SUMMARY OF 1961 ARIZONA CASE LAW

Summary

ADMINISTRATIVE LAW AND PROCEDURE

Delegation of Power. — In a suit for a declaratory judgment entitling taxpayer to recover overpayment of taxes, the court denied that such broad authority should be delegated to the county treasurer or county in anticipation of fact situations that might or might not occur.

In *Maricopa County v. Leppla,*[1] the court admitted that the plaintiff was entitled to relief but noted that ordinarily taxes paid negligently by a taxpayer, and on which the city or county relied in budgeting its funds, are not recoverable. However, a taxpayer should not be required to meet his obligations twice, and each future case should be tried on its merits.

Administrative Procedure. — The question of a petition not timely filed was reviewed by the court in *Moody v. Van's Gila Gin Co.*[2] Held, where twenty calendar days are allowed for filing notice of protest with the Industrial Commission, and the last day fell on Sunday, a petition and an application for a rehearing filed on Monday was timely. This is not a legal extension of time, even though if the legally excluded day were counted, the actual number of days would exceed the limitation.

Review by Courts. — In *Fio Rito v. Duncan,*[3] the court held that the Superintendent of Liquor Licenses had the right to deny a liquor license to an agent for a key club because under an Arizona statute[4] a corporation may not own a liquor license. To hold otherwise would allow an ineligible person to secure a liquor license in the guise of a corporate agent.

The court, in *Jenney v. Arizona Express Inc.,*[5] decided that the denial of an application for rehearing by the Corporation Commission after such application had been denied by operation of law

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[1] 89 Ariz. 220, 360 P.2d 227 (1961); see also *Courts and Civil Procedure* and *Taxation.*

[2] 89 Ariz. 280, 361 P.2d 541 (1961); see also *Workmen's Compensation.*

[3] 89 Ariz. 385, 363 P.2d 69 (1961); see also *Private Corporations.*

[4] ARIZ. REV. STAT. ANN. §§ 4-202, 4-203(A) (1956).

[5] 89 Ariz. 343, 362 P.2d 664 (1961); see also *Courts and Civil Procedure.*

did not effect an extension of the automatic termination date. The court will follow an administrative interpretation of "effective date" since such interpretation is presumed to have been adopted by the legislature in re-enacting the statute.

The court, in *Grace v. Maricopa Bd. of Supervisors*,[6] evaluated various job classifications. In a suit brought by county hospital employees for amounts allegedly due them under minimum wage legislation, the court measured the duties of each job classification instead of relying on the job title to determine which employees were covered.

In *Beaman v. Superior Products*,[7] an action was brought by the Employment Security Commission, requiring the defendant to pay unemployment contributions. The court found that the salesmen were employees within the broad definition intended by the legislature. It is well within the legislative process to add to the common law definition of employees.

In *Kalastro v. Duncan*[8] the court reaffirmed that an agreement, providing that one party may secure a liquor license to hold it for the benefit of an undisclosed party, is invalid.[9] The court further found that the basic procedure set out by statute[10] must be followed if there is to be valid issuance of a liquor license.

Method of Review. — In *Sines v. Holden*,[11] the court held that the extraordinary remedy of mandamus to compel refund of retirement contributions is not available to a former state employee who was found guilty of a violation of a trust placed in him. The court limits this remedy to one who comes to court "with clean hands."

Unemployment Compensation. — *Employment Sec. Comm'n v. Magma Copper Co.*[12] determined that an employee, forced to retire at a certain age by the terms of a collectively bargained employment agreement, had not left work "voluntarily without good cause" and therefore may be entitled to unemployment benefits.[13]

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[6] 89 Ariz. 140, 359 P.2d 73 (1961).
[7] 89 Ariz. 119, 358 P.2d 997 (1961); see also *Agency*.
[8] 366 P.2d 684 (Ariz. 1961).
[9] 81 Ariz. 259, 304 P.2d 947 (1956).
[10] ARIZ. REV. STAT. ANN. § 4-201 (1956).
[11] 89 Ariz. 207, 360 P.2d 218 (1961); see also *Courts and Civil Procedure, Equity* and *Evidence*.
[12] 366 P.2d 84 (Ariz. 1961).
[13] ARIZ. REV. STAT. ANN. §§ 23-771 to -790 (1956).

AGENCY

Nature of the Relationship. — Beaman v. Superior Products, Inc.,[1] wherein the Employment Security Commission sought to compel the defendant to pay unemployment contributions on amounts earned as commissions by salesmen selling vacuum cleaners, held that the facts justified a determination by the commission that the salesmen were employees for purposes of the Employment Security Act.

In *Sheet Metal Workers Int'l Ass'n v. Nichols,* a conspiracy action, the court stated that one conspirator is the agent of the other and each is bound by the statements or acts of the other in execution of the conspiracy.[2]

Creation and Existence of the Relationship. — Plaintiff contended in *Daru v. Martin*[3] that he had accepted the defendant's offer to purchase land as agent for the offeree. The court held that plaintiff had failed to establish agency either by contract, by facts which might raise the implication of agency, by ratification, or by estoppel.

Duties and Liabilities of Agent and Principal. — In *Beckwith v. Clevenger Realty Co.*,[4] an action to recover a real estate commission, the agent was not allowed compensation because he had breached the duty owed his principal by disclosing to the buyer the fact that the principal wanted to sell because of poor health and would accept less than the listed price.

Fred E. Ferguson Jr.

ATTORNEY AND CLIENT

Attorney's Fees. — In *Ashton v. Ashton,*[1] the trial court did not abuse its discretion in awarding a fee to wife's attorney in an action to interpret a property settlement agreement that had been incorporated into a divorce decree.

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[1] 89 Ariz. 119, 358 P.2d 997 (1961); see also *Administrative Law and Procedure.*

[2] 89 Ariz. 187, 360 P.2d 204 (1961); 4 WIGMORE, EVIDENCE § 1079 (1940); see also *Courts and Civil Procedure, Evidence, Labor Law* and *Torts.*

[3] 89 Ariz. 373, 363 P.2d 61 (1961); RESTATEMENT (SECOND), AGENCY §§ 26, 27, 31, 319 (1958); see also *Contracts, Constitutional Law* and *Courts and Civil Procedure.*

[4] 89 Ariz. 238, 360 P.2d 596 (1961); RESTATEMENT (SECOND), AGENCY § 387 (1958); see also *Contracts, Courts and Civil Procedure* and *Real Property.*

[1] 89 Ariz. 148, 359 P.2d 400 (1961); see also *Domestic Relations.*

Conflict of Interests. — The court in *State v. Garaygordobil*[2] determined that the proper persons to raise the issue of conflict of interest are the clients of an attorney who undertakes to represent interests that may conflict. A person accused of the wrongful appropriation of public (county) funds and falsification of public records may retain the city attorney as counsel, so long as the city attorney's duties to the accused do not conflict with his duties to the city, and so long as he is not identified in the public mind as a prosecutor.

Discipline of Counsel. — The court adopted the recommendation of the Board of Governors of the State Bar in *In re Garcia*[3] to disbar respondent after finding that he accepted retainer fees for various services and then failed to file the actions for which he was retained and failed to contact the client.

Conduct of Counsel. — In *Higgins v. Arizona Savings and Loan,*[4] the court decided that it was within the trial court's jurisdiction to determine whether to advise the jury to disregard counsel's inappropriate or improper remarks or to merely sustain objections thereto. The judgment of the trial court was affirmed here, in the absence of any showing of abuse of such discretion.

But in *Colfer v. Ballentyne,*[5] a motion for a new trial was granted and affirmed because of the conduct of counsel. The court found his repeated references to evidence that had been determined inadmissible, and his unnecessary allusions to insurance improper.

Admission to Practice. — In *Application of Guberman,*[6] the court examined all circumstances and general behavior of applicant in determining that he had proved his good moral character, and that he should be admitted to the bar.

Unauthorized Practice of Law. — In *State Bar of Ariz. v. Arizona Land Title & Trust Co.,*[7] and *Lohse v. Hoffman,*[8] certain specific acts as well as certain general practices of both corporations and individuals were found to constitute the unauthorized practice of law.[9]

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[2] 89 Ariz. 161, 359 P.2d 753 (1961); see also *Evidence* and *Municipal Corporations.*
[3] 89 Ariz. 155, 359 P.2d 499 (1961).
[4] 90 Ariz. 55, 365 P.2d 476 (1961); see also *Contracts, Damages* and *Evidence.*
[5] 89 Ariz. 408, 363 P.2d 588 (1961); see also *Courts and Civil Procedure.*
[6] 90 Ariz. 27, 363 P.2d 617 (1961).
[7] 366 P.2d 1 (Ariz. 1961).
[8] *Ibid.*
[9] *Cf.* Arkansas Bar Ass'n v. Block, 323 S.W.2d 912 (Ark. 1959); 2 ARIZ. L. REV. 270 (1960).

BILLS AND NOTES

Community Liability. — The court held in *Donato v. Fishburn*[1] that when a transaction is intended by the maker to be for the benefit of the community, then the creditor is entitled to proceed against the community so long as the creditor did not agree to accept the sole obligation of the maker only and did not waive his rights against the community. The acceptance of the instrument with only the husband's signature after a request for the signature of both husband and wife was not deemed to be an agreement to accept the sole obligation of the husband, nor was it deemed a waiver of the creditor's rights against the community. As in a previous case,[2] no benefit to the community was required to make the debt a community obligation.

Conditional Payment. — A check given in exchange for a negotiable instrument is a conditional payment only unless there is an express agreement to the contrary. This rule is laid down in *Steele v. Vanderslice*[3] where the court held that a letter which stated that the checks had been received "in payment of the obligation" was not an unconditional payment if the checks were dishonored.

Drawee's Liability. — In *Valley Nat'l Bank of Phoenix v. Electrical District Number Four, Pinal County,*[4] the court held that the bank which had been negligent in detecting a signature fraud on the plaintiff's account withdrawals could not invoke estoppel as a defense in a suit to recover the moneys paid out on unauthorized checks, even though the plaintiff corporation had failed to inspect the bank's statements which would have disclosed the fraud. The bank was held liable for such checks as had been debited to the corporation's account within six months of the corporation's notice to the bank.[5]

Usury. — The court held in *Small v. Ellis*[6] that a note providing for the legal rate of interest was not rendered usurious because its acceleration clause, if invoked prior to maturity, would impose interest in excess of the legal eight percent rate.

Warren Ridge

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[1] 367 P.2d 245 (Ariz. 1961); see also *Community Property* and *Courts and Civil Procedure.*
[2] McFadden v. Watson, 51 Ariz. 110, 74 P.2d 1181 (1938).
[3] 367 P.2d 636 (Ariz. 1961); see also *Contracts, Evidence* and *Courts and Civil Procedure.*
[4] 367 P.2d 655 (Ariz. 1961); see also *Municipal Corporations.*
[5] ARIZ. REV. STAT. ANN. § 6-262 (1956).
[6] 367 P.2d 234 (Ariz. 1961); see also *Criminal Law and Procedure.*

COMMUNITY PROPERTY

Promissory Notes. — In *Donato v. Fishburn,*[1] the court held that where a husband signs a note intending to benefit the community, then such is a community obligation regardless of husband's desire that it be his separate obligation.

David K. Udall

CONSTITUTIONAL LAW

Due Process, Annexations. — The Arizona court, in deciding two cases on annexations to municipalities, *City of Phoenix v. Fehlner*[1] and *Swift v. City of Phoenix,*[2] which had been appealed as violating the constitution, held first that nonconfiscatory financial loss caused by rezoning, where the property can be reasonably used for the purpose for which zoned, is not, as a matter of law, sufficient to permit the courts to hold the zoning ordinance unconstitutional;[3] and secondly, that persons who may desire to protest the annexation have not been denied "due process" when the city fails to give them notice of annexation petitions it is holding in its possession.[4]

Due Process, Procedure. — In *Daru v. Martin*[5] the court held that the cumulative legal effect of procedural errors by the trial court will not amount to a lack of due process under the Federal Constitution, amend. 14, when it cannot be established that the court's action constituted error.[6]

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[1] 367 P.2d 245 (Ariz. 1961); see also *Bills and Notes* and *Courts and Civil Procedure.*

[1] 363 P.2d 607 (Ariz. 1961), 4 ARIZ. L. REV. (1962).

[2] 367 P.2d 791 (Ariz. 1961); see also *Courts and Civil Procedure* and *Municipal Corporations.*

[3] City of Phoenix v. Fehlner, 363 P.2d 607 (Ariz. 1961). *Accord,* Berman v. Parker, 348 U.S. 26 (1954), and City of Tucson v. Arizona Mortuary, 34 Ariz. 495, 272 Pac. 923 (1928).

[4] Swift v. City of Phoenix, 367 P.2d 791 (Ariz. 1961). The court cites 62 C.J.S. *Mun. Corps.* § 55, for the proposition that a city must only give that notice which is required of it by statute. *Cf.* City of Tucson v. Garrett, 77 Ariz. 73, 267 P.2d 717 (1954).

[5] 363 P.2d 61 (Ariz. 1961); see also *Agency, Contracts* and *Courts and Civil Procedure.*

[6] The appellant based his appeal upon these alleged errors: that he had reserved final oral argument but had failed to file his opening memorandum on time, that the court abused its power in refusing a continuance for more than two days, and that the court prejudiced him by allowing objections to certain questions. Daru v. Martin, 363 P.2d 61 (Ariz. 1961).

Due Process and Equal Protection, Criminal Law. — The court ruled, in *State v. Castano*,[7] that sentences within the statutory limits of a constitutional statute will not be considered cruel and unusual under Ariz. Const. art. 2, § 15, which provides that no cruel or unusual punishment shall be inflicted;[8] and that neither penalty provisions of the Uniform Narcotics Drug Act[9] nor the fact that others less worthy than the defendant have received less punishment constitutes a violation of due process or equal protection of the law.[10]

Religious Freedom. — In *Smith v. Smith*[11] the court reversed the trial court's decision to deny a mother the custody of her child because of her religious beliefs by relying on the United States Supreme Court holding in *West Virginia State Board of Education v. Barnette*.[12]

Interstate Commerce. — In *Union Interchange, Inc. v. Mortensen*[13] it was held that Arizona could not require a California corporation engaged in interstate commerce to comply with certain local statutory requirements.[14]

Edward L. Morgan

CONTRACTS

Acceptance of Offer. — In *Daru v. Martin*,[1] the court reiterated the well settled rule that when an offer is made to a principal through his agent, the attempted acceptance of the offer by the agent as a principal does not bind the offeror to the contract.[2] In addition, the

[7] 360 P.2d 479 (Ariz. 1961); see also *Criminal Law and Procedure.*
[8] *Cf.* State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948).
[9] See ARIZ. REV. STAT. ANN. § 36-1020 (1956).
[10] "As long as the punishment is approximately proportionate to the type of crime and not so severe as to shock the moral sense of the community, its extent is necessarily within the discretion of the legislature." State v. Taylor, 82 Ariz. 289, 294, 312 P.2d 162, 166 (1957). See generally, 15 AM. JUR. *Criminal Law* § 524.
[11] 367 P.2d 330 (1961); see also *Domestic Relations.*
[12] "The First Amendment of the Constitution of the United States provides in part that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' By the 14th Amendment the fundamental concepts embodied therein ambrace the liberties guaranteed by the First Amendment." Smith v. Smith, 367 P.2d 230, 233 (Ariz. 1961), relying on Cantwell v. State of Connecticut, 310 U.S. 296, 303 (1940).
[13] 366 P.2d 333 (Ariz. 1961); see also *Private Corporations.*
[14] ARIZ. REV. STAT. ANN. §§ 10-481, -482 (1956).

[1] 89 Ariz. 373, 363 P.2d 61 (1961); see also *Agency* and *Constitutional Law.*
[2] RESTATEMENT, CONTRACTS § 54 (1932).

court held that when the offer asks for a payment of money and a promise to lend money to the offeror interest free, the payment of money alone is not a sufficient acceptance to form a contract.[3]

Breach of Contract. — In *Beckwith v. Clevenger Realty Co.*,[4] the plaintiff was not allowed to recover a broker's commission because he breached his fiduciary relationship in revealing to the purchaser that the vendor wished to sell quickly for reasons of health.[5]

In an action between a proprietor of land and a well driller, the court in *Phelan v. Hightower*[6] found the evidence sufficient to support the conclusion that the owner had exercised his option in the contract to terminate the drilling rather than an anticipatory breach by the driller.

Defenses. — The court, in *Mason v. Hasso*,[7] distinguished an abandonment of a contract from the question of forfeiture,[8] holding that where the evidence showed the vendee had unilaterally abandoned the contract, it was no longer in full force and effect; therefore, in a subsequent quiet title action by the vendor, the question of forfeiture of the vendee's interest was not before the court. The court further stated that once the abandonment had occurred, a letter from the vendor to the vendee inquiring into the status of the contract was at most an offer of a new contract.[9]

Where the defendant denied liability on an oral contract, but offered a check in "final payment" to the plaintiff, and it was accepted and cashed by the plaintiff, the plaintiff's claim in *Rossi v. Stewart*[10] was held to be discharged by way of an accord and satisfaction.[11]

In *Mackey v. Philzona Petroleum Co.*,[12] the court held that where a fiduciary relationship exists between parties to a contract, one of the parties does not lose his right to rescind when he knows facts entitling him to rescind but retains the benefit of such contract as his own.[13] Also, in *Caldwell v. Tilford*,[14] where the vendor of land had partially performed his contract, a breach of the contract by

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[3] RESTATEMENT, CONTRACTS § 59 (1932).

[4] 89 Ariz. 238, 360 P.2d 596 (1961); see also *Agency, Courts and Civil Procedure* and *Real Property.*

[5] Haymes v. Rogers, 70 Ariz. 257, 219 P.2d 339 (1950).

[6] 89 Ariz. 242, 360 P.2d 817 (1961); see also *Courts and Civil Procedure.*

[7] 367 P.2d 1 (Ariz. 1961); see also *Real Property* and *Sales.*

[8] City of Tucson v. Koerber, 82 Ariz. 347, 313 P.2d 411 (1957); Gila Water Co. v. Green, 29 Ariz. 304, 241 Pac. 307 (1925).

[9] Fisher v. Chaffee, 49 Cal. App. 97, 121 P.2d 51 (1942).

[10] 367 P.2d 242 (Ariz. 1961); see also *Courts and Civil Procedure.*

[11] Green v. Huber, 66 Ariz. 116, 184 P.2d 662 (1947); RESTATEMENT, CONTRACTS § 420 (1932); 6 WILLISTON, CONTRACTS § 1854 (Rev. ed. 1938).

[12] 367 P.2d 632 (Ariz. 1961); see also *Courts and Civil Procedure.*

[13] Garratt v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 Pac. 1044, 1052 (1928).

[14] 367 P.2d 239 (Ariz. 1961).

refusing to furnish a gas meter to service the premises conveyed was too minor to authorize rescission[15]

Illegality. — Where the subject matter of the partnership agreement was technically in violation of the liquor statutes,[16] but the parties to the agreement were not in *pari delicto,* and the plaintiff had acted in utmost good faith,[17] the court in *Brand v. Elledge*[18] allowed an accounting and dissolution of the partnership.

In *Sulger v. Maslin,*[19] the court found that the following separate loan transactions were not usurious[20] even though the loans were made at the maximum legal rate: (1) a rental agreement allowing 10% of the rental income to the lender from the mortgaged property, a separate consideration being found for such agreement; (2) a transfer of barren land from the borrower to the lender at a nominal consideration, the entire transaction not smacking of usurious intent; and (3) a portion of the brokerage commission being given to the lender, the evidence showing that it was not exacted by the lender as a condition of the loan.[21]

Interpretation of Contract Terms. — It was held in *Dunlap v. Fort Mohave Farms, Inc.*[22] that a contract which embraces the same subject matter as an earlier contract but is inconsistent with it, will supersede the earlier one even though there is no express agreement by the contracting parties that the new contract shall have that effect.[23]

In *Holaway v. Realty Associates,*[24] an option contract was not void for indefiniteness although quantities and descriptions of land mortgaged as security on the notes were not specified in the deed, for the method of determining these items in the future was understood and agreed upon by both parties to the transaction.[25]

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[15] Cracchiolo v. Carlucci, 62 Ariz. 284, 157 P.2d 352, 355 (1945); RESTATEMENT, CONTRACTS § 275(e) (1932).

[16] ARIZ. CODE ANN. § 72-106(a) (1939) required the holder of a liquor license to be a qualified elector. This was subsequently amended to bona-fide resident. ARIZ. REV. STAT. ANN. § 4-202(A) (1956).

[17] Furman v. Furman, 178 Misc. 582, 34 N.Y.S.2d 699 (Sup. Ct. 1941); Cosden Oil & Gas Co. v. Hendrickson, 96 Okla. 206, 221 Pac. 86 (1923); 6 WILLISTON, CONTRACTS § 1789 (Rev. ed. 1938).

[18] 89 Ariz. 200, 360 P.2d 213 (1961); see also *Partnership.*

[19] 90 Ariz. 70, 365 P.2d 1113 (1961).

[20] Britz v. Kinsvater, 87 Ariz. 385, 351 P.2d 986 (1960); Seargeant v. Smith, 63 Ariz. 466, 163 P.2d 680 (1945); Blaisdell v. Steinfeld, 15 Ariz. 155, 137 Pac. 555 (1914); ARIZ. REV. STAT. ANN. § 44-1202 (1956).

[21] Great So. Life Ins. Co. v. Williams, 135 S.W.2d 241 (Tex. Civ. App. 1939); 91 C.J.S. *Usury* § 43 (1955).

[22] 89 Ariz. 387, 363 P.2d 194 (1961); see also *Real Property.*

[23] Decca Records, Inc. v. Republic Recording Co., 235 F.2d 360 (1956); RESTATEMENT, CONTRACTS § 408 (1932); 6 WILLISTON, CONTRACTS § 1826 (Rev. ed. 1938).

[24] 367 P.2d 643 (Ariz. 1961); see also *Courts and Civil Procedure* and *Equity.*

[25] Gamble v. Consol. Nat. Bank of Tucson, 33 Ariz. 117, 262 Pac. 612 (1928).

Novation. — In an action upon a note, the court in *Steele v. Vanderslice*[26] refused to find that checks given by a mortgagor to the mortgagee constituted a novation extinguishing such note where no new consideration passed to the mortgagee and there was no intention or express agreement shown between the parties to accept the check as a novation.[27]

Parol Evidence. — In *Richards Development Co. v. Sligh*,[28] where a reference to a note and mortgage in a listing agreement was made in the context of realty mortgages, such a reference was not ambiguous and parol evidence was not admissible to show that the mortgage was intended to be a chattel mortgage on furnishings.[29]

In the absence of an ambiguity in the contract, a request for reformation, or a showing of fraud in the inception of the contract, parol evidence was not admissible in *Caldwell v. Tilford*[30] to show that the vendor of realty had orally promised to construct an access road to the property sold under the contract.

However, in *Higgins v. Ariz. Savings and Loan Ass'n*,[31] on a suit for breach of a contract to make a loan, parol evidence was properly admitted to show that a written instrument was not intended to embody all the essential terms of the contract, and that a contract never came into existence because certain oral conditions were not performed.[32] Although the loan settlement agreement was signed, escrow instructions made, and a loan account book and check issued, it was properly a jury question whether an oral condition to the loan had been performed.[33]

Remedies. — In *Hassenpflug v. Hart*,[34] the court held that the failure of the trial court to grant specific performance of a land contract was not an abuse of this discretionary power, when such purchaser, although having improved the property in question and liable for the improvements, was in default on his contract and had paid no part of the purchase price the court concluded that the plaintiff had

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[26] 367 P.2d 636 (Ariz. 1961); see also *Bills and Notes, Courts and Civil Procedure* and *Evidence.*

[27] Catalina Groves, Inc. v. Oliver, 73 Ariz. 38, 236 P.2d 1022 (1951).

[28] 89 Ariz. 100, 358 P.2d 329 (1961).

[29] Diamond v. Chiate, 81 Ariz. 86, 300 P.2d 583 (1956).

[30] 367 P.2d 239 (Ariz. 1961); see also *Courts and Civil Procedure* and *Sales.*

[31] 90 Ariz. 55, 365 P.2d 476 (1961); see also *Attorney and Client, Damages* and *Evidence.*

[32] 4 WILLISTON, CONTRACTS § 631 (3d ed. 1961).

[33] Firehall v. Barringer Crater Co., 86 Ariz. 215, 222, 344 P.2d 486, 490-91 (1959).

[34] 89 Ariz. 235, 360 P.2d 481 (1961); see also *Real Property.*

gambled on the possibility of inflationary trends and did not come into equity with clean hands.

Tender of Consideration. — It was held in *Dunlap v. Fort Mohave Farms, Inc.*,[35] that a good faith tender of the purchase price of realty does not require the placing of a check in the vendor's hand when the entire effect would be wholly nugatory.[36]

Neal Kurn

COURTS AND CIVIL PROCEDURE

Federal Rules. — The Arizona Rules of Civil Procedure were adopted from the Federal Rules of Civil Procedure, and the Arizona court has stated in *Jenney v. Arizona Express, Inc.*[1] that great weight will be given to interpretations of the federal rules.

Complaints. — In an action for breach of a memorandum agreement in *Builders Finance Co. v. Holmes*[2] the complaint, which failed to allege a duty or obligation running from the defendant to the plaintiff, was subject to a motion to dismiss for failure to state a claim upon which relief can be granted.

Jurisdiction. — In *Sheet Metal Workers Int'l Ass'n v. Nichols*,[3] the superior court was found to have jurisdiction of a conspiracy action charging a labor organization with violation of the state right to work statute.[4]

In *Jenney v. Arizona Express, Inc.*,[5] it was decided that an intervenor may challenge the jurisdiction of the court.

It was held in *Arizona Securities, Inc. v. Keene*[6] that when personal service is obtained over the defendant[7] the superior court does

[35] 89 Ariz. 387, 363 P.2d 194 (1961); see also *Real Property.*
[36] Shreeve v. Greer, 65 Ariz. 35, 173 P.2d 641 (1946).

[1] 89 Ariz. 343, 362 P.2d 664 (1961); see also *Administrative Law and Procedure.*
[2] 89 Ariz. 157, 359 P.2d 751 (1961).
[3] 89 Ariz. 187, 360 P.2d 204 (1961); see also *Agency, Evidence, Labor Law* and *Torts.*
[4] ARIZ. REV. STAT. ANN. § 23-1302 (1956).
[5] 89 Ariz. 343, 362 P.2d 664 (1961); see also *Administrative Law and Procedure.*
[6] 89 Ariz. 211, 360 P.2d 221 (1961).
[7] ARIZ. R. CIV. P. 60(c) (1956).

not have jurisdiction to set aside a default judgment upon a motion made more than six months after entry of the judgment.[8]

Failure to join the principal obligor in an action against his surety[9] in *State Auto. & Cas. Underwriters v. Engler*[10] was ruled to be not jurisdictional, but procedural, and therefore can be waived.

In garnishment proceedings, service of process at the garnishee's dwelling house was held proper in *Gonzales v. Whitney*,[11] where the writ was served by a duly appointed process server, rather than by a sheriff or constable, upon the garnishee's wife rather than upon the garnishee personally.

In *Rojas v. Kimble*,[12] the court stated that in determining the jurisdictional amount in justice court, attorney's fees allowed by statute are "costs"[13] excluded from such amount, but in an action based upon an express promise for attorney's fees contained in a promissory note, the attorney's fee claim must be included. The court further said that where the justice court properly dismissed the action because the jurisdictional amount was exceeded, the superior court on appeal could not have jurisdiction though the amount involved would have been within its original jurisdiction.

Parties. — The court in *Moynahan v. Fritz*,[14] having granted an order permitting impleader, could vacate such order when the ends of justice are satisfied, and the granting of the order vacating the original order permitting impleader will be treated on appeal as if it were an original denial of a motion to implead.

Default Judgments. — In *Overson v. Martin*,[15] the court found that the trial court had abused its discretion by granting an order vacating a default judgment, for a mere showing by the defendant that he had not answered because he was busy gathering facts and figures did not constitute "good cause."[16] A further abuse of discretion in setting aside a default judgment was found in *Gonzales v. Whitney*[17] where no facts were shown to excuse the failure to answer a writ of garnishment or that there was a meritorious or substantial defense.

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[8] Personal service was held to constitute "actually personally notified" within ARIZ. R. CIV. P. 60(c) (1956).
[9] ARIZ. R. CIV. P. 17(f) (1956).
[10] 367 P.2d 665 (Ariz. 1961).
[11] 367 P.2d 668 (Ariz. 1961); see also *Creditors' Rights.*
[12] 89 Ariz. 276, 361 P.2d 403 (1961).
[13] ARIZ. CONST. art. 6, § 6; ARIZ. REV. STAT. ANN. § 22-201 (1956).
[14] 367 P.2d 199 (Ariz. 1961).
[15] 90 Ariz. 9, 363 P.2d 604 (1961).
[16] ARIZ. R. CIV. P. 55(c) (1956); 3 BARRON & HOLTZOFF, FED. PRACTICE AND PROC. § 1217 (Rules ed. 1958).
[17] 367 P.2d 668 (Ariz. 1961); see also *Creditors' Rights.*

Counterclaims. — The state's failure to assert a claim as a compulsory counterclaim prior to summary judgment was held in *Fletcher v. State*[18] to constitute a waiver of such claim and precluded the state from raising it as an independent action.

Affirmative Defenses. — In *Mackey v. Philzona Petroleum Corp.*,[19] it was found to be reversible error to allow the defendant to interrupt the presentation of plaintiff's case to establish an affirmative defense and then to compel the plaintiff to rebut that defense before the plaintiff has established his case in chief.

Amending Pleadings. — Amendments of the pleadings to make them conform to the evidence are within the discretion of the trial court and should be liberally allowed[20] and in the absence of a showing that the trial court abused its discretion, its action in accepting an amendment to the pleadings will not be disturbed on appeal.[21] Applying these rules, the court in *Beckwith v. Clevenger Realty Co.*[22] said that as the issue was testified to without objection, neither party was surprised nor prejudiced by allowing the amendment; however the court in *Caldwell v. Tilford*[23] said that leave to amend and reopen should not be granted when the offered evidence amounts to mere conclusions the plaintiff hopes will be drawn from the testimony of unnamed witnesses.

Depositions. — Where information was available and not deemed important prior to trial, a motion to quash a notice to take a deposition of a foreign witness while the trial was in progress was held properly granted in *Coyner Crop Dusters v. Marsh*[24] as the notice was not timely.

Motion to Dismiss. — In *Long. v. Arizona Portland Cement Co.*,[25] the principle was reaffirmed that the trial court should not grant a motion to dismiss unless it appears certain that the plaintiff would be entitled to no relief under any state of facts which is susceptible

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[18] 367 P.2d 272 (Ariz. 1961); ARIZ. R. CIV. P. 13(a) (1956); 1A BARRON & HOLTZOFF, FED. PRACTICE AND PROC. § 394.1 (Rules ed. 1960); see also *Real Property.*

[19] 367 P.2d 632 (Ariz. 1961); see also *Contracts.*

[20] Beckwith v. Clevenger Realty Co., 89 Ariz. 239, 360 P.2d 596 (1961); see also *Agency, Contracts* and *Real Property;* Caldwell v. Tilford, 367 P.2d 239 (Ariz. 1961); see also *Contracts* and *Sales;* Lieberman v. Brittan Hendrickson Mining Co., 367 P.2d 278 (Ariz. 1961); Puntel v. Kirtides, 89 Ariz. 361, 362 P.2d 737 (1961).

[21] Swift v. City of Phoenix, 367 P.2d 791 (Ariz. 1961); see also *Constitutional Law* and *Municipal Corporations.*

[22] 360 P.2d 596 (Ariz. 1961); see also *Agency, Contracts* and *Real Property.*

[23] 367 P.2d 239 (Ariz. 1961); see also *Contracts* and *Sales.*

[24] 367 P.2d 208 (Ariz. 1961); see also *Evidence* and *Torts.*

[25] 89 Ariz. 366, 362 P.2d 741 (1961).

of proof under the claim as stated. The court in the *Long* case[26] further stated that a general allegation of "conspiracy" although a legal conclusion does not make the complaint subject to a motion to dismiss.

Trials. — Although the Arizona Rule of Civil Procedure 51(c) (1956) provides that the party having under the pleadings the burden of proof on the whole case shall be entitled to open and close the argument, the court in *Daru v. Martin*[27] stated that this rule applies only to jury trials, and the court, in a non-jury trial, found that the plaintiff's failure to present oral argument, not being due to the trial court's neglect, denial, or refusal, was not so prejudicial as to require a reversal of the judgment.

Instructions. — The prime function of a jury instruction as stated in *Coyner Crop Dusters v. Marsh*[28] is to advise the jury of the applicable law in terms and form that the jury can understand, and the test of the instruction on appeal is whether, considering the instruction as a whole, the jury will gather the proper rules to be applied in arriving at a correct result.

It would be error for the trial court to instruct on a theory where there is no evidence to support it, but the trial court should not refuse to instruct on any theory which is supported by substantial evidence.[29]

Elliott v. Landon[30] held that it was not reversible error for the trial court, in its discretion, to refuse to instruct as to uncontroverted facts, but that when the jury has been given correct instructions, it is presumed that the jury correctly applied them.

A party contending that the trial court erred in giving a jury instruction intended to be and in fact marked "refused," waived his right to claim error on appeal by failing to advise the trial judge of the inadvertent mistake.[31]

In *Terzis v. Miles*[32] the court approved a jury instruction which stated that the plaintiff's act of crossing against a red traffic signal was negligence per se,[33] so long as the jury was allowed to decide whether such act amounted to contributory negligence.[34]

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[26] *Ibid.*

[27] 89 Ariz. 373, 363 P.2d 61 (1961); see also *Agency, Constitutional Law* and *Contracts.*

[28] 367 P.2d 208 (Ariz. 1961); see also *Evidence* and *Torts.*

[29] *Ibid.*

[30] 89 Ariz. 335, 362 P.2d 733 (1961).

[31] Coyner Crop Dusters v. Marsh, 367 P.2d 208 (Ariz. 1961); ARIZ. R. CIV. P 51(a) (1956); 2B BARRON & HOLTZOFF, FED. PRACTICE AND PROC. § 1104 (Rules ed. 1961); see also *Evidence* and *Torts.*

[32] 366 P.2d 683 (Ariz. 1961).

[33] See Wolfswinkel v. Southern Pac. Co., 82 Ariz. 33, 307 P.2d 1040 (1957).

[34] Although not mentioned by the court, this holding involves a consideration of ARIZ. CONST. art. 18, § 5.

Juries. — Where the jury verdict is only advisory, the finding of the trial court contrary to the jury's verdict determines the judgment and on appeal the trial court's determination will be assumed to be correct.[35]

Directed Verdicts. — In *Costello v. Wood*,[36] it was stated that the trial court is justified in directing a verdict only where the evidence is insufficient to support a contrary verdict or so weak that a court would feel constrained to set aside such a verdict on a motion for a new trial, and in *Steel v. Vanderslice*,[37] this rule was applied in an action on a negotiable instrument.

As stated in *Mutz v. Lucero*,[38] the defendant's motion for a directed verdict admits the truth of whatever competent evidence the plaintiff has introduced, including all inferences that can reasonably be drawn therefrom, and requires that the evidence be interpreted most strongly against the moving party.

A motion for a directed verdict was held not to be an effective substitute for an objection to the evidence in *City of Phoenix v. Williams*.[39]

When a logical inference, rather than mere speculation, may be drawn from the evidence, and when such an inference supports the plaintiff's allegations, a question is presented for the jury; therefore the granting of a directed verdict was held to be error in *Petty v. Butane Corp.*[40]

In *Puntel v. Kirtides*[41] the court noted that the modern trend is to render justice upon the merits of the controversy rather than to defeat justice upon technicalities, and held that the trial court erred in granting a directed verdict for the defendant after denying plaintiff's motion to amend and reopen his case.

Declaratory Judgments. — In an action brought to recover taxes mistakenly paid and for a declaratory judgment, the court in *Maricopa County v. Leppla*,[42] after holding that the plaintiff could recover the taxes, stated that a declaratory judgment should not be granted in anticipation of a fact situation that might or might not develop.

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[35] Merryweather v. Pendleton, 367 P.2d 251 (Ariz. 1961); see also *Creditors' Rights* and *Sales;* ARIZ. R. CIV. P. 39(1) (1956).

[36] 89 Ariz. 270, 361 P.2d 10 (1961); see also Campbell v. Brinson, 89 Ariz. 197, 360 P.2d 211 (1961).

[37] 367 P.2d 636 (Ariz. 1961); see also *Bills and Notes, Contracts* and *Evidence.*

[38] 90 Ariz. 38, 365 P.2d 49 (1961); see also *Evidence* and *Torts.*

[39] 89 Ariz. 299, 361 P.2d 651 (1961); see also *Municipal Corporations.*

[40] 89 Ariz. 358, 362 P.2d 735 (1961).

[41] 89 Ariz. 361, 362 P.2d 737 (1961).

[42] 89 Ariz. 220, 369 P.2d 227 (1961); see also *Administrative Law and Procedure* and *Taxation.*

Verdicts. — Where the jury, which had only the damage issue, returned a verdict in less than 40 minutes, the court in *Moore v. Menges*[43] held the record failed to show that the verdict was excessive or the result of passion and prejudice.

In *Costello v. Wood*,[44] on an appeal by the defendant, a verdict for the plaintiff in an amount less than that instructed was held not prejudicial to the defendant where no motion was made for correction of the verdict.

Waiver of Defenses. — In *State Auto. & Cas. Underwriters v. Engler*,[45] the court held that on a motion for summary judgment, the failure of the defendant to urge the defense that the complaint failed to state a claim upon which the relief could be granted waived the defense.

New Trials. — *Daru v Martin*[46] stated that the granting of a new trial by a successor to the judge who tried the case is discretionary, and that he need not go further than the record and judgment to exercise his discretion.

It was not an abuse of discretion to grant the defendant's motion for a new trial in *Colfer v. Ballantyne*,[47] on the ground of misconduct of the counsel. Further, the fact that motions for mistrial as to specific matters had been denied did not prevent the same matters from being urged, on a motion for a new trial, as part of the overall cumulative effect of the alleged improper conduct of the counsel.

In *Caldwell v. Tremper*,[48] the failure of the defendant to file a petition in the supreme court to require the trial judge to specify with particularity the grounds on which a new trial was granted waived this right.[49] The court further stated that it is the right and the duty of the trial court to set aside a jury verdict when it is contrary to the weight of the evidence.

Appeals from Justice Court. — In *Horne v. Superior Court*,[50] it was held that on the defendant's appeal from a default judgment en-

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[43] 89 Ariz. 268, 361 P.2d 9 (1961).
[44] 89 Ariz. 270, 361 P.2d 10 (1961).
[45] 367 P.2d 665 (Ariz. 1961).
[46] 89 Ariz. 373, 363 P.2d 61 (1961); see also *Agency, Constitutional Law* and *Contracts.*
[47] 89 Ariz. 408, 363 P.2d 588 (1961); see also *Attorney and Client.*
[48] 367 P.2d 266 (Ariz. 1961).
[49] ARIZ. R. CIV. P. 59(m) (1956).
[50] 89 Ariz. 289, 361 P.2d 547 (1961); see also Rojas v. Kimble, 89 Ariz. 276, 361 P.2d 403 (1961).

tered in the justice court, even though the defendant had not moved to set aside the default judgment, the superior court erred in striking the defendant's answer and counterclaim because the defendant was entitled to a trial de novo on such appeal.

Review of Evidence. — In a number of decisions the court reiterated the familiar rules that on appeal the court will not substitute its own opinion for that of the trial court,[51] but will take the evidence in the strongest manner in favor of sustaining the judgment,[52] and when there is any reasonable evidence to support it, the judgment will not be disturbed.[53]

Appeals. — In *Stevens v. Mehagian's Home Furnishings, Inc.*,[54] where a motion for summary judgment was granted as to the complaint, the court held that no appeal would lie from this judgment absent the court complying with the Arizona Rule of Civil Procedure 54(b) (1956)[55] while proceedings of a crossclaim were still pending. Other matters, such as an order granting a motion to dismiss where a judgment of dismissal was not entered,[56] and an order denying a motion to implead third party defendants,[57] were held unappealable as interlocutory orders.

In *Middleton Restaurant Enterprises v. Tovrea Land & Cattle Co.*,[58] and *Skousen v. Nidy*,[59] it was stated that where no argument

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[51] Bonine v. Bonine, 367 P.2d 664 (Ariz. 1961); see also *Domestic Relations* and *Evidence;* Daru v. Martin, 89 Ariz. 373, 363 P.2d 61 (1961); see also *Agency, Constitutional Law* and *Contracts;* Halaway v. Realty Associates, 367 P.2d 643 (Ariz. 1961); see also *Contracts, Equity* and *Sales;* Merryweather v. Pendleton, 367 P.2d 251 (Ariz. 1961); see also *Creditors' Rights* and *Sales;* Patzman v. Marshall, 90 Ariz. 1, 363 P.2d 599 (1961); Rossi v. Stewart, 367 P.2d 242 (Ariz. 1961); see also *Contracts.*

[52] Bonine v. Bonine, *supra* note 46; Daru v. Martin, *supra* note 46; McNelis v. Bruce, 367 P.2d 625 (Ariz. 1961); see also *Creditors' Rights* and *Damages;* Patzman v. Marshall, *supra* note 46; Rossi v. Stewart, *supra* note 46.

[53] Bonine v. Bonine, 367 P.2d 664 (Ariz. 1961); see also *Domestic Relations* and *Evidence;* Caldwell v. Tremper, 367 P.2d 266 (Ariz. 1961); Daru v. Martin, 89 Ariz. 373, 363 P.2d 61 (1961); see also *Agency, Constitutional Law* and *Contracts;* Donato v. Fishburn, 367 P.2d 245 (Ariz. 1961); see also *Bills and Notes;* Halaway v. Realty Associates, 367 P.2d 642 (Ariz. 1961); see also *Contracts, Equity and Sales;* Patzman v. Marshall, 90 Ariz. 1, 363 P.2d 599 (1961); Phelan v. Hightower, 89 Ariz. 242, 360 P.2d 817 (1961); see also *Contracts;* Rossi v. Stewart, 367 P.2d 245 (Ariz. 1961); see also *Contracts.*

[54] 90 Ariz. 42, 365 P.2d 208 (1961).

[55] ARIZ. R. CIV. P. 54(b) (1956) requires "an express determination that there is no just reason for delay and an express direction for entry of judgment" before one or more but less than all the claims may be appealable; 3 BARRON & HOLTZOFF, FED. PRACTICE AND PROC. § 1193 (Rules ed. 1958).

[56] Butler v. San Sant, 90 Ariz. 46, 365 P.2d 210 (1961).

[57] Moynahan v. Fritz, 367 P.2d 199 (Ariz. 1961).

[58] 89 Ariz. 316, 361 P.2d 930 (1961).

[59] 367 P.2d 248 (Ariz. 1961); see also *Damages, Evidence* and *Torts.*

or authority is presented in support of an assignment of error, it is considered abandoned, and where the appellee failed to file an answering brief, it was held in *Steves Bros. Constr. Co. v. Lipinski*[60] that such failure will be assumed to be a confession of reversible error. Also, in *Butler v. Van Sant*,[61] an appeal was dismissed where the appellant failed to set forth any assignments of error.

In *Overson v. Martin*,[62] on a petition to dismiss an appeal on which an opinion had previously been rendered,[63] the court held that as the petition was filed after the time for a motion for rehearing, the court would not consider the petition.[64]

The statutory period of thirty days for notice of appeal, as provided in the Arizona Revised Statute § 40-254 (1956) was held to be extended as provided in the Arizona Rule of Civil Procedure 73(b) (1956) to commence from the date of entry of an order denying the motion for a new trial in *Jenney v. Arizona Express, Inc.*[65]

In *Kerr-McGee Oil Indus., Inc. v. McCray*,[66] where the appellant designated the entire record without specification of the portion of the record desired as contemplated by the rules,[67] the court said that without a showing of prejudice, it will not require a more literal compliance.

When considering an appeal from a judgment entered on a general verdict, the court in *Elliott v. Landon*[68] stated that it would be assumed that the jury passed on every material issue necessary to reach the verdict.

The familiar rule of stare decisis, that past decisions should be given great weight and adhered to unless reasons for them have ceased to exist or they are clearly wrong, was reaffirmed in *White v. Bateman*.[69]

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[60] 89 Ariz. 401, 363 P.2d 584 (1961).
[61] 90 Ariz. 46, 365 P.2d 210 (1961).
[62] 367 P.2d 203 (Ariz. 1961).
[63] In the first Overson v. Martin decision, 90 Ariz. 9, 363 P.2d 604 (1961), the supreme court set aside the trial court order granting a motion by the defendants to set aside their default and reinstated the entry of default.
[64] The plaintiff's petition raised the question of the appealability of the order setting aside the entry of default. To this the court noted that if it was not an appealable order, the inadvertent acceptance of the appeal would not bar the court from refusing subsequent appeals in other cases involving the same question. 367 P.2d at 205.
[65] 89 Ariz. 147, 359 P.2d 78 (1961); see also *Administrative Law and Procedure.*
[66] 89 Ariz. 307, 361 P.2d 734 (1961); see also *Creditors' Rights* and *Real Property.*
[67] ARIZ. R. CIV. P. 75(a) (1956).
[68] 89 Ariz. 335, 362 P.2d 733 (1961).
[69] 89 Ariz. 110, 358 P.2d 712 (1961); see also *Elections.*

The supreme court will only declare an award of damages excessive when from the facts the amount at first blush suggests passion or prejudice of the jury.[70]

Original Writs. — In *Emery v. Superior Court*,[71] where the alternative writ of mandamus was void for failure to set out a claim upon which relief could be granted, the peremptory writ of mandamus, amended after the lower court had been divested of jurisdiction by the filing of this appeal, and based upon the alternative writ, was void for lack of foundation. The court further stated that prohibition was the proper remedy to halt enforcement of the void peremptory writ.

On an action of mandamus in *Sines v. Holden*,[72] the court held that the granting of the writ is discretionary and would be withheld when sought by one with unclean hands.

In *Board of Supervisors v. Traficanti*,[73] where the superior court found the petitioners in contempt for failure to comply with a law which was subsequently amended, the question of compliance with the original law was moot and a writ of prohibition would not issue.

Stipulations. — *Stewart v. Stevens*[74] held that any procedural irregularities which arose from the transferral of a case from the court commissioner to a superior court judge, were cured by stipulation of counsel to the transfer the case.

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CREDITORS' RIGHTS

Mechanic's and Materialmen's Liens. — In *Kerr-McGee Oil Industries, Inc. v. McCray*[1] a contractor who placed machinery upon premises on a "stand-by" status, use of which was contemplated at

[70] Skousen v. Nidy, 367 P.2d 248 (Ariz. 1961); see also *Damages, Evidence* and *Torts.*

[71] 89 Ariz. 246, 360 P.2d 1025 (1961).

[72] 89 Ariz. 207, 360 P.2d 218 (1961); see also *Administrative Law and Procedure, Evidence* and *Equity.*

[73] 89 Ariz. 306, 361 P.2d 733 (1961).

[74] 366 P.2d 84 (Ariz. 1961).

[1] 89 Ariz. 307, 361 P.2d 734 (1961); see Hulsey v. LaMance, 73 Ariz. 430, 242 P.2d 554 (1952); ARIZ. REV. STAT. ANN. § 33-981(A) (1956); see also *Courts and Civil Procedure* and *Real Property.*

a later time, was not entitled to a mechanic's or materialmen's lien for the value of its use during that period.

The court held also that for purposes of filing a materialmen's lien for use of mining machinery furnished under contract, work is completed when the contract is terminated even though the well is not then completed.[2]

In *Rackers v. Nicholson*[3] a mechanic's and materialmen's lien on a bankrupt's property could not be foreclosed in a state court when the property was sold free and clear of all liens by order of the bankruptcy court, when the lien holder was subject to the jurisdiction of the bankruptcy court and had notice of the order directing such sale but no notice of the confirmation of sale.

Judgment Lien. — *McClanahan v. Hawkins*[4] held that a divorce decree awarding periodic support payments to the wife does not become a lien upon real property of the husband when recorded except as to previously determined attorney's fees.

Garnishment. — *Gonzales v. Whitney*[5] involved a garnishment proceeding in which the garnishee contended that garnishment statutes required service of the writ by the sheriff or constable[6] directly upon the garnishee.[7] It was held that a writ of garnishment may be served by a specially appointed process server,[8] and that service may be made by leaving a copy of the writ at garnishee's residence with a person of suitable age and discretion.[9]

McNellis v. Bruce[10] held that periodic payments to become due under a property settlement agreement entered into as a substitute for the wife's rights in the community estate were debts subject to garnishment.

Chattel Mortgage and Pledge. — In *Merryweather v. Pendleton*,[11] where the vendor of stocks with an option to repurchase brought an action to establish an equitable mortgage or a pledge, the court, by a three to two vote, held the facts supported a finding that the transaction was not intended to be such. *Fred E. Ferguson Jr.*

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[2] Kerr-McGee Oil Industries, Inc. v. McCray, 89 Ariz. 307, 361 P.2d 734 (1961); see Arizona E.R.R. Co. v. Globe Hardware Co., 14 Ariz. 397, 129 Pac. 1104 (1913).

[3] 89 Ariz. 397, 363 P.2d 581 (1961); see 6 REMINGTON, BANKRUPTCY § 2577 (1952).

[4] 367 P.2d 196 (Ariz. 1961); see also ARIZ. REV. STAT. ANN. § 25-318(B) (1956); see also *Domestic Relations* and *Real Property.*

[5] 367 P.2d 668 (Ariz. 1961); *see also Courts and Civil Procedure.*

[6] ARIZ. REV. STAT. ANN. § 12-1577(B) (1956).

[7] ARIZ. REV. STAT. ANN. § 12-1577(B) (1956).

[8] ARIZ. R. CIV. P. 4(c).

[9] ARIZ. R. CIV. P. 4(d).

[10] 367 P.2d 625 (Ariz. 1961); see also *Damages, Domestic Relations* and *Courts and Civil Procedure.*

[11] 367 P.2d 251 (Ariz. 1961); Britz v. Kinsvater, 87 Ariz. 385, 351 P.2d 986 (1960); ARIZ. REV. STAT. ANN. § 33-702 (1956); see also *Courts and Civil Procedure* and *Sales.*

CRIMINAL LAW AND PROCEDURE

Indictment and Information. — Defendant, in *State v. Navarro*,[1] by failing to file notice of hearing on his motion to quash information in accordance with the local rule waived any right to a hearing of said motion.[2]

Pre-Trial. — In *State v. Superior Court*,[3] the superior court judge ordered the prosecution to produce a medical report of the results of a balloon and blood alcohol test which had been submitted to the defendant immediately after being arrested. The supreme court held that the trial court has a residuum of inherent power, notwithstanding the limitation of Rule 195,[4] to order production and inspection when such is essential to the due administration of justice.

In an action for wrongfully appropriating money and falsifying public records, *State v. Garaygordobil*,[5] the court stated that it was defendant's right to refrain from testifying at any hearing and the trial court committed reversible error in permitting the prosecution to ask the defendant, on cross-examination, why he declined to testify at the preliminary examination.[6]

Jury. — Where the court granted a mistrial of a rape prosecution because of a remark by a prospective juror that the defendant had attacked her daughter several years ago, the case of *State v. Hilliard*[7] decided that the defendant was not denied a fair and impartial trial by the court's refusal to vacate the trial setting so that the defendant might be tried by a later venire. A defendant is not entitled to be tried by a particular jury, but only by one which is fair and impartital.[8]

Evidence. — Clothes, identified as belonging to a third party, were found in decedent's room and the state contended that these were placed in decedent's room by the defendant to make it appear that the defendant had not killed the deceased. The court in *State v. Loftis*[9] held that these items were relevant and admissible as form-

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[1] 367 P.2d 227 (Ariz. 1961); see also *Evidence.*
[2] ARIZ. R. CRIM. P. 172, 365; Rule VIII of the Superior Court of Pima County.
[3] 367 P.2d 6 (Ariz. 1961); see ARIZ. REV. STAT. ANN. § 28-692(3) (Supp. 1961). 1961).
[4] ARIZ. R. CRIM P. 195.
[5] 89 Ariz. 161, 359 P.2d 753 (1961); see also *Attorney and Client, Evidence* and *Municipal Corporations.*
[6] ARIZ. REV. STAT. ANN. § 13-163 (1956); ARIZ. CONST. art. 2, § 10; ARIZ. R. CRIM. P. 24.
[7] 89 Ariz. 129, 359 P.2d 66 (1961).
[8] ARIZ. CONST. art. 2, § 24.
[9] 89 Ariz. 403, 363 P.2d 585 (1961); see also *Evidence.*

ing a link in the circumstantial chain of evidence connecting the defendant with the crime charged.

In a murder prosecution, *State v. Preis*,[10] the court ruled that when a confession is offered and objected to by the defendant, the state must lay a prima facie foundation by showing that the confession was freely and voluntarily made, and the defendant must be given the opportunity in the absence of a jury to show that such was not so made. If the trial court concludes that it was voluntarily made, or there is conflict thereon, it must admit confession, and then submit it to the jury under proper instructions.[11]

In *State v. Robinson*,[12] photographs of a deceased body were admissible to identify the deceased, to show the location of the mortal wounds, to illustrate how the murder was committed and to aid the jury in understanding the testimony.

In a trial for issuing a check on insufficient funds, *State v. Daymus*,[13] the drawee bank's "rejected check" record and group of checks written by the defendant and returned for insufficient funds which showed a continuing pattern whereby checks were drawn by him without sufficient funds were admissible even though some of the items occurred subsequent to the check forming the basis of the prosecution.[14]

Following the well settled rule in this state,[15] the court in *State v. Harvill*,[16] said that the use of a prior felony conviction for impeachment of the defendant is allowed, even though the prior conviction is unrelated in time, place or character of offense charged in the information, unless it is so remote that it cannot reasonably cast reflection upon the defendant's credibility.

Witnesses. — The court affirmed in *State v. Hilliard*[17] that the state may inquire of a defendant when he is a witness, if he was previously convicted of a felony, and in case of an affirmative answer, he may be asked the number of such convictions, names and nature of the crime and places where they were committed.

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[10] 89 Ariz. 336, 362 P.2d 660 (1961); see also *Evidence.*

[11] See UDALL, ARIZONA LAW OF EVIDENCE, § 100 (1960). Many states take the view that a confession is prima facie involuntary and that the state has the burden of proof, while others place the burden on the defendant, asserting that, like any utterance, a confession is prima facie voluntary.

[12] 89 Ariz. 224, 360 P.2d 474 (1961); see also *Courts and Civil Procedure* and *Evidence.*

[13] 367 P.2d 647 (Ariz. 1961); see also *Evidence.*

[14] ARIZ. REV. STAT. ANN. § 13-316(a)(b) (1956).

[15] Sibley v. Jeffreys, 76 Ariz. 340, 345, 264 P.2d 831, 833 (1953).

[16] 89 Ariz. 340, 362 P.2d 663 (1961); see also *Evidence.*

[17] 89 Ariz. 129, 359 P.2d 66 (1961); see also *Evidence;* UDALL, ARIZONA LAW OF EVIDENCE, § 65 (1960).

In accord with former decisions in this state,[18] the court in *State v. Vidalez*,[19] held that the jury is entitled to be apprised of any bias, prejudice or hostility which a particular witness may feel toward a party to a lawsuit or the prosecution in order that the jury may better be able to evaluate the witness's testimony.

Burden of Proof. — As stated in *State v. Daymus*,[20] if the defendant charged with issuing a check on insufficient funds believed that there were sufficient funds or credit to pay the check, it was his obligation to bring forward affirmative evidence to rebut the contrary inference raised by the state's evidence and such obligation in no way altered the burden of the state or the presumption of innocence.

Presumptions. — The jury in *State v. Preis*[21] was instructed that the presumption of intent to kill or do other great bodily harm was a proper presumption to draw from the use of a deadly weapon. However, it was pointed out that this presumption is not one of law and is to be drawn by the jury as a matter of fact and that it is a presumption of fact permitting the jury to find intent from the use of a deadly weapon. A "presumption of fact" is nothing more than a prima facie inference shifting the burden of going forward with the evidence to the defendant to prove circumstances of mitigation or circumstances that justify or excuse the killing, unless the state's proof does not amount to murder.[22]

Intent. — Is intent an essential element of usury? This question was recently answered in the affirmative by the supreme court in *Small v. Ellis*,[23] in which the court said that it was committed by its decision to the position that intent is an essential element of usury although such intent may be inferred from the doing of what is forbidden.[24]

False Pretenses. — In a trial for issuing a check on insufficient funds, the court in *State v. Daymus*[25] stated that while there is no presumption, as a matter of law, that the depositor knows the status of his checking account, once there is evidence to support the finding that the defendant issued the check and that there were insufficient funds for credit, as a natural and rational inference therefrom, the

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[18] State v. Rothe, 74 Ariz. 382, 249 P.2d 946 (1952).
[19] 89 Ariz. 215, 360 P.2d 224 (1961); see also *Evidence.*
[20] 367 P.2d 647 (Ariz. 1961); see also *Evidence.*
[21] 89 Ariz. 336, 362 P.2d 660 (1961); see also *Evidence.*
[22] ARIZ. REV. STAT. ANN. § 13-454 (1956).
[23] 367 P.2d 234 (Ariz. 1961); see also *Bills and Notes.*
[24] Blaisdell v. Steinfeld, 15 Ariz. 155, 137 Pac. 555 (1914).
[25] 367 P.2d 647 (Ariz. 1961); see also *Evidence.*

jury may conclude there was knowledge of the insufficiency and intent to defraud.[26] The making and delivery of the check amounted to a representation that it was good.

Corpus Delicti. — *State v. Navarro*[27] was a case of first impression in Arizona involving the first conviction obtained under Ariz. Rev. Stat. Ann. § 13-611(6) (1956).[28] The court stated the rule that the corpus delicti in a rape case is the fact that the complaining witness has been ravished against her will, and the complaining witness' testimony of such fact is adequate independent proof to permit the state to use the defendant's confession. A conviction may be had on the testimony of the prosecuting witness alone, and the truth of her story is for the jury, unless her testimony is of a nature which is incredible or unreasonable.

Instructions. — In a murder prosecution, *State v. Preis*,[29] the refusal of a requested instruction to the effect that if the defendant was acting under an uncontrollable impulse he was not criminally responsible was not error where the court in substance gave the "M'Naghten Rule" as the test to apply.[30]

The instruction that the right of self-defense is not available to a person who sought a quarrel with the design to force a deadly issue and thus through his fault creates a real or apparent necessity for making a felonious assault was held in *State v. Robinson*[31] to be a proper and correct statement of the law as authorized by the evidence.

In overruling *State v. Colvin*,[32] the court in *State v. Simmering*[33]

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[26] ARIZ. REV. STAT. ANN. § 13-316(a)(b) (1956); State v. Campbell, 70 Idaho 408, 219 P.2d 956 (1950).

[27] 367 P.2d 227 (Ariz. 1961); see also *Evidence*.

[28] ARIZ. REV. STAT. ANN. § 13-316(6) (1956): "Where the female submits under a belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense or concealment practiced by the accused with intent to induce such belief."

[29] 89 Ariz. 336, 362 P.2d 660 (1961); see also *Evidence*.

[30] "M'Naghten Rule" is that if at the time the accused committed the act he was laboring under such a defect of reason from disease he did not know it, that he did not know that he was doing what was wrong, accused is incapable of committing crime." People v. Nash, 52 Cal. 2d 36, 338 P.2d 416, 417 (1959). In giving this instruction the trial court followed the approved method in this jurisdiction for testing the criminal responsibility when insanity is raised as a defense. State v. Crose, 88 Ariz. 389, 357 P.2d 136 (1960).

[31] 89 Ariz. 224, 360 P.2d 474 (1961); see also *Evidence*.

[32] 81 Ariz. 400, 307 P.2d 106 (1957).

[33] 89 Ariz. 261, 361 P.2d 4 (1961); State v. Simmering, 89 Ariz. 261, 265, 361 P.2d 4, 7 (1961): "The defendant by raising the defense of alibi thus made the time of the commission of the crime a material issue in the case. There was no foundation upon which the jury could have found that the crime occurred at any other time. Under the disputed instruction it was possible for the jury to believe the alibi and yet find the defendant guilty." (dissenting opinion)

ruled that although all of the state's evidence positively fixed the day of the charged forgery, to which the defendant imposed the defense of alibi, the giving of the instruction that the state was not required to prove forgery on the exact day charged was not reversible error where it was followed by an alibi instruction.[34]

Sentence. — On appeal from a sentence for illegal possession of narcotics, the court in *State v. Castano*,[35] said that a penalty within limits of a statute[36] is entirely within the sound discretion of the trial judge, and will not be modified unless it clearly appears that the sentence is excessive, resulting in an abuse of discretion.

In *State v. Robinson*,[37] the court decided that it was discretionary with the jury to determine the punishment where the defendant had been found guilty of first degree murder and unless the record showed that such discretion was abused or the decision was capricious or arbitrary the sentence must stand.[38] The court in this case also stated that whether an application for change of venue should be granted is largely discretionary with the trial court.

The trial court in *State v. Loftis*[39] did not abuse its discretion when it rejected a motion to recall a witness for the state, for further cross-examination, where the defendant made no offer of proof although requested to do so, except as to the fact that the witness was confined in the county jail at the time of the trial.

Double Jeopardy. — *State v. Morales*[40] established that the defense of double jeopardy may be waived and may not be raised for the first time in a collateral proceeding, and reiterated that a writ of habeas corpus cannot operate as a writ of review.[41]

Carl E. Hazlett

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[34] ARIZ. R. CRIM. P. 118.
[35] 89 Ariz. 231, 360 P.2d 479 (1961); see also *Constitutional Law* and *Courts and Civil Procedure.*
[36] ARIZ. REV. STAT. ANN. §§ 36-1020, 13-1717(b) (1956).
[37] 89 Ariz. 224, 360 P.2d 474 (1961); see also *Evidence.*
[38] ARIZ. REV. STAT. ANN. §§ 13-453, 13-1717 (1956).
[39] 89 Ariz. 403, 363 P.2d 585 (1961); see also *Evidence.*
[40] 90 Ariz. 11, 363 P.2d 606 (1961).
[41] See State v. Henderson, 34 Ariz. 430, 272 Pac. 97, 98 (1928).

DAMAGES

Measure of Damages. — In *Higgins v. Arizona Savings and Loan Ass'n*[1] the court reiterated the rule of *Hadley v. Baxendale*,[2] and allowed testimony that an employee lacked knowledge of probable loss of the property through foreclosure in the event that a loan was refused.

The measure of damages for wrongful eviction in *San Manuel Copper Corp. v. Farrell*[3] was actual or market value of the unexpired term as of time eviction, plus whatever other loss lessee may have incurred as a direct and natural consequence of wrongful eviction, less the agreed rent. The value of labor performed in preparing land for crops was an element of the value of the remainder of the term of the lease and should not have been included in instructions covering losses incurred.

In *Parker v. State*[4] the court would not as a matter of law hold that damages for eminent domain should have been greater than the amount given. The price paid for the land was not an element of damages where there were marked fluctuations in the value of the property.

Mental Suffering. — In an action for injuries resulting from indecent assault, the court held in *Skouson v. Nidy*[5] that mental suffering, including shame from the indignities of the act, was an injury for which damages could be given, and the damages were not excessive unless the amount at first blush would suggest passion and prejudice on the part of the jury.[6]

In *Boies v. Raynor*[7] the court followed the rule that mental suffering, including fright, shame and mortification from the indignity and disgrace, consequent upon an illegal detention, were injuries for which compensation could be obtained.

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[1] 90 Ariz. 55, 365 P.2d 476 (1961); see also *Attorney and Client, Contracts* and *Evidence.*

[2] 9 Exch. 341, 156 Eng. Rep. 145 (1854). In an action for breach of contract, the plaintiff may recover for all the consequences which the parties might fairly and reasonably have had in contemplation at the time the contract was made. This includes special or peculiar consequences communicated or reasonably contemplated at the time.

[3] 89 Ariz. 349, 362 P.2d 730 (1961); see also *Real Property.*

[4] 89 Ariz. 124, 359 P.2d 63 (1961); see also *Evidence* and *Real Property.*

[5] 367 P.2d 248 (Ariz. 1961); see also *Courts and Civil Procedure, Evidence* and *Torts.*

[6] City of Phoenix v. Brown, 88 Ariz. 60, 67, 352 P.2d 754, 759 (1960).

[7] 89 Ariz. 257, 361 P.2d 1 (1961); see also *Torts.*

Punitive Damages. — The court held in *McNelis v. Bruce*[8] that no punitive damages should be awarded in a suit for alienation of affections, in the absence of wanton indifference.

In *Gomez v. Dykes*[9] punitive damages were not recoverable where no actual damages were found.

Chris T. Johnson

DOMESTIC RELATIONS

Condonation. — In *Henning v. Henning*[1] the court held that probationary reconciliation in the hope that the offending spouse would treat the other with conjugal kindness, did not constitute condonation.

Discretion of Court. — In *Ashton v. Ashton*[2] the discretion of the court was not violated in directing the husband to pay wife attorney's fees for an action interpreting a property settlement agreement incorporated in the divorce decree.

Liens by Divorce. — The court, in *McClanahan v. Hawkins*,[3] held that a divorce decree was an award for support and maintenance and the amount due was not definite and certain[4] as required by the general lien statutes,[5] thus, where the trial court in its discretion did not apply the specific divorce lien statute,[6] a recorded divorce decree was not a lien on the spouse's separate property.

In *Matlow v. Matlow*[7] it was held that a lien impressed on real property by the trial court under the divorce lien statute[8] was unenforcible when the amount of the lien was not ascertainable due to ambiguous language in the decree.

Custody. — On the basis of *West Virginia State Board of Education v. Barnette*[9] which held that saluting the flag was not com-

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[8] 367 P.2d 625 (Ariz. 1961); see also *Courts and Civil Procedure, Creditors' Rights* and *Domestic Relations.*
[9] 89 Ariz. 171, 359 P.2d 760 (1961); see also *Real Property* and *Sales.*

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[1] 89 Ariz. 330, 362 P.2d 627 (1961).
[2] 89 Ariz. 148, 359 P.2d 400 (1961); see also *Attorney and Client* and *Sales.*
[3] 367 P.2d 196 (Ariz. 1961); see also *Creditors' Rights* and *Real Property.*
[4] ARIZ. REV. STAT. ANN. § 25-321 (1956).
[5] ARIZ. REV. STAT. ANN. §§ 33-961, 964 (1956).
[6] ARIZ. REV. STAT. ANN. § 25-318 (1956).
[7] 89 Ariz. 293, 361 P.2d 648 (1961); Comment, 4 ARIZ. L. REV. 88; see also *Evidence.*
[8] ARIZ. REV. STAT. ANN. § 25-318 (1956).
[9] 319 U.S. 624 (1943).

pulsory, the court held in *Smith v. Smith*[10] that a change in custody would not be allowed on the basis of a mothers religious beliefs.

Alienation of Affections. — Arizona adopted the view that defendants conduct has to be the controlling cause in alienating spouse's affection in *McNelis v. Bruce*,[11] and stated that the cause of action could arise even after the husband and wife were separated or had entered into a formal separation agreement.

Separation Agreement. — In *McNelis v. Bruce*[12] funds of a divorced husband under a separation agreement providing for incorporation by reference into a divorce decree, were subject to claims of creditors of the wife, notwithstanding such funds could not be reached if they were alimony, as the separation agreement was just a contract right where the intent showed that the agreement was not to be merged in the judgment.

Alimony. — The court would not reverse a judgment in *Bonine v. Bonine*[13] where there was reasonable evidence to support a modification of a divorce decree by a reduction of monthly payments.

Chris T. Johnson

ELECTIONS

Elected Legislator's Appointment to a Judgeship. — The court ruled in *State ex rel. Pickrell v. Myers*[1] that a person who is elected to the Legislature does not become a member of the Legislature within the meaning of the constitutional provision,[2] which disqualifies a member from any other office during the term for which he is elected, unless affirmative action[3] is taken by the House by judging of the election and qualifications of its own members.

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[10] 367 P.2d 230 (1961); see also *Constitutional Law.*
[11] 367 P.2d 625 (Ariz. 1961); see also *Damages, Courts and Civil Procedure* and *Creditors' Rights.*
[12] *Ibid.*
[13] 367 P.2d 664 (Ariz. 1961); see also *Courts and Civil Procedure* and *Evidence.*

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[1] 89 Ariz. 167, 359 P.2d 757 (1961); see also *Courts and Civil Procedure.*
[2] ARIZ. CONST. art. IV, § 5.
[3] ARIZ. REV. STAT. ANN. § 41-1101 (1956).

Method of Nomination. — It was decided in *White v. Bateman*[4] that a candidate who has been defeated in the primary election has the right to seek election to that office in the general election by complying with the statutory requirements.[5] As announced in a previous case,[6] this holding does not violate the Arizona Constitution.

Write-in votes. — In *White v. De Arman*,[7] the court said that write-in votes for candidates whose names appear on a ballot are illegal. The intent of the voter is the question of primary importance, but the expression of this intention is subject to statutory mandates.[8] The controlling statute here[9] makes no allowance for write-in votes for those candidates whose names appear on the ballot.

Warren Ridge

EQUITY

Public Policy. — In *Brand v. Elledge*[1] a defendant was not allowed to accept benefits of a transaction in violation of public policy and then take the technical position in a court of equity that the parties were in pari delicto, where the conduct of the plaintiff was not culpable and not equal to that of the defendant, even though the parties had entered into a partnership agreement in the face of a statute.[2]

In *Sines v. Holden*[3] the Supreme Court reversed the lower court and held that a former Highway Department employee, convicted of conspiracy gravely affecting public interests, was not entitled to equitable relief to compel a refund of retirement funds.

Equitable Maxim. — The court in *Holaway v. Realty Associates*[4] cited the equitable maxim, "that is certain which can be made certain," and held that an option contract was not void by being indefinite where specified land could be determined in the future.

Chris T. Johnson

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[4] 89 Ariz. 110, 358 P.2d 712 (1961).
[5] ARIZ. REV. STAT. ANN. § 16-834 (1956).
[6] Cavender v. Bd. of Supervisors, 85 Ariz. 156, 333 P.2d 967 (1958).
[7] 89 Ariz. 327, 362 P.2d 122 (1961).
[8] Findley v. Sorenson, 35 Ariz. 265, 276 Pac. 843 (1929).
[9] ARIZ. REV. STAT. ANN. § 16-834 (A)(2) (1956).

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[1] 89 Ariz. 200, 360 P.2d 213 (1961); see also *Contracts* and *Partnership*.
[2] ARIZ. REV. STAT. ANN. § 4-202(A) (Supp. 1961).
[3] 89 Ariz. 207, 360 P.2d 218 (1961); see also *Administrative Law, Courts and Civil Procedure* and *Evidence*.
[4] 367 P.2d 643 (Ariz. 1961); see also *Contracts* and *Courts and Civil Procedure*.

EVIDENCE

Confessions. — The rule against admission of statements not voluntarily made, interpreted in *State v. Robinson*,[1] was said to apply only to confessions and not to statements against interest.

A confession may be admissible even though the defendant is not told his words may be used against him, according to *State v. Preis*.[2] The prime requisite is the absence of threats, coercion or promises of immunity. In the same case the court repeated the rule that the admissibility of a confession, when objected to, is a matter for the court to decide upon showing out of the presence of the jury.

State v. Navarro[3] reiterated the general rule that the state may not introduce in evidence a confession or incriminating statements of the defendant without first producing other evidence tending to prove the corpus delicti.

Expert and Opinion Evidence. — In *Ray v. Bush*,[4] the court held that uncontroverted expert testimony, which excluded any other possible cause of fire, created a strong enough inference to sustain a jury finding that an unguarded lamp left burning in an attic was the cause of the fire.

The admissibility of expert testimony with respect to the cause of fire in a truck was upheld in *Patterson v. Chenowth*[5] against the objection that the expert did not himself lay the factual foundation for his testimony. The court also ruled that the expert's opinion should not be excluded as mere guess and conjecture since it was based on his own observations of the subject matter.

In *Higgins v. Arizona Savings & Loan Ass'n*,[6] the appraiser's lack of membership in a professional appraisers' organization was held to go only to the credibility of his opinion and not to the admissibility of it as expert testimony. However, in *Parker v. State ex rel. Church*,[7] the trial court was found within the limits of its sound discretion in

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[1] 89 Ariz. 224, 360 P.2d 474 (1961); UDALL, ARIZONA LAW OF EVIDENCE § 100 (1960); see also *Criminal Law and Procedure.*

[2] 89 Ariz. 336, 362 P.2d 660 (1961); UDALL, ARIZONA LAW OF EVIDENCE § 100 (1960); see also *Criminal Law and Procedure.*

[3] 367 P.2d 227 (Ariz. 1961); UDALL, ARIZONA LAW OF EVIDENCE § 179 (1960); see also *Criminal Law and Procedure.*

[4] 89 Ariz. 177, 359 P.2d 764 (1961); UDALL, ARIZONA LAW OF EVIDENCE § 26 (1960); see also *Torts.*

[5] 89 Ariz. 183, 360 P.2d 202 (1961); see also *Torts.*

[6] 90 Ariz. 55, 365 P.2d 476 (1961); UDALL, ARIZONA LAW OF EVIDENCE § 23 (1960); see also *Attorney and Client, Contracts* and *Damages*.....

[7] 89 Ariz. 124, 359 P.2d 63 (1961); UDALL, ARIZONA LAW OF EVIDENCE § 23 (1960); see also *Damages* and *Real Property.*

refusing to admit testimony from a witness having 14 years experience with a roadside business but who was not familiar with property values in the Camp Verde area and had made only one inspection of the property to be appraised.[8]

Hearsay. — As set forth in *Sheet Metal Workers Int'l Ass'n v. Nichols*,[9] the admissibility of hearsay statements by co-conspirators depends upon (1) a showing by independent evidence of the existence of the conspiracy, and membership in it by both parties, and (2) a further showing that the statements or acts testified to have occurred during the pendency of the conspiracy and in furtherance of its purposes.

In *Bonine v. Bonine*,[10] the reception of hearsay evidence was held no ground for reversal in the presence of enough competent evidence to sustain the judgment.[11]

Impeachment of Witness. — The court in *State v. Harvill*[12] followed the well settled rule that an unrelated prior felony conviction may be used to impeach the testimony of a witness unless it is so remote that it could not reasonably reflect on the credibility of the witness. *State v. Daymus*[13] stressed that a prior conviction might not be used for impeachment unless it were a felony. The same point was noted in *State v. Loftis*[14] where a showing that the witness was in jail, without more, was held insufficient for impeachment.

In *State v. Hilliard*,[15] the state's offer of proof of a previous conviction, equivocally denied by the defendant, was said not to constitute reversible error simply because the state was never put to the proof. It is error only where the state makes insinuations which it is not able and prepared to prove.

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[8] Higgins v. Ariz. Sav. & Loan Ass'n, 90 Ariz. 55, 365 P.2d 476 (1961), also commented on the wide discretion of the trial judge in determining whether an "expert" is competent to testify on a given subject.

[9] 89 Ariz. 187, 360 P.2d 204 (1961); UDALL, ARIZONA LAW OF EVIDENCE § 178 (1960); see also *Agency, Courts and Civil Procedure, Labor Law* and *Torts.*

[10] 367 P.2d 664 (Ariz. 1961); see also *Courts and Civil Procedure* and *Domestic Relations.*

[11] In Parker v. State *ex rel. Church*, 89 Ariz. 124, 359 P.2d 63 (1961), the court similarly ruled that incompetent evidence might be disregarded if there were enough competent evidence to support the judgment.

[12] 89 Ariz. 340, 362 P.2d 663 (1961); UDALL, ARIZONA LAW OF EVIDENCE § 67 (1960); see also *Criminal Law and Procedure.*

[13] 367 P.2d 647 (Ariz. 1961); UDALL, ARIZONA LAW OF EVIDENCE § 67 (1960); see also *Criminal Law and Procedure.*

[14] 89 Ariz. 403, 363 P.2d 585 (1961); UDALL, ARIZONA LAW OF EVIDENCE § 67 (1960); see also *Criminal Law and Procedure.*

[15] 89 Ariz. 129, 359 P.2d 66 (1961); UDALL, ARIZONA LAW OF EVIDENCE § 67 (1960); see also *Criminal Law and Procedure.*

In *Skouson v. Nidy*[16] the court held that plaintiff's attorney might properly ask, for purposes of impeachment, whether defendant had ever propounded a falsehood under oath.

Judicial Notice. — In *Coyner Crop Dusters v. Marsh,*[17] judicial notice was taken of a Standard Order of the United States Department of Commerce, relating to civil aeronautics, since it was of general public interest and issued under proper governmental authority.

Petitioner's conviction of conspiracy in a proceeding unrelated to the present issue, but occurring between the trial court's adjudication of the instant controversy and this appeal, was made the subject of judicial notice in *Sines v. Holden.*[18]

Limited Admissibility. — Two cases in 1961, *Steele v. Vanderslice*[19] and *State v. Vidalez,*[20] had occasions to apply the rule that evidence admissible for one purpose is not excluded because it would be inadmissible for other purposes.

Negative Evidence Rule. — The negative evidence rule was said not to apply to a pilot's statement that he did not see another plane approaching the landing strip. As stated in *Coyner Crop Dusters v. Marsh,*[21] the rule is concerned with the existence or non-existence of a fact, whereas this is concerned with the pilot's knowledge of the fact.

Photographs. — In *Higgins v. Arizona Savings & Loan Ass'n,*[22] the court excluded a photograph of certain premises for lack of positive identification. Although the photo need not be identified by the person who took the picture, nor by a witness present at the time it was taken, the court insisted that it must be identified as representing the object or place in issue. The court in *Mutz v. Lucero*[23] also excluded a photo offered in evidence because there was no showing

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[16] 367 P.2d 248 (Ariz. 1961); see also *Courts and Civil Procedure, Damages* and *Torts.*

[17] 367 P.2d 208 (Ariz. 1961); UDALL, ARIZONA LAW OF EVIDENCE § 202 (1960); see also *Courts and Civil Procedure* and *Torts.*

[18] 89 Ariz. 207, 360 P.2d 218 (1961); UDALL, ARIZONA LAW OF EVIDENCE § 202 (1960); see also *Administrative Law and Procedure, Courts and Civil Procedure* and *Equity.*

[19] 367 P.2d 636 (Ariz. 1961); UDALL, ARIZONA LAW OF EVIDENCE § 11 (1960); see also *Bills and Notes, Contracts* and *Courts and Civil Procedure.*

[20] 89 Ariz. 215, 360 P.2d 224 (1961); UDALL, ARIZONA LAW OF EVIDENCE § 11 (1960); see also *Criminal Law and Procedure.*

[21] 367 P.2d 208 (Ariz. 1961); UDALL, ARIZONA LAW OF EVIDENCE §§ 131, 132 (1960); see also *Courts and Civil Procedure* and *Torts.*

[22] 90 Ariz. 55, 365 P.2d 476 (1961); UDALL, ARIZONA LAW OF EVIDENCE §§ 131, 132 (1960); see also *Attorney and Client, Courts and Civil Procedure* and *Damages.*

[23] 90 Ariz. 38, 365 P.2d (1961); UDALL, ARIZONA LAW OF EVIDENCE §§ 131, 132 (1960); see also *Courts and Civil Procedure* and *Torts.*

that the tire marks in the picture were caused by defendant's automobile.

Postponement of Ruling on Admissibility. — The postponement of a ruling with regard to the admissibility of evidence was held not to constitute an exclusion, in *Matlow v. Matlow*.[24] If the evidence is not offered again, and the court's attention is not again called to it, an objection or exception cannot be sustained on appeal on the ground that such evidence was excluded.

Relevancy of Other Offenses. — Although evidence of other criminal offenses is ordinarily not admissible on the question of defendant's guilt, it becomes admissible if it tends to establish an essential element of the offense charged, according to *State v. Daymus*.[25] Relying upon this principle, the court held that evidence of other bad checks, written either before or after the check in issue, was admissible as long as it met the test of raising an inference in favor of the fact to be proved.

Res Gestae. — Clothing of another man carried by defendant into his own hotel room for the purpose of misleading investigators was held in *State v. Loftis*[26] to be admissible in evidence as part of the *res gestae,* or as forming a link in the chain of proof when the evidence is circumstantial.

Self-incrimination. — Although taking the witness stand waives the defendant's objection to cross-examination, it was held in *State v. Garay-gordobil*[27] not to waive the protection of Rule 24 which provides that refusal to make a statement in a preliminary examination may not be used against him at the trial.

Robert E. Riggs

INSURANCE

Contestability. — The court held in *National Life & Cas. Ins. Co. v. Blankenbiller*[1] that a "Benefit Certificate" policy as defined by statute[2] is contestable by the insurer only under the terms of the stat-

[24] 89 Ariz. 293, 361 P.2d 648 (1961); UDALL, ARIZONA LAW OF EVIDENCE § 121 (1960); see also *Domestic Relations.*

[25] 367 P.2d 647 (Ariz. 1961); UDALL, ARIZONA LAW OF EVIDENCE § 115 (1960); see also *Criminal Law and Procedure.*

[26] 89 Ariz. 403, 363 P.2d 585 (1961); UDALL, ARIZONA LAW OF EVIDENCE §§ 115, 173 (1960); see also *Criminal Law and Procedure.*

[27] 89 Ariz. 161, 359 P.2d 753 (1961); ARIZ. REV. STAT. ANN. § 13-163 (1956); see also *Attorney and Client, Criminal Law and Procedure* and *Municipal Corporations.*

[1] 89 Ariz. 253, 360 P.2d 1030 (1961).

[2] ARIZ. CODE ANN. § 61-1002 (1939).

ute[3] for non-payment of premiums, notwithstanding a clause in the policy which provides another defense on the basis of pre-existing disease.

Warren Ridge

LABOR LAW

Jurisdiction. — In *Sheet Metal Workers Int'l Ass'n v. Nichols,*[1] it was held that the superior court had jurisdiction of an action which charged that a labor organization and employers conspired to deprive a sheet metal worker of employment by enforcing a compulsory union contract in violation of the State Constitution[2] and the "right to work" statute.[3] This case follows the interpretation of the Labor Relations Management Act[4] by the United States Supreme Court.[5]

Warren Ridge

MUNICIPAL CORPORATIONS

Annexation. — In *Swift v. City of Phoenix,*[1] the court held that under the present statute[2] the use of paid city employees to secure signatures on petitions for annexation is not prohibited. The court also stated that the annexatiton of property by a city is not invalid under the statute[3] because the city did not then have authority to provide the residents with water.

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[3] ARIZ. CODE ANN. § 61-1017 (1952 Supp.).

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[1] 89 Ariz. 187, 360 P.2d 204 (1961); see also *Agency, Courts and Civil Procedure* and *Evidence.*
[2] ARIZ. CONST. art. 25.
[3] ARIZ. REV. STAT. ANN. § 23-1302 (1956).
[4] Labor Management Relations Act § 14(b) (1947).
[5] Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd, 336 U.S. 301 (1948).

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[1] 367 P.2d 791 (Ariz. 1961); see also *Constitutional Law* and *Courts and Civil Procedure.*
[2] ARIZ. REV. STAT. ANN. § 9-471(B) (1956).
[3] ARIZ. REV. STAT. ANN. §§ 9-511, -519 (1956).

City Attorney. — According to *State v. Garaygordobil,*[4] the mere acceptance of the office of city attorney will not preclude the holder from the defense of persons charged with violation of criminal statutes in justice courts and superior courts so long as such representations do not conflict with the duty of the city attorney to represent the city, and so long as such city attorney is not identified in the minds of the public with the prosecution of criminal cases.

Sovereign Immunity. — In *Valley Nat'l Bank of Phoenix v. Electrical District No. 4,*[5] the court ruled that an electrical district which maintains a checking account does not have sovereign immunity from a statute[6] exempting banks from liability for paying forged checks unless the depositor notifies the bank within six months of the rendition of the statement to the depositor.

Tort Action Against Municipality. — In *City of Phoenix v. Williams,*[7] the court held that an ordinance which exempts a city from liability for injuries sustained because of streets being unsafe or out of repair unless written notice has been given and the city has failed to repair within a reasonable time, is not indispensable to the accomplishment of the purposes of the city and is invalid in the absence of authority from the legislature for the enactment of such an ordinance. The court also stated that where a city has received actual notice of a defect in a street it is immaterial whether the defect involved is patent or latent, since the city can be held liable in either case.

Paul R. Fannin

PARTNERSHIP

Dissolution. — In *Brand v. Elledge,*[1] the court held that a partner who was not qualified to obtain a liquor license in Arizona, who allowed her partner to obtain a license for the partnership in violation of the Arizona statute,[2] was not precluded from maintaining an action for an accounting and dissolution when other evidence showed that she was not in "pari delicto" with her partner.

Paul R. Fannin

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[4] 89 Ariz. 161, 359 P.2d 753 (1961); see also *Attorney and Client, Criminal Law* and *Evidence.*
[5] 367 P.2d 655 (Ariz. 1961); see also *Bills and Notes.*
[6] ARIZ. REV. STAT. ANN. § 6-262 (1956).
[7] 89 Ariz. 299, 361 P.2d 651 (1960); see also *Courts and Civil Procedure.*

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[1] 89 Ariz. 200, 360 P.2d 213 (1961); see also *Contracts* and *Equity.*
[2] ARIZ. REV. STAT. ANN. § 4-202 (1956).

PRIVATE CORPORATIONS

Corporate Ownership of Liquor Licenses. — In *Fio Rito v. Duncan*,[1] it was held, under the Arizona statute,[2] that an agent may not hold a spirituous liquor license for the benefit of a corporation.

Statutory Requirements. — According to *Union Interchange, Inc. v. Mortensen*,[3] a California corporation whose contracts with out of state advertisers accepted, performed and paid in California, is engaged in interstate commerce and is not subject to Arizona corporation laws.[4]

Paul R. Fannin

PUBLIC UTILITIES

Service. — In *Meyer v. Senner*,[1] the court held that one who has only one contract with the United States Government to haul for hire over the highways of Arizona is either a contract carrier or no carrier at all and therefore, is not a "common carrier" under the Arizona statute[2] requiring a certificate of convenience and necessity.

Paul R. Fannin

REAL PROPERTY

Brokers. — In *Beckwith v. Clevenger Realty Co.*,[1] the court followed a recent Arizona decision[2] in holding that when a real estate broker tells a customer that the vendor is in a hurry to sell his land for reasons of health, he has breached his fiduciary duty and may not recover his commission.

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[1] 89 Ariz. 385, 363 P.2d 69 (1961); see also *Administrative Law and Procedure.*
[2] ARIZ. REV. STAT. ANN. § 4-202 (1956).
[3] 366 P.2d 333 (Ariz. 1961); see also *Constitutional Law.*
[4] The case specifically involved ARIZ. REV. STAT. ANN. §§ 10-481, -482 (1956).

[1] 89 Ariz. 282, 361 P.2d 542 (1960).
[2] ARIZ. REV. STAT. ANN. § 40-607 (1956).

[1] 89 Ariz. 238, 360 P.2d 596 (1961); see also *Agency, Contracts* and *Courts and Civil Procedure.*
[2] Haymes v. Rogers, 70 Ariz. 257, 219 P.2d 339 (1950).

Characterization of Realty and Personalty. — *Gomez v. Dykes*[3] involved a sale of ranch realty and necessitated a determination of whether certain items were personalty or realty. The court held that a trailer house situated on the land would not become a fixture absent the intent of the annexer that it become an accession to the land. As to the character of accumulated manure lying on the ground, the court adopted the following rule: If the animals are fed from products of the land then it belongs to the landowner while if fed on products from outside the land, then it belongs to the owner of the cattle.

Eminent Domain. — In *Dong ex rel. Willey v. State*[4] the court sustained a condemnation award based on the value of the property at the time of filing the summons under the condemnation statute[5] rather than the value at the time of the highway commission's resolution to condemn authorized by an unconstitutional statute.[6]

Fletcher v. State ex rel. Morrison[7] followed four recent Arizona decisions[8] in declaring that the destruction or the material impairment of an access easement of an abutting property owner is separately compensible.

Parker v. State ex rel. Church[9] rules that where there is conflicting testimony supported by reasonable evidence as to the value of an eminent domain award, the trial courts judgment will not be disturbed.

Eviction. — The court, in *San Manuel Copper Corp. v. Farrel,*[10] said that a lessor who stands by while the sub-lessee expends time and money, is estopped to assert his failure to give written consent to the sublease and is thereby liable for a subsequent wrongful eviction of the sub-lessee by the lessee.

Forfeiture. — According to *Hassenpflug v. Hart,*[11] an extension of time in the forfeiture of realty under the statute,[12] is available only where there has been some payment by the vendee.

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[3] 89 Ariz. 124, 359 P.2d 63 (1961); see also *Damages* and *Sales.*
[4] 267 P.2d 202 (Ariz. 1961).
[5] ARIZ. REV. STAT. ANN. § 12-1123(A) (1956).
[6] ARIZ. REV. STAT. ANN. § 18-155(D) (1956) was declared unconstitutional in State v. Griggs, 89 Ariz. 70, 358 P.2d 174 (1960).
[7] 367 P.2d 272 (Ariz. 1961); see also *Courts and Civil Procedure.*
[8] State v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960), discussed in 3 ARIZ. L. REV. 49, 111 (1960); Pima County v. Bilby, 87 Ariz. 366, 351 P.2d 647 (1960); State v. McDonald, 88 Ariz. 1, 352 P.2d 343 (1960); State v. Jay Six Cattle Co., 88 Ariz. 97, 353 P.2d 185 (1960).
[9] 89 Ariz. 124, 359 P.2d 63 (1961); see also *Damages* and *Evidence.*
[10] 89 Ariz. 349, 362 P.2d 730 (1961); see also *Damages.*
[11] 89 Ariz. 235, 360 P.2d 481 (1961); see also *Contracts.*
[12] ARIZ. REV. STAT. ANN. § 33-741 (1956).

Liens. — In *McClanahan v. Hawkins*[13] it was stated that where the trial judge does not apply the divorce lien statute[14] against the realty of the husband, the husband may convey the land free and clear.

The court in *Kerr-McGee Oil Industries, Inc. v. McCray*[15] said that the 90 days within which a well driller must file his mechanic's lien under the statute,[16] runs from the day of the completion of the job and not from the day the driller is told to go on standby. The court reasoned that because of the stop and start nature of the mining business, the work is deemed to be continuing where one is on standby.

Options. — In *Dunlap v. Fort Mohave Farms*,[17] plaintiff's option contract to buy defendant's realty was renewed omitting a clause found in the first option that defendant could revoke by sale to another. In reversing the trial court, the Supreme Court held that the question of whether the first and second options were inconsistent was one for the trier of fact and the complaint should not have been dismissed.

Quiet Title Actions. — The court in *Mason v. Hasso*[18] decided that the plaintiff was entitled to a judgment quieting title in him where defendant, after making down payment, had failed to pay annual installments, taxes, and interest and had written a letter to plaintiff stating that he could not go through with the deal.

David K. Udall

SALES

Sales Contract. — Where a sales contract specifically described real and personal property to be transferred, the court in *Gomez v. Dykes*[1] adopted the rule that manure on the land was personalty when animals were fed with products grown elsewhere, and the phrase "any other tools and supplies" did not include farm machinery, or a trailer house owned by an employee who temporarily attached it to real property without intent to make a permanent accession to freehold.

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[13] 367 P.2d 196 (Ariz. 1961); see also *Creditors Rights* and *Domestic Relations.*
[14] ARIZ. REV. STAT. ANN. § 25-318 (1956).
[15] 89 Ariz. 307, 361 P.2d 734 (1961); see also *Courts and Civil Procedure* and *Creditors Rights.*
[16] ARIZ. REV. STAT. ANN. § 33-933 (1956).
[17] 89 Ariz. 387, 363 P.2d 194 (1961); see also *Contracts.*
[18] 367 P.2d 1 (Ariz. 1961); see also *Contracts* and *Sales.*

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[1] 89 Ariz. 171, 359 P.2d 760 (1961); see also *Damages* and *Real Property.*

In *Merryweather v. Pendleton*[2] the court held that a contract in the form of an absolute sale of shares of stock with an option to repurchase was not a mortgage or a pledge, in the absence of clear and conclusive evidence,[3] in spite of disparity between consideration paid and the market value of the property involved.

Where there was an exchange of stock in *Ashton v. Ashton*[4] the court explained that a statutory definition of a sale[5] applied only for the purpose of identifying transactions brought within the purview of blue-sky law, and was not intended to have any effect on the rights of buyers and sellers. Then the court adopted the general rule that where the consideration is a transfer of property, the transaction is an exchange, not a sale.[6] The court went on to say that if the transaction had not been an exchange, it would have been an executory contract to sell, rather than a sale,[7] because of numerous conditions precedent to be performed before market value could be established.

In *Mason v. Hasso*[8] the court held that parties who paid only part of the down payment, then stated in a letter that they couldn't go through with the agreement, and failed to pay taxes or interest, abandoned the sales contract,[9] and a subsequent letter by the vendors, inquiring whether the vendees would pay rent, was at best a new offer which could not be accepted six months later.

Recission. — In *Caldwell v. Tilford*[10] the court refused to reverse a decision denying recission, where a vendor of real estate had committed a minor breach of contract by failing to install a water and gas heater.

Chris T. Johnson

TAXATION

Tax Exemption for Educational Institutions. — In *Verde Valley School v. County of Yavapai*[1] the court ruled that a private, nonprofit

[2] 367 P.2d 251 (Ariz. 1961); see also *Courts and Civil Procedure* and *Creditors' Rights.*
[3] Sullivan v. Woods, 5 Ariz. 196, 200, 50 Pac. 113, 115 (1897).
[4] 89 Ariz. 148, 359 P.2d 400 (1961); see also *Attorney and Client* and *Domestic Relations.*
[5] ARIZ. REV. STAT. ANN. § 44-1801(A) (1956).
[6] 33 C.J.S. *Exchange of Property* § 1 (1936).
[7] ARIZ. REV. STAT. ANN. § 44-201 (1956).
[8] 367 P.2d 1 (Ariz. 1961); see also *Contracts* and *Real Property.*
[9] Tucson v. Koerber, 82 Ariz. 347, 356, 313 P.2d 411, 418 (1957).
[10] 367 P.2d 239 (Ariz. 1961); see also *Contracts* and *Courts and Civil Procedure.*

[1] 367 P.2d 223 (Ariz. 1961).

educational institution, otherwise entitled to a real property tax exemption, is not disqualified by the receipt of student tuition and fees. These charges do not constitute "a rent or valuable consideration," as would disqualify the institution from an exemption under Arizona statute.[2]

Recovery of Overpayment. — Following the *Restatement of Restitution*,[3] the court decided in *Maricopa County v. Leppla*,[4] that those who, being ignorant of the fact that their taxes have already been paid, again pay taxes, are entitled to recover from the county taxes mistakenly paid.

Change of Distribution Rate. — *City of Phoenix v. Kelly*[5] determined that a statutory change in tax distribution rate[6] applied only to tax funds collected after the date of the statutory change, and not to those funds collected before but distributed after that date.

Warren Ridge

TORTS

Assault and Battery. — In *Skousen v. Nidy*[1] the court decided that a complaint alleging an attempt to "seduce" by force and violence sufficiently stated a cause of action for assault and battery thereby requiring the application of the two year statute of limitations for injuries done to the person of another[2] rather than the one year statute of limitations for seduction.[3]

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[2] ARIZ. REV. STAT. ANN. § 42-271(3) (1956).
[3] *Restatement, Restitution* § 19(h) (1937).
[4] 89 Ariz. 220, 360 P.2d 227 (1961); see also *Administrative Law and Procedure* and *Courts and Civil Procedure.*
[5] 366 P.2d 470 (Ariz. 1961).
[6] ARIZ. REV. STAT. ANN. § 42-1341(D) (Supp. 1961).

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[1] 367 P.2d 248 (Ariz. 1961); *see also Courts and Civil Procedure, Damages* and *Evidence.*
[2] ARIZ. REV. STAT. ANN. § 12-542 (1956). "There shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions: 1. For injuries done to the person of another . . . ."
[3] ARIZ. REV. STAT. ANN. § 12-541 (1956). "There shall be commenced and prosecuted within one year after the cause of action accrues, and not afterwards, the following actions: . . . 2. For damages for seduction or breach of promise of marriage . . . ."
The court in the Skousen case cited Van DeVelde v. Colle, 8 N.J. Misc. 782, 152 Atl. 645, 646 (1930), for the generally accepted definition of seduction: "it is the act of a man in enticing a woman to have unlawful intercourse with him by means of persuasion, solicitation, promises, bribes, or other means *without the employment of force.*"

Bailments. — In *Patterson v. Chenowth*[4] the court ruled that a bailor has the duty of ordinary care to see that the bailed equipment is in reasonably safe condition when he delivers it to the bailee. The bailor's failure to tell the bailee of defects in the equipment[5] constitutes negligence, and he will be liable for damages resulting therefrom which were proximately caused by such defect.

Conspiracy. — The court in *Sheet Metal Workers Int'l Ass'n v. Nichols*[6] held that the mere fact of expulsion from a labor organization, combined with later discharges from employment by various employers, is not sufficient to constitute a prima facie case of conspiracy to violate an open shop law.[8]

False Imprisonment. — In *Boies v. Raynor*[9] the court held when the evidence indicates that the arresting officers did not use due diligence in determining the identity of the person falsely arrested,[10] then an action for false arrest will lie against them.[11]

Negligence, Automobiles. — In *Reichardt v. Albert*[12] the court reaffirmed the doctrine of *Wolf v. Ornelas*[13] that a failure to reduce speed when conditions require it is not merely prima facie evidence of negligence but is negligence.[14]

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[4] 360 P.2d 202 (Ariz. 1961); see also *Evidence.*

[5] It was found as a fact that the defendant *knew* of the defective wiring in the truck that he delivered to the plaintiff. Patterson v. Chenowth, 360 P.2d 202 (Ariz. 1961).

[6] 360 P.2d 204 (Ariz. 1961); see also *Agency, Courts and Civil Procedure, Evidence* and *Labor Law.*

[7] Plaintiff was attempting to prove an oral agreement to deprive him of his employment but was only able to prove that he was an experienced journeyman, that he had been expelled from the defendant union, and that he had been thereafter discharged from three successive jobs; nor did plaintiff claim that such discharges were wrongful. Sheet Metal Workers Int'l Ass'n v. Nichols, 360 P.2d 204 (Ariz. 1961).

[8] See ARIZ. CONST. art. 25 and ARIZ. REV. STAT. ANN. § 23-1302 (1956).

[9] 361 P.2d 1 (Ariz. 1961); see also *Damages.*

[10] The evidence showed that the officers did not have an accurate description of the accused and that they had obtained the plaintiff's name from the phone book. Boies v. Raynor, 361 P.2d 1 (Ariz. 1961).

[11] The court cited Swetnam v. F. W. Woolworth Co., 83 Ariz. 189, 192, 318 P.2d 364, 366 (1957), in defining false arrest: "The essential element of false imprisonment is the direct restraint of personal liberty or the freedom of locomotion. . . . There need not be actual force; the restraint may be from the fear of force as well as from force itself." The court went on to cite RESTATEMENT, TORTS § 125, comment *f* (1934), for a definition of due diligence: "If the person arrested is sufficiently though not accurately named or if there is another person known to the actor as to whom the name is also accurate, the actor is not privileged to make an arrest if he doubts and therefore does not believe that the person arrested is the person intended."

[12] 361 P.2d 934 (Ariz. 1961).

[13] 84 Ariz. 115, 324 P.2d 999 (1958).

[14] The court stated that although driving at a speed less than the posted speed limit is relevant, it is certainly not conclusive as to whether a person is driving at a speed greater than is "reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." Reichardt v. Albert, 361 P.2d 934 (Ariz. 1961).

Mutz v. Lucero[15] held that only when there is a proximate causal connection between the violation of the driver's licensing statute and the injury complained of is the violation admissible as evidence of negligence.[16]

And, in *Campbell v. Brinson*,[17] the court said that while it is a well established rule that violation of a statute may be negligence *per se*,[18] when it is possible from the evidence to find that the person could have reasonably believed that his vehicle was in safe mechanical condition so as not to endanger himself or others using the highway, the duty is upon the jury to apply the defense if imminent peril or sudden emergency to determine whether or not he was negligent.

Contributory Negligence. — In *Coyner Crop Dusters v. Marsh*[19] the court rendered the Alabama Freight Lines doctrine[20] inapplicable where a jury can find both the plaintiff and defendant guilty of wanton negligence; and, the court inferred that the negligence of the parties is to be weighed by the jury.[21]

Proximate Cause. — The court ruled in *Ray v. Bush*[22] that uncontroverted expert testimony, which excludes any other cause, will be sufficient to sustain findings that the alleged negligence was the proximate cause of the harm.[23]

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[15] 365 P.2d 49 (Ariz. 1961); see also *Courts and Civil Procedure* and *Evidence.*

[16] "While possession of an operator's license, regularly issued, might be some evidence of his competency, the lack of such license would be no evidence whatever that he was not a capable, skilled and safe driver." Lufty v. Lockhart, 37 Ariz. 488, 493, 295 Pac. 975, 977 (1931).

[17] 360 P.2d 211 (Ariz. 1961); see also *Courts and Civil Procedure.*

[18] See Valley Transportation System v. Reinartz, 67 Ariz. 380, 197 P.2d 269 (1948); Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945); Cobb v. Salt River Valley Water Users' Ass'n, 57 Ariz. 451, 114 P.2d 904 (1941).

[19] 367 P.2d 208 (Ariz. 1961); see also *Courts and Civil Procedure* and *Evidence.*

[20] 64 Ariz. 101, 166 P.2d 816 (1946), wherein the court discusses wanton negligence. *Accord,* Butane Corp. v. Kirby, 66 Ariz. 272, 187 P.2d 325 (1947).

[21] "Clearly, if Nicholson's conduct has any of the ingredients of 'wantonness,' it was solely a question for the jury. . . ." Coyner Crop Dusters v. Marsh, 367 P.2d 208 (Ariz. 1961).

[22] 359 P.2d 764 (Ariz. 1961); see also *Evidence.*

[23] "[T]hat the prior inferences must be established to the exclusion of any other reasonable theory rather than merely by a probability, in order that the last inference of the probability of the ultimate fact may be based thereon. . . ." New York Life Ins. Co. v. McNeely, 52 Ariz. 181, 196, 79 P.2d 948, 955 (1938), is cited by the court in holding that an ultimate fact may be supported by successive inferences.

Last Clear Chance. — In *Odekirk v. Austin*[24] the court adopted the doctrine of last clear chance as set out in the *Restatement*,[25] rather than follow the entire doctrine as established in prior Arizona cases.[26]

In *Terzis v. Miles*[27] the court again applied the *Restatement* view of the doctrine.

Edward L. Morgan

WORKMEN'S COMPENSATION

Statute of Limitations. — In accordance with a prior Arizona opinion,[1] and a statutory provision[2] which require application for compensation to be filed within one year after the date of the injury, or date the injury becomes manifest, *McGee v. San Manuel Copper Corp.*[3] held that where the claimant filed his application eighteen months after manifestation of the hernia, compensation was properly denied.

Both *Naylor v. Industrial Com'n*[4] and *Black v. Industrial Com'n*[5] ruled that where the injured party permitted twenty days to elapse from the date of the denial of compensation without filing an objection to the finding,[6] the commission had no jurisdiction to entertain an application for compensation or in the alternative to reopen the proceedings. On the other hand, where twentieth day for filing the petition and application for re-hearing fell on a Sunday, *Moody v. Vans Gila Gin Co.*[7] stated that a filing on the following Monday was timely.

Out of and In the Course of Employment. — In *Ortega v. Ed Horrell & Son*[8] the decedent had been drinking and had taken the longer route in driving from Douglas to Globe after having returned two ranch hands to Douglas for his employer. This was not sufficient to hold that he had left the course of his employment thereby barring his widow from recovering for his death in an automobile wreck on the return trip.

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[24] 366 P.2d 80 (Ariz. 1961); see also Comment, 4 ARIZ. L. REV. 72 (1962).
[25] RESTATEMENT, TORTS §§ 479, 480 (1934).
[26] Layne v. Hartung, 87 Ariz. 88, 348 P.2d 291 (1960) was expressly overruled in so far as it was inconsistant with the views of the principal case.
[27] 366 P.2d 683 (Ariz. 1961).

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[1] 88 Ariz. 14, 352 P.2d 352 (1960).
[2] ARIZ. REV. STAT. ANN. § 23-1061(d) (1956).
[3] 89 Ariz. 244, 360 P.2d 1024 (1961).
[4] 89 Ariz. 394, 363 P.2d 579 (1961).
[5] 89 Ariz. 273, 361 P.2d 402 (1961).
[6] Ariz. Industrial Comm'n, Rule 37.
[7] 89 Ariz. 380, 361 P.2d 541 (1961).
[8] 89 Ariz. 370, 362 P.2d 744 (1961).

The court, after reviewing applicable sections of the Employers Liability Law,[9] ruled in *Feffer v. Bowman*[10] that a three acre plot of land where livestock were held until sale, was not a "yard" under the law, therefor precluding the claimant from recovering for three fingers cut off by a hay machine.

Proximate Cause. — In *Fendell v. Industrial Comm'n*[11] it was found that medical evidence supported the finding denying compensation for a heart attack sustained by a sixty-nine year old workman while he was unloading bundles of tar paper. The reason for this denial was a lack of causal connection between his employment and the attack.

However, in *Mead v. American Smelting and Refining Co.*[12] the court reversed a denial of an award and said that medical evidence compelled the conclusion that there was a causal connection between the claimants employment and the emphysema for which he claims compensation.

Pneumonia contracted by a workman as a result of fumes from defects in a bulldozer exhaust which he was employed to operate was held to be within the course of his employment[13] in *Industrial Comm'n v. Dunlap.*[14]

Loss of Earning Power. — An employee did not have an absolute statutory[15] right to partial disability payments in *Minton v. Industrial Comm'n*[16] and the commission had the power to stop payments until evidence was presented to compute permanent disability benefits.

A claimant in *Phelps Dodge Corp. v. Industrial Comm'n*[17] was not disqualified from receiving workmen's compensation for "total permanent disability" when he could not find any work which he could do in his home community though he might have found work in some other town.

The court in *Prince v. Industrial Comm'n*[18] said that loss of earning capacity must be determined on composite testimony not only of

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[9] ARIZ. REV. STAT. ANN. §§ 23-801 to -808 (1956).
[10] 90 Ariz. 48, 365 P.2d 472 (1961).
[11] 89 Ariz. 180, 359 P.2d 988 (1961); see also *Administrative Law and Procedure.*
[12] 90 Ariz. 32, 363 P.2d 930 (1961).
[13] ARIZ. REV. STAT. ANN. § 23-1021 (1956).
[14] 90 Ariz. 3, 363 P.2d 600 (1961); 3 ARIZ. L. REV. 316 (1961); see also *Administrative Law and Procedure.*
[15] ARIZ. REV. STAT. ANN. § 23-1044 (1956).
[16] 367 P.2d 275 (Ariz. 1961).
[17] 367 P.2d 270 (Ariz. 1961).
[18] 89 Ariz. 314, 361 P.2d 929 (1961).

doctors, but persons qualified to assess the employees ability to secure and maintain a job, and reversed the commission's denial of an award because of the exclusion of his employers testimony regarding the attitude of contractors as to hiring men with a disability similar to that suffered by the claimant.

In *Goodyear Aircraft Corp. v. Industrial Comm'n*[19] the court quoted words in the statute[20] regarding a "previous disability" and said that this referred to a prior condition which affected earning power and since the claimant's previous hearing trouble did not affect his earning power he was entitled to a full award.

Judicial Review. — Waller v. Howard P. Foley Co.[21] held in setting aside a denial of an award that the failure of a claimant to specifically set forth each ground for his complaint did not deprive him of the right to a formal hearing on all issues previously informally determined.

The claimant in *Hughes Aircraft Co. v. Industrial Comm'n*[22] whose bursitis condition had been arrested at the time of the original award but whose condition had grown worse, forcing him to leave his job, established the elements necessary to reopen consideration and obtain additional workmen's compensation.[23]

Because the findings of the Industrial Commission were not sufficiently explicit for the court to determine whether the facts as found provided a reasonable basis for the commission's decision, the award was set aside in *Hatfield v. Industrial Comm'n.*[24]

Donald F. Kenney

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[19] 89 Ariz. 114, 358 P.2d 715 (1961).

[20] ARIZ. REV. STAT. ANN. § 21-1044(e) (1956) provides that in case of a "previous disability" the percentage of disability for a later injury will be determined by computing the percentage of the entire disability and subtracting from this the percentage of the "previous disability."

[21] 367 P.2d 795 (Ariz. 1961).

[22] 367 P.2d 206 (Ariz. 1961).

[23] ARIZ. REV. STAT. ANN. § 23-1044(f) (1956).

[24] 89 Ariz. 285, 361 P.2d 544 (1961).