RECENT DECISIONS

BUSINESS ASSOCIATIONS

AGENCY — FIDUCIARY RELATIONSHIP — STOCKBROKER-CUSTOMER RELATIONSHIP DOES NOT IMPOSE POSITIVE DUTY TO SUPPLY INFORMATION. — *Walston & Co. v. Miller*, 100 Ariz. 48, 410 P.2d 658 (1966).

In action brought by stockbroker against customer to recover balance owed on margin account, customer counterclaimed on the basis that the broker had breached its duty to supply information regarding price fluctuations. The Superior Court found in favor of customer's counterclaim. On appeal, *held*, counterclaim reversed. Where there is a mere margin agreement no fiduciary relationship arises and there is no duty for stockbroker to supply his customers with information of price influencing factors.

CORPORATIONS — CORPORATE LIABILITY — CORPORATION LIABLE FOR LOAN SIGNED BY ITS PRESIDENT-MAJORITY STOCKHOLDER. — *Air Technical Dev. Co. v. Arizona Bank*, 101 Ariz. 70, 416 P.2d 183 (1966).

The president of defendant corporation applied for an improvement loan for property leased by the corporation. The president and his wife owned 90% of the corporate stock and were its only directors. Plaintiff-bank granted the loan without a corporate resolution approving the loan and without a corporate seal. The Superior Court rendered judgment on the note for the bank against the corporation. On appeal, *held*, affirmed. Where plaintiff was justified in relying on the president-majority shareholder's representations that he was acting as an agent for the corporation in securing the loan, and the corporation received the benefits from the loan; the corporation is bound on the note.

CORPORATIONS — CORPORATE OPPORTUNITY DOCTRINE — LOSSES CAUSED BY GOOD FAITH TRANSACTIONS ARE NOT VIOLATIVE OF CORPORATE OPPORTUNITY DOCTRINE. — *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 412 P.2d 47 (1966).*

The president of defendant corporation in 1947 authorized a $2,800,000 purchase of war surplus goods without knowledge or consent of the directors. The transaction was ratified by stockholders one year later. In 1958 the corporation undertook liquidation. The directors voted a 5% discount on all corporate assets and accepted the corporate president's counter-offer to purchase the corporate assets which resulted

in a $700,000 loss to the corporation. The Superior Court entered judgment for plaintiffs-minority shareholders. On appeal, *held*, reversed. Where the directors and the president of the corporation acted in good faith in transactions in which the corporation is usually involved, and where the records are open for stockholders, and where the loss is caused by an error in speculation, no cause of action arises against the directors for fraud or violation of the corporate opportunity doctrine.

° Commented on in 9 ARIZ. L. REV. 59 (1967).

CORPORATIONS — DISREGARDING THE CORPORATE ENTITY — STOCKHOLDER-DIRECTORS PERSONALLY LIABLE ON AN ULTRA VIRES CONTRACT. — *Lurie v. Arizona Fertilizer and Chemical Co.*, 101 Ariz. 482, 421 P.2d 330 (1966).°

Defendants, sole stockholder-directors of Allied Yuma Farms, Inc., an undercapitalized Washington corporation licensed to do business in Arizona, entered an unsuccessful joint farming venture for which plaintiff furnished fertilizers to the defendants. The articles of incorporation of Allied Yuma Farms, Inc., did not expressly authorize the business of farming. The lower court directed a verdict against the defendants as individuals. On appeal, *held*, affirmed. Where farming was not authorized by the charter of an undercapitalized corporation and defendant stockholder-directors led plaintiff to believe that defendants were acting as individuals, defendants were personally liable.

° Noted in 9 ARIZ. L. REV. 97 (1967).

PRINCIPAL AND AGENT — APPARENT AUTHORITY — APPARENTLY AUTHORIZED ACTS OF GENERAL MANAGER BOUND PRINCIPAL. — *Gibralter Escrow Co. v. Thomas J. Grosso Investment, Inc.* 4 Ariz. App. 490, 421 P.2d 923 (1966).

Relying for loan security upon fraudulent representations by defendant's agent in escrow instructions, plaintiff loaned money to co-defendants. Defendant's agent had complete organizational, managerial, and accounting control over defendant's escrow department, including sole knowledge of money received for deposit to the escrow accounts. Plaintiff's motion for summary judgment was granted. On appeal, *held*, affirmed. Defendant was bound by the tortious representation of its agent under the theory of apparent authority where the agent was general manager in complete control of defendant's office. .

STATE OFFICIALS — CONFLICT OF INTEREST — MEMBER OF STATE BOARD PROHIBITED FROM HAVING SELF INTEREST IN BOARD PURCHASES. — *State v. Bohannan*, 101 Ariz. 520, 421 P.2d 877 (1966).

During respondent's term on the Arizona State Retirement Board, the

Board purchased mortgages from a company of which respondent was president. On original proceeding in quo warranto in the Supreme Court, *held,* respondent permanently excluded from public office in Arizona. Respondent's simultaneous board membership and mortgage company interest constituted a violation of statute prohibiting state officials from having an interest directly or indirectly in any purchase made by a board of which they are a member.

WORKMEN'S COMPENSATION — SCOPE OF EMPLOYMENT — INJURY WHILE LEAVING PREMISES NOT WITHIN SCOPE OF EMPLOYMENT. — *Sendejaz v. Industrial Commission,* 4 Ariz. App. 309, 420 P.2d 32 (1966).

While driving home after work on a road within his employer's premises, plaintiff was injured in a fall from his motorcycle. The Industrial Commission found that the injury was not the result of an accident arising in the course of employment. On certiorari, *held,* writ denied. The injury, although occurring on the employer's premises, did not arise out of the course of employment where plaintiff was sharing the general hazards of travel with the general public.

COMMERCIAL TRANSACTIONS

BILLS AND NOTES — SUFFICIENCY OF CONSIDERATION — CONTROL OVER PROCEEDS OF NOTES AS SUFFICIENT CONSIDERATION. — *Weber v. Bates,* 3 Ariz. App. 420, 415 P.2d 135 (1966).

Defendant's business partner held and invested funds on behalf of plaintiff-payee. Defendant-maker, with plaintiff's approval, borrowed some of this money from his partner. The money, which was used in a joint business venture, was credited to the business partner's capital account in the business, although defendant had complete control over it. The Superior Court entered summary judgment for plaintiff in an action to recover on two promissory notes that defendant had signed. On appeal, *held,* affirmed. Even though the funds were credited to the partner's capital account, defendant's control over the funds was sufficient consideration to enforce payment of the notes.

SALES — SUBROGATION — UNCONDITIONAL GUARANTOR'S RIGHT TO SUBROGATION NOT IMPAIRED WHERE GUARANTEE FAILS TO RECORD THE SECURITY. — *D. W. Jaquays & Co. v. First Security Bank,* 101 Ariz. 301, 419 P.2d 85 (1966).

Plaintiff obtained conditional sales contracts in which defendant unconditionally guaranteed faithful performance by the purchaser. Fol-

lowing the purchaser's bankruptcy, defendant's petition for reclamation of the goods sold was denied because plaintiff failed to record the sales contracts. Plaintiff was awarded a summary judgment on the guarantee. On appeal, *held*, reversed. Although defendant, as an unconditional guarantor consented to any extensions, the defense that his subrogation right was destroyed by plaintiff's negligence in failing to record the sales contracts was not waived.

SECURITY TRANSACTIONS — ASSIGNMENTS — ASSIGNEE OF CONTRACT PROCEEDS HAS PRIORITY OVER ATTORNEY SEEKING FEES FOR MAINTAINING SUIT ON THE CONTRACT. — *Valley Nat. Bank v. Byrne*, 101 Ariz. 363, 419 P.2d 720 (1966).

A subcontractor assigned to plaintiff-lender all proceeds from a contract in consideration for a loan. Defendant-attorney recovered a judgment for the subcontractor on the contract for anticipated profits. Defendant, who knew of the assignment but failed to assert a lien on the judgment, was awarded his fee from the judgment proceeds by the Court of Appeals. On appeal, *held*, reversed. An attorney who recovers judgment for breach of contract is not entitled to the judgment-proceeds ahead of a bank to which all contract proceeds had previously been assigned since the bank's interest in the proceeds had already vested.

CONSTITUTIONAL LAW

CONSTITUTIONAL LAW — DUE PROCESS — PROSECUTION HAS DUTY TO DISCLOSE EVIDENCE WHICH MIGHT BE MATERIALLY USEFUL TO DEFENDANT. — *State v. Fowler*, 101 Ariz. 56, 422 P.2d 125 (1967).

Defendant shot decedent in a scuffle. Near the scene, unknown to defendant, police discovered a knife. Defendant pleaded self-defense alleging decedent's reputation as a "knifer." The prosecution concealed discovery of the knife and told the jury there was no evidence of a knife on decedent. Defendant's motion for new trial on grounds of newly-discovered evidence and prosecution's misconduct was denied. On appeal, *held*, reversed. Failure of the prosecution to disclose physical evidence which may be of material use to defendant, regardless of whether the prosecution doubts its admissibility or whether the defense attorney requests evidence, constitutes denial of due process of law to defendant.

CONSTITUTIONAL LAW — DUE PROCESS — RIGHT TO EXERCISE IN PERSONAM JURISDICTION OVER A NONRESIDENT DEFENDANT. — *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966).*

The plaintiff, an Arizona resident, brought action against the defendant, an Ohio corporation, for injuries received when a dish manufactured in Ohio by defendant exploded. There was no allegation that plaintiff purchased the dish in Arizona nor that defendant was doing business in Arizona at the time of the purchase. Defendant's motion to dismiss for lack of jurisdiction was granted. On petition for review, *held,* reversed. Due process requires that the cause be remanded to allow additional evidence to be presented to determine whether defendant has sufficient minimum contacts with the forum so that exercise of in personam jurisdiction over defendant would not offend traditional notions of fair play and substantial justice; the trial court should consider the nature and size of defendant's business, economic independence of plaintiff, law applicable to the cause of action and practical matters of the trial.

° Noted in 8 ARIZ. L. REV. 356 (1967).

CONSTITUTIONAL LAW — FAIR TRADE ACT — NONSIGNER PROVISION OF ARIZONA'S FAIR TRADE ACT NOT AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER. — *Skaggs Drug Center v. U. S. Time Corp.,* 101 Ariz. 392, 420 P.2d 177 (1966).

The defendant, an Arizona corporation selling brand name watches at retail, had knowledge that fair trade agreements existed between plaintiff and other Arizona retailers concerning the sale of these watches. A preliminary injunction was granted restraining the defendant from offering plaintiff's products for less than the minimum fair trade price. On appeal, *held,* affirmed. Where defendant knew of pre-existing restrictions imposed by plaintiff concerning minimum prices in fair trade contracts and defendant voluntarily accepted the watches for sale, the Fair Trade Act, to the extent that the defendant was affected as a "non-signer," was not an unconstitutional delegation of legislative power.

CONSTITUTIONAL LAW — OPEN COURT — FREEDOM OF THE PRESS TO REPORT OPEN COURT PROCEEDINGS. — *Phoenix Newspapers, Inc. v. Superior Court,* 101 Ariz. 257, 418 P.2d 594 (1966).

The defendant, a Phoenix newspaper, sought to prohibit the Superior Court from conducting a hearing in which defendant was to appear to show cause why it should not be held in contempt for publishing an article reporting habeas corpus proceedings after being ordered by the court to refrain from same. On petition for writ of prohibition, *held,* writ made permanent. The court may not foreclose the right of the press from freely printing what occurs in open court in the course of a

judicial hearing without violating constitutional guarantees of free speech and press.

CONSTITUTIONAL LAW — RIGHT TO TRIAL BY JURY — RIGHT TO TRIAL BY JURY EXTENDS TO DRUNK DRIVING OFFENSES. — *Rothweiler v. Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966).*

The Court of Appeals granted a writ of prohibition to prevent the Superior Court from determining without a jury trial defendant's trial *de novo* of a conviction of driving while under the influence of intoxicating liquor. Penalty for drunk driving is imprisonment, fine, and suspension of right to drive, or any combination of the three. On petition for review, *held*, petition granted and writ of prohibition made permanent. Even though driving while intoxicated was a petty offense not triable by a jury at common law, the present severity of the penalty imposed by statute indicates that driving while intoxicated is now a serious criminal offense for which trial by jury is a constitutional right within the meaning of the state and federal constitutions.

* Noted in 8 ARIZ. L. REV. 365 (1967).

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — A SEARCH IS PREREQUISITE TO CLAIM OF UNREASONABLE SEARCH AND SEIZURE. — *State v. Turner*, 101 Ariz. 85, 416 P.2d 409 (1966).

The defendant entered Tucson Medical Center for treatment of a bullet wound in his head. The bullet was removed from defendant's head and turned over to police, who then performed ballistic tests. As a result, defendant was convicted of assault with intent to commit murder. On appeal, *held*, affirmed. The bullet which the doctor removed from defendant's head and delivered to the police officers was not the product of a search, and hence not the product of an unreasonable search and seizure.

CONTRACTS

CONTRACTS — ILLUSORY PROMISES — PROMISE TO PAY LEFT TO DISCRETION OF PROMISOR NOT ILLUSORY. — *Allen D. Shadron, Inc., v. Cole*, 101 Ariz. 122, 416 P.2d 555 (1966).

Plaintiff, a real estate salesman for defendant broker, was employed under a contract which provided for additional commissions at "the discretion of the Broker." Defendant orally promised to pay certain additional commissions, but later refused. The Superior Court entered judgment for the plaintiff. On appeal, *held*, affirmed. Although the

broker could decide either to pay or not to pay the additional commissions, he could not refuse to exercise his discretion, and, having elected to pay, is obligated to do so.

CONTRACTS — INDEMNIFICATION — RIGHT TO INDEMNIFY AGAINST INJURIES RESULTING FROM OWN NEGLIGENCE NOT AGAINST PUBLIC POLICY. — *Graver Tank & Manufacturing Co. v. The Fluor Corp. Ltd.*, 4 Ariz. App. 476, 421 P.2d 909 (1966).

Plaintiff, a general contractor, who had obtained a contract with the United States Government, provided in its subcontract with defendant that the subcontractor would indemnify the prime contractor against claims for injuries arising out of services and materials furnished by the subcontractor. An employee of the subcontractor was killed and his administrator brought an action for negligence against the plaintiff. Plaintiff sought a declaratory judgment that it was protected by the indemnity clause. The Superior Court entered judgment for plaintiff. On appeal, *held*, affirmed. Contracts with the United States Government do not come within the "public service" exception to general rule that it is not contrary to public policy to allow indemnification against one's own negligence.

CONTRACTS — INSURANCE — DEATH FROM OVER-INGESTION CONSTITUTES ACCIDENTAL BODILY INJURY. — *Malanga v. Royal Indemnity Co.*, 101 Ariz. 588, 422 P.2d 704 (1967).

Plaintiff's insured consumed drugs and alcohol in quantities which, taken alone, would not cause death. When the combination resulted in the insured's death, defendant refused payment for the loss, contending death was neither accidental nor a bodily injury since the consumption was voluntary and produced no traumatic injuries. Judgment for defendant was affirmed by the Court of Appeals. On petition for review, *held*, reversed. Where normal bodily functions are interfered with so that death results, there is a "bodily injury," and where a reasonably prudent man would not anticipate such a result to flow from his own acts, the death is "accidental."

CONTRACTS — INSURANCE — FINANCIAL RESPONSIBILITY ACT DOES NOT ABOLISH DEFENSE OF FAILURE TO GIVE NOTICE. — *Sandoval v. Chenoweth*, 2 Ariz. App. 553, 410 P.2d 671 (1966).

Plaintiff was injured because of the alleged negligence of insured defendant who subsequently failed to give notice of suit to his insurer as his policy required. The insurance policy was not issued to satisfy insured's proof of financial responsibility. Judgment by default was

entered against defendant and a writ of garnishment was served on defendant's insurer. The Superior Court entered summary judgment for plaintiff. On appeal, *held,* reversed. The Financial Responsibility Act should not be construed to abrogate the defense of non-fulfillment of the condition of notice on policies voluntarily obtained.

CONTRACTS — REAL ESTATE — RIGHT OF DEFAULTING BUYER TO RECOVER PURCHASE MONEY PAID TO SELLER DECLARING PREMATURE FORFEITURE. — *Kammert Brothers Enterprises Inc. v. Tanque Verde Plaza Co.*, 4 Ariz. App. 349, 420 P.2d 592 (1966).*

Plaintiff agreed to purchase realty from defendant-seller, making one payment when the contract was signed and promising to pay the balance in four annual installments. Plaintiff made no further payments, but obtained parol extensions to December 31, 1961. During December, plaintiff found another party ready, willing and able to buy the property at the contract price, and negotiated with defendant for a re-sale. No agreement in writing resulted, and no tender was made. One day premature, the escrow agent, acting on defendant's instructions, declared a forfeiture and recorded deeds reinvesting title. The Superior Court gave judgment for plaintiff for money paid and damages. On appeal, *held,* affirmed as modified. Oral extension agreements are within the Statute of Frauds; since plaintiff did not rely on them, no estoppel arises. Nevertheless, because of the requirement of unequivocal notice, defendant cannot declare a forfeiture until extensions and statutory grace period have expired, and since defendant's declaration was one day premature, plaintiff can recover money paid with interest, but cannot recover damages since he is also in default.

* Since this note has gone to the printer, the Arizona Supreme Court vacated the decision of the Court of Appeals and reinstated the Superior Court's judgment awarding damages to plaintiff for loss of bargain under a jury finding of bad faith.

CONTRACTS — STATUTE OF FRAUDS — ESCROW AGREEMENT CONTAINING ESSENTIAL TERMS OF UNSIGNED CONTRACT IS A SUFFICIENT WRITTEN MEMORANDUM OF ORAL AGREEMENT. — *T. D. Dennis Builder, Inc. v. Goff*, 101 Ariz. 211, 418 P.2d 367 (1966).

The plaintiff-seller and defendant-buyer signed an escrow agreement containing the terms of a prior unsigned land purchase contract, including the names of the parties, description of land, price, time of payment and promise to deliver instruments of conveyance. The trial court held no contract existed and rendered judgment for the plaintiff. On appeal, *held,* reversed. An escrow agreement signed by the parties containing the essential terms of a land sale contract constitutes such a sufficient written memorandum of a prior oral agreement as to take it out of the Statute of Frauds.

COURTS AND PROCEDURE

CIVIL PROCEDURE — SUPERSEDEAS BOND — COURT MUST SET AMOUNT OF BOND AND STAY EXECUTION. — *Hackin v. Superior Court,* Ariz. , 425 P.2d 420 (1967).

Petitioners had a mortgage foreclosure judgment rendered against them and date of the sheriff's sale was set. Notice of appeal was given and a cost bond posted. Acting on petitioners' request, the court fixed a supersedeas bond, but refused to stay the Sheriff's sale. On petition for writ of mandamus, *held,* granted. Since the purpose of the supersedeas bond is to stay further proceedings in the cause being appealed until the appeal has been ruled upon, the court must determine the amount of the bond *and* stay execution for a reasonable time to permit petitioners to post the bond.

CIVIL PROCEDURE — VENUE — "SHALL" EXCEPTIONS TO VENUE STATUTE HAVE PREFERENCE OVER "MAY" EXCEPTIONS. — *Massengill v. Superior Court,* 3 Ariz. App. 588, 416 P.2d 1009 (1966).

Tort action arising out of automobile accident occurring in Yuma County was brought in Maricopa County against a resident of Maricopa County and against Yuma County, its sheriff and deputy sheriff. The Yuma defendants were granted a change of venue to Yuma County. Arizona venue statutes provide that no one shall be sued outside his county of residence except that actions in the nature of trespass "may" be brought in the county of any defendant's residence, actions against counties "shall" be brought in the county being sued, and actions against public officers "shall" be brought in the county of their office. On petition for writ of certiorari, *held,* dismissed. Where defendant is within the "shall" exceptions to the venue statute, which are mandatory, a change of venue will be granted as against "may" provisions, which are permissive.

CONFLICT OF LAWS — FULL FAITH AND CREDIT — FOREIGN JUDGMENT IN CONFLICT WITH PRIOR ARIZONA JUDGMENTS NOT ENTITLED TO FULL FAITH AND CREDIT IN ARIZONA. — *Porter v. Porter,* 101 Ariz. 131, 416 P.2d 564 (1966), *cert. denied,* 87 S. Ct. 1028 (1967).*

In separate maintenance proceeding, presumption that Arizona hotel was community property was not overcome by intervening plaintiffs' contending that hotel was held by husband and wife in copartnership with plaintiffs. In satisfaction of alimony arrearage due under judgment in favor of wife, hotel was sold at sheriff's sale where wife bought husband's interest. Subsequently, wife participated in divorce

suit filed by husband in Idaho. In Idaho, a community property state, courts have no statutory authority to compel distribution of wife's separate property in divorce proceedings; however, the Idaho divorce decree found husband and wife to have community interest in hotel in copartnership with plaintiffs. Plaintiffs filed a supplemental complaint to the Arizona proceeding, but trial court refused to recognize plaintiffs' interest found by Idaho judgment. On appeal, *held*, affirmed. Idaho judgment was fatally defective and not entitled to full faith and credit in Arizona because it denied credit to the earlier Arizona judgment, which found the hotel was community property of husband and wife only, and to that judgment's execution, which resulted in hotel's becoming separate property of wife and its removal from the jurisdiction of the Idaho court.

° Noted in 9 ARIZ. L. REV. 88 (1967).

JURISDICTION — ANCILLARY PROBATE — COURT WITHOUT JURISDICTION CANNOT TRANSFER CAUSE. — *Leiby v. Superior Court*, 101 Ariz. 517, 421 P.2d 874 (1966).

Petitioner filed for ancillary probate in the Maricopa County Superior Court alleging that testator's only assets were in another county. Respondent judge ordered the action transferred to that county. On petition for writ of prohibition, *held*, writ made permanent. The statute relating to ancillary probate is jurisdictional and a petition for ancillary probate must be filed directly in the superior court of the county in which the testator has left an estate.

JURISDICTION — ATTORNEY'S FEES — COURT WITHOUT JURISDICTION TO AWARD ATTORNEY FEES AFTER VOLUNTARY DISMISSAL. — *Spring v. Spring*, 3 Ariz. App. 381, 414 P.2d 769 (1966).

Plaintiff sued for divorce after attempts failed to settle marital difficulties. The attorneys, who were originally counsel for both plaintiff and defendant, acted as plaintiff's attorneys. The suit was voluntarily dismissed. Eight days later the court entered an order for attorney's fees. On appeal, *held*, reversed. A voluntary dismissal before filing motion for summary judgment removes jurisdiction from the court so that the court was without jurisdiction to enter an order for attorney's fees in this cause.

JURISDICTION — SERVICE OF PROCESS — COURT WITHOUT JURISDICTION WHERE NONRESIDENT MOTORIST WHO HAD KNOWLEDGE OF THE SUIT IS IMPROPERLY SERVED. — *Stinson v. Johnson*, 3 Ariz. App. 320, 414 P.2d 169 (1966).

Plaintiff attempted to obtain service on a nonresident motorist by filing an alias summons and complaint with the Superintendent of Motor Vehicles, and by publication. Copies of the summons and complaint were sent to defendant's last known address but were returned stamped "moved, left no address." Plaintiff did nothing further to serve defendant, thus failing to comply with the statute. Defendant appeared in court to file a motion to dismiss. The lower court dismissed the complaint and quashed the service. On appeal, *held,* affirmed. Failure to comply with the nonresident motorist statute and rules concerning notice denies the court jurisdiction to enter judgment against defendant even though defendant had personal knowledge of the action.

CRIMINAL LAW

CRIMINAL LAW — CLOSING ARGUMENT — PROSECUTING ATTORNEY'S PREJUDICIAL REMARKS TO THE JURY GROUNDS FOR REVERSAL. — *State v. Cortez,* 101 Ariz. 214, 418 P.2d 370 (1966).

During his closing remarks to the jury, the prosecuting attorney stated: "Had this been a weak case, the court would have directed us out" in response to defense counsel's charge of sloppy police work. The trial court denied defendant's motion to strike and defendant was found guilty. On appeal, *held,* reversed. Failure to strike a prejudicial remark made without sufficient provocation may have suggested to the jury that the judge had weighed the evidence and found defendant guilty and was ground for reversal.

CRIMINAL LAW — DIRECTED VERDICTS — DEFENDANT NOT PREJUDICED WHERE DEFENSE PROCEEDS WITH CASE WHILE MOTION FOR DIRECTED VERDICT IS TAKEN UNDER ADVISEMENT. — *State v. Villegas,* 101 Ariz. 465, 420 P.2d 940 (1966).

The court, at the close of state's evidence, took defendant's motion for a directed verdict under advisement. The defense elected to proceed with its case whereupon the defendant took the stand and revealed his presence at the scene of a robbery, leading to his conviction. On appeal, *held,* affirmed. Taking a motion for directed verdict under advisement at the close of state's evidence may be reversible error, but if defendant elects to proceed with his case, such error is waived since defendant can protect himself from being forced into a premature election by refusing either to rest or to introduce evidence until the trial judge rules on the motion.

CRIMINAL LAW — INSANITY — AMNESIA AS GROUND FOR POSTPONEMENT. — *State v. McClendon*, 101 Ariz. 285, 419 P.2d 69 (1966).

Defendant suffered from amnesia to some degree from the time of the alleged murder until trial. A court-appointed psychiatrist examined defendant for an hour and found him suffering from some degree of amnesia and unable to assist in his own defense, although his examination did not indicate the exact nature or extent of defendant's condition. The Superior Court denied defendant's request for a postponement and defendant was convicted. On appeal, *held*, reversed. Evidence strongly suggesting that a defendant is unable to assist in his own defense constitutes ground for postponement of trial, and denial of a request for postponement made by a court which did not avail itself of all possible information is an abuse of its discretion and ground for reversal.

CRIMINAL LAW — MURDER — MALICE NOT PRESENT BY A SHOWING OF GROSS NEGLIGENCE IN OPERATING A MOTOR VEHICLE. — *State v. Chalmers*, 100 Ariz. 70, 411 P.2d 448 (1966).*

The defendant, while driving at a high rate of speed, crossed into the oncoming traffic lane several times forcing two vehicles off the road. Shortly thereafter the defendant collided with two other vehicles in the left lane killing two persons. The defendant was convicted on two counts of murder in the second degree. Defendant appealed contending that Arizona's manslaughter statute impliedly repeals application of the general murder statute where death results from operating a motor vehicle. On appeal, *held*, reversed. The manslaughter statute withdraws any application of the general murder statute to a death caused by a motor vehicle, unless accomplished with malice aforethought; and proof of gross negligence in the operation of a motor vehicle is insufficient.

* Noted in 8 ARIZ. L. REV. 370 (1967).

HOMICIDE — MURDER BY TORTURE — ERROR NOT TO CORRECTLY INSTRUCT JURY ON ALL ELEMENTS OF THE CRIME. — *State v. Brock*, 101 Ariz. 168, 416 P.2d 601 (1966).

After hearing deceased admit to sexual relations with another man defendant became enraged and severely beat her, causing death. The jury was instructed that where accused is charged with murder by torture, he must have intended to cause extreme suffering and death must result from the torture. On appeal, *held*, reversed. The instruction was erroneous for not including an additional element of the crime — that defendant must have acted for the purpose of persuasion or to extort a confession from decedent.

EVIDENCE

EVIDENCE — EMINENT DOMAIN — VALUE OF UTILITY AS GOING BUSINESS ADMISSIBLE TO ESTABLISH AWARD. — *City of Phoenix v. Consolidated Water Co.*, 101 Ariz. 43, 415 P.2d 866 (1966).

The plaintiff acquired defendant's water company by eminent domain. The trial court, in setting the award, included the cost of cutting and replacing certain pavement although such costs were not incurred by defendant at the time of installation. On appeal, *held*, affirmed. The cost of cutting and replacing pavement is admissible in setting the award since it is part of the utility's value as a going business.

EVIDENCE — EXPERT OPINION — PSYCHIATRIC EVIDENCE BASED ON STUDY OF CASE HISTORY ADMISSIBLE. — *State v. McGill*, 101 Ariz. 320, 419 P.2d 499 (1966).

The Superior Court refused to allow in evidence opinion testimony of a psychiatrist based partly on personal interviews with defendant and partly on defendant's case history which had been prepared by another psychiatrist. On appeal, *held*, reversed. Expert opinion testimony to defendant's mental competence, based in part on defendant's case history which was not prepared by the witness, is admissible in evidence not to show the ultimate truth of the report, but as one of the bases of the expert's conclusion of insanity.

EVIDENCE — FLIGHT — ESCAPE FROM JAIL ADMISSIBLE TO SHOW DEFENDANT'S CONSCIOUSNESS OF GUILT. — *State v. White*, 101 Ariz. 164, 416 P.2d 597 (1966).

The defendant was convicted of armed robbery. Under cross-examination prosecution's witness referred to defendant's escape from jail while awaiting trial. Defendant's motion for a mistrial, on ground that reference to a separate and unrelated offense was prejudicial, was denied. On appeal, *held*, affirmed. Evidence of defendant's escape from jail while awaiting trial is admissible as raising an inference, in connection with other circumstances, and in the absence of explanation as to reasons or motives that prompted it, that accused is guilty of the crime charged.

EVIDENCE — HEARSAY — STATEMENT MADE TO STRANGER BY RAPE VICTIM ADMISSIBLE AS PART OF THE RES GESTAE. — *State v. Owen*, 101 Ariz. 156, 416 P.2d 589 (1966).

The defendant allegedly took prosecutrix into the desert and raped

her. Prosecutrix, after wandering for one and one half hours, arrived at the home of a stranger and related the alleged incident in a disjointed manner. The trial court admitted the conversation in evidence and defendant was convicted of rape. On appeal, *held,* affirmed. Statement made by a rape victim who was still hysterical one and one half hours after the attack is admissible in evidence as part of the res gestae.

EVIDENCE — HYPOTHETICAL QUESTION — HYPOTHETICAL QUESTION MUST INCLUDE ALL RELEVANT PORTIONS OF EXPERT'S TESTIMONY. — *Schmidt v. Gibbons,* 101 Ariz. 222, 418 P.2d 378 (1966).

Plaintiff crashed into the rear of defendant's truck which was parked on the highway. A hypothetical question was allowed which put plaintiff's speed at 60 miles per hour, although there was expert testimony that the speed could have been as low as 30 miles per hour. The jury found for defendant. On petition for review, *held,* reversed. A hypothetical question is improper if it fails to include all pertinent portions of the expert's testimony.

EVIDENCE — MEDICAL TESTIMONY — EXPERT MEDICAL TESTIMONY IN MALPRACTICE SUIT NOT REQUIRED WHERE NEGLIGENCE IS GROSSLY APPARENT TO LAYMEN. — *Revels v. Pohle,* 101 Ariz. 208, 418 P.2d 364 (1966).

Plaintiff complained of pains for nine months after undergoing a hysterectomy performed by defendant doctor. Defendant prescribed pills: however, a second doctor operated after examining plaintiff, removing steel sutures from plaintiff's abdomen. The Superior Court directed a verdict for defendant. On appeal, *held,* reversed. In a malpractice suit, expert medical testimony is not required to raise a question for the jury concerning the doctor's negligence where it is so obvious that a layman would have no difficulty in recognizing it.

EVIDENCE — MEDICAL TESTIMONY — PSYCHIATRIST'S TESTIMONY ADMITTED WITHOUT RECEIPT OF EXAMINATION REPORT BY DEFENDANTS. — *Simpson v. Heidrich,* 4 Ariz. App. 232, 419 P.2d 362 (1966).

Plaintiff, a housekeeper for defendants, brought an action for personal injuries. The testimony of plaintiff's psychiatrist was admitted even though defendants, who failed to move for a court order for production of the report, were not furnished a copy. The Superior Court entered a judgment for plaintiff. On appeal, *held,* affirmed. Medical testimony is excluded by Rule 35(b) only when the doctor himself fails to make his medical report of plaintiff available after having been ordered to do so by the court.

EVIDENCE — PRIOR BAD ACTS — PRIOR BAD ACTS ADMISSIBLE WHERE DEFENDANT CLAIMS INSANITY. — *State v. Sexton*, 4 Ariz. App. 41, 417 P.2d 554 (1966).

A medical expert, who was testifying as to defendant's sanity at the time of the burglary charged, brought out prior specific acts of defendant's misconduct which were related in the course of the medical examination. Defendant was convicted of burglary. On appeal, *held*, reversed on other grounds. Rule that evidence concerning other crimes or bad acts of defendant are not admissible in evidence does not apply where the defense is insanity since any type of conduct tends to prove either defendant's sanity or insanity.

PROPERTY

REAL PROPERTY — ADVERSE POSSESSION — USE OF DRIVEWAY BY OWNER'S PREDECESSOR DOES NOT DEFEAT CLAIM BY ADVERSE POSSESSOR AGAINST OWNER. — *Wise v. Knapp*, 3 Ariz. App. 99, 412 P.2d 96 (1966).

For twenty years plaintiff-adverse possessor and defendant's predecessor had mistakenly recognized a fence as their common boundary; although it actually ran obliquely to the true boundary, cutting off a section of defendant's lot. Within this section was a driveway which both had made use of prior to defendant's purchase of the lot. Shortly after acquiring the property, defendant conducted a survey which disclosed the error. Plaintiff brought a successful quiet title suit. On appeal, *held*, affirmed as modified. Common use of the driveway prior to defendant's acquisition did not prevent plaintiff from acquiring title by his adverse possession, but for reasons of necessity such possession is subject to the use made of the driveway by defendant's predecessor.

REAL PROPERTY — CHARITABLE TRUST — TRUSTEE MAY CONVEY REALTY IN CHARITABLE TRUST WHEN COMPATIBLE WITH PURPOSE OF TRUST. — *State v. Coerver*, 100 Ariz. 135, 412 P.2d 259 (1966).

In 1885 the Board of Supervisors of Maricopa County conveyed certain land to the Directors of the Insane Asylum of Arizona "for the use and benefit of the Territory of Arizona and said asylum." In 1965 the respondents, successors of the original Directors, intended to reconvey an unused portion of the land to the county for locating a general hospital. The state brought this action to test the authority of the respondents to reconvey the land. On writ of injunction, *held*, denied. Where conveyance to Directors of state Asylum was construed as creating a charitable trust with grantee Directors and successors as trustees and the Territory of Arizona and those confined to Asylum as bene-

ficiaries, succeeding trustees could reconvey an unused portion of the trust realty to the county as a location for a general hospital, since the reconveyance was compatible with the purpose of the trust.

REAL PROPERTY — CONSTRUCTIVE TRUST — SECOND WIFE HOLDS PROCEEDS FROM SALE OF ARIZONA REALTY IN CONSTRUCTIVE TRUST PURSUANT TO VALID FOREIGN PROPERTY SETTLEMENT. — *Markel v. Phoenix Title & Trust Co.*, 100 Ariz. 53, 410 P.2d 662 (1966).

Under a property settlement incorporated in a foreign divorce decree, plaintiff-first wife received one-half interest in any proceeds resulting from the sale of certain Arizona realty owned solely by her husband. Plaintiff's husband later remarried and sold the property, indirectly through his brother, to his second wife who knew of the property settlement. After plaintiff's ex-husband died, the second wife sold the property and retained all of the proceeds. The defendant-second wife contended that she should not be a constructive trustee for plaintiff's one-half interest since the foreign decree attempted to transfer title to land located in Arizona. The trial court granted defendant's motion for summary judgment. On appeal, *held*, reversed. Where a foreign divorce decree awarded the wife a one-half interest in future proceeds realized from the sale of Arizona realty, leaving legal title thereto in the husband, and where the husband later conveyed the realty to his second wife who had notice of the decree; the foreign decree did not constitute a prohibited transfer of title to Arizona land, and the second wife held one-half of the proceeds from a subsequent sale of the realty in constructive trust for the first wife.

REAL PROPERTY — JOINT TENANCY — SURVIVORSHIP DOES NOT APPLY TO PROCEEDS REALIZED FROM SALE OF REALTY HELD IN JOINT TENANCY ABSENT CONTRARY INTENT. — *Smith v. Tang*, 100 Ariz. 196, 412 P.2d 697 (1966).*

Plaintiff's husband had purchased certain realty with his separate funds, taking the property with plaintiff in joint tenancy with right of survivorship. Plaintiff and her husband subsequently contracted to sell the property, delivering their deed to an escrow agent. The contract of sale and the escrow instructions were silent as to whether the vendors intended to hold the proceeds as joint tenants or otherwise. A down payment was made to the husband and deposited in his separate bank account. After the husband's demise, plaintiff executed and delivered a separate deed to the escrow agent, who paid the balance of the purchase price to her. Defendant, administrator of the husband's estate, moved for partial summary judgment on its counterclaim for one-half of the proceeds realized in the sale of the joint tenancy property which

was granted. On appeal, *held,* affirmed. Where spouses own realty in joint tenancy with right of survivorship, and where they execute a contract of sale and sign escrow instructions, neither of which evidence an intent to take the purchase price as joint tenants; under the doctrine of equitable conversion: the tenancy is severed, survivorship does not apply to the proceeds, and the deceased husband's estate is entitled to one-half of the sale proceeds either as a tenancy in common or as community property (the opinion does not state).

° Noted in 8 ARIZ. L. REV. 178 (1966).

WILLS — REVOCATION BY REMARRIAGE — WILL REVOKED WHERE TESTATOR ACQUIRES COMMON-LAW SPOUSE WHO IS NOT MENTIONED IN THE WILL. — *In Re Trigg's Estate,* 3 Ariz. App. 385, 414 P.2d 988 (1966).

After plaintiff divorced her husband, deceased had her sign a false marriage certificate. They were then "married" in an informal church service, living together as man and wife in a state which recognized common-law marriages. Before his "marriage" to her, deceased executed the will in question which makes no mention of the plaintiff. Plaintiff claimed the will was revoked by an Arizona statute which provides that wills made before marriage are revoked if they do not mention or provide for the surviving spouse. The Superior Court admitted the will to probate on the ground that deceased never intended the marriage to be binding. On appeal, *held,* reversed. Where a testator has participated in a marriage ceremony in a sister state which recognizes the validity of common-law marriages and lives there as husband and wife, the presumption that the marriage is valid prevails, absent other evidence; and a will executed before the marriage which does not mention the surviving spouse is revoked.

TAXATION

TAXATION — PRIVILEGE TAX — NEWSPAPER'S REVENUES DERIVED FROM NATIONAL ADVERTISING AND OUT OF CITY SALES EXEMPT FROM CITY PRIVILEGE TAX. — *City of Phoenix v. Phoenix Newspapers, Inc.,* 100 Ariz. 189, 412 P.2d 693 (1966).

Plaintiff, a Phoenix newspaper publisher, obtained revenue from national advertising and papers sold outside the corporate limits of the city. A city ordinance imposed a license tax for the privilege of carrying on business in Phoenix and included income derived from subscriptions, advertising, and notices. The trial court granted Plaintiff's motion for summary judgment to recover taxes paid under protest. On appeal, *held,* affirmed. The city privilege tax as construed includes only income

earned from activities carried on within the city and a newspaper is exempt from taxation on gross proceeds of sales derived from national advertising and the sale of newspapers outside the city limits.

TORTS

NEGLIGENCE — LIMITATION OF LIABILITY — RECOVERY FOR MENTAL ILLNESS ARISING OUT OF PHYSICAL INJURY DOES NOT INCLUDE DAMAGES FOR ATTEMPTED SUICIDE. — *Tucson Rapid Transit Co. v. Tocci,* 3 Ariz. App. 330, 414 P.2d 179 (1966).

The plaintiff, lucid, but mentally depressed, attempted suicide one month after being injured in an automobile accident. Plaintiff had a history of mental instability and previously had attempted suicide. Trial court entered judgment for the plaintiff awarding damages for injuries sustained in the suicide attempt. On appeal, *held,* remanded on issue of damages. Even if plaintiff's mental illness was caused by defendant's negligence, it is not the proximate cause of the suicide attempt absent evidence that the insane attempt resulted from an irresistible impulse, or that the insanity prevented her from realizing the nature of her act.

NEGLIGENCE — SUPERVENING CAUSE — SUPERVENING CAUSE MUST BE UNFORESEEABLE AND EXTRAORDINARY. *Serrano v. Kenneth A. Ethridge Contracting Company,* 2 Ariz. App. 473, 409 P.2d 757 (1966).

Defendant contractor negligently failed to construct and illuminate a "road closed" sign in the manner prescribed by an Arizona State Highway Commission manual. Consequently plaintiff was injured when the driver of the vehicle in which she was a passenger negligently turned to avoid the sign and drove over an embankment. After an instruction by the trial court that a supervening cause must be unforeseeable, judgment was rendered in defendant contractor's favor. On appeal, *held,* reversed. Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing the harm, although the harm is brought about through the intervention of another force (and even though the harm may be unforeseeable), the actor is liable unless that intervention is unforeseeable *and extraordinary.*

TORTS — EMPLOYER'S LIABILITY — EMPLOYER WHO SUPERVISES CONTRACTOR'S WORK AND LATER MAINTAINS EMBANKMENT IS STRICTLY LIABLE FOR DIVERSION. — *Kennecott Copper Corporation v. McDowell,* 100 Ariz. 276, 413 P.2d 749 (1966).

Plaintiff's son was killed when a bridge approach collapsed beneath

his automobile. The defendant mining company hired a contractor to make excavations near the bridge two months prior to the accident, accepted his work, and subsequently maintained the embankment. The lower court directed a verdict for defendant contractor and rendered judgment against defendant mining company. On appeal, *held,* affirmed. Where the natural course of a waterway is diverted causing a bridge approach to collapse, defendant mining company is strictly liable even though the actual excavations were made by a contractor, where the mining company supervised the excavations, accepted the construction work, and later maintained the embankment.

TORTS — LIBEL — STUDENT EDITOR'S COMMENTS CONCERNING STUDENT SENATOR WITHIN PUBLIC OFFICIAL PRIVILEGE. — *Klahr v. Winterble,* 4 Ariz. App. 158, 418 P.2d 404 (1966).

An issue of a university student newspaper contained an editorial written by defendant editor strongly criticizing and ridiculing plaintiff, a student senator, who was likened to a snake, and to Stalin, Mussolini, and Hitler. The Superior Court granted summary judgment for defendant in plaintiff's action for libel. On appeal, *held,* affirmed. Caustic criticism of student senator in campus newspaper by analogy, metaphor, and ridicule is within the privilege to freely criticize "public officials" under the *New York Times* rule.

TORTS — NEGLIGENCE — VIOLATION OF CITY ORDINANCE AS NEGLIGENCE PER SE. — *Rogers v. Mountain States Telephone and Telegraph Co.,* 100 Ariz. 154, 412 P.2d 272 (1966).

The plaintiff was injured when he fell into defendant's excavation in a parkway. Defendant had failed to obtain an excavation permit required by a city ordinance and had neglected to provide either barricades or flares to warn pedestrians. The Court of Appeals affirmed the Superior Court's granting defendant's motion for a new trial. On petition for review, *held,* reversed. Where defendant failed to obtain an excavation permit as required by a city ordinance, and the permit form contained safety requirements and the city engineer would have advised defendant as to the necessary safety factors, violation of the ordinance was negligence per se.

TORTS — WRONGFUL DEATH CLAIMS — INSURER LIABLE TO LEGAL WIFE AFTER SETTLING WITH PUTATIVE WIDOW. — *In Re Estate of Milliman,* 101 Ariz. 54, 415 P.2d 877 (1966).*

The decedent deserted his first wife and six children in a foreign state in 1956, moved to Arizona, married, and subsequently divorced a

second "wife." In 1960, in a third state, he married a third "wife." The decedent was killed in an automobile accident in 1961. Aided by the insurance company, the third "wife" was appointed administratrix of the estate and the probate court approved her settlement of the wrongful death claim. Subsequently, the first wife petitioned to set aside the probate court order approving settlement of the claim. At a hearing on the petition, there was testimony that insurer's adjuster had been informed of facts indicating that there might be other beneficiaries to the wrongful death claim. The Superior Court granted the petition. On petition for review, *held,* affirmed. Where an insurance adjuster had knowledge of facts indicating other possible beneficiaries, the insurer was not protected against liability to the party legally entitled to bring action by settlement with a person fraudulently asserting the claim.

° Noted in 9 ARIZ. L. REV. 138 (1967).

TRIAL — FINAL ARGUMENT — USE OF "MATHEMATICAL" CHART COMPUTING DAMAGES NOT ERROR PROVIDED CAUTIONARY INSTRUCTIONS GIVEN. — *O'Rielly Motor Company v. Rich,* 3 Ariz. App. 21, 411 P.2d 194 (1966).

During summation to the jury in a negligent tort action, plaintiff's counsel displayed a "How to Figure Damages" chart over the objection of opposing counsel. The chart remained in view, without further objection, throughout closing arguments and during the charge to the jury. Judgment for plaintiff. On appeal, *held,* affirmed. In view of the fact that a cautionary instruction was given to the jury and there was no claim of excessiveness of the verdict, there was no error in allowing plaintiff's counsel to use the chart during final arguments to the jury, the court not ruling on the failure to remove the chart since it was not raised at trial.