255 F.2d 820 (9th Cir. 1958). The union failed to supply workmen and refused to supply such labor as required by the agreement. The court held employer could recover damages for breach of contract to supply labor.

Breach of contract implies some action or failure to act contrary to the provisions of the contract. *Bates Chevrolet Corp. v. State*, 192 Misc. 151, 76 N.Y.S.2d 718 (1948). See also RESTATEMENT, *CONTRACTS* §§ 312, 314, 327 (1932).

¹¹ *Am.-Hawaiian S.S. Co. v. Sailors Union*, 37 F. Supp. 828 (N.D. Cal. 1941).

¹² 93 N.Y.S.2d 500 (Sup. Ct. 1949).

¹³ *Union Liability For Misconduct of Employees Furnished Under Closed Shop Contract*, 1 SYRACUSE L. REV. 533 (1950).

¹⁴ *Aldman v. Consol. Garage Corp.*, 194 Misc. 793, 87 N.Y.S.2d 773 (1949).

¹⁵ *Gill v. Middleton*, 105 Mass. 477 (1870); *Coggs v. Bernard*, 2 Ld. Rynd. 909, 92 Eng. Rep. 107, 108 (1702) per Powell, J., ". . . and therefore, when I have reposed a trust in you upon your undertaking, if I suffer, when I have relied upon

ever, in the instant case, the agreement between the employer and the union specified that the union was to furnish qualified, competent workmen. The union's breach of this contractual obligation,¹⁶ in failing to supply such workmen, resulted in damage to the employer and the union should be held liable.¹⁷

The employer and the union had a collective bargaining agreement in *Gates v. Arizona Brewing Co.*,¹⁸ which provided that members of the union in good standing would be employed by the employer. The court stated:

. . . the only reasonable implication . . . is that the union promises that its members who work for the [employer], shall be competent. . . .¹⁹

The court also implied that such promise by the union to the employer was sufficient to support a contract. Arizona courts could, by extending this reasoning, hold in accord with the principal case even without a fortifying agreement of a specified nature.

A cogent argument on behalf of the unions might be that the sole purpose of such agreements is to aid in achieving union security and casts no obligation upon the union whatever with respect to its members.²⁰ But when the union undertakes by agreement to furnish an employer with qualified, competent workers, the employer is entitled to rely on each worker's fitness for the task assigned as nearly and reasonably as the union can ascertain the fact, and if the union fails in this responsibility, it should bear the consequences.²¹ Indeed, obligations to exercise good faith and diligence in performance of contracts to supply qualified, competent workers should be imposed, and if unions fail to do so they should be held liable for the resulting damages.

C. Webb Crockett

you, I shall have my action."; *Accord*, *Siegel v. Spear*, 234 N.Y. 479, 138 N.E. 414 (1923).

PROSSER, TORTS § 38(c) (2d ed. 1955). ". . . if [one] enters upon an affirmative course of conduct affecting the interest of another, he is regarded as assuming a duty to act, and will thereafter be liable for negligent acts or omissions."

¹⁶ For a history of the contractual relationship of employer and union, see Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109 (1941).

¹⁷ "A breach of a contract is the commission of an act, or the omission of some act, specified or implied in the contract." *Dulworth v. Hyman*, 246 S.W.2d 993, 995 (Ky. 1952). See also *Columbia Cas. Co. v. Mertin*, *supra* note 12.

¹⁸ *Gates v. Arizona Brewing Co.*, *supra* note 8.

¹⁹ *Id.* at 273, 95 P.2d at 52.

²⁰ *Columbia Cas. Co. v. Mertin*, *supra* note 12. The court rejected the union's contention that the sole purpose of the agreement was to provide for wages and working conditions and that it was not intended to impose duties upon the union with respect to employee qualifications.

²¹ *Ibid.*

PREROGATIVE WRITS—CERTIORARI—PROPER WHEN APPEAL RULED INADEQUATE BECAUSE OF FINANCIAL DISTRESS.—At dismissal proceedings the school district board of trustees denied a discharged teacher the right to cross-examine the complaining witness. The teacher ignored the statutory right of appeal¹ and sought certiorari from the supreme court. On certiorari, *held*, writ granted. Certiorari will lie where the court assumes that financial distress will render the right of appeal inadequate. *Forman v. Creighton School District No. 14*, 87 Ariz. 329, 351 P.2d 165 (1960).

Certiorari is a writ issuing out of a court with equitable powers to call up the record of an inferior court or a body acting in a quasi-judicial capacity to assure the party more sure and speedy justice, or to correct errors and irregularities.² It is generally agreed that the writ is used for review of judicial or quasi-judicial actions³ and will lie in two types of cases: (1) Whenever the inferior court or tribunal has exceeded its jurisdiction; and (2) whenever the inferior court or tribunal has proceeded illegally and no appeal or other mode provided for reviewing is allowed.⁴ Upon review, the only questions usually considered are those going to the legality of the action on the basis of the record below,⁵ and not questions of fact to be determined by evidence outside the record.⁶

A writ of certiorari is limited in that it will seldom issue until the proceeding has terminated.⁷ Also, the issuance is not regarded as one of right, but rather it is discretionary with the court in order to promote the ends of justice as effectively as possible,⁸ taking into account all the

¹ ARIZ. REV. STAT. § 15-255 (1956).

A. The decision of the board shall be final unless the teacher aggrieved files, within ten days after the date of the decision, an appeal with the superior court of the county within which he was employed.

B. On appeal, the court shall hear and determine the matter de novo, no less than twenty or more than forty days after the date the appeal was filed. Pending determination of the appeal, the decision of the board shall remain in full force and effect, and may not be superseded.

² CYCLOPEDIA LAW DICTIONARY 161 (3d ed. 1940); see also WEBSTER'S NEW INTERNATIONAL DICTIONARY 441 (2d ed. 1957).

³ *Swank v. Myers*, 386 Pa. 331, 126 A.2d 267 (1956).

The writ will not lie to review or annul any judgment or proceeding which is non-judicial, such as: legislative, executive or ministerial. *Wulzen v. San Francisco*, 101 Cal. 15, 35 Pac. 353 (1894); cf. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 393 (1958).

⁴ *Wulzen v. San Francisco*, *supra* note 3.

⁵ JAFFE, ADMINISTRATIVE LAW 497 (1953).

⁶ *Chenoweth v. State Board of Medical Examiners*, 57 Colo. 74, 141 Pac. 132 (1913).

Arizona courts have said that certiorari is limited to whether the inferior tribunal has acted within or in excess of its jurisdiction, and evidence may be considered only so far as it may tend to show jurisdiction thereof. *Civil Service Comm'n v. Foley*, 75 Ariz. 364, 257 P.2d 384 (1953); *accord*, *Metropolitan Lines, Inc. v. Brooks*, 70 Ariz. 344, 220 P.2d 480 (1950).

⁷ *State ex rel. Johnston v. District Court*, 93 Mont. 439, 19 P.2d 220 (1933).

⁸ *Howe v. Superior Court*, 96 Cal. App. 769, 274 Pac. 992 (1929).

Courts have always exercised a more liberal discretion in awarding or refusing writs of certiorari than in any other matter. *Daniel B. Frazier Co. v. Cedars*, 111 N.J.L. 163, 168 Atl. 128, 129 (1933) (dictum).

circumstances and exigencies of the particular case.⁹ Another important limitation is that generally a writ will not issue if another remedy, such as appeal or writ of error, exists;¹⁰ but various cases seem to show that this one-time hard rule is gradually crumbling.¹¹ Refusal always to recognize the old rule is due to the fact that the court may feel that appeal may not prove adequate either in promptness or completeness so that a partial or total failure of justice may result.¹²

The Supreme Court of Arizona in the principal case reasoned that the statutory right of appeal¹³ was not an adequate remedy because of petitioner's probable financial situation, which would create great difficulty in bridging a period of enforced idleness. Since an injustice would inure to petitioner, the court determined it could use its discretion and issue the writ requested. Supporting authority from other jurisdictions has reasoned that the court may use discretion and exercise its supervisory powers by certiorari to prevent a denial of justice,¹⁴ such as where the case presents exceptional circumstances and probable and irreparable harm would result from delay in deciding the questions presented, notwithstanding the fact that the remedy of appeal is available;¹⁵ even though the legislature intended statutory appeal to be an exclusive remedy for review.¹⁶ However, as to the adequacy of appeal, it seems that better reasoning is found in Washington cases holding that delays and annoyances incident to an appeal,¹⁷ as well as questions of expense, do not affect the adequacy thereof, as respects review by certiorari; but such inadequacy is shown only where it is apparent that the appellate court will not be able to protect the rights of litigants or afford them adequate redress.¹⁸

⁹ *Cushing v. Gay*, 23 Me. 9 (1843).

¹⁰ *JAFFE, op cit. supra* note 5, at 494.

¹¹ 3 *K. DAVIS, op. cit supra* note 3, at 399.

The theory that certiorari is not available when another adequate remedy exists is honored about as much in the breach as in the observance. Even an oversimplified summary of significant cases leaves an aura of confusion. *Id.* at 397.

The writ was denied when appeal was available in North Carolina. *City of Sanford v. Southern Oil Co.*, 244 N.C. 388, 93 S.E.2d 560 (1956); *contra*, *Connors v. Knoxville*, 136 Tenn. 428, 189 S.W. 870 (1916).

¹² *State ex rel. Hamilton v. Guinotte*, 156 Mo. 513, 57 S.W. 281 (1900).

¹³ ARIZ. REV. STAT. § 15-255 (1956).

¹⁴ *State ex rel. Stimatz v. District Court*, 105 Mont. 510, 74 P.2d 8 (1937); *cf. State ex rel. Shartel v. Westhues*, 320 Mo. 1093, 9 S.W.2d 612 (1928). See also *Wheeler v. Wheeler*, 184 La. 689, 167 So. 191 (1936).

¹⁵ *Conte v. Roberts*, 58 R.I. 353, 192 Atl. 814 (1937); *cf. Kauffman v. King*, 89 So. 2d 24 (Fla. 1956).

¹⁶ *Perkins v. Peacock*, 263 Wis. 644, 58 N.W.2d 536 (1953). An example is if the injured party's right of appeal was lost for some fault not of his own. *Ibid.*

¹⁷ *State ex rel. Burkhard v. Superior Court*, 11 Wash. 2d 600, 120 P.2d 477 (1941).

¹⁸ *State ex rel. Public Utility Dist. No. 1 v. Schwab*, 40 Wash. 2d 814, 246 P.2d 1081 (1952).

Even though authority is found in other courts, the Supreme Court of Arizona has apparently departed from its own precedent in putting a very liberal interpretation on the Arizona statute¹⁹ to reach its decision in this case. Early Arizona decisions determined that certiorari would not be permitted to take the place of an appeal²⁰ and in a leading case the court stated:

The language of the statute seems to settle it that, where there is an appeal, certiorari cannot be invoked to secure a review of the action. . . .²¹

California has extended this reasoning in saying that certiorari will not lie to review an appealable order or judgment, notwithstanding the fact that appeal does not afford a plain, speedy and adequate remedy.²²

In recent Arizona cases certiorari was granted only when an inferior tribunal's jurisdiction had been exceeded and there was no appeal or other plain, speedy and adequate remedy.²³ These decisions seem to imply that the statutory right of appeal is an adequate and speedy remedy. It appears that this same interpretation should be given to the Arizona statute²⁴ wherein it provides for certiorari if there is ". . . no appeal, nor, in the judgment of the court, a plain, speedy and adequate remedy." According to definitions of "or"²⁵ and "nor"²⁶ they are co-ordinating particles that mark alternatives. Therefore, should a wronged party have either a remedy of statutory appeal, or some other plain, speedy and adequate remedy, it would suffice and certiorari should not issue. The Teacher Tenure Act²⁷ gave the dismissed teacher an express remedy of appeal with provisions for a hearing within twenty to forty days; thus there would not be a great period of waiting. Also, there is no showing that petitioner was financially distressed, just an assumption

¹⁹ ARIZ. REV. STAT. § 12-2001 (1956).

The writ of certiorari may be granted by the Superior and Supreme Courts or by a judge thereof, in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded its jurisdiction and there is no appeal, nor, in the judgment of the court, a plain, speedy and adequate remedy.

²⁰ Territory v. Doan, 7 Ariz. 89, 60 Pac. 893 (1900).

The writ of certiorari will not issue except when excess of jurisdiction has occurred and appeal will not lie. Royce v. Smith, 1 Ariz. 511, 25 Pac. 799 (1878); Reilly v. Tyng, 1 Ariz. 510, 25 Pac. 798 (1878).

²¹ Miller v. Superior Court, 21 Ariz. 61, 185 Pac. 357 (1919). This case was based on REV. STAT. OF 1913 § 1495 (Ariz.). This code section has been incorporated into the present-day ARIZ. REV. STAT. § 12-2001 (1956).

²² State Bd. of Equalization v. Superior Court, 9 Cal. 2d 252, 70 P.2d 482 (1937).

Since the statute prescribing other conditions is explicit, it must control. Monterey Club v. Superior Court, 44 Cal. App. 2d 351, 112 P.2d 321 (1941).

²³ Hunt v. Norton, 68 Ariz. 1, 198 P.2d 124 (1948); see Metropolitan Lines, Inc. v. Brooks, *supra* note 6.

²⁴ ARIZ. REV. STAT. § 12-2001 (1956).

²⁵ WEBSTER'S NEW INTERNATIONAL DICTIONARY 1712 (2d ed. 1957).

²⁶ *Id.* at 1664.

²⁷ ARIZ. REV. STAT. § 15-255 (1956).

to that effect by the court. From these considerations it is submitted, as the dissenting opinion aptly stated,²⁸ the supreme court may have opened too wide a door for reviewing cases by certiorari, especially when the statutory right of appeal is given to the distressed party.

Richard E. Skousen

STATE OFFICERS—ATTORNEY GENERAL—RIGHT TO INSTITUTE ACTION AGAINST STATE AGENCY.—Pursuant to its statutory authority,¹ the Arizona State Land Department authorized the sale of some state land at public auction. Acting in behalf of the state, the Attorney General petitioned the superior court to enjoin the Land Department from commencing the sale. A temporary restraining order was granted whereupon the Land Department applied to the supreme court for a writ of prohibition requiring the superior court to refrain from any further action in the proceeding instituted by the Attorney General.² On prohibition, *held*, writ granted. The Attorney General lacks authority to institute an action on behalf of the State of Arizona to enjoin the State Land Department from selling public lands. *Arizona State Land Dept' v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960).

By the time of the colonization of America, the Attorney General in England had numerous and varied functions as the chief law officer of the crown.³ In general, he controlled and maintained all litigation on behalf of the crown and could both intervene and institute all actions which were of concern to the general welfare.⁴ On the theory that the prerogatives which pertained to the crown in England are vested in the people of this country,⁵ the Attorney General is vested in some states with common law powers without express constitutional provision for the office.⁶

²⁸ *Forman v. Creighton School Dist. No. 14*, 87 Ariz. 329, 351 P.2d 165, 169 (1960) (L. Udall, J., dissenting).

¹ ARIZ. REV. STAT. § 37-236 (1956).

² A petition for a writ of prohibition is the proper procedure to challenge the jurisdiction of the lower court over the parties before it. *D. W. Onan & Sons v. Superior Court*, 65 Ariz. 255, 179 P.2d 243 (1947).

³ Holdsworth, *The Early History of the Attorney and Solicitor General*, 13 ILL. L. REV. 602 (1919).

⁴ *Capitol Stages Inc. v. State ex rel. Hewitt*, 157 Miss. 576, 128 So. 759, 763 (1930).

⁵ 2 THORNTON, ATTORNEYS AT LAW 1143 (1914).

⁶ There are two states without constitutional provision for the office of Attorney General: Indiana and Oregon. Indiana denies common law powers to its Attorney General. *State ex rel. Steers v. Criminal Court of Lake County*, 232 Ind. 443, 112 N.E.2d 445 (1953). On the other hand, Oregon affirms them. *Gibson v. Kay*, 68 Ore. 589, 137 Pac. 864 (1914).

The Maine constitution simply provides for the election of the Attorney General. ME. CONST. art. IX, § 11. It has been held that this confers upon him the status of a constitutional officer and that he has common law powers and duties. *Withee v. Lane & Libby Fisheries Co.*, 120 Me. 121, 113 Atl. 22 (1921).

The more common mode of establishment, however, is by constitutional enactment and the jurisdictions fall generally into two categories: (1) those which merely provide for the office, and (2) those which provide for the office and state that its duties shall be as prescribed by law.⁷ Arizona falls within the latter classification.⁸ Of the jurisdictions with provisions substantially similar to those of Arizona, the vast majority hold that the Attorney General has powers as were recognized in the common law office.⁹ This result is often reached by interpreting the phrase "as prescribed by law" to indicate statutory law and viewing the statutes in force in these states adopting the common law ". . . as adopting not only the common-law rights and remedies of litigants, but also such common-law powers of public officers as were possessed by similar officers in England. . . ."¹⁰ Furthermore, the powers and duties of the Attorney General were so varied and multitudinous, that the framers of the various constitutions would have found it impractical to enumerate them specifically.¹¹

In the first Arizona case considering the subject, it was held that the Attorney General was not a common law officer and that his powers and duties could be ascertained only by resort to the statutes.¹² In the instant case, the court searched the statutes to find legislative authority which would allow the Attorney General judicially to oppose the determination of the Land Department. Finding none, it was concluded that he was without standing to institute the action. It was further reasoned that the fundamental concept of the Attorney General's office is that of legal advisor to the state departments. Thus:

. . . the initiation of litigation by the attorney general in furtherance of interests of the public generally, as distinguished from policies or practices of a particular department is not a concomitant function of this role.¹³

⁷ Comment, 16 N.C.L. Rev. 282 (1938). For a digest of the various state constitutional provisions, see LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS 35-42 (1959).

⁸ ARIZ. CONST. art. V, §§ 1 & 9.

⁹ See Comment, *supra* note 7, at 285 n.23.

¹⁰ State *ex rel.* McKittrick v. Missouri Pub. Serv. Comm'n, 352 Mo. 29, 175 S.W.2d 857, 861 (1943). *Accord*, State *ex rel.* Williams v. Karston, 208 Ark. 703, 187 S.W.2d 327 (1945); State v. Finch, 128 Kan. 665, 280 Pac. 910 (1929).

¹¹ Shepperd, *Common Law Powers and Duties of the Attorney General*, 7 BAYLOR L. Rev. 1 (1955).

The legislatures of those states recognizing the common law powers of the Attorney General may either enlarge or subtract from them. *E.g.*, Johnson v. Commonwealth *ex rel.* Meredith, 291 Ky. 829, 165 S.W.2d 208 (1942); State v. McFeeley, 136 N.J.L. 102, 54 A.2d 797 (1947). Illinois is the only state which holds that the legislature may not subtract from these common law powers. People *ex rel.* Barrett v. Finnegan, 378 Ill. 387, 38 N.E.2d 715 (1941).

¹² Shute v. Frohmiller, 53 Ariz. 483, 90 P.2d 998 (1939). *Accord*, Westover v. State, 66 Ariz. 145, 185 P.2d 315 (1947); State *ex rel.* Frohmiller v. Hendrix, 59 Ariz. 184, 124 P.2d 768 (1942); Conway v. State Consol. Publishing Co., 57 Ariz. 162, 112 P.2d 218 (1941).

¹³ Arizona State Land Dep't v. McFate, 87 Ariz. 139, 348 P.2d 912, 915 (1960).

The Attorney General in Arizona is thus greatly restricted in his ability to institute actions which he may deem to be in the public interest. A private citizen, in a situation such as the one in the present case, has probably neither the desire to sue nor the standing to do so.¹⁴ The decision to oppose the official determination of a state agency would, then, vest only in the Governor.¹⁵ Yet there seems no reason why the power in the Governor should necessarily negate the power of the Attorney General to institute suits in the interests of the general welfare.¹⁶ It has thus been held in other jurisdictions that the authority of the Attorney General as a law enforcement officer is not inconsistent with that of the Governor.¹⁷ Nor would there seem to be anything inconsistent in the Attorney General advancing the unconstitutionality of a statute which a state agency is seeking to enforce;¹⁸ for if the statute is unconstitutional, the Governor, as well as the administrative departments and the people, has a vested interest in having a determination of its validity.

The proposition advanced by the present case may greatly impede law enforcement in Arizona.¹⁹ With the expanding role of administrative agencies it is more important than ever to have a state officer who is charged with the protection of the interests of the people and who has ready access to the courts for this purpose. The Attorney General, rather than the Governor, has the machinery to accomplish this on his own initiative. However, in view of the present case, it will be up to the Legislature to expand the powers of the Attorney General so as to give him the authority now enjoyed by his counterparts in most jurisdictions.

Howard N. Singer

¹⁴ Cf. *McCarthy v. McAloon*, 79 R.I. 55, 83 A.2d 75 (1951).

¹⁵ *Arizona State Land Dep't v. McFate*, *supra* note 13, at 918.

State ex rel. Morrison v. Thomas, 80 Ariz. 327, 297 P.2d 624 (1956), would seem on its face to support the claim of the Attorney General in the present case. In that case, the court said that ". . . the narrow question is whether the Attorney General can represent the State without the permission of the administrative officer whose department has been given the authority to handle such affairs generally." *Id.* at 331, 297 P.2d at 627. The court concluded that he could, saying that the Attorney General ". . . like the Governor, [may] go to the courts for the protection of the rights of the people." *Id.* at 332, 297 P.2d at 628. While not expressly overruling the *Thomas* case, the court distinguished it from the present case. *Arizona State Land Dep't v. McFate*, *supra* note 13, at 917-18.

¹⁶ Cf. *Montgomery v. Sparks*, 225 Ala. 343, 142 So. 769 (1932).

¹⁷ *McDowell v. State*, 243 Ala. 87, 8 So. 2d 569 (1942). *Accord*, *State of Ohio v. Arnett*, 314 Ky. 403, 234 S.W.2d 722 (1950).

¹⁸ *Wilentz v. Hendrickson*, 133 N.J. Eq. 447, 33 A.2d 366 (1943), *aff'd*, 135 N.J. Eq. 244, 38 A.2d 199 (1944).

¹⁹ The proposition advanced by the present case that the Attorney General may not oppose a state agency without a specific legislative grant of authority, since it is his duty to represent and advise them, was urged upon the Washington court which, like Arizona, does not recognize the common law powers of the Attorney General. *State ex rel. Winston v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 68 Pac. 946 (1902). In response the court stated:

TORTS—ATTRACTIVE NUISANCE—ARTIFICIAL BODY OF WATER MAY BE SUBJECT OF LIABILITY.—The plaintiff's year old son drowned in the defendant's swimming pool which was open, visible and easily accessible to children passing on the street. The trial court granted defendant's motion to dismiss on the grounds that a body of water is a common danger which would not come within the attractive nuisance doctrine. On appeal, *held*, reversed. A body of water which is artificial may be an attractive nuisance even though it is neither unusual nor uncommon. *King v. Lennen*, 1 Cal. Rptr. 665, 348 P.2d 98 (1959).

It is generally said that occupiers of land owe no greater duty to trespassers than to refrain from inflicting wilful or wanton injury¹ regardless of whether the trespasser is a child or an adult.² With the decision in the "turntable case"³ the courts introduced an exception to this general rule which became known as the attractive nuisance doctrine.⁴ Basically the original doctrine stated that one who maintained upon his premises a condition or instrumentality which was dangerous to young children because of their inability to realize the danger, and which might reasonably be expected to attract young children to the premises, was under a duty to exercise reasonable care to protect them against the dangers of the attraction.⁵

One theory behind the doctrine was that the attraction was considered an invitation which made the children invitees and imposed upon the occupier of land the duty of ordinary care.⁶ This attractive nuisance exception could be so extended as to circumvent the general rule as to children. For this reason some courts refused to accept the doctrine,⁷

The legitimate conclusion of such an argument is that the Attorney General must . . . sit supinely by and allow state officers to violate their trusts and that, instead of preventing such actions, it is his duty to defend the delinquents. The law cannot be given any such construction. His paramount duty is made the protection of the interest of the people . . . and, where he is cognizant of violations of the Constitution or the statutes by a state officer, his duty is to obstruct and not to assist, and where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers. *State ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 361, 249 Pac. 996, 999 (1926).

¹ *Buckeye Irrigation Co. v. Askren*, 45 Ariz. 566, 46 P.2d 1068 (1935); *Salt River Valley Water Users' Ass'n v. Compton*, 39 Ariz. 491, 8 P.2d 249 (1932); *Salladay v. Old Dominion Copper Mining & Smelting Co.*, 12 Ariz. 124, 100 Pac. 441 (1909); *PROSSER, TORTS* 432 (2d ed. 1955); 16 *FORDHAM L. REV.*, 295, 297 (1947).

² *FORDHAM L. REV.*, *Ibid.*

³ *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (17 Wall.) 657 (1874).

⁴ *Barnhill v. Mt. Morgan Coal Co.*, 215 Fed. 608 (E.D. Ky. 1910); *Illinois Central R.R. v. Wilson*, 23 Ky. L. Rep. 684, 63 S.W. 608 (1901).

⁵ *Annot.*, 36 A.L.R. 53 (1925).

⁶ *Kopplekom v. Colorado Cement Pipe Co.*, 16 Colo. App. 274, 64 Pac. 1047 (1901).

⁷ *Annot.*, 36 A.L.R. 66 (1925).

One court criticises the doctrine by saying that the trend is to make everyone

and those who accepted it were careful to see that the doctrine was properly restricted.⁸ If all things which aroused the curiosity of children and which held some element of danger for them could be thought of as attractive nuisances, there would be no limit to the instrumentalities and conditions to which the doctrine might apply;⁹ therefore the courts often limited its application to things which were special, unusual, uncommon or artificial.¹⁰

Within that limitation, bodies of water were excluded from the operation of the doctrine because they were considered so common that their perils were obvious even to the youngest child.¹¹ However, the advent of Section 339 of the *Restatement of Torts* changed the character of the approach to liability.¹² Whereas previously liability had been based on that which was unusual, uncommon, or artificial,¹³ the *Restatement* where accepted by the courts, grounded its liability on those things which were artificial only and seemed to disregard the "unusual" and "uncommon" elements which had existed before.¹⁴ Many authorities felt this greatly extended the coverage of liability.¹⁵ In keeping with older reasoning, the California court had on numerous occasions held that bodies of water were not attractive nuisances because they were very common.¹⁶ In the instant case the California court has followed the *Restatement's* much expanded version of the doctrine.¹⁷

In Arizona a great deal will depend on which theory is adopted. The only case of this type decided in Arizona was *Salladay v. Old Dominion Copper Mining & Smelting Co.* where it was held that an open

responsible for the safety of children except the parents. *Zartner v. George*, 156 Wis. 131, 145 N.W. 971 (1914). Some courts feel the reasons for the doctrine do not justify the material restrictions which it places upon the enjoyment of real property. *Kaproli v. Central R.R.*, 105 N.J.L. 225, 143 Atl. 343 (1928).

⁸ *Cox v. Alabama Water Co.*, 216 Ala. 35, 112 So. 352 (1927); *Shell Petroleum Corp. v. Beers*, 185 Okla. 331, 91 P.2d 777 (1938).

⁹ *Missouri, K. & T. Ry. v. Dobbins*, 91 Tex. 60, 40 S.W. 861, 864 (1896).

¹⁰ *Shell Petroleum Corp. v. Beers*, *supra* note 8; *Brown v. Salt Lake City*, 33 Utah 222, 93 Pac. 570 (1908). In the late 19th Century this doctrine was born out of the conflict between society and industry after the latter had introduced new, unusual and often dangerous machinery on the American scene. Considering this background, it is not surprising some courts wanted to restrict this doctrine solely to machinery and appliances. *Overhold v. Veiths*, 93 Mo. 442, 6 S.W. 74 (1887).

¹¹ Annot., 12 A.L.R. 2d 1262 (1949).

¹² RESTATEMENT, TORTS § 339, comment a (1934); 35 NOTRE DAME LAW. 463, 465 (1960).

¹³ See note 11 *supra*.

¹⁴ RESTATEMENT, TORTS § 339 (1934).

¹⁵ HARPER & JAMES, TORTS 1451 (1956); 35 NOTRE DAME LAW. 463, 465 (1960).

¹⁶ *Knight v. Kaiser Co.*, 48 Cal. 2d 778, 312 P.2d 1089 (1957); *Melendez v. City of Los Angeles*, 8 Cal. 2d 741, 68 P.2d 971 (1937); *Doyle v. Pacific Elec. Ry.*, 6 Cal. 2d 550, 59 P.2d 93 (1936); *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113 (1896).

¹⁷ *King v. Lennen*, 1 Cal. Rptr. 665, 666, 348 P.2d 98, 99 (1959).

flume was not an attractive nuisance.¹⁸ However, since then there have been several cases of attractive nuisances where the court quoted and followed the *Restatement of Torts*, but none of these dealt with a body of water. They were cases involving electric current,¹⁹ blasting powder,²⁰ and dynamite caps,²¹ which could just as well fit under the reasoning of either the older cases or the *Restatement* because they were not only uncommon but also artificial.

Because Arizona has a vast area of desert, we are faced with the problem of having several types of bodies of water which are both artificial and common. Among these are the irrigation ditches and the swimming pools. With the ever increasing number of private and municipal swimming pools in the Southwest, it is doubtful if they could be classed as uncommon, and certainly the miles of irrigation ditches would not be considered unusual. Therefore, the older rule which excludes bodies of water from the operation of the attractive nuisance doctrine could find justifiable application. However, if the *Restatement's* theory is adopted in Arizona, it is possible that occupiers of land will find themselves burdened with heavy responsibilities for the protection of children.

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¹⁸ Salladay v. Old Dominion Copper Mining & Smelting Co., *supra* note 1.

¹⁹ Downs v. Sulphur Springs, 80 Ariz. 286, 297 P.2d 339 (1956).

²⁰ Buckeye Irrigation Co. v. Askren, *supra* note 1.

²¹ MacNeil v. Perkins, 84 Ariz. 74, 324 P.2d 211 (1958).