SUMMARY OF 1960 ARIZONA CASE LAW

Summary

ADMINISTRATIVE LAW AND PROCEDURE

Delegation of Power.—The Pinal County Board of Supervisors denied a petition by various landowners requesting the organization of an electrical district. Thereafter a trial de novo in the superior court reversed the Board. In reversing the superior court in *Davis v. Brittain,*[1] the court held that there was no delegation of legislative power to the Board.[2] For the Board to make a determination of facts under a legislative grant of authority and to exercise its discretion in making such a determination, is more a process of fact finding than of law making.

Administrative Procedure.—In re-affirming its earlier decision,[3] the court stated in *Climate Control, Inc. v. Hill*[4] that the Corporation Commission was the proper party defendant. While any person in interest is given the power to contest an order of the Commission in the superior court, the statute limits the action to the Commission as defendant.[5] However, the court recognized that other parties may intervene if they so desire.

In *Martin v. Industrial Comm'n*[6] the court set aside a commission award holding that where the original award is made on an informal basis, there being no hearing whatsoever, the aggrieved party may have a re-hearing provided he makes a timely request.

Administrative Evidence.—Petitioner produced only one medical expert to support his compensation claim. The court affirmed the award of the Industrial Commission in *Helmericks v. Airesearch Mfg. Co.*[7] stating that where the only expert testimony touching on causation is impregnated with substantial uncertainty and it appears that the expert is speaking more of possibilities than probabilities, the findings of the commission will not be set aside.

In *Bierman v. Magma Copper Co.,*[8] in affirming an award of the Industrial Commission, the court held that the burden was on the applicant to prove the material allegations of his petition by a preponderance of the evidence.

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[1] 358 P.2d 322 (Ariz. 1960); see also *Constitutional Law* and *Water Law.*

[2] See ARIZ. REV. STAT. ANN. § 30-505 (1956); 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 2.10 (1958).

[3] Climate Control, Inc. v. Hill, 86 Ariz. 180, 342 P.2d 854 (1959). See Summary, 2 ARIZ. L. REV. 88 (1960).

[4] 87 Ariz. 201, 349 P.2d 771 (1960); see also *Workmens Compensation.*

[5] ARIZ. REV. STAT. ANN. § 23-946 (1956).

[6] 88 Ariz. 14, 352 P.2d 352 (1960). See Scott v. L. E. Dixon Co., 42 Ariz. 525, 27 P.2d 1109 (1934); ARIZ. REV. STAT. ANN. § 23-945(b) (1956). See also *Workmens Compensation.*

[7] 357 P.2d 152 (Ariz. 1960); see also *Workmens Compensation.*

[8] 88 Ariz. 21, 352 P.2d 356 (1960). See Smith v. Industrial Comm'n, 82 Ariz. 75, 308 P.2d 698 (1957); 12 SCHNEIDER, WORKMEN'S COMPENSATION § 2527 (1959). See also *Workmens Compensation.*

A reversal of an Industrial Commission finding was sought in *Scherer v. Industrial Comm'n.*[9] In affirming the award, the court held that the finding was amply supported by competent and substantial evidence. The "substantial evidence rule" was again invoked in *Parnau v. Industrial Comm'n,*[10] where the court held that an award was supported by substantial evidence.

An applicant for admission to the Bar was found by a bar committee not to be a fit person to be admitted. In *Application of Burke*[11] the court admitted the petitioner; it held that the denial of admission cannot be solely based upon secret reports not revealed to the applicant.

Method of Review.—The application of the Bank of Douglas to the Corporation Commission for a change of name was denied.[12] Thereupon the applicant sought mandamus. In *Senner v. Bank of Douglas*[13] the court held that mandamus was the proper remedy. The court recognized the general rule that, if the action of the public official is discretionary, that discretion may not be controlled by mandamus.[14] However, if the offiical has acted arbitrarily and unjustly and abuses his discretion, mandamus is proper.

Mandamus was again brought and upheld in *Eastman v. Southworth*[15] where the Board of Examiners denied applicant a license to practice medicine. While the court recognized that mandamus will not lie to compel an administrative board to exercise its discretion in any particular manner, it was found that in this particular case the action of the board was arbitrary and capricious.

In *Garrett v. Folsom*[16] mandamus was sought to compel the county attorney to file a quo warranto action. The court held that, as there was no abuse of discretion on the part of the county attorney, the superior court properly denied the writ.

A writ of prohibition was sought in *Lindsey v. Duncan*[17] to prohibit the Superintendent of Liquor Licenses from processing additional applications. The court held that its power to issue writs against such administrative officers is limited to habeas corpus, quo warranto and mandamus; in so holding, the court overruled *City of Phoenix v. Lane.*[18]

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[9] 87 Ariz. 224, 349 P.2d 786 (1960). See 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 29.02 (1958). See also *Workmens Compensation.*

[10] 87 Ariz. 361, 351 P.2d 643 (1960). *Contra,* Carrol v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916). See also *Workmens Compensation.*

[11] 87 Ariz. 336, 351 P.2d 169 (1960). See 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 14.06 (1958). See also *Constitutional Law.*

[12] See ARIZ. REV. STAT. ANN. § 10-122 (1956).

[13] 88 Ariz. 194, 354 P.2d 48 (1960). See also *Private Corporations.*

[14] *E.g.,* Collins v. Krucker, 56 Ariz. 6, 104 P.2d 176 (1940).

[15] 87 Ariz. 394, 351 P.2d 992 (1960); See also *Constitutional Law,* and *Courts and Civil Procedure.*

[16] 357 P.2d 130 (Ariz. 1960).

[17] 356 P.2d 392 (Ariz. 1960). See 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 23.14 (1958). See also *Courts and Civil Procedure.*

[18] 76 Ariz. 240, 263 P.2d 302 (1953).

During 1960 the method of review used to review actions of the Industrial Commission was uniformly that of certiorari.[19] Certiorari came under special attention in *Forman v. Creighton School Dist.*[20] where appellant was given notice of her dismissal as a teacher. Appellant, who appeared with counsel at a public hearing, was there denied due process. The court held that a trial *de novo* in the superior court would not constitute an adequate remedy and therefore certiorari was proper.

In *Application of Burke*,[21] petitioner instituted an original proceeding on application to the State Bar. The court admitted him without further proceedings.

Scope of Review.—In *Helmericks v. Airesearch Mfg. Co.*[22] the court held, in affirming an Industrial Commission award, that a finding of the commission is conclusive upon the court unless it has no support in the evidence. *Parnau v. Industrial Comm'n*[23] was a similar case and the court followed the often repeated rule that the award was supported by substantial evidence. It was further stated that on review by certiorari, the court does not weigh the testimony or resolve conflicts, but only searches the record to see if the commission's findings are reasonably supported by the evidence.

In *Pacific Motor Trucking Co. v. Industrial Comm'n*,[24] the court found that the evidence supported the findings of the commission; but, in *Revles v. Industrial Comm'n*[25] the court held that there was no evidence to support the commission's finding. While the evidence was far from satisfactory, the court in *Bierman v. Magma Copper Co.*[26] held that where the evidence is in conflict, the award will not be disturbed.

The Corporation Commission denied a petition by Southern Pacific. Thereafter, an action was instituted in superior court to vacate the order. The court held in *Arizona Corp. Comm'n v. Southern Pac. Co.*[27] that the proceedings in the superior court were in the nature of a trial de novo and that the court had a right to form its own judgment as an independent tribunal as to the conclusions to be drawn from the evidence.

In *Davis v. Brittain*,[28] the court held that where the statute gives

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[19] See ARIZ. REV. STAT. ANN. § 23-951 (1956).
[20] 87 Ariz. 329, 351 P.2d 165 (1960). See 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 23.13 (1958); Note, 2 ARIZ. L. REV. 290 (1960). See also *Evidence*, and *Constitutional Law*.
[21] Application of Burke, 87 Ariz. 336, 351 P.2d 169 (1960).
[22] 357 P.2d 152 (Ariz. 1960).
[23] 87 Ariz. 361, 351 P. 2d 643 (1960).
[24] 355 P.2d 966 (Ariz. 1960); see also *Workmens Compensation*.
[25] 88 Ariz. 67, 352 P.2d 759 (1960); see also *Workmens Compensation*.
[26] 88 Ariz. 21, 352 P.2d 356 (1960).
[27] 87 Ariz. 310, 350 P.2d 765 (1960); see also *Public Utilities*.
[28] 358 P. 2d 322 (Ariz. 1960).

the discretion and final determination to a lower board or commission and makes such determination final, it has such conclusive effect only in the absence of an appeal to the superior court .

Howard N. Singer

AGENCY

Consignee.—Our court, in *State Tax Comm'n v. Murray Co. of Texas*,[1] held that a consignee of goods is the agent of the consignor, but unless otherwise agreed it is a limited agency only for the purpose of selling the merchandise furnished on consignment.[2] Such a limited agency is insufficient without more to constitute doing business in the state for taxation of an otherwise purely interstate transaction.[3]

Declarations and Acts of Agent.—The Arizona Supreme Court followed a long line of cases in holding, in *Bank of America v. Barnett*,[4] that an agent cannot create in himself an authority to do a particular act by its performance, and the authority of an agent cannot be proven by the agent's own statement that he is such.[5]

Special Directions of a Principal.—Bishop v. Norell[6] involved a real estate transaction in which a broker procured a buyer who agreed to buy but on terms different from those set out in a specific listing agreement. Our court held that, in a real estate transaction although a deviation from the terms of a specific listing agreement may destroy a broker's

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[1] 87 Ariz. 268, 350 P.2d 674 (1960), Comment, 3 ARIZ. L. REV. 93 (1961); see also *Courts and Civil Procedure* and *Taxation*.

The United States Supreme Court in Murray Co. of Texas v. State Tax Comm'n, 364 U.S. 289 (1960), vacated the judgment in the principal case and remanded it for clarification. The Arizona Supreme Court restated its original conclusion in 358 P.2d 167 (Ariz. 1960).

[2] MECHEM, AGENCY § 112 (3d ed. 1923); see also RESTATEMENT (SECOND), AGENCY § 145 (1957).

[3] For other cases, see Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945); Yarbrough v. Gaget Co., 334 Mo. 1145, 70 S.W.2d 1055 (1934).

The statute under which the tax was attempted to be levied is ARIZ. REV. STAT. ANN. § 42-1301 (1956).

[4] 87 Ariz. 96, 348 P.2d 296 (1960); see also *Bills and Notes*.

[5] MECHEM, AGENCY § 289 (3d ed. 1923); see also RESTATEMENT (SECOND), AGENCY § § 288, 289 (1957).

For other examples, see Cameron v. Lanier, 56 Ariz. 400, 108 P.2d 579 (1940); Louis Grunow Memorial Clinic v. Davis, 49 Ariz. 277, 66 P.2d 238 (1939); Navajo-Apache Bank and Trust Co. v. Willis, 21 Ariz. 610, 193 Pac. 297 (1920); Brutinel v. Nygen, 17 Ariz. 491, 154 Pac. 1042 (1916).

[6] 88 Ariz. 148, 353 P.2d 1022 (1960); see also *Contracts*.

right to a commission, where the buyer procured by the broker eventually agrees to buy on altered terms, there is at least a question of fact whether or not the buyer had agreed to the listing terms and then changed his mind.[7]

Ralph Bushnell

ATTORNEY AND CLIENT

Conduct of Case.—The court, in *McCarrel v. State*,[1] found that the evidence failed to disclose such extrinsic fraud on the part of the appellant's attorney as would justify setting aside a default judgment against the state.

Attorney's Fees.—On rehearing, it was decided in *McNeil v. Attaway*[2] that it is in the sound discretion of the trial court to determine whether attorney's fees should be allowed, and, if so, the trial court should determine the amount in an action to quiet title.[3]

Discipline of Counsel.—In an original proceeding for disciplinary action, certified to the court by the Board of Governors of the State Bar, the court adopted the recommendation of the board that an attorney be suspended for six months in *In re Nelson*.[4]

Howard N. Singer

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[7] Material deviation from the terms specified in a listing agreement will destroy the broker's right to compensation so that where parties agree upon the total price as stated in the listing agreement but differ as to terms of payment, broker is not entitled to his commission. Heurich v. Sullivan, 281 Fed. 599 (D.C. Cir. 1922). See also Halloway v. McArthur, 224 Ark. 461, 274 S.W.2d 474 (1955); Annot., 18 A.L.R.2d 376 (1951).

ARIZ. REV. STAT. ANN. § 44-101 (7) (1956) states: "No action shall be brought in any court in the following cases unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereto lawfully authorized: . . . Upon an agreement authorizing or employing an agent or broker to purchase or sell real property, or mines, for compensation or commission."

[1] 357 P.2d 139 (Ariz. 1960); see also *Courts and Civil Procedure.*

[2] 87 Ariz. 103, 348 P.2d 301 (1960); see also *Contracts*, and *Real Property.*

[3] See ARIZ. REV. STAT. ANN. § 12-1103(b) (1956).

[4] 357 P.2d 623 (Ariz. 1960).

BILLS AND NOTES

Liability of Guarantor. — In *Maestro Music Inc. v. Rudolph Wurlitzer Co.*,[1] the court held that although a guarantor of a note would normally be released when the parties extended the payment date, if the guarantor had contracted that he would still be bound, he would remain liable on the note.[2]

Enforceability of Note.—In *Bank of America, Nat'l Trust and Sav. Ass'n v. Barnett*,[3] the court held that where notes made by an Arizona resident were transferred to a California corporation, not qualified to do business in Arizona, and the transfer and acceptance took place outside the state of Arizona, the transaction would be valid and enforceable under the Arizona statute.[4]

James E. Rogers

CONSTITUTIONAL LAW

Separation of Powers.—The courts have no authority to invade the legislative field and supply a penalty for a statutory prohibition. This rule was expounded in *Davis v. Industrial Comm'n*,[1] where the court would not uphold the industrial commission's denial of a widow's claim. The fact that her husband had violated a statute,[2] which provides that a party to a divorce may marry again only after one year has elapsed from the divorce and includes no penalty, does not render the marriage void.[3]

In *Davis v. Brittain*,[4] the court held that, absent a constitutional provision, the legislature has freedom of action to provide for and expand the jurisdiction of the superior court. Therefore the acts of the legislature,[5] enabling an appeal from the Board of Supervisors to be had by a trial de novo, are constitutional.

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[1] 354 P.2d 266 (Ariz. 1960).
[2] BRITTON, BILLS AND NOTES, § § 291, 293 (1943).
[3] 87 Ariz. 96, 348 P.2d 296 (1960).
[4] ARIZ. REV. STAT. ANN. § 10-482 (1956). See also *Contracts, Creditors Rights* and *Sales.*

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[1] 88 Ariz. 117, 353 P.2d 627 (1960); see also *Domestic Relations.* Comment, 3 ARIZ. L. REV. 88 (1961).
[2] ARIZ. REV. STAT. ANN. § 25-329 (1956).
[3] ARIZ. CONST. art. III.
[4] 358 P.2d 322 (Ariz. 1960); see also *Administrative Law and Procedure* and *Water Rights.*
[5] ARIZ. REV. STAT. ANN. § § 12-124, 30-511 (1956).

In *Arizona Land Dep't v. McFate*[6] the court held that the powers of the Attorney-General are limited by statute,[7] and there is no statutory provision in Arizona which gives him the authority to bring an action to enjoin the activities of the State Land Department.[8]

Taxation Powers.—It was held in *State Tax Comm'n v. Murray Co. of Texas*,[9] that sales in Arizona of steel buildings by a Texas firm were interstate and not intrastate transactions. Such transactions are not subject to the transaction privilege tax for they are protected by the Commerce Clause of the Federal Constitution.[10]

Accepting Benefits of an Unconstitutional Statute.—In *Eastman v. Southworth*[11] the court reiterated the proposition that one who relies on the provisions of a statute for relief may not attack its constitutionality.[12]

Vague Statutes.—Defendant's contention that the Arizona "hit and run" statute[13] was unconstitutional due to vagueness was denied by the court in *State v. Milligan*.[14] The court said there was nothing vague to men of common, ordinary intelligence as to what "rendition of reasonable assistance to injured party" means.

Similarly, in *State v. Robles*,[15] the court held there was nothing vague about the statute[16] making it a misdemeanor for any person voting to remain within the fifty foot limits as fixed by the election marshall.

Double Jeopardy.—In State v. Thomas,[17] the court held that a defendant, who has been convicted of manslaughter on an information charging him with murder in the first degree, was not exposed to jeopardy twice when, after a reversal of his appeal and a new trial order, a second trial is commenced under the same information charging him with murder in the first degree.[18]

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[6] 87 Ariz. 139, 348 P.2d 912 (1960), 2 ARIZ. L. REV. 290 (1960); see also *Courts and Civil Procedure.*

[7] ARIZ. CONST. art. V, § 1.

[8] See ARIZ. REV. STAT. ANN. § 41-192 (1956). Westover v. State, 66 Ariz. 145, 185 P.2d 315 (1947); Shute v. Frohmiller, 53 Ariz. 483, 90 P.2d 998 (1939). For a further discussion, see Shepperd, *Common Law Powers and Duties of an Attorney-General*, 7 BAYLOR L. REV. 1 (1955).

[9] 358 P.2d 167 (Ariz. 1960); see also *Taxation.*

[10] See Myers, *Interstate Commerce—The Constitutional Interpretation of a Non-Constitutional Term.* 17 U. PITT. L. REV. 329 (1956).

[11] 87 Ariz. 394, 351 P.2d 992 (1960); see also *Administrative Law and Procedure* and *Courts and Civil Procedure.*

[12] See Anthony A. Bianco Inc. v. Hess, 86 Ariz. 14, 339 P.2d 1038 (1959).

[13] ARIZ. REV. STAT. ANN. § 28-661 (1956).

[14] 87 Ariz. 165, 349 P.2d 180 (1960); see also *Criminal Law and Procedure. Accord,* Scott v. State, 90 Tex. Crim. 100, 233 S.W. 1097 (1921).

[15] 355 P.2d 895 (Ariz. 1960); see also *Criminal Law and Procedure.* See Collings, *Unconstitutional Uncertainty—An Appraisal,* 40 CORNELL, L.Q. 195 (1955).

[16] ARIZ. REV. STAT. ANN. § 16-1862 (1956).

[17] 356 P.2d 20 (Ariz. 1960); see also *Criminal Law and Procedure.*

[18] See Palko v. Conn., 302 U.S. 319 (1937). *But see* Green v. United States, 355 U.S. 184 (1957). In the principal case the dissent pointed out that of the thirty-six

Confrontation of Witnesses.—The court ruled, in *Application of Burke,*[19] that denial of admission to the practice of law cannot be based solely on secret reports concerning applicant's character which are not revealed to him.

In *Forman v. Creighton School Dist.*[20] and *State v. Holden,*[21] the court was concerned with the problem of cross-examination. In *Forman,*[22] it was held that a teacher was denied due process where cross-examination of a witness against her in an administrative hearing was not allowed.[23] Similarly, the court held in *Holden*[24] that if the trial judge excludes testimony from the cross-examination of a witness, which would show bias and interest on the part of that witness, it is error and ground for a new trial. The court stated that the constitutional provisions which outline the procedure to be followed must be complied with before a conviction may be sustained.[25]

Right of Review.—In *State v. Vallejos,*[26] the court held that the right of an indigent, convicted defendant to a free transcript for appeal purposes shall not be denied for his failure to show the inability of his friends and relatives to pay the costs.

In *Burton v. City of Tucson*[27] and *Burton v. Kautenburger,*[28] the court was faced with the situation where the City Council of Tucson issued an emergency annexation ordinance effective immediately.[29] On the same day, the County Board of Supervisors denied petitions seeking incorporation of the same area. The court held that the petitioners have no constitutional right to a judicial review of the denial of the Board of Supervisors.[30]

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states that have considered this question, sixteen permit retrial and twenty hold such a retrial to be a violation of their double jeopardy provisions. State v. Thomas, 356 P.2d 20, 23 (Ariz. 1960) (dissent).

[19] 87 Ariz. 336, 351 P.2d 169 (1960); see also *Administrative Law and Procedure.*

[20] 87 Ariz. 329, 351 P.2d 165) (1960), 2 ARIZ. L. REV. 190 (1960); see also *Administrative Law and Procedure and Evidence.* To the same effect, see Napuche v. Liquor Control Comm'n, 336 Mich. 398, 58 N.W.2d 118 (1953).

[21] 88 Ariz. 43, 352 P.2d 705 (1960); see also *Criminal Law* and *Evidence.* See State v. Jackson, 227 La. 949, 81 So.2d 5 (1955).

[22] 87 Ariz. 329, 351 P.2d 165 (1960); see also *Administrative Law and Procedure* and *Evidence.*

[23] ARIZ. REV. STAT. ANN. § 15-254 providing teacher with counsel would be meaningless otherwise.

[24] 88 Ariz. 43, 352 P.2d 705 (1960); see also *Criminal Law and Procedure* and *Evidence.*

[25] ARIZ. CONST. art. VI, § 22.

[26] 87 Ariz. 119, 348 P.2d 554 (1960), 3 ARIZ. L. REV. 103 (1961); see also *Criminal Law and Procedure* and *Evidence.* For a further discussion, see 55 MICH. L. REV. 413 (1957); 14 WASH. & LEE L. REV. 57 (1957).

[27] 356 P.2d 413 (Ariz. 1960); see also *Municipal Corporations.*

[28] 356 P.2d 412 (Ariz. 1960); see also *Municipal Corporations.*

[29] CHARTER OF THE CITY OF TUCSON, ch. 10, § 8.

[30] Skinner v. City of Phoenix, 54 Ariz. 316, 95 P.2d 424 (1939); Faulkner v. Board of Supervisors, 17 Ariz. 139, 149 Pac. 382 (1915).

Equal Protection.—In both *State v. Douglas*[31] and *State v. Shackleford*,[32] mitigation of criminal punishment was sought on the basis that defendants were respectable, law abiding citizens. It was held that the fact that other judges have suspended sentences and granted probation in apparently less worthy cases than the defendants' here does not amount to a denial of due process and equal protection of the law.[33]

Condemnation.—Pima County v. Bilby,[34] held that a change in the established grade, which injuriously affects adjoining property, is damage and is recompensable within the condemnation clause of the state constitution.[35]

State v. McDonald[36] held that non-payment of fees by the state for an expert witness in a condemnation case is not in violation of the state constitution.[37] Allowances for such fees in a condemnation case must be made by the legislature rather than by judicial fiat.[38].

The court held, in *State v. Griggs*,[39] that a statute, which established the resolution date of condemnation as the valuation date and enabled the state to abandon condemnation proceedings at any time prior to the payment of compensation, was unconstitutional. The court felt the statute provided no compensation for restrictions on the use of the land after the condemnation resolution by the State Highway Commission.[40]

Norman Rosenblum

CONTRACTS

Condition Precedent.—In *Diamond v. Haydis*[1] a broker was denied his commission where the sale of real property was conditioned upon the purchase by a third party of a note which condition was never fulfilled. The court stated that a broker must produce a purchaser ready, able and willing to buy in accordance with the terms specified by the vendor in his contract with the broker in order to be entitled to his commission.[2]

In another action by a broker for his commission allegedly due under

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31 87 Ariz. 182, 349 P.2d 622 (1960); see also *Criminal Law and Procedure.*
32 87 Ariz. 189, 349 P.2d 626 (1960); see also *Criminal Law and Procedure.*
33 U.S. CONST. amend. XIV.
34 87 Ariz. 156, 351 P.2d 647 (1960); see also *Courts and Civil Procedure* and *Real Property.*
35 ARIZ. CONST. art. II. § 17.
36 88 Ariz. 1, 352 P.2d 343 (1960); see also *Courts and Civil Procedure, Evidence,* and *Real Property.*
37 ARIZ. CONST. art. II § 17.
38 People v. Bowman, 173 Cal. App. 2d 416, 343 P.2d 267 (1959).
39 358 P.2d 174 (Ariz. 1960). See also ARIZ. REV. STAT. ANN. § 18-155 (D) (1956).
40 See County of Maricopa v. Paysnoe, 83 Ariz. 236, 239, 319 P.2d 995, 996 (1957).

1 356 P.2d 643 (Ariz. 1960).
2 Blaine v. Stinger, 79 Ariz. 376, 290 P.2d 732 (1955).

the listing agreement, *Bishop v. Norell*,[3] the court held that material deviation from the terms specified in the listing agreement will destroy the broker's right to compensation under the agreement.[4]

The rule that where an express contract is not renewed because of failure of the condition precedent to renewal, there is no longer an express contract upon which the plaintiff can prove a deficiency payment was stated in *Shun v. Hospital Benefit Ass'n.*[5]

On the other hand, in *Young v. Bishop*,[6] the court found that an alleged contract for the sale of land was not conditioned upon the completion of a supplemental escrow agreement and allowed specific performance.

Defenses.—A carrier who accepted payments lower than those provided for in the contract on file with the corporation commission was held in *Builders Supply Corp. v. Marshall*[7] not to have waived his rights under the contract for the reason that the carrier constantly demanded the full amount due him.[8] The court went on to state that the acceptance of lower payments did not constitute an estoppel in pais because the carrier had made it clear that the shipper was violating the contract and that the carrier was due more money.[9] A further ruling was made that failure to sue on the first under-payment did not deprive the carrier of the right to sue on subsequent under-payments and recover such amounts as were not barred by the six-year statute of limitations.[10]

In *Mountain States Constr. Co. v. Riley*[11] the employer was denied his counterclaim based upon a written contract where there was sufficient evidence for the trial court to conclude that the contract had been mutually rescinded.

In deciding *Simpson v. Superior Court*[12] the court ruled that the survival of a valid separation agreement does not deprive the court of

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[3] 88 Ariz. 148, 353 P.2d 1022 (1960); see also *Agency.*

[4] Buckner v. Tweed, 157 F.2d 211 (D.C. Cir. 1946); Olson v. Penkert, 252 Minn. 334, 90 N.W.2d 193 (1958).

[5] 357 P.2d 603 (Ariz. 1960); see also *Courts and Civil Procedure.*

[6] 88 Ariz. 140, 353 P.2d 1017 (1960); see also *Courts and Civil Procedure* and *Real Property.*

[7] 88 Ariz. 89, 352 P.2d 982 (1960); see also *Courts and Civil Procedure* and *Public Utilities.*

[8] Builders Supply Corp. v. Shipley, 86 Ariz. 153, 341 P.2d 940 (1959); see also Dover Copper Mining Co. v. Doenges, 40 Ariz. 349, 12 P.2d 288 (1932); RESTATEMENT, CONTRACTS §§ 407-08 (1932); 4 WILLISTON, CONTRACTS §§ 1027, 1027A (2d ed. 1936).

[9] See Holmes v. Graves, 83 Ariz. 174, 318 P.2d 354 (1957); Kerby v. State, 62 Ariz. 294, 157 P.2d 698 (1945); Valley Nat'l Bank of Phoenix v. Battles, 62 Ariz. 204, 156 P.2d 244 (1945).

[10] ARIZ. REV. STAT. ANN. § 12-548 (1956). A cause of action accrues each time defendant fails to perform as required under the contract. Morris v. Russell, 120 Utah 545, 236 P.2d 451 (1951); see also Johnstone v. E. & J. Mfg. Co., 45 Cal. App. 2d 586, 114 P.2d 658 (1941).

[11] 356 P.2d 648 (Ariz. 1960); see also *Courts and Civil Procedure.*

[12] 87 Ariz. 350, 351 P.2d 179 (1960); see also *Courts and Civil Procedure.*

power to modify a divorce decree based thereon even when the agreement specified that the husband was not to petition the court for modification of the decree.[13]

That a writing is signed within the meaning of the statute of frauds if it is signed by the party to be charged in printing, provided the same is done with the intention of signing,[14] was the decision of the court in *Bishop v. Norell.*[15]

In *Young v. Bishop*[16] the court held that an escrow agreement containing the identity of the buyer and the seller, the price to be paid, the time and manner of payment, a description sufficiently identifying the property to be sold, and signed by the party to be charged is sufficient written memorandum to take an oral agreement for the sale of real property out of the statute of frauds.[17]

The failure of the seller of cemetery property to allege that he was licensed to sell such property in accordance with the statute[18] entitled the defendant to be granted his motion to dismiss the seller's action on a subscription agreement in *Hall v. Bowman.*[19]

Parol Evidence Rule.—That parol evidence will not be allowed where the terms of properly executed deeds are clear and unambiguous since to do so would be to vary the terms of the deeds[20] was stated in *McNeil v. Attaway.*[21]

In *Bohmfalk v. Vaughan*[22] the court reaffirmed its position that parol evidence is admissible to show fraud in the inducement of a written contract.[23]

Reformation.—McNeil v. Attaway,[24] in accordance with prior deci-

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[13] ARIZ. REV. STAT. ANN. § 25-321 (1956). See also Goldman v. Goldman, 282 N.Y. 296, 26 N.E.2d 265 (1940); Fox v. Fox, 263 N.Y. 68, 188 N.E. 160 (1933).

[14] ARIZ. REV. STAT. ANN. § 44-101(7) (1956). *Accord,* Weiner v. Mullaney, 59 Cal. App. 2d 620, 140 P.2d 704 (1943); City of Gary v. Russell, 123 Ind. App. 609, 112 N.E.2d 872 (1953); Cummings v. Landes, 140 Iowa 80, 117 N.W. 22 (1908).

[15] 88 Ariz. 148, 353 P.2d 1022 (1960); see also *Agency.*

[16] 88 Ariz. 140, 353 P.2d 1017 (1960); see also *Courts and Civil Procedure* and *Real Property.*

[17] ARIZ. REV. STAT. ANN. § 44-101(6) (1956). See Durham v. Dodd, 79 Ariz. 168, 285 P.2d 747 (1955); King v. Stanley, 197 P.2d 321 (Cal. 1948).

[18] ARIZ. REV. STAT. ANN. § § 32-2121, -2122, -2152 (1956). *Accord,* Foster v. House Beautiful Homes, 78 Ariz. 406, 281 P.2d 116 (1954); see also Northern v. Elledge, 72 Ariz. 166, 232 P.2d 111 (1950).

[19] 357 P.2d 149 (Ariz. 1960); see also *Courts and Civil Procedure.*

[20] See Berger v. Bhend, 79 Ariz. 173, 285 P.2d 751 (1955); Corn v. Branche, 74 Ariz. 356, 249 P.2d 537 (1952); Davis v. Kleindienst, 64 Ariz. 251, 169 P.2d 78 (1946).

[21] 87 Ariz. 103, 348 P.2d 301 (1960); see also *Attorney and Client, Courts and Civil Procedure,* and *Real Property.*

[22] 357 P.2d 617 (Ariz. 1960); see also *Courts and Civil Procedure, Evidence,* and *Partnerships.*

[23] Lusk Corp. v. Burgess, 85 Ariz. 90, 332 P.2d 493 (1958); Pioneer Constructors v. Symes, 77 Ariz. 107, 267 P.2d 740 (1954).

[24] 87 Ariz. 103, 348 P.2d 301 (1960).

sions,[25] held that there can be no reformation of a written contract to conform to the terms of a pre-existing oral agreement unless there is clear and convincing proof of the agreement and its terms.

Third Party Beneficiary.—California Cotton Oil Corp. v. Rabb[26] involved a crop financing agreement between a farm tenant and the defendant. Plaintiffs were the landlords who claimed to have been damaged by the defendant's non-compliance with a "crop budget" which allegedly limited the terms of the agreement. The court held that the plaintiffs had no right to sue since there was no showing of intent that they were to be benefited by the budget.[27]

Usury.—Britz v. Kinsvater[28] held that where a pretended sale was actually a loan secured by a contract of sale which set an absolute rate of return, the loan was absolutely repayable so that the usury statute was applicable,[29] and where a loan agreement unequivocally calls for an excessive rate of return on the indebtedness, intent to exact usury is presumed.[30]

The defense of usury was held to be available only to the debtor or the maker of a note and not to the original payee and creditor in *Maestro Music, Inc. v. Rudolph Wurlitzer Co.*[31]

Susan T. Payne

COURTS AND CIVIL PROCEDURE

Jurisdiction.—A court has jurisdiction to use its discretion in permitting a party to submit an amended affidavit to cure omissions in the original motion to set aside a default judgment,[1] but it is in excess of jurisdiction to transfer venue to the county of defendant's residence where the action was originally brought in a proper county; thus certiorari may issue for the improper transfer.[2]

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[25] See City of Tucson v. Koerber, 82 Ariz. 347, 313 P.2d 411 (1957); Diamond v. Chiate, 81 Ariz. 86, 300 P.2d 583 (1956); Carrilo v. Taylor, 81 Ariz. 14, 299 P.2d 188 (1956); Cashion v. Bank of Arizona, 30 Ariz. 172, 245 Pac. 360 (1926).

[26] 357 P.2d 126 (Ariz. 1960).

[27] *Accord,* Irwin v. Murphey, 81 Ariz. 148, 302 P.2d 534 (1956).

[28] 87 Ariz. 385, 351 P.2d 986 (1960), 2 ARIZ. L. REV. 275 (1960); see also *Courts and Civil Procedure.*

[29] ARIZ. REV. STAT. ANN. § 44-1202 (1956).

[30] See Houchard v. Berman, 79 Ariz. 381, 290 P.2d 735 (1955); Seargeant v. Smith, 63 Ariz. 466, 163 P.2d 680 (1945); Fagerberg v. Denny, 57 Ariz. 179, 112 P.2d 578 (1941); Blaisdell v. Steinfeld, 15 Ariz. 155, 137 Pac. 555 (1914).

[31] 88 Ariz. 222, 354 P.2d 266 (1960); see also *Bills and Notes, Creditors Rights,* and *Sales. Accord,* Collister v. Inter-State Fidelity Bldg. & Loan Ass'n, 44 Ariz. 427, 38 P.2d 626 (1934).

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[1] ARIZ. R. CIV. P. 60(c) cited in Hendrie Buick Co. v. Mack, 88 Ariz. 248, 355 P.2d 892 (1960).

[2] Pride v. Superior Court, 87 Ariz. 157, 348 P.2d 924 (1960), 3 ARIZ. L. REV. 105 (1961).

Venue.—In *Pride v. Superior Court*[3] the court said that venue is determined from the complaint construed in favor of the pleader, and that negligence in an automobile accident is a transitory action for which the defendant may be sued in any county in which he may be found.[4]

Original Writs.—According to *Simpson v. Superior Court,*[5] a writ of prohibition is a proper remedy only if the superior court is without jurisdiction. *Lindsey v. Duncan*[6] held that a writ of prohibition may not be issued against the State Superintendent of Liquor Licenses and Controls because such officer falls within that general class of state officers to whom only the original writs of habeas corpus, quo warranto and mandamus may issue from the supreme court.[7]

Eastman v. Southworth[8] stated a court may issue mandamus to compel a board to exercise discretion, but not to compel the exercise in a particular manner. In *Buzard v. Brooks*[9] the writ of mandamus to compel compliance with a judgment was quashed, since the earlier judgment was reversed in a prior proceeding.[10]

In *Miller v. Superior Court*[11] certiorari was denied by the supreme court when it appeared that a removed trustee of an intervivos trust by order of the superior court had an appeal available from the order.[12]

Proper Party.—The court in *Harvey v. Stewart*[13] held that a proper party must be submitted for the deceased appellant or the appeal would be dismissed.[14] And in *Arizona State Land Dep't v. McFate,*[15] where the attorney general instituted an action without statutory authority, the proceeding failed.[16]

Complaints.—The complaint in *Hall v. Bowman*[17] was insufficient for failure to allege statutory compliance.[18]

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[3] *Supra* note 2.
[4] ARIZ. R. STAT. ANN. § 12-401 (1956).
[5] 87 Ariz. 350, 351 P.2d 179 (1960); see also *Contracts; In re* West's Adoption, 87 Ariz. 234, 350 P.2d 125 (1960); see also *Domestic Relations;* ARIZ. REV. STAT. ANN. § § 25-315, -319(a), -321 (1956); Compare Cummings v. Lockwood, 84 Ariz. 335, 327 P.2d 1012 (1958).
[6] 356 P.2d 392 (Ariz. 1960) overruled the earlier case of City of Phoenix v. Lane, 76 Ariz. 240, 263 P.2d 302 (1953); see also *Administrative Law.*
[7] ARIZ. CONST. art. 6 § 4.
[8] Eastman v. Southworth, 87 Ariz. 394, 351 P.2d 992 (1960); see also *Constitutional Law* and *Administrative Law;* see Arizona State Highway Commission v. Superior Court, 81 Ariz. 74, 299 P.2d 783 (1956).
[9] 358 P.2d 783 (1956).
[10] Buzard v. Griffin, 358 P.2d 155 (Ariz. 1960); see also *Evidence* and *Torts.*
[11] 356 P.2d 699 (Ariz. 1960); see also *Trusts.*
[12] ARIZ. REV. STAT. ANN. § 12-2001 (1956).
[13] 357 P.2d 623 (Ariz. 1960).
[14] ARIZ. REV. STAT. ANN. § 14-341 (1956).
[15] 87 Ariz. 139, 348 P.2d 912 (1960); 2 ARIZ. L. REV. 293 (1960); see also *Constitutional Law.*
[16] ARIZ. REV. STAT. ANN. § § 27-521, 37-102, -132, -231 (1956).
[17] 357 P.2d 149 (Ariz. 1960); see also *Contracts.*
[18] ARIZ. REV. STAT. ANN. § § 32-2121, -2152 (1956).

Young v. Bishop[19] relied upon the rule that those items submitted with the complaint become part of the complaint for all purposes including determining sufficiency of the complaint.[20]

The court in *Adams v. Bear*[21] said that the parties were bound by their pleading and could not contradict their own complaint in subsequent proceedings involving the same parties and issues.

Mountain States Constr. Co. v. Riley[22] allowed the complaint on the express contract to be amended to have an alternative count of quantum meruit, and on appeal the judgment on the facts was sustained so long as the evidence would be sufficient on the theory of the express contract only.

Counterclaim and Reply.—The compulsory counterclaim rule[23] is not applicable where the claim of the defendant is admitted in the complaint.[24]

In *Bohmfalk v. Vaughan*[25] the plaintiff did not anticipate the affirmative defense to fraud which was disclosed by the defendant's answer, but did not have to make a reply since no counterclaim was set up in the answer.[26]

Judgments on the Pleadings.—The defendant's motion for judgment on the pleadings tests sufficiency of the complaint, and if the complaint fails to state a cause of action, judgment will be entered for the defendant with leave to the plaintiff to amend.[27] However in an action for specific performance, *Young v. Bishop*[28] held that the defendant could not obtain a judgment on the pleadings on the basis of the allegations in his answer since these allegations are deemed denied when such a motion is made.[29]

Discovery.—When a party or a witness refuses to answer any question propounded upon oral deposition, the opposing party may apply to the court for an order compelling an answer. It then becomes the duty of the court to determine whether the refusal was without substantial justification; and if found to be so, the court will order the party to answer. If he still refuses, the court may enter an order striking the pleadings.[30] However in *Buzard v. Griffin*[31] the court recognized the

[19] 88 Ariz. 140, 353 P.2d 1017 (1960); see also *Contracts* and *Real Property.*
[20] ARIZ. R. CIV. P. 10(c).
[21] 87 Ariz. 288, 350 P.2d 751 (1960).
[22] 356 P.2d 648 (Ariz. 1960); see also *Contracts.*
[23] ARIZ. R. CIV. P. 13(a).
[24] 87 Ariz. 288, 350 P.2d 751 (1960).
[25] 357 P.2d 617 (Ariz. 1960); see also *Contracts, Evidence* and *Partnerships.*
[26] ARIZ. R. CIV. P. 7(a), see *In re* Brandt's Estate, 67 Ariz. 42, 190 P.2d 497, 499 (1948).
[27] Young v. Bishop, 88 Ariz. 140, 353 P.2d 1017 (1960).
[28] *Ibid.*
[29] ARIZ. R. CIV. P. 8(e); see 2 MOORE, FEDERAL PRACTICE ¶ 12.15 (2d ed. 1948).
[30] ARIZ. R. CIV. P. 37 (a), (e).
[31] 358 P.2d 155 (Ariz. 1960).

constitutional right of a party to refuse to testify and thus denied the motion to strike the pleadings.

It was mandatory in *Fritts v. Ericson*[32] that the court find all the essential facts when so requested prior to trial.[33] By such a request, a petitioner may not then claim on appeal that the court erred in so finding the facts.[34] Findings of fact are unnecessary however where the parties litigant have stipulated the facts as in *State Tax Comm'n v. Murray Company of Texas, Inc.*[35]

On a motion to dismiss for failure to state a claim[36] the court may go beyond the pleadings to make findings of fact[37] and judgment on those findings was not error in *Shun v. Hospital Benefit Ass'n.*[38]

Directed Verdicts.—The trial judge is authorized to direct a verdict only where no evidence has been introduced which would justify a reasonable man in returning a verdict in favor of the other party[39] or to have ruled otherwise it would permit the jury to draw speculative inferences not based on probative facts.[40]

A motion for a directed verdict presupposes that all evidence admitted by the court over or without objection is competent. Therefore, competence of evidence is not properly triable upon such a motion, and *City of Phoenix v. Brown*[41] held that it was an improper assignment of error to attack incompetency of evidence on a motion for a directed verdict.

The doctrine that the trial court has power to weigh evidence on a motion to dismiss and need not view it in a light most favorable to the plaintiff is not applicable in Arizona since the amendment to the Rules of Civil Procedure 41(b)[42] in 1955. The rule now stands as reiterated by *Joseph v. Tibesherany*[43] that, if the court sustains the defendant's motion to dismiss, it shall also find the facts specifically and state separately its conclusions of law thereon. Since this was not complied with, defendant's motion must be treated the same as a motion for

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[32] 87 Ariz. 227, 349 P.2d 1107 (1960); see also *Real Property.*

[33] ARIZ. R. CIV. P. 52(a); Keystone Copper Mining Co. v. Miller, 63 Ariz. 544, 553, 164 P.2d 603 (1945).

[34] Bohmfalk v. Vaughan, 357 P.2d 617 (Ariz. 1960); Hightower v. State, 67 Ariz. 351, 158 P.2d 156 (1948).

[35] 87 Ariz. 268, 350 P.2d 674 (1960); Comment, 3 ARIZ. L. REV. 93 (1961); see also *Agency* and *Taxation;* Work v. United Globe Mines, 12 Ariz. 339, 100 Pac. 813 (1909).

[36] ARIZ. R. CIV. P. 12(b)(6).

[37] ARIZ. R. CIV. P. 56(d), also rule 52.

[38] 357 P.2d 603 (Ariz. 1960); see also *Contracts.*

[39] City of Phoenix v. Brown, 88 Ariz. 60, 352 P.2d 754 (1960); see also *Evidence, Municipal Corporations* and *Torts.*

[40] *In re* Schade's Estate, 87 Ariz. 341, 351 P.2d 173 (1960); see also *Evidence* and *Wills and Administration.*

[41] 88 Ariz. 60, 352 P.2d 754 (1960).

[42] ARIZ. R. CIV. P. 41(b), see also rule 52(a).

[43] 88 Ariz. 205, 354 P.2d 254 (1960); see also *Trusts.*

a directed verdict in a jury case and thus plaintiff's evidence must be construed as being uncontroverted.

Instructions.—In *Layne v. Hartung*[44] failure of the trial court to give requested instructions to the jury on all phases of law applicable to the various fact situations developed in the trial was reversible error. To determine whether requested instructions should be given the evidence must be considered in the strongest possible manner in support of the requesting party.[45]

It is not error for the court to refuse to give requested instructions adequately covered elsewhere in the instructions,[46] or in viewing the instructions as a whole, the jury was properly informed as to the law governing the case.[47] Issues in pleadings not supported by the evidence also should not be submitted to the jury.[48]

In *Sarwark Motor Sales, Inc. v. Woolridge*[49] the trial court committed reversible error by submitting instructions to the jury as to the existence of probable cause for the court must instruct the jury properly on such a vital question. It was held that the defendants, by calling attention to the court of the proper form of instructions, complied with the rule relating to instructions[50] and could not be held to have waived the error in instructions given to the jury.

Judgment Notwithstanding the Verdict.—The supreme court cannot reverse the trial courts decision on denying a judgment notwithstanding the verdict where sufficient factual evidence permits the jury to find the verdict.[51]

In Re Schade's Estate[52] held that a motion for judgment notwithstanding the verdict is a renewal of a motion for a directed verdict and may be entered in accordance with a directed verdict after the trial court has given more mature deliberation, so as to revise its ruling in denying the motion for a directed verdict.[53]

Judgments.—To set aside a default judgment, the party in default must show his failure to answer within the time required by law was excusable neglect and that he had a meritorious defense.[54] Thus in

[44] 87 Ariz. 88, 348 P.2d 291 (1960); see also *Evidence* and *Torts;* Compare Reah v. Jupin, 68 Ariz. 335, 206 P.2d 558 (1949).
[45] Layne v. Hartung, 87 Ariz. 88, 348 P.2d 291 (1960); also Webb v. Hardin, 53 Ariz. 310, 89 P.2d 30 (1939).
[46] City of Phoenix v. Brown, 88 Ariz. 60, 352 P.2d 754 (1960).
[47] State *ex rel.* Morrison v. Jay Six Cattle Co., 88 Ariz. 97, 353 P.2d 185 (1960); see also *Evidence* and *Real Property.*
[48] *In re* Schade's Estate, 87 Ariz. 341, 351 P.2d 173 (1960).
[49] 88 Ariz. 173, 354 P.2d 34 (1960); see also *Torts.*
[50] ARIZ. R. CIV. P. 51(a).
[51] Sarwark Motor Sales, Inc. v. Woolridge, 88 Ariz. 173, 354 P.2d 34 (1960).
[52] *In re* Schade's Estate, 87 Ariz. 341, 351 P.2d 173 (1960).
[53] ARIZ. R. CIV. P. 50(b), also Glowacke v. A. J. Bayless Markets, 76 Ariz. 295, 263 P.2d 799 (1953).
[54] ARIZ. R. CIV. P. 55(c).

Hendrie Buick Co. v. Mack,[55] when it was adequately shown that the defendant's failure to answer the complaint was excusable, the court held that the affidavit stating the motion to set aside the default money judgment need only show upon its face that there is a substantial defense to the action if the facts were to be proved at a trial. Doubts should be resolved in favor of the applicant as each party should be given reasonable opportunity to litigate his claim or defense on the merits.

An attorney concealing facts from the judge was not extrinsic fraud to vacate the judgment in *McCarrell v. State*.[56] Extrinsic fraud is the means whereby judgment is procured, not fraud in the case of action or material presented.[57]

Amending Judgments.—In an action against the administratrix, the plaintiff's motion to amend the judgment was denied in *Fernandez v. Garza*.[58] Motion was filed under the section which permits correction of clerical mistakes,[59] of which there was none in the case; also such motion must be filed within ten days of judgment or it must fail[60] so as to serve the cause of justice re requiring an end to litigation.

Damages.—When the trial court failed to correctly apply the six-year statute of limitations in granting judgment in *Builders Supply Corp. v. Marshall*,[61] the supreme court was not required to remand the case for new trial, but remanded it with directions to enter correct amount in judgment.

On assignment of error as to excessive damages the supreme court will not set aside the verdict unless it shocks the court's conscience.[62]

Costs.—The trial court in *State ex rel. Morrison v. Jay Six Cattle Co.*[63] awarded the fees of expert witnesses and costs of exhibits received in evidence at the trial as taxable costs, but this was reversed on the rule that such costs are not taxable in an eniment doman proceeding.[64]

New Trials.—A holding in *State ex rel. Morrison v. McMinn*[65] states

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[55] 88 Ariz. 248, 355 P.2d 892 (1960).

[56] 357 P.2d 139 (Ariz. 1960); see also *Attorney and Client.*

[57] Compare, Jacobson v. Brey, 72 N.D. 269, 6 N.W.2d 269 (1942); and Deyl v. Deyl, 88 Cal. App. 2d 536, 199 P.2d 424, 426 (1948).

[58] 88 Ariz. 205, 354 P.2d 260 (1960); see also *Partnerships* and *Wills and Administration.*

[59] ARIZ. R. CIV. P. 60.

[60] ARIZ. R. CIV. P. 59(i).

[61] 88 Ariz. 89, 352 P.2d 982 (1960); see also *Contracts* and *Public Utilities.*

[62] City of Phoenix v. Brown, 88 Ariz. 60, 352 P.2d 754 (1960); Standard Oil Co. of Calif. v. Shields, 58 Ariz. 239, 119 P.2d 116 (1941).

[63] 88 Ariz. 97, 353 P.2d 185 (1960).

[64] ARIZ. REV. STAT. ANN. § § 12-332, -1128 (1956); ARIZ. R. CIV. P. 54(f); Compare with State v. McDonald, 88 Ariz. 1, 352 P.2d 343 (1960), where the same rule was applied with respect to expert witness. See also *Constitutional Law, Evidence* and *Real Property.*

[65] 88 Ariz. 261, 355 P. 2d 900 (1960); see also *Real Property;* Pima County v. Bilby, 87 Ariz. 366, 351 P.2d 647 (1960); see also *Constitutional Law* and *Real Property.*

that the trial judge had discretion to grant a new trial unless a clear preponderance shows the verdict is just.

Pima County v. Bilby[66] held that failure to specify the ground for granting a new trial is not reversible error unless failure to do so results in surprise, prejudice or undue burden on the court.[67]

Appeals.—Appeal was denied in *Kemble v. Porter*[68] for it did not come under the enumerated sections of the statute giving the right of appeal.[69] Requirements of a supersedeas bond were not satisfied by a criminal appeal bond and should not have been approved as such in *In Re West's Adoption.*[70]

The filing of a transcript is not mandatory on appeal,[71] but usually both bond and notice are prerequisites to appellate jurisdiction.[72] However in *Marquez v. Rapid Harvest Co.*[73] the exception rule was applied in that no bond was required by a guardian ad litem.[74]

Res Judicata.—Where there was no decision on the merits and no rights or remedies of the parties were affected in *Adams v. Bear,*[75] dismissal without prejudice prevented the action from being res judicata. Res judicata will attach when a declaratory judgment is given by the court as to subsequent liabilities and defenses on the same action.[76]

Review of Evidence.—In a number of decisions the court reaffirmed the well-established rules that upon appeal its scope of review is limited by the posture of the case presented.[77] Also findings of fact should be stated in a light most favorable to sustaining the judgment of the lower court[78] and will not be disturbed when there is substantial evidence to support them.[79]

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[66] *Supra* note 65.
[67] ARIZ. R. CIV. P. 59(m).
[68] 357 P.2d 155 (Ariz. 1960).
[69] ARIZ. REV. STAT. ANN. § 12-2101 (1956); Knape v. Brown, 86 Ariz. 158, 342 P.2d 195 (1959).
[70] 87 Ariz. 234, 350 P.2d 125 (1960); ARIZ. R. CIV. P. 73(l).
[71] Hall v. Bowman, 357 P.2d 149 (Ariz. 1960); ARIZ. R. CIV. P. 75.
[72] ARIZ. R. CIV. P. 73(b).
[73] 358 P.2d 168 (Ariz. 1960).
[74] ARIZ. R. CIV. P. 73(p).
[75] 87 Ariz. 177, 349 P.2d 184 (1960).
[76] Adams v. Bear, 87 Ariz. 288, 350 P.2d 751 (1960).
[77] Hall v. Bowman, 357 P.2d 149 (Ariz. 1960); State *ex rel.* Morrison v. McMinn, 88 Ariz. 261, 355 P.2d 900 (1960); Young v. Bishop, 88 Ariz. 140, 353 P.2d 1017 (1960).
[78] Builders Supply Co. v. Marshall, 88 Ariz. 89, 352 P.2d 982 (1960); Walking Mining Co. v. Covey, 88 Ariz. 80, 352 P.2d 768 (1960); see also *Mining Law* and *Real Property.*
[79] Smith v. Smith, 358 P.2d 183 (Ariz. 1960); see also *Domestic Relations;* Shun v. Hospital Benefit Ass'n, 357 P.2d 603 (Ariz. 1960); Mountain States Constr. Co. v. Riley, 356 P.2d 648 (Ariz. 1960); Cullison v. Pride O'Texas Citrus Ass'n, 88 Ariz. 257, 355 P.2d 898 (1960); see also *Torts;* Fernandez v. Garza, 88 Ariz. 205, 354 P.2d 260 (1960); Britz v. Kinsuater, 87 Ariz. 385, 351 P.2d 986 (1960); 2 ARIZ. L. REV. 275 (1960); see also *Contracts;* State *ex rel.* Morrison v. Wall, 87 Ariz. 327, 350 P.2d 993 (1960); see also *Real Property;* State *ex rel.* Morrison v. Thelberg, 87 Ariz.

Another case,[80] following the Arizona Constitution,[81] stated that where a technical error has occurred but has not interferred in application of substantive rules of law, which correctly measure the rights of the parties litigant, the supreme court will not reverse the decision.

Irval LaFaun Mortensen
Richard E. Skousen

CREDITORS' RIGHTS

Conditional Sales.—Maestro Music v. Wurlitzer[1] stated that only the buyer and not the seller-assignor is entitled to rely on the resale provisions of the Uniform Conditional Sales Act.[2]

Robert L. Johnson

CRIMINAL LAW AND PROCEDURE

Institution of Criminal Proceedings.—In quashing a writ of habeas corpus, in *McConnell v. Newman*,[1] the court held that the order authorizing the filing of a new complaint need not be made simultaneously with the order dismissing the prosecution, but it must be done without undue delay.[2]

The court reversed the conviction in *State v. Holden*,[3] but held that the county attorney properly filed a new complaint against the defendant without first procuring an order from the court to do so.[4]

The court granted a writ of habeas corpus in *Dodd v. Boies*[5] holding that the evidence adduced at the preliminary hearing did not justify the magistrate in concluding that there was probable cause for charging the accused with first degree murder as an aider and abettor.[6]

318, 350 P.2d 988 (1960); 3 ARIZ. L. REV. 111 (1961); see also *Real Property;* Consolidated Tungsten Mines v. Frazier, 87 Ariz. 128, 348 P.2d 734 (1960); see also *Evidence, Mining Law,* and *Real Property.*

[80] *In re* Schade's Estate, 87 Ariz. 341, 351 P.2d 178 (1960).

[81] ARIZ. CONST. art. 6, § 22.

[1] 88 Ariz. 222, 354 P.2d 266 (1960); see also *Sales, Bills and Notes* and *Contracts.*

[2] ARIZ. REV. STAT. ANN. § 44-323 (1956).

[1] 87 Ariz. 381, 351 P.2d 657 (1960).

[2] See ARIZ. R. CRIM. P. 236, 238.

[3] 88 Ariz. 43, 352 P.2d 705 (1960); see also *Constitutional Law* and *Evidence.*

[4] ARIZ. R. CRIM. P. 168, 175, 176, 177; State v. Freeman, 78 Ariz. 281, 279 P.2d 440 (1955); State v. King, 66 Ariz. 42, 182 P.2d 915 (1947).

[5] 357 P.2d 144 (Ariz. 1960).

[6] Application of Williams, 85 Ariz. 109, 333 P.2d 280 (1958); ARIZ. REV. STAT. ANN. § 13-2012 (7) (1956); ARIZ. R. CRIM. P. 33; CLARK & MARSHALL, CRIMES § 8 (6th ed. 1958); PERKINS, CRIMINAL LAW 555 (1957).

In a certified question to the supreme court in *State v. Treadway*,[7] the court held that the failure to file an information within 30 days after the defendant had been held to answer[8] did not preclude a showing of good cause by the county attorney for the delay in filing, and did not operate as a mandate requiring the court on motion of defendant to quash such an information.[9]

Sanity Hearings.—In *State v. DeVote*[10] where the attention of the trial judge was not directed until time of sentencing to an order given by another judge "dismissing a petition for a sanity hearing without prejudice" the court held that the trial judge committed no error in then passing sentence since, under the rule[11] requiring an examination of a defendant's mental condition prior to or during the trial, the question of sanity was for him in the first instance, and he was required to hold a sanity hearing only if there were reasonable grounds to believe that the defendant was insane or mentally defective.[12]

The trial court interrupted the proceedings in *State v. Reid*[13] and ordered a hearing to see if the defendant was mentally competent to stand trial due to the peculiar behavior exhibited by him during the examination when he took the stand. In affirming the conviction the court held there had been full compliance with the rule[14] requiring an examination of defendant's mental condition prior to or during the trial if there are reasonable grounds that he does not understand the proceedings against him and that there was no error in ordering resumption of the trial.

In *State v. Crose*[15] the court affirmed the conviction of a defendant who had entered a plea of not guilty by reason of insanity, thereby holding that the defendant was not entitled to have medical experts appointed by the court at state expense to examine him and assist in his defense.

Felony-murder Rule.—In *State v. Hitchcock*[16] the court held that even though the defendant had not actually taken the property out of the victim's presence the evidence supported conviction for murder in

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7 357 P.2d 157 (Ariz. 1960).
8 See ARIZ. R. CRIM. P. 80, 236.
9 The court stated that the rule requiring a county to file an information within 30 days after a defendant is held to answer must be construed in *pari materia* with the rule providing that a prosecution shall be dismissed unless good cause to the contrary is shown by affidavit. Prideaux v. Frohmiller, 47 Ariz. 347, 56 P.2d 628 (1936).
10 87 Ariz. 179, 349 P.2d 189 (1960).
11 ARIZ. R. CRIM. P. 250 (A).
12 State v. Reid, 87 Ariz. 123, 348 P.2d 731 (1960); State v. Croff, 85 Ariz. 143, 333 P.2d 728 (1958).
13 87 Ariz. 23, 348 P.2d 731 (1960).
14 ARIZ. R. CRIM. P. 250 (A).
15 357 P.2d 136 (Ariz. 1960); see also *Evidence.*
16 87 Ariz. 277, 350 P.2d 681 (1960).

the first degree since the homicide was committed in perpetration of robbery.[17]

Continuances.—In *Everett v. State*,[18] the state had requested a continuance since the victim of the assault for which the defendant was being tried was out of town. The case was reversed on another point, but the court held that continuances are discretionary with the trial court[19] and the appellate court will not review the action of the trial court unless it clearly appears that the discretion has been abused. The court also stated that the defendant had shown no prejudice as a result of the continuance and hence he was not deprived of right to a speedy trial.[20]

Failure to Object.—The court affirmed defendant's conviction in *State v. Graninger*[21] holding that the evidence established that the defendant was completely represented at all times of the trial and defendant did not at any time object to the presence of any of the attorneys acting in his behalf.[22]

Instructions.—In *State v. Pulliam*[23] the court reversed the conviction, holding that the failure of the trial court to instruct the jury as to the manner in which a confession should be considered in their deliberations constituted such fundamental error as to require a reversal although the defendant did not request any instructions in that regard.[24]

In affirming the defendant's conviction, the court held in *State v. Evans*[25] that the instructions when read as a whole, were comprehensive and fair, and that instructions must be read as a whole and not

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[17] ARIZ. REV. STAT. ANN. §§ 13-452, 641 (1956); People v. Quinn, 177 Cal. App. 2d 734, 176 P.2d 404 (1947), People v. Beal, 2 Cal. App. 2d 251, 39 P.2d 504 (1934). The California cases construe the California statute from which the Arizona statute was copied verbatim.

CLARK & MARSHALL, CRIMES § 10.07 (6th ed. 1958); PERKINS, CRIMINAL LAW 33 (1957).

[18] 356 P.2d 394 (Ariz. 1960).

[19] Hunter v. State, 43 Ariz. 269, 30 P.2d 499 (1934); Shaffer v. Territory, 14 Ariz. 329, 127 Pac. 746 (1912).

[20] Whether a speedy trial has been denied will vary with the facts of the case. State v. Hoffman, 78 Ariz. 319, 279 P.2d 898 (1955).

[21] 87 Ariz. 152, 348 P.2d 921 (1960).

[22] Burgunger v. State, 55 Ariz. 411, 103 P.2d 256 (1940).

[23] 87 Ariz. 216, 349 P.2d 781, 2 ARIZ. L. REV. 281 (1960).

[24] The rule in this jurisdiction is well established that it is the duty of the trial court to submit appropriate instructions to the jury regarding any confession that is admitted into evidence where the defense raises the issue of involuntariness. State v. Thomas, 78 Ariz. 52, 275 P.2d 408 (1954); State v. Hood, 69 Ariz. 294, 213 P.2d 368 (1950); Ramirez v. State, 55 Ariz. 441, 103 P.2d 459 (1940); Galas v. State, 32 Ariz. 195, 256 Pac. 1053 (1927).

Contra, Hernandez v. State, 43 Ariz. 442, 32 P.2d 25 (1934). However, the decision in this case was expressly disapproved by the court.

[25] 356 P.2d 1106 (Ariz. 1960); see also *Evidence*.

piecemeal,[26] that if from an examination of the instructions they are substantially free from error, an assignment predicated upon an isolated paragraph which, standing alone might be misleading, will be given no weight.[27]

The court also held in the *Evans* case[28] that where there was nothing from which the jury could have inferred that the court was anxious for a verdict, and where instructions in the instant case were given prior to the supreme court's disapproval of the use of the *Voeckell*[29] instructions,[30] the giving of such instruction would not require reversal of a first degree murder conviction.

In *Everett v. State*[31] defendant gave evidence on the material elements of self defense. The trial court's failure to instruct on self defense was held to be reversible error.[32]

Verdict Contra to Weight of Evidence.—In *State v. Saenz*[33] and *State v. Bogard*[34] the defendants were found guilty, but the court awarded a new trial based on the fact that the verdicts were contrary to the weight of evidence. The judgments were affirmed as the evidence did not clearly establish the defendants' guilt beyond a reasonable doubt, and the trial court did not abuse its discretion in granting defendants a new trial.[35]

Mistrial.—In *State v. Little*[36] the jury list used did not comply with the statute,[37] but the court, reversing the conviction on another point, held that such non-compliance, in the absence of a showing of prejudice to the defendant, did not require a mistrial.[38]

The defendant appealed on the basis of failure to grant a motion for mistrial for reading of complaint to jury alleging prior conviction in

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[26] State v. Parsons, 70 Ariz. 399, 222 P.2d 637 (1950); Browning v. State, 53 Ariz. 174, 87 P.2d 112 (1939).

[27] State v. Singleton, 66 Ariz. 49, 182 P.2d 920 (1947); Davis v. State, 41 Ariz. 12, 15 P. 2d 242 (1932).

[28] State v. Evans, 356 P.2d 1106 (Ariz. 1960).

[29] State v. Voeckell, 69 Ariz. 145, 210 P.2d 972 (1949).

[30] State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959). In that case the supreme court overruled a line of precedent established in Arizona to the effect that such instruction would, in the proper circumstances, be upheld.

[31] 356 P.2d 394 (Ariz. 1960).

[32] Richardson v. State, 34 Ariz. 139, 268 Pac. 615 (1928).

[33] 88 Ariz. 154, 353 P.2d 1026 (1960); see also *Evidence.*

[34] 88 Ariz. 244, 354 P.2d 862 (1960).

[35] State v. Chase, 78 Ariz. 240, 278 P.2d 423 (1954); ARIZ. R. CRIM. P. 310.

[36] 87 Ariz. 295, 350 P.2d 756 (1960).

[37] ARIZ. REV. STAT. ANN. § 21-301 (1956).

[38] Midkiff v. State, 29 Ariz. 523, 243 Pac. 601 (1926). But the court stated that their holding herein is not to be construed as sanctioning non-compliance with the statute.

State v. Holman.[39] In affirming the judgment the court held that since the state had to establish the prior conviction at the trial, no possible prejudice could result from the jury being advised thereof.[40]

The court held in the *Pulliam* case[41] that the trial court did not err in not granting defendant's motion for mistrial on the ground that defendant's manacles were allegedly removed in the presence of members of the jury panel.[42]

Motion for New Trial.—In *State v. Hill*[43] the defendant based his appeal upon new evidence, the new evidence constituting a discrepancy between the shorthand reporter's transcript which was used by the county attorney at the trial and the answers as recorded by a machine. In reversing the conviction the court held that the failure to compare the recording with the reporter's transcript prior to submission of the case to the jury would not preclude the defendant from predicating a motion for new trial on allegedly newly-discovered evidence.[44]

Sentencing.—In modifying the judgment in *State v. Robles*[45] the court held that where either a fine *or* imprisonment was authorized and both were imposed, the payment of the fine executed that part of the sentence and rendered the imprisonment provision void, and the state could not subsequently remit the fine so as to preserve the suspended sentence of imprisonment.[46]

Affirming denials of requests for suspension of sentence, in *State v. Douglas*[47] and *State v. Shackelford*[48] the court held that suspension of sentence was a matter within the trial court's discretion and refusal to suspend sentence and grant probation was not an abuse of discretion under the circumstances involved.[49]

Excessive Punishment.—The defendant pleaded guilty to first degree burglary and grand theft in *State v. Hutton.*[50] The court held that

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[39] 356 P.2d 27 (Ariz. 1960); see also *Evidence.*

[40] See ARIZ. R. CRIM. P. 134.

[41] State v. Pulliam, 87 Ariz. 216, 349 P.2d 781 (1960).

[42] McDonald v. United States, 89 F.2d 128 (8th Cir. 1937); see also Cwach v. United States, 212 F.2d 520 (8th Cir. 1954).

[43] 88 Ariz. 33, 352 P.2d 699 (1960); see also *Civil Procedure* and *Courts.*

[44] See ARIZ. R. CRIM. P. 310. However, there was a dissent in the case which felt the case was res judicata on the new evidence.

Granting a new trial for newly discovered evidence is largely discretionary. Grijalva v. State, 32 Ariz. 470, 260 P. 188 (1927); Tolley v. State, 18 Ariz. 309, 159 Pac. 59 (1916).

[45] 87 Ariz. 359, 351 P.2d 642 (1960).

[46] ARIZ. REV. STAT. ANN. § 13-351 (1956); State v. Bigelow, 76 Ariz. 13, 258 P.2d 409 (1953); Smith v. State, 37 Ariz. 262, 293 Pac. 23 (1930).

[47] 87 Ariz. 182, 349 P.2d 622 (1960); see also *Constitutional Law.*

[48] 87 Ariz. 189, 349 P.2d 626 (1960); see also *Constitutional Law.*

[49] ARIZ. REV. STAT. ANN. § 13-1657 (1956); The suspension of sentence is not a matter of right under any circumstances but is purely a matter of discretion in the trial court. Varela v. Merrill, 51 Ariz. 64, 74 P.2d 569 (1937).

[50] 87 Ariz. 176, 349 P.2d 187 (1960).

the defendant could legally be sentenced for both crimes,[51] but modified the sentence[52] holding that even though the defendant had a prior criminal record, sentence of 23 to 25 years was excessive, and the interests of justice require that the maximum sentences imposed for burglary and theft run concurrently rather than consecutively.

The court held in *State v. Reid*[53] that a sentence of 7 to 8 years on two counts of bogus checks to run concurrently was not excessive for a three time loser.

Double Jeopardy.—In a certified question to the supreme court in *State v. Thomas*[54] the court held that where a defendant has been convicted of the crime of manslaughter under an information charging him with murder and said conviction has been reversed on appeal and a new trial ordered, the defendant can be charged with murder in a second trial under the same information.[55]

Review.—The defendant in *State v. Vallejos*[56] was wholly unable to pay the cost of transcripts.[57] The court overruled *Riley v. State*[58] and held that a convicted defendant who applies for a transcript is not required to show, in addition to his own indigence, the inability of his friends and relatives to pay the costs.

In *State v. Kingman Justice Court*[59] a writ of certiorari was quashed since review of the evidence upon which a justice of the peace found no probable cause to hold defendants to answer a felony charge was not within the scope of that writ.[60]

The court affirmed defendant's conviction in *State v. Vallejos*[61] hold-

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[51] The two alleged crimes must have identical components in order to prevent double punishment. State v. Westbrook, 79 Ariz. 116, 285 P.2d 161 (1954).

One who commits burglary and larceny in one transaction is guilty of two crimes. People v. Goodman, 159 Cal. App. 2d 54, 323 P.2d 536 (1958); People v. Guarino, 132 Cal. App. 2d 554, 282 P.2d 538 (1955).

[52] The court exercised a power given to it under ARIZ. REV. STAT. ANN. § 13-1717 (B) (1956).

[53] 87 Ariz. 123, 348 P.2d 731 (1960).

[54] 356 P.2d 20 (Ariz. 1960); see also *Constitutional Law.*

[55] See ARIZ. R. CRIM. P. 314.

The states are about evenly split on this point. See Green v. United States, 355 U.S. 184 (1957), footnote 4 of dissenting opinion.

[56] 87 Ariz. 119, 348 P.2d 554, 3 ARIZ. L. REV. 103 (1961); see also *Constitutional Law* and *Evidence.*

[57] ARIZ. R. CRIM. P. 361 (B) provides that where a defendant is unabel to pay the cost of the transcript of the trial proceeding it shall be furnished him at the expense of the county as provided by ARIZ. REV. STAT. ANN. § 13-1714 (1956).

[58] 49 Ariz. 123, 65 P.2d 32 (1937). That case denied the benefits of ARIZ. REV. STAT. ANN. § 13-1714 (1956) to those whose friends or relatives, though not legally responsible, were able to pay for the appeal.

[59] 356 P.2d 694 (Ariz. 1960).

[60] ARIZ. REV. STAT. ANN. § 12-2001 (1956); ARIZ. R. CRIM. P. 16-37, 32 (B).

Accord, Welker v. Stevens, 82 Ariz. 233, 311 P.2d 832 (1957); Hazard v. Superior Court, 82 Ariz. 211, 310 P.2d 830 (1937).

[61] 358 P.2d 178 (Ariz. 1960); see also *Courts* and *Civil Procedure* and *Evidence.*

ing that possession of marijuana was unrelated in any way to the sale, and therefore, conviction and sentence for both sale and possession was justified. The sale to two agents was also held to constitute two separate transactions even though only seconds elapsed between the two sales and therefore conviction and sentence as to each sale was justified.

C. Webb Crockett

DOMESTIC RELATIONS

Divorce. — In *Lawson v. Lawson*[1] the court relied upon an Arizona statute,[2] holding that testimony must be corroborated before a court can grant a divorce thereon.

Modification of Agreement. — The court, in *Simpson v. Superior Court*,[3] held that by statute,[4] the lower court had the right to modify any decree in a divorce proceeding, although the parties might still have a cause of action for their separate contractual obligations.

Alimony. — In *Smith v. Smith*[5] the court held that it would not reverse the decree unless palpably erroneous and excessive, as the trial court was in the best position to determine the reasonableness of alimony.[6]

Custody. — In *Ward v. Ward*[7] the court held that conditions had changed sufficiently to warrant a modification of the decree.[8] Upon motion for rehearing,[9] the court modified, ordering the lower court to determine the fitness of the father to have the child.[10]

In *Galraith v. Galbraith*[11] the court held that the mere showing that the mother had recovered from mental illness, without a showing that it would be for the betterment of the children's welfare to

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[1] 356 P.2d 701 (Ariz. 1960).
[2] ARIZ. REV. STAT. ANN. § 25-317 (1956). See also *Evidence.*
[3] 87 Ariz. 350, 351 P.2d 179 (1960).
[4] ARIZ. REV. STAT. ANN. §§ 25-315, -319 (1956).
[5] 358 P.2d 183 (Ariz. 1960); Oliver v. Oliver 258 S.W.2d 703 (Ky. 1953).
[6] Tennery v. Tennery, 35 Ariz. 69, 274 P. 638 (1929); ARIZ. REV. STAT. ANN. § 25-319 (1956). See also *Courts and Civil Procedure.*
[7] 353 P.2d 895 (Ariz. 1960).
[8] ARIZ. REV. STAT. ANN. § 25-321 (1956).
[9] 356 P.2d 30 (Ariz. 1960).
[10] Stewart v. Stewart, 41 Cal. 2d 447, 260 P.2d 44 (1953).
[11] 356 P.2d 1023 (Ariz. 1960).

give the mother custody does not show a sufficient change in circumstances to warrant a modification of the original decree.[12]

The court, in *In Re West's Adoption*,[13] held that an extraordinary writ of prohibition would lie only where an inferior tribunal was acting without or in excess of its jurisdiction and that petitioner must allege and prove that the court was without jurisdiction.

Remarriage. — The court, in *Davis v. Industrial Comm'n*,[14] relying upon another analogous case,[15] held that petitioner's marriage, taking place in Arizona within one year after an Arizona divorce, was valid though voidable since the statute provided no penalty;[16] the court had no power to invade the legislative field to supply the penalty.

James E. Rogers

EVIDENCE

Expert and Opinion Evidence. — In *State v. McDonald*[1] and *State ex rel. Morrison v. Jay Six Cattle Co.*[2] the supreme court again held that the admission of expert and opinion evidence is a matter of the trial court's discretion. Also, trial courts found it necessary in *State v. McDonald*[3] and *City of Phoenix v. Brown*[4] to allow laymen to qualify as expert witnesses; this too was held a matter of the trial court's discretion, so long as the individuals testifying had some knowledge of the subject superior to that possessed by men generally.

In *Murray v. Industrial Comm'n*[5] the court considered a conflict between expert medical testimony and necessary legal conclusions as to causation and proximate cause. The court said that where the medical facts constituting the basis of the medical opinion are clearly shown,

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[12] ARIZ. REV. STAT. ANN. § 25-321 (1956).
[13] 87 Ariz. 234, 350 P.2d 125 (1960). See also *Courts and Civil Procedure.*
[14] 88 Ariz. 117, 353 P.2d 627 (1960). Comment 3 ARIZ. L. REV. 88 (1961).
[15] Hack v. Industrial Comm'n, 74 Ariz. 305, 248 P.2d 863 (1952), Horton v. Horton, 22 Ariz. 490, 198 Pac. 1105 (1921).
[16] ARIZ. REV. STAT. ANN. § 25-320 (1956). See also *Constitutional Law.*

[1] 88 Ariz. 1, 352 P.2d 343 (1960); UDALL, ARIZONA LAW OF EVIDENCE § 23 (1960); see also *Real Property, Courts and Civil Procedure* and *Constitutional Law.*
[2] 88 Ariz. 97, 353 P.2d 185 (1960); UDALL, *op. cit. supra* note 1, at § 23; see also *Real Property* and *Courts and Civil Procedure.*
[3] 88 Ariz. 1, 352 P.2d 343 (1960); UDALL, *op. cit. supra* note 1, at § 23.
[4] 88 Ariz. 60, 352 P.2d 754 (1960); UDALL, *op. cit. supra* note 1, at § 23; see also *Municipal Corporations, Courts and Civil Procedure* and *Torts.*
[5] 87 Ariz. 190, 349 P.2d 627 (1960); UDALL, *op. cit. supra* note 1, at § 26; see also *Workmen's Compensation.*

and the medical opinion as to causation conflicts with the inescapable legal conclusion on proximate cause, the former must give way to the latter.

Business Records. — An accident report, in *Layne v. Hartung,*[6] and a written statement that machinery had been delivered to certain premises, in *Consolidated Tungsten Mines v. Frazier,*[7] were held not to be business records within the meaning of the Arizona statute.[8]

Right of Cross-examination. — In *State v. Jay Six Cattle Co.*[9] the trial court refused to allow cross-examination of the witness concerning an appraisal he had previously made of the premises in question for federal income tax purposes. The lower court erred in not permitting this cross-examination for purposes of impeaching the witness, but it was not reversible error.

The court also decided in *Forman v. Creighton School Dist.*[10] that a teacher, appearing with counsel before a school's board of trustees which is considering the teacher's dismissal after she had gained tenure,[11] has the right of cross-examination of those witnesses who testify against her at such meeting.

Corroboration. — Although the statutory rule requiring corroboration of a party's testimony in a divorce case[12] has been given a very lax treatment, under *Lawson v. Lawson,*[13] there still must be some minimum amount of corroboratiton.

Impeachment of Witnesses. — In *State v. Saenz,*[14] where a police officer had made notes to record defendant's statements, the defendant was entitled to see the notes for purposes of impeaching the credibility of the officer's testimony although the officer did not refer to the notes while testifying.

In regard to depositions, *Bolmfalk v. Vaughan*[15] stated that the admission of defendant's deposition was proper for purposes of impeaching the defendant, since the defense was afforded an opportunity

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[6] 87 Ariz. 88, 348 P.2d 291 (1960); UDALL, *op. cit. supra* note 1, at § 155; see also *Torts* and *Courts and Civil Procedure.*

[7] 87 Ariz. 128, 348 P.2d 734 (1960); UDALL, *op. cit. supra* note 1, at § 155; see also *Courts and Civil Procedure* and *Real Property.*

[8] ARIZ. REV. STAT. ANN. § 12-2262 (1956).

[9] 88 Ariz. 97, 353 P.2d 185 (1960); UDALL, *op. cit. supra* note 1, at § 23.

[10] 87 Ariz. 329, 351 P.2d 165 (1960); UDALL, ARIZONA LAW OF EVIDENCE § 45 (1960); 2 ARIZ. LAW REV. 290 (1960); see also *Administrative Law and Procedure,* and *Constitutional Law.*

[11] ARIZ. REV. STAT. ANN. §§ 15-251, -260 (1956).

[12] ARIZ. REV. STAT. ANN. § 25-317 (1956).

[13] 356 P.2d 701 (Ariz. 1960); Hemphill v. Hemphill, 84 Ariz. 95, 324 P.2d 225 (1958); Lundy v. Lundy, 23 Ariz. 213, 202 Pac. 809 (1922); see also *Domestic Relations.*

[14] 88 Ariz. 154, 353 P.2d 1026 (1960); UDALL, *op. cit. supra* note 1, § 63; see also *Criminal Law and Procedure.*

[15] 357 P.2d 617 (Ariz. 1960); UDALL, *op. cit. supra* note 1, at § 63; see also *Partnership, Contracts* and *Courts and Civil Procedure.*

to object to material contained in the deposition, and it failed to object. However, according to *Buzard v. Griffin*,[16] a witness who appears and testifies generally at a trial on the merits may not be discredited by showing that in a previously taken deposition he refused to testify on the grounds that his testimony might tend to incriminate him. Although evidence of precautions taken after an accident generally cannot be admitted to prove negligence, it may be admitted to impeach the testimony of a witness as was done in *Slow Development Co. v. Coulter*.[17]

Confessions. — As was stated in *State v. Holden*,[18] in considering whether the prosecution has sustained its burden of making a prima facie case of a free and voluntary confession before introducing a confession in evidence, the court should consider such circumstances as events occurring immediately prior to and at the time of the confession.

Relevancy. — In a suit to determine the value of real property, the court was correct in admitting a contract showing the sale price of the business and personal property located on the premises. Since the contract was accompanied by testimony establishing the value of the personalty sold under the contract, the court said, in *State v. McDonald*[19] that by simple subtraction the jury could arrive at the price paid for the real property and therefore the contract was not prejudicial.

However, the same case stated it was improper to admit evidence of amounts paid in other condemnation actions for similar land, evidence of amounts of unaccepted offers for the land condemned, or evidence of proposed exchanges of the condemned land with other land.[20]

In *Slow Development Co. v. Coulter*[21] it was proper to admit evidence of similar accidents at the same place as tending to prove the existence of a defective condition, knowledge or notice of the condition, or negligence in permitting that condition to continue.

Entrapment was the defense in *State v. Vallejos*[22] and evidence of other crimes was properly admitted to show that the defendant's criminal intent was the procuring cause in the commission of the crime. Another criminal case, *State v. Holman*,[23] stated that when a defendant

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[16] 358 P.2d 155 (Ariz. 1960); see also *Torts* and *Courts and Civil Procedure.*

[17] 88 Ariz. 122, 353 P.2d 890 (1960); UDALL, *op. cit. supra* note 1, at § 96.

[18] 88 Ariz. 43, 352 P.2d 705 (1960); UDALL, *op. cit. supra* note 1, at § 100; see also *Criminal Law and Procedure* and *Constitutional Law.*

[19] 88 Ariz. 1, 352 P.2d 343 (1960); *but see* State *ex rel.* La Prade v. Carrow, 57 Ariz. 429, 114 P.2d 891 (1941).

[20] State v. McDonald, *supra* note 19.

[21] 88 Ariz. 122, 353 P.2d 890 (1960); MCCORMICK, EVIDENCE § 67 (1954); UDALL, *op. cit. supra* note 1, at § 116; 2 WIGMORE, EVIDENCE §§ 252, 458 (3d ed. 1935).

[22] 358 P.2d 178 (Ariz. 1960); UDALL, *op. cit. supra* note 1, at § 115; 3 ARIZ. LAW REV. 103 (1961).

[23] 356 P.2d 27 (Ariz. 1960); UDALL, *op. cit. supra* note 1, at §§ 115, 45; see also *Criminal Law and Procedure.*

with prior convictions is charged with the commission of a crime, upon his taking the stand in his own behalf, he may be cross-examined concerning the prior convictions.

Testimony that a witness did not see or hear an event is not sufficient in and of itself to prove that the event did not occur. *In re Estate of Schade*[24] properly held that it must first be established that the witness was in such a situation that he would have heard or seen the event if it happened. In the matter of drawing inferences from a witness's refusal to answer questions, *Buzard v. Griffin*[25] states that in order to draw an inference from an inference, the prior inference must be established to the exclusion of any other reasonable theory than a mere probability.

Robert L. Johnson

INSURANCE

Sufficiency of Notice of Cancellation. — In *Hagin v. Fireman's Fund Ins. Co.*[1] our court held that a letter mailed to and received at the address shown and provided for within a policy, stating that a premium was due on a designated date and that the policy would be cancelled unless the premium was timely paid, is sufficient notice that strict compliance of a contract will be expected even though the letter was addressed to the wife and the insurance agent had heard a rumor that the couple was separated.

Premium Adjustment. — In *Hagin*[2] our court also held that a policy provision for premium adjustment, after cancellation, cannot effect the sufficiency of notice of cancellation, which is given to the insured, because it relates to a matter subsequent to effective cancellation.

Ralph Bushnell

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[24] 87 Ariz. 341, 351 P.2d 173 (1960); see, Cope v. Southern Pac. Co., 66 Ariz. 197, 185 P.2d 772 (1947); UDALL, *op. cit. supra* note 1, at § 112; see also *Courts and Civil Procedure* and *Wills and Administration.*

[25] 358 P.2d 155 (Ariz. 1960); UDALL, *op. cit. supra* note 1, at § 111; see also *Torts* and *Courts and Civil Procedure.*

[1] 88 Ariz. 158, 353 P.2d 1029 (1960); see generally 39 AM. JUR. *Notice and Notices* §§ 12, 16 (1942).

[2] Hagin v. Fireman's Fund Inc. Co., 88 Ariz. 158, 353 P.2d 1029 (1960); see also Medford v. Pacific Nat'l Fire Ins. Co., 189 Ore. 617, 219 P.2d 142 (1950); Annot., 16 A.L.R.2d 1182 (1951); VANCE, INSURANCE § 891 (3d ed. 1951).

MINING LAW

Assessment Work. — In *Consolidated Tungsten Mines v. Frazier*[1] an original locator of a mining claim failed to do the required assessment work[2] for the year in question, and the court held that doing the assessment work in the three months that followed the expiration date could not revive any legal rights in and to such claim if a subsequent locator makes a prior valid relocation.[3]

Subsequent Locator. — In *Bagg v. New Jersey Loan Co.*[4] the Arizona Supreme Court held that any subsequent locator entering upon the actual possession of another's unpatented claim, for the purpose of initiating a claim, must act in good faith and an attempt to obtain monies through the devise of a conflicting mining claim is sufficient evidence of bad faith as to make such attempted location void ab initio.

Unpatented Mining Claims. — In both *Bagg v. New Jersey Loan Co.*[5] and *Walkeng Mining Co. v. Covey*[6] our court, in dealing with disputes over subsequent locations of mining claims, restated that unpatented mining claims are only a possessory right governed by the law of possession.[7] The claimant must show, as between the parties involved, a superior right to possession in himself, and prior location and possession carry with them prior and better rights, unless forfeited or abandoned.[8]

Withdrawal of Land. — *Walkeng Mining Co. v. Covey*[9] involved public domain that had been withdrawn from entry or location by order of the Secretary of Interior. Plaintiff attempted to relocate defend-

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[1] 87 Ariz. 128, 348 P.2d 784 (1960); see also *Courts and Civil Procedure, Evidence* and *Real Property.*

[2] 17 Stat. 91 (1872), 30 U.S.C. § 23 (1940).

[3] *Accord,* Frazier v. Consolidated Tungsten Mines, 80 Ariz. 261, 296 P.2d 447 (1956).

[4] 88 Ariz. 182, 354 P.2d 40 (1960); see also Harvey v. Havener, 135 Mont. 437, 340 P.2d 1084 (1959); Brown v. Murphy, 36 Cal. App. 2d 171, 97 P.2d 281 (1939); Hess v. Moodey, 35 Cal. App. 2d 401, 95 P.2d 699 (1939).

[5] 88 Ariz. 182, 354 P.2d 40 (1960).

[6] 88 Ariz. 80, 352 P.2d 768 (1960); see also *Courts and Civil Procedure* and *Real Property.*

[7] 1 AMERICAN MINING LAW §§ 382, 383, 384 (4th ed. 1931); see also Rudle v. Republic Cement Corp., 86 Ariz. 96, 341 P.2d 226 (1960).

[8] *Accord,* Bradley v. Fackler, 13 Wash. 2d 614, 126 P.2d 190 (1942).

[9] 88 Ariz. 80, 352 P.2d 768 (1960).

ant's unpatented mining claim subsequent to the withdrawal order. Our court held that the withdrawal order segregated the validity subsisting unpatented mining claims reserving exclusive right of possession for mining purposes in the locator but prevented relocation of these claims by anyone.[10]

Ralph Bushnell

MUNICIPAL CORPORATIONS

Tort Action Against Municipality. — In *City of Phoenix v. Brown*[1] the court held that notice to the city of faulty streets may be implied from the length of time in which the street was in unsafe condition and from the lack of the city's agents or officers to exercise due diligence to discover the condition.[2]

Tax Sale by Municipality. — Plaintiff's action, in *Nicholas v. Fowler*,[3] to quiet title failed, the court holding that statutes are strictly construed in tax sales, and failure to abide by them renders the sale and deed absolutely void.[4]

Control of Board of Regents by Municipality. — In *Bd. of Regents v. City of Tempe*[5] the court held that the Board of Regents, being an agency of the state, could not be controlled by a city, as the state had not delegated the power to the city for university construction, but had placed it completely within the power of the Board of Regents.[6]

Power of City to Incorporate. — Plaintiffs' petition, in *Burton v. City of Tucson*,[7] and in the companion case of *Burton v. Kautenburger*,[8]

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[10] 58 C.J.S. *Mines and Minerals* § 59 (1949); 73 C.J.S. *Public Lands* § 38 (1951); see also West v. Lyders, 36 F.2d 108 (D.C. Cir. 1929).

By way of dictum, the court stated that the assessment work is not necessary to preserve possession as against the United States, but only as against subsequent locators. Walkeng Mining Co. v. Covey, 88 Ariz. 80, 352 P.2d 768 (1960) *(dictum)*.

[1] 88 Ariz. 60, 352 P.2d 754 (1960).

[2] PROSSOR, TORTS 129 (2nd ed. 1955). See also *Courts and Civil Procedure, Evidence* and *Torts*.

[3] 357 P.2d 331 (Ariz. 1960).

[4] ARIZ. REV. STAT. ANN. § 11-743 (1956).

[5] 356 P.2d 399 (Ariz. 1960).

[6] ARIZ. CONST. art. 11 §§ 1, 2, 5; ARIZ. REV. STAT. ANN. §§ 9-101, -276, 15-721, -723, -724 (1956).

[7] 356 P.2d 413 (Ariz. 1960); TUCSON, ARIZ., CHARTER ch. 9, § 8. See also *Constitutional Law*.

[8] 356 P.2d 412 (Ariz. 1960); ARIZ. REV. STAT. ANN. §§ 9-471, -812 (1956). See also *Constitutional Law*.

failed to stop the City of Tucson from incorporating outlying areas, the court holding that the Board of Supervisors' refusal of plaintiffs' proposed incorporation was final and that thereafter the City of Tucson was free to go ahead with its incorporating plans.

James E. Rogers

PARTNERSHIP

Creation and Dissolution. — *Fernandez v. Garza*[1] held that where the plaintiff and deceased agreed to work together for their joint benefit, and to divide all the profits made therefrom, the essential elements of a partnership existed.[2] The court further stated that partnership assets in the hands of an administratrix are trust funds and are not part of the assets of the estate. They are held in trust for the surviving partner.[3]

A partnership asset consisting of a liquor license cannot be partitioned. The court held in *Myerson v. Myerson*[4] that, since the license cannot be equitably partitioned, it was required to be sold upon dissolution and the amount received partitioned.[5]

If a partnership rests upon an unambiguous written instrument and expresses in good faith the full understanding and obligations of the parties, the question of whether a partnership exists, held the court in *Bohmfalk v. Vaughan*,[6] is one of law for the courts.

Suit by a Partner. — In the *Bohmfalk case*,[7] the court further held that a partner cannot sue his co-partner for damages in conversion with respect to the firm property. Only an action for an accounting will lie.[8]

Norman Rosenblum

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[1] 88 Ariz. 214, 354 P.2d 260 (1960); see also *Courts and Civil Procedure* and *Wills and Administration.*
[2] ARIZ. REV. STAT. ANN. § 29-207 (1956); UNIFORM PARTNERSHIP ACT § 7.
[3] In re Baxter's Estate, 22 Ariz. 91, 194 Pac. 333 (1921).
[4] 357 P.2d 133 (Ariz. 1960); see also *Private Corporations* and *Trusts.*
[5] ARIZ. REV. STAT. ANN. § 12-1222 (1956).
[6] 357 P.2d 617 (Ariz. 1960); see also *Courts and Civil Procedure, Evidence,* and *Contracts.*
[7] *Ibid.*
[8] Jacob v. Cherry, 65 Ariz. 307, 180 P.2d 217 (1947).

PRIVATE CORPORATIONS

Change of Corporation Name. — In *Senner v. Bank of Douglas*,[1] a case in which the Bank of Douglas was trying to change its name to the "Arizona Bank," the Supreme Court of Arizona held as a matter of law that the names "Arizona Bank" and "Southern Arizona Bank and Trust Co." were not deceptively similar.[2] The case was remanded to the lower court to decide the similarity of the proposed name to that of other banks not before considered.

Corporate Ownership of Liquor Licenses. — In *Myerson v. Myerson*[3] the court held that, under the Arizona statute,[4] a corporation was not capable of owning a liquor license; since a corporation was not capable, a person could not hold it in trust for the company,[5] an act which would defeat the purpose of the statute.

James E. Rogers

PUBLIC UTILITIES

Debt. — In *Builder's Supply Corp. v. Marshall*,[1] the court held that a carrier was entitled to collect fees due under an approved contract on file with the Corporation Commission where the shipper had begun to use a different basis of payment calling for lower rates. The carrier had not waived any rights under the contract by accepting payments under protest.[2]

Service. — Where the Corporation Commission denied the railroad's petition to discontinue the service of an agent in *Arizona Corp. Comm'n v. Southern Pac. Co.*,[3] the court stated that the duty to maintain an

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[1] 88 Ariz. 194, 354 P.2d 48 (1960); ARIZ. CONST. art. 5, § 5; ARIZ. REV. STAT. ANN. §§ 10-122, 12-901 (1956); Collins v. Krucker, 56 Ariz. 6, 104 P.2d 176 (1940). See also *Administrative Law and Procedure.*

[2] ARIZ. REV. STAT. ANN. § 10-122 (1956).

[3] 357 P.2d 133 (Ariz. 1960).

[4] ARIZ. REV. STAT. ANN. § 4-202 (1956); Clark v. Tinnin, 81 Ariz. 259, 304 P.2d 947 (1956).

[5] 1A BOGERT, TRUSTS AND TRUSTEES, § 211. See also *Partnership and Trusts.*

[1] 88 Ariz. 89, 352 P.2d 982 (1960); see also *Courts and Civil Procedure* and *Contracts.*

[2] See Builder's Supply Corp. v. Shipley, 86 Ariz. 153, 341 P.2d 940 (1959).

[3] 87 Ariz. 310, 350 P.2d 765 (1960); see also *Administrative Law and Procedure.*

agent is incidental to the railroad's primary and absolute duty to furnish transportation services, and that it is unreasonable to require maintenance of an agency station where the cost of services is out of proportion to the revenue derived from the portion of the public benefitted thereby.[4]

Norman Rosenblum

REAL PROPERTY

Eminent Domain. — State ex rel. Morrison v. Thelberg[1] represented a material change in Arizona law[2] in allowing compensation for impairment of highway access separate from the award for the actual taking of property by condemnation.[3] The court recognized impairment of an easement of ingress and egress to be a taking of a property right,[4] and in *State ex rel. Morrison v. Wall*[5] held the measure of damages to be the difference between market value of abutting property immediately before and immediately after the impairment.[6]

A further application of the *Thelberg* doctrine was made in *Pima County v. Bilby*[7] where impairment resulted from the mere change of grade of an existing road. The taking was found to be compensable.

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[4] Illinois Cent. R.R. v. Illinois Commerce Comm'n, 399 Ill. 67, 77 N.E.2d 180 (1948).

[1] 87 Ariz. 318, 350 P.2d 988 (1960), *opinion superceding* State *ex rel.* Morrison v. Thelberg, 86 Ariz. 263, 344 P.2d 1015 (1959); 3 ARIZ. L. REV. 111 (1961); see also *Courts and Civil Procedure.*

For a discussion of the original opinion, see Summary, 2 ARIZ. L. REV. 122 (1960).

[2] Specifically overruling *In re* Forsstrom, 44 Ariz. 472, 38 P.2d 878 (1934), and Grande v. Casson, 50 Ariz. 397, 72 P.2d 676 (1937), which laid down the principle that when a right of way for a highway is once taken, the owners are presumed to have been compensated for any future impairments of access resulting from changing conditions of the right of way. This principle was not followed in State *ex rel.* Sullivan v. Carrow, 57 Ariz. 484, 114 P.2d 896 (1941), where a change in grade was made at the time of taking the right of way; and the court would have allowed compensation if the extent of the injury had been shown.

[3] The court adopted the rule as laid down in Starr v. Linzell, 129 N.E.2d 659 (Ohio 1955). For textual treatment of this question, see JAHR, EMINENT DOMAIN § 55 (1953).

[4] ARIZ. CONST. art. II, § 17 requires compensation for either taking or damaging of a property right.

[5] 87 Ariz. 327, 350 P.2d 993 (1960); see also *Courts and Civil Procedure.*

[6] The value of the access itself is not used as a measure of damage. State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960).

[7] 87 Ariz. 366, 351 P.2d 647 (1960); see also *Constitutional Law* and *Courts and Civil Procedure.*

Valuation of property and property rights taken by condemnation was the subject of decision in *State ex rel. Morrison v. Jay Six Cattle Co.*[8] and *State ex rel. Morrison v. McMinn.*[9] The *Jay Six* case involved severance of part of a large parcel,[10] and the court permitted consideration of a 'front footage' valuation of part of the land with an acreage valuation of the remainder. Damages were allowed to be based on the highest and most profitable use for which the property was adapted or likely to be in demand in the reasonably foreseeable future; however, the court held in the *McMinn* case that the land taken must be valued under restrictions of existing zoning with consideration given to the impact on market value of the likelihood of a zoning change.

State v. McDonald[11] concerned the admissibility of certain evidence of market value, including options to purchase and amounts paid in other condemnation actions.

The constitutionality[12] of a condemnation statute[13] was successfully challenged in *State ex rel. Willey v. Griggs,*[14] in which the court held invalid a provision establishing a fixed date for maximum land valuation and allowing the State Highway Commission a two year period following that date either to condemn as planned or abandon the condemnation proceedings.

Interpretation of Documents. — The mere reference to restrictive covenants of record, in a "subject to the following encumbrances" clause of a deed,[15] will not make such restrictions effective as to the deeded property according to *Smith v. Second Church of Christ Scientist.*[16]

The rule, that a deed description which is clear, unambiguous, and relates to the land without inconsistency will be controlling in the absence of anterior agreement, was followed in *McNeil v. Attaway.*[18]

The court noted in *Young v. Bishop*[19] that an escrow agreement supplemental to a contract for sale of real property cannot be bind-

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[8] 88 Ariz. 97, 353 P.2d 185 (1960); see also *Courts and Civil Procedure* and *Evidence.*

[9] 88 Ariz. 261, 355 P.2d 900 (1960); see also *Courts and Civil Procedure.*

[10] See ARIZ. REV. STAT. ANN. § 12-1122 (1956).

[11] 88 Ariz. 1, 352 P.2d 343 (1960); see also *Constitutional Law, Courts and Civil Procedure* and *Evidence.*

[12] Violations charged were of ARIZ. CONST. art. II, §§ 4, 17.

[13] ARIZ. REV. STAT. ANN. § 18-155(D) (1956).

[14] 358 P.2d 174 (Ariz. 1960); see also *Constitutional Law.*

[15] The Arizona court had not previously passed on such references in the "subject to" clause, and based its holding on Van Duyn v. H. S. Chase & Co., 149 Iowa 222, 128 N.W. 300 (1910).

[16] 87 Ariz. 400, 351 P.2d 1104 (1960).

[17] 11 C.J.S. *Boundaries* § 74 (1938).

[18] 87 Ariz. 103, 348 P.2d 301 (1959); see also *Attorney and Client* and *Contracts.*

[19] 88 Ariz. 140, 353 P.2d 1017 (1960); see also *Contracts* and *Courts and Civil Procedure.*

ing without completion of the contract, but held that the contract itself may be binding even though full agreement on the escrow arrangements was never reached.[20]

Lateral Support. — In refusing reimbursement to an excavator for underpinning structures on adjoining land, the court, in *James Steward Co. v. Garden Plaza Bldg. Corp.*,[21] held the excavator to be a mere volunteer not acting under a duty to the adjoining land owner[22] even in light of the applicable statutory provision.[23]

Adverse Possession. — The court held in *Fritts v. Ericson*[24] that the defendant, seeking to prove title superior to that of plaintiff's established deed, must bear the burden of establishing each element of his claim of adverse possession,[25] with no equities favoring the establishment of his claim.[26]

Forceable Entry and Detainer. — According to the court in *Walkeng Mining Co. v. Covey*,[27] disputed possession of unpatented mining claims[28] may properly be settled in an action for forcible entry and detainer.[29]

Quiet Title Action. — In its consideration of a second case concerning mining claims, *Consolidated Tungsten Mines Inc. v. Frazier*,[30] the court commented that a promissory note given for a quit claim deed constituted valid consideration even when the grantor attempted to repudiate before the note was paid.

Robert W. Eppstein

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[20] Citing Johnson v. Wallden, 343 Ill. 201, 173 N.E. 790 (1930); McLain v. Healy, 98 Wash. 489, 168 Pac. 1 (1917).

[21] 88 Ariz. 286, 356 P.2d 31 (1960).

[22] The court adopted the majority common-law rule, following Cornet Stores v. Security Trust and Savings Bank, 120 Cal. App. 2d 852, 262 P.2d 77 (1953); Braun v. Hamack, 206 Minn. 572, 289 N.W. 553 (1940).

[23] TUCSON, ARIZ., UNIF. BLDG. CODE ch. 28 § 2801 (1952). The court further held that this ordinance codified the common-law doctrine while adding a requirement that excavator give adequate notice to adjoining building owner, and that excavator share the burden of support when he goes below a twelve foot depth.

[24] 87 Ariz. 227, 349 P.2d 1107 (1960); see also *Courts and Civil Procedure.*

[25] ARIZ. REV. STAT. ANN. §§ 12-521(A) -526 (1956).

[26] Lewis v. Ferrah, 65 Ariz. 320, 180 P.2d 578 (1947).

[27] 88 Ariz. 80, 352 P.2d 768 (1960); see also *Courts and Civil Procedure* and *Mining Law.*

[28] The fee title of an unpatented mining claim remains in the federal government until patenting of the claim. See COSTIGAN, AMERICAN MINING LAW ch. 20, § 108 (1908 Ed.)

[29] ARIZ. REV. STAT. ANN. §§ 12-1171, -1172. See also 1 AMERICAN MINING LAW §§ 332, 383, 384 (4th Ed.).

[30] 87 Ariz. 128, 348 P.2d 734 (1960); see also *Courts and Civil Procedure, Evidence* and *Mining Law.*

SALES

Conditional Sales Contract. — In *Ray v. First Nat'l Bank of Arizona*[1] the court held that the buyer's signing of a conditional sales contract with knowledge that the machine was not working satisfactorily was not a waiver of the implied warranty of fitness where the seller expressly warranted that the machine would be made to work.[2]

Maestro Music, Inc. v. Rudolph Wurlitzer Co.[3] held that the buyer under a conditional sales contract can waive the resale provisions of the Uniform Conditional Sales Act[4] by an agreement based on new consideration and made after the buyer's default.[5]

Susan T. Payne

TAXATION

Construction of Statutes. — Two cases involving "trading stamps" required judicial interpretation of the Transaction Privilege Tax statutes.[1] In *State Tax Comm'n v. Consumers Market Inc.*[2] the tax had been assessed on the value of merchandise given in redemption of the trading stamps, but the court found such a transaction was not a "sale" for a "consideration" as defined by the statute.[3]

Relying partly on the *Consumers* decision, the drug company in *State Tax Comm'n v. Ryan-Evans Drug*[4] contended that the cost of stamp redemption merchandise should be deducted from taxable gross

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[1] 356 P.2d 691 (Ariz. 1960).

[2] ARIZ. REV. STAT. ANN. §§ 44-215(6), -302 (1956); see Brought v. Redewill Music Co., 17 Ariz. 393, 153 Pac. 285 (1915); Rohland v. Int'l Harvester Co. of America, 182 Okla. 200, 76 P.2d 1078 (1938); Fairbanks, Morse & Co. v. Miller, 80 Okla. 265, 195 Pac. 1083 (1921); BOGERT, COMMENTARIES ON CONDITIONAL SALES § 31 (1924).

[3] 88 Ariz. 222, 354 P.2d 266 (1960); see also *Bills and Notes, Contracts,* and *Creditors Rights.*

[4] ARIZ. REV. STAT. ANN. § 44-319 (1956).

[5] See Commercial Credit Co. v. Phoenix Hudson-Essex, Inc., 33 Ariz. 56, 262 Pac. 1 (1927). The waiver of statutory conditions must come after default, it must be clearly intended, and it must be given for adequate new consideration running from the seller to the buyer. Waverly, Sayer & Athens Transp. Co. v. General Motors Truck Co., 36 F. Supp. 285 (D.C. Pa. 1940); see also Adler v. Weis & Fisher Co., 218 N.Y. 295, 112 N.E. 1049 (1916); Mack Int'l Truck Corp. v. Thelen Trucking Co., 205 Wis. 434, 237 N.W. 75 (1931); BOGERT, COMMENTARIES ON CONDITIONAL SALES §§ 137, 139-42 (1924); Annot., 49 A.L.R.2d 15 (1956).

[1] ARIZ. REV. STAT. ANN. §§ 42-1301, -1347 (1956).

[2] 87 Ariz. 376, 351 P.2d 654 (1960).

[3] ARIZ. REV. STAT. ANN. § 42-1301(11) (1956).

[4] 89 Ariz. 18, 357 P.2d 607 (1960).

proceeds as a cash discount.[5] The court, however, held that trading stamp costs were not a discount of any type, but a device to stimulate sales which, like any other business expense, could not be deducted.[6]

Beaman v. Westward Ho Hotel Co.[7] posed the question of whether a pre-agreed "tip rate" added to dinner bills at chartered hotel parties, which amount was subsequently distibuted to employees in addition to their regular hourly rate of pay, was actually a wage. The court held such a payment was in fact a wage within the meaning of the State Unemployment Compensation Fund provisions.[8]

Interstate Transactions. — The controversy in *State Tax Comm'n v. Murray Co. of Texas Inc.*[9] arose from the Company's contention that their shipments into Arizona of knocked-down metal buildings and cotton gins, and parts for them, were wholly interstate in nature and could not be taxed by the state. The court agreed, ruling that the mere fact that a salesman resided within the state, or that labor is furnished within the state to put the imported manufactured item to its intended use, was not enough to subject otherwise interstate business to local taxation.[10]

Robert W. Eppstein

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[5] ARIZ. REV. STAT. ANN. § 42-1301(6) (1956).

[6] The court defined "cash discount" as applying only to discounts of cash and not to discounts for payment of cash.

[7] 357 P.2d 327 (Ariz. 1960).

[8] ARIZ. REV. STAT. ANN. § 23-622 (1956).

Although the Beaman case holds that the payment was not a gratuity, the court raised, and left unanswered, the question whether a true gratuity is subject to Unemployment Fund collection. The present statute defines wages as "all remuneration from whatever source," while the previous statutory provision, ARIZ. CODE ANN. § 56-1002m (1930), prior to a 1947 amendment, specifically included gratuities received from sources other than employers. The 1947 amendment removed this provision and it was not re-inserted in the 1956 code.

[9] 87 Ariz. 268, 350 P.2d 674 (1960), Comment, 3 ARIZ. L. REV. 93 (1961), *opinion restated on remand from U.S. Supreme Court*, 89 Ariz. 61, 358 P.2d 167 (1960); see also *Constitutional Law*.

[10] In Nippert v. Richmond, 327 U.S. 416 (1946), the U.S. Supreme Court noted that local incidents, such as in-state salesmen or sales offices, are important mainly to determine the due process aspects of a tax; that is, whether enough takes place within a state to justify its jurisdiction to levy the tax. Local incidents are not enough to determine the question of burden on interstate commerce.

TORTS

Contractual Immunity from Tort Liability. — In *Craviolini v. Scholer and Fuller*[1] our court held that the quasi-immunity from tort liability granted by agreement to an architect, as arbitrator[2] between the owner and the contractor, will not extend so far as to make him immune from tortious actions committed in the performance of other duties.[3]

Negligence. — In *Layne v. Hartung*[4] our court held that the mere fact that a driver has a green light at an intersection, controlled by an electric signal, does not release him from his negligence in failing to keep a proper lookout[5] so as to yield the right of way when he discovers that another is not acting within the law.[6]

City of Phoenix v. Brown[7] involved a situation where the defendant had no actual notice of the existence of a dangerous condition upon which his liability was based. Our court held that notice may be implied where the dangerous condition existed at the time of, and previous to, the injuries complained of for such length of time that the city or its officers or agents, in the exercise of ordinary care and diligence, should have discovered the condition and remedied it.

In *Parker Hamburger No. One v. Fitzgerald*[8] the court held that a property owner is not liable to a gratuitous licensee for a trap unless the alleged danger is not visable at all, and that it is not sufficient that gratuitous, licensee, in exercising due care, did not see it.

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[1] 357 P.2d 611 (Ariz. 1960).

[2] An arbitrator is one who resolves a dispute between others; where there is no dispute, there is no arbitration and no arbitrator, *ibid. Accord,* Toledo S. S. Co. v. Zenith Transport Co., 184 Fed. 391 (6th Cir. 1911).

[3] "[An architect] may in the construction of a building assume many roles — planner, designer, supervisor, arbitrator and owner's agent." 357 P.2d 611, 614 (Ariz. 1960).

[4] 87 Ariz. 88, 348 P.2d 291 (1960); see also *Courts and Civil Procedure* and *Evidence*

[5] *Accord,* Henderson v. Breesman, 77 Ariz. 256, 269 P.2d 1059 (1954); Krauth v. Billar, 71 Ariz. 298, 226 P.2d 1012 (1951); Pearson and Dickerson Contractors v. Harrington, 60 Ariz. 354, 137 P.2d 381 (1943).

[6] The court distinguished Nicholas v. City of Phoenix, 68 Ariz. 124, 202 P.2d 201 (1949), from this case by saying that a motorist on a favored highway has the right to assume that the driver coming from the other direction will stop before entering the highway *unless* he continues on with the knowledge that the other motorist is not going to stop. See also Glatz v. Kroeger Bros. Co., 168 Wis. 635, 170 N.W. 934 (1919).

[7] 88 Ariz. 60, 352 P.2d 754 (1960); City of Phoenix v. Weedon, 71 Ariz. 259, 226 P.2d 157 (1950); see also *Courts and Civil Procedure, Evidence,* and *Municipal Corporations.*

[8] 356 P.2d 25 (Ariz. 1960); see also Sanders v. Brown, 73 Ariz. 116, 238 P.2d 941 (1951); Southwest Cotton Co. v. Pope, 25 Ariz. 364, 218 Pac. 152 (1923).

Malicious Prosecution. — The Arizona Supreme Court in *Sarwark Motor Sales Inc. v. Woolridge*[9] held that the presence or absence of probable cause is a separate element of a cause of action for malicious prosecution[10] and is always a question of law.[11]

Misrepresentation. — Our court restated in *Cullison v. Pride O' Texas Citrus Ass'n*[12] that it is fundamental in this jurisdiction that there can be no actionable fraud without a concurrence of all nine elements thereof[13] and although a direct affirmative allegation of all essentials of fraud is not necessary,[14] a failure to prove any one of the elements will be fatal, especially where the parties are dealing at arms-length.[15]

Buzard v. Griffin[16] involved an alleged fraud in a primary election but there was little or no substantial proof. Our court held that fraud must be established by clear and convincing evidence and may not be predicated on speculation or conjecture.

Ralph Bushnell

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[9] 88 Ariz. 173, 354 P.2d 34 (1960); see also *Courts and Civil Procedure.*

[10] "Probable cause has been defined as 'a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the party is guilty of the offense'." PROSSER, TORTS § 98 at 652 (2d ed. 1955); see also McClinton v. Rice, 76 Ariz. 358, 265 P.2d 425 (1953).

In Sarwark Motor Sales Inc. v. Woolridge, 88 Ariz. 173, 354 P.2d 34 (1960), the court also distinguishes malicious prosecution from false imprisonment; see generally PROSSER, TORTS §§ 12, 98 (2d ed. 1955); RESTATEMENT, TORTS § 37 (1934).

[11] *Accord,* Murphy v. Russell, 40 Ariz. 109, 9 P.2d 1020 (1932).

[12] 355 P.2d 898 (Ariz. 1960); see also *Courts and Civil Procedure.*

[13] The nine elements of fraud as used in Arizona are found in 37 C.J.S. *Fraud* § 3 (1943); see also PROSSER, TORTS §§ 87, 89, 90 (2d ed. 1955); *but see* RESTATEMENT, TORTS § 539 (1934).

For other Arizona cases, see Poley v. Bender, 87 Ariz. 35, 347 P.2d 696 (1959), Summary, 2 ARIZ. L. REV. 128 (1960).

[14] *Accord,* Wood v. Ford, 50 Ariz. 356, 72 P.2d 423 (1937).

[15] *Accord, In re* McDonnell's Estate, 65 Ariz. 248, 179 P.2d 238 (1947).

[16] 358 P.2d 155 (Ariz. 1960); see also Griffin v. Buzard, 86 Ariz. 166, 342 P.2d 201 (1959), Summary, 2 ARIZ. L. REV. 113 (1960); Murillo v. Hernandez, 79 Ariz. 1, 281 P.2d 786 (1955); Stewart v. Schrepf, 62 Ariz. 440, 158 P.2d 529 (1945).

TRUSTS

Proceedings. — An attempt by the creator of an inter vivos trust to obtain a writ of certiorari was denied in *Miller v. Superior Court*[1] where the court ruled that an order removing a foreign corporation as trustee[2] is appealable and cannot be reviewed by certiorari.[3]

Validity. — In *Myerson v. Myerson*[4] the court held that an intended trust is invalid if enforcement thereof would enable a corporation to hold a liquor license in contravention of both law[5] and public policy.[6]

Constructive Trusts. — Testimony by the plaintiff and her witnesses in *Joseph v. Tibsherany*[7] clearly established that there was a confidential relationship between the plaintiff and her brother; that the plaintiff was illiterate in the English language; and that plaintiff's brother promised to convey to her property which had been purchased with her money. The court held that such evidence was sufficient to make out a prima facie case for constructive trust.[8]

Susan T. Payne

WATER LAW

Percolating Water.—Diversion of percolating water to previously uncultivated land heretofore under cultivation was held lawful in *State v. Anway.*[1] In this action the court felt that if the use of the water

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[1] 356 P.2d 699 (Ariz. 1960); see also *Courts and Civil Procedure.*

[2] ARIZ. REV. STAT. ANN. § 10-484(E) (1956).

[3] ARIZ. REV. STAT. ANN. §§ 12-2001, 12-2101(E,G) (1956). See also BOGERT, TRUSTS & TRUSTEES § 519 (2d ed. 1960).

[4] 357 P.2d 133 (Ariz. 1960); see also *Partnerships.*

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

[6] Clark v. Tinnin, 81 Ariz. 259, 304 P.2d 947 (1956);; see also 1A BOGERT, TRUSTS & TRUSTEES § 211 (1935); RESTATEMENT, TRUSTS § 62 (1937).

[7] 88 Ariz. 205, 354 P.2d 254 (1960); see also *Courts and Civil Procedure.*

[8] Except for the fact that this case involved a directed verdict for the defendant at the close of the plaintiff's evidence, the decision would seem to be inconsistent with earlier decisions that to justify imposition of a construction trust, evidence of inequity must be clear and convincing. See, *e.g.*, Smith v. Conner, 87 Ariz. 6, 347 P.2d 568 (1959); Murillo v. Hernandez, 79 Ariz. 1, 281 P.2d 786 (1955); Stewart v. Schnepf, 62 Ariz. 440, 158 P.2d 529 (1945); Costello v. Cunningham, 16 Ariz. 447, 147 Pac. 701 (1915); Butler v. Shumaker, 4 Ariz. 16, 32 Pac. 265 (1893).

[1] 87 Ariz. 206, 349 P.2d 774 (1960), 3 ARIZ. L. REV. 115 (1961).

complied with the doctrine of reasonable use adopted in *Bristor v. Cheatham*[2] for application in Arizona to percolating water, then it should not be interfered with, although the land had been declared to be within a critical water area.

Reclamation of Desert Land.—In *Davis v. Brittain*[3] an effort failed to procure cheap government-produced power for "reclamation" because the fertile desert lands involved had already been irrigated and brought under cultivation, they must, therefore, be considered "reclaimed" and are not "reclaimable" under the Arizona Statute.[4]

Ralph E. Hunsaker

WILLS AND ADMINISTRATION

Lost Wills. — In re Schade's Estate[1] held that testimony of the contestants of a lost will that they never saw a duly executed and properly attested will does not sufficiently contradict competent, positive testimony of the existence of such will and raises no jury question.[2] The court further stated that the presumption that a lost will was destroyed by the testatrix animo revocandi retires upon positive evidence of the will's existence one month after decedent's death.[3]

Undue Influence. — Affirming its earlier decision,[4] the court ruled in *In re Pitt's Estate*[5] that active participation by the principal beneficiary, in the preparation of the will of a person with whom the beneficiary occupied a confidential relationship, raises a presumption of undue influence, but the presumption dissolves upon denial by the beneficiary that he influenced or attempted to influence the testatrix in the disposition of her property.

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[2] 75 Ariz. 227, 255 P.2d 173 (1953).
[3] 358 P.2d 322 (Ariz. 1960); see also *Administrative Law and Procedure,* and *Constitutional Law.*
[4] ARIZ. REV. STAT. ANN. § 30-505 (A) (2) (1956).

[1] 87 Ariz. 341, 351 P.2d 173 (1960); see also *Courts and Civil Procedure* and *Evidence.*
[2] ARIZ. REV. STAT. ANN. § 14-321(B) (1956); see also Southern Pac. Co. v. Fisher, 35 Ariz. 87, 274 Pac. 779 (1929); UDALL, ARIZONA LAW OF EVIDENCE § 112 (1960).
[3] State Tax Comm'n v. Phelps Dodge Corp., 62 Ariz. 320, 157 P.2d 693 (1945).
[4] *In re* O'Connor's Estate, 74 Ariz. 248, 246 P.2d 1063 (1952).
[5] 356 P.2d 408 (Ariz. 1960).

Presentation of Claims. — In accordance with prior opinions,[6] *Fernandez v. Garza*[7] stated that no presentation of claim against the estate is necessary, with respect to partnership assets in the hands of the administratrix of the deceased partner, since they are not a part of the estate, but are held in trust for the surviving partner.

Appeal. — A residual beneficiary, not a creditor of the estate, was denied the right to appeal an order directing payment of specific bequests on the ground that such a beneficiary is not an aggrieved party[8] in *In re Wiswall's Estate.*[9]

Susan T. Payne

WORKMEN'S COMPENSATION

Burden of Proof.—In the four cases decided on burden of proof, *Parnau v. Industrial Comm'n,*[1] *Scherer v. Industrial Comm'n,*[2] *Helmericks v. Airesearch Mfg. Co.*[3] and *Pacific Motor Trucking Co. v. Industrial Comm'n,*[4] the basic rule is set down that one claiming review or rehearing bears the burden of proof of showing the award of the Commission should be set aside.[5] The burden that must be sustained is a showing by clear evidence,[6] that upon no reasonable consideration of the evidence could the Commission have reached its conclusion.[7]

Statute of Limitations.—Where a slight injury subsequently develops into something more serious, *Martin v. Industrial Comm'n*[8] holds that the statute of limitations starts to run from the date the injury becomes manifest rather than from the date of the accident.[9]

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[6] *In re* Baxter's Estate, 22 Ariz. 91, 194 Pac. 333 (1921); Franklin v. Trickey, 9 Ariz. 282, 80 Pac. 352 (1905).
[7] 88 Ariz. 214, 354 P.2d 260 (1960); see also *Courts and Civil Procedure* and *Partnership.*
[8] ARIZ. R. CIV. P. 73(a); see also Keystone Copper Mining Co. v. Miller, 63 Ariz. 544, 164 P.2d 603 (1945); Burmister v. City of Prescott, 38 Ariz. 66, 297 Pac. 443 (1931).
[9] 358 P.2d 172 (Ariz. 1960).

[1] 87 Ariz. 361, 351 P.2d 643 (1960); see also *Administrative Law and Procedure.*
[2] 87 Ariz. 224, 349 P.2d 786 (1960); see also *Administrative Law and Proceudre.*
[3] 357 P.2d 152 (Ariz. 1960); see also *Administrative Law and Procedure.*
[4] 355 P.2d 966 (Ariz. 1960); see also *Administrative Law and Procedure.*
[5] ARIZ. REV. STAT. ANN. § 23-1044 (F) (1956).
[7] 357 P.2d 152 (Ariz. 1960).
[6] 87 Ariz. 224, 349 P.2d 786 (1960).
[8] 88 Ariz. 14, 352 P.2d 352 (1960); see also *Administrative Law and Procedure.*
[9] ARIZ. REV. STAT. ANN. § 23-1102 (1956). This statute sets down the occupational diseases in Arizona and high frequency sound deafness is not one that is enumerated as compensable.

Out of and In the Course of Employment.—It was held in *Johnson v. Industrial Comm'n*[10] that an inmate of a county jail sent out to work for a private corporation, to be fed and housed by that corporation, and under the supervision and control of the corporation who is injured while so engaged is deemed an employee covered by the Workmen's Compensation code of this state.[11]

In *Posey v. Industrial Comm'n*[12] the court determined that where the employer retained the right, under a contract with the union, to reject prospective employees that the union sent to the job site, that an injury received on the way to the site was not an injury arising out of and in the course of employment.[13]

In *Kiewit Sons' v. Industrial Comm'n*[14] it was held that an injury at the hands of a highway inspector, arising from an earlier argument about the performance of the employee while the plaintiff is waiting for his check at the job is out of and in the course of employment.

Proximate Cause.—*Revles v. Industrial Comm'n*[15] and *Murray v. Industrial Comm'n*[16] state that an accident need not be the sole cause of an injury, if in a continuing unbroken chain of events it is a motivating cause. Although in each of these cases a former condition aided in bringing about the result, the injury at hand was concluded to be the proximate cause.

Loss of Earning Power.—In *White v. Industrial Comm'n*[17] it was held that actual employment at a job which pays more than the work at which the claimant was employed at the time of the injury is properly considered as a basis for rejecting the claim for compensation because claimant suffered no loss in earning power.[18]

The difference in prior earnings and present job earnings as a basis of loss of earning power, at the guaranteed wage,[19] was held correct in Bierman v. Magma Copper Co.[20]

Psychoneurosis.—Citing various sections of the code[21] and several

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[10] 356 P.2d 1021 (Ariz. 1960).
[11] ARIZ. REV. STAT. ANN. § 23-901 (1956).
[12] 87 Ariz. 245, 350 P.2d 659 (1960).
[13] ARIZ. REV. STAT. ANN. § 23-1021 (1956).
[14] 88 Ariz. 164, 354 P.2d 28 (1960).
[15] 88 Ariz. 67, 352 P.2d 759 (1960); see also *Administrative Law and Procedure.*
[16] 87 Ariz. 190, 349 P.2d 627 (1960); see also *Evidence.*
[17] 87 Ariz. 154, 348 P.2d 922 (1960).
[18] ARIZ. REV. STAT. ANN. § 23-1044 (D) (1956); 2 LARSON, WORKMEN'S COMPENSATION §§ 57.31, 57.32, 57.34 (1952).
[19] ARIZ. REV. STAT. ANN. § 23-1041 (C) (1956).
[20] 88 Ariz. 21, 352 P.2d 356 (1960); see also *Administrative Law and Procedure.*
[21] ARIZ. REV. STAT. ANN. §§ 23-1021, -1041, -1081 (1956).

cases,[22] the court in *McAllister v. Industrial Comm'n*[23] held, due to the fact that petitioner is still able to work and has suffered no loss of earning capacity[24] from the psychoneurosis that occurred from the injury suffered, he should get no compensation, but is entitled to medical treatment for the psychoneurotic pain.[25]

Fraud.—Wammack v. Peerless Concrete Pipe Co.[26] and *Scott v. Wasielewski*[27] are very similar and the reasoning for both cases is set out in the *Scott* case. Where the evidence shows that the claim for compensation is fraudulent no award will be allowed; there is no statute of limitation or rule of law which prevents the Commission from upsetting a finding when it has been determined subsequently that it was procured by fraud.[28]

Deductible Payment.—In *Worthington v. Industrial Comm'n*[29] it was held that a recovery of $3,000 from the estate of one of the owners of the Little Horn Mining Company, with whom decedent was riding at the time of the injury and death, was properly considered and deducted from the award.[30]

Death Benefits to Minor.—Thomas v. Industrial Comm'n[31] held that a minor son living with his mother and having no support from his father with no expectation of ever receiving such support from him has no basis for an award of death benefits upon death of decedent.[32]

Premium Rates.—In *Climate Control v. Hill*[33] pursuant to the code[34] that any person of interest dissatisfied with the order of the Commission

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22 Paramount Pictures, Inc. v. Industrial Comm'n, 56 Ariz. 217, 106 P.2d 1024 (1940); *modified on other grounds*, 56 Ariz. 352, 106 P.2d 1024 (1940); Pressley v. Industrial Comm'n, 73 Ariz. 22, 236 P.2d 1011 (1951); Engle v. Industrial Comm'n, 77 Ariz. 202, 269 P.2d 604 (1954).

23 88 Ariz. 25, 352 P.2d 359 (1960).

24 Koch v. Industrial Comm'n, 70 Ariz. 283, 219 P.2d 773 (1950).

25 ARIZ. REV. STAT. ANN. § 23-1081 (1956).

26 357 P.2d 617 (Ariz. 1960).

27 357 P.2d 614 (Ariz. 1960).

28 ARIZ. REV. STAT. ANN. § 23-681 (1956).

29 88 Ariz. 192, 354 P.2d 47 (1960). For the facts to this case, see Worthington v. Industrial Comm'n, 85 Ariz. 310, 338 P.2d 363 (1959).

30 ARIZ. REV. STAT. ANN. § 23-1023 (1956).

31 87 Ariz. 238, 350 P.2d 392 (1960).

32 ARIZ. REV. STAT. ANN. § 23-1046 (1956). Note ARIZ. REV. STAT. ANN. § 23-1064 (1956), which covers those presumed to be dependent, especially subdivision A, paragraph 3.

33 87 Ariz. 201, 349 P.2d 771 (1960); see also *Administrative Law and Procedure.*

34 ARIZ. REV. STAT. ANN. § 23-946 (1956) in part states: "Any person of interest dissatisfied with an order of the commission may commence an action in the superior court . . . against the commission as defendant. . . ."

may commence an action with the Commission as defendant to set aside, vacate, or amend its order, the *statute limits action to Industrial Commissions as defendant and is plaintiff's exclusive remedy.* (Emphasis Supplied). On the strength of the provision the action against the corporate defendant was dismissed.

Ralph E. Hunsaker