SURVEY OF 1958 ARIZONA CASE LAW

PART I

Part II of the Survey of 1958 Arizona Case Law will be published in the Fall, 1959 issue of the ARIZONA LAW REVIEW.

Administrative Law and Procedure

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Delegation of Power

McDaniel v. State Board of Technical Registration[1] presented the Court with the question of whether or not there had been a constitutional delegation of power to the administrative agency. The case is a companion to *State v. Beadle*[2] and *State Board of Technical Registration v. Bauer.*[3] All three involve a construction of the Technical Registration Act, hereinafter called the Act.[4] Insofar as the administrative law question was concerned, the *Beadle* case was disposed of by reference to the *McDaniel* and *Bauer* opinions.

In *McDaniel* the board was contemplating action of a disciplinary nature against the plaintiff, who applied for and obtained a writ of prohibition from the supreior court on the ground that the Act was not definite enough to establish a standard under which the board could proceed. The Court relied heavily on a Michigan case,[5] construing a similar statute, and held that in viewing the act as a whole it was not so vague and indefinite as to constitute an unlawful delegation of power. Holding that the Act sufficiently defined the rights, duties and privileges of the registrants and the board, the Court said:

> The leaving of details of operation and administration [to the board], within the standards set forth by the legislature, is not an objectionable delegation of legislative authority.[6]

Timing of Review

In *City of Tucson v. Simpson,*[7] the plaintiff obtained an award for damages based on his arbitrary and wrongful discharge from the employ

[1] 84 Ariz. 223, 326 P.2d 348 (1958). See also CONSTITUTIONAL LAW, *infra.*
[2] 84 Ariz. 217, 326 P.2d 344 (1958).
[3] 84 Ariz. 237, 326 P.2d 358 (1958).
[4] A.R.S. §§ 32-101 to 32-145.
[5] People v. Babcock, 343 Mich. 671, 73 N.W. 2d 521 (1955).
[6] The Court cited State v. Marana Plantations, 75 Ariz. 111, 252 P.2d 87 (1953) at this point, as well as other Arizona cases. In that case the delegation of powers question was raised and the Court held that there was an unlawful delegation of power within the meaning of the cases of Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). The rule as promulgated by these cases is considerably narrower than that found in Yakus v. United States, 321 U.S. 414 (1940). The federal courts and many of the state courts now follow the Yakus case as to requisite standards imposed by the legislature. In light of the cases decided by the Arizona Court since Marana Plantations, *supra,* it is believed that the rule in Arizona is now in accord with Yakus.
[7] 84 Ariz. 39, 323 P.2d 689 (1958).

of the defendant. The city charter provided for the establishment of a civil service commission and this commission had adopted rules for the taking of appeals in cases of this nature. Though the Court recognized the existence of a cause of action in the plaintiff, it held that the trial court had acted beyond its "jurisdiction" and, hence, its action was *void.* The Court reasoned that since plaintiff had failed to take an appeal within the prescribed period of time he had not exhausted his administrative remedies and therefore had no recourse to the courts.[8] The Court further held that the question of exhaustion of remedies may be raised in the Supreme Court though not raised in the court below.

Scope of Review

In *Dick v. Cahoon*[9] an appeal was taken to the Supreme Court from an order permanently enjoining the county board of supervisors from changing the boundaries of a school district. After a hearing on the matter, the board had issued such an order, pursuant to the authority conferred on it by statute, which provided that its action should be final.[10] The Court held that the record disclosed no reasonable basis for the board's action and that the board had abused the discretion conferred on it by the statute. In holding that the board's action was in excess of its "jurisdiction," hence *void,* the Court apparently applied the familiar rule that there must be "substantial evidence on the whole record" to support the findings of the agency.[11]

Method of Review[12]

In *State Board of Dispensing Opticians v. Carp*[13] mandamus was used as the vehicle for the review of the board action. The Court said that since the licensing statute itself provided for no method of review and the board had not rendered a decision from which an appeal could be taken under the Administrative Review Act,[14] this was a proper case

[8] The leading case on the "exhaustion" doctrine is Meyers v. Bethlehem Shipbuilding Co., 303 U.S. 41 (1938). Certain exceptions to this doctrine have been recognized in the state courts, as in Nolin v. Fitzpatrick, 9 N.J. 477, 89 A.2d 13 (1952). In general on this subject see DAVIS, ADMINISTRATIVE LAW (1951), §§ 182-96.

[9] 84 Ariz. 199, 325 P.2d 835 (1958).

[10] A.R.S. § 15-403. As to the effect of a statute purporting to make the action of the administrative agency final, see DAVIS, ADMINISTRATIVE LAW (1951) § 238.

[11] On the "substantial evidence" rule see DAVIS, ADMINISTRATIVE LAW (1951), 254; Universal Camera Co. v. N.L.R.B., 340 U.S. 474 (1951); Cooper, *The "Substantial Evidence" Rule,* 44 A.B.A.J. 945 (1958).

[12] See Carrow, *Types of Judicial Relief from Administrative Action,* 58 COLUM. L. REV. 1 (1958) for a recent article on this subject.

[13] 85 Ariz. 35, 330 P.2d 996 (1958).

[14] A.R.S. §§ 12-901 thru 914.

for mandamus to compel the board to act. Mandamus will lie to compel board action, when the statute requires it to act, yet the courts can not substitute their discretion for that of the board's. The Supreme Court reversed because the trial court had ordered the board to issue the license and this was a judicial invasion of the discretion given the board, not the court, by the legislature.

Mandamus was also used in the *Bauer* case, *supra,* where the plaintiff sought to compel the board to issue him a license. In this case it was held that mandamus was not available inasmuch as the board had rendered a final decision from which an appeal could be taken under the Administrative Review Act. Such an appeal provided a plain, speedy, and adequate remedy at law. In the *Carp* case, *supra,* the statute required that the board issue the applicant a license if it found that he possessed ". . . minimum basic skills . . ."[15] and the board had refused to act unless the applicant took an examination. The Court held that the board had to make a decision on this matter and this distinguishes the case from *Bauer* where the board had rendered a decision, thus making it reviewable under the Administrative Review Act. The Court pointed out that the applicant could, by later proceedings, test the board's discretion in complying with the writ.[16]

Smoker v. Bolin[17] was another case involving a writ of mandamus. The Supreme Court held that the relief asked for was in the nature of an injunction, and not to compel an official to act. While the Arizona Constitution conferred original jurisdiction on the Supreme Court in certain mandamus cases, it did not in the case of injunctions,[18] and the case was dismissed.

Certiorari was the prerogative writ used in the *Dick* case, *supra,* though it was granted by stipulation of counsel. The superior court, reviewing the case on certiorari, allowed the admission of certain sworn testimony in addition to the record sent up. Apparently no objection was made to this, though it appears questionable whether or not the testimony was properly before the court. Were the case heard under the provisions of the Administrative Review Act such testimony could be heard at the discretion of the court,[19] but it would seem that the provisions thereof would have no application where the case is before

[15] A.R.S. § 32-1683.
[16] The leading case on mandamus as a method of review of administrative action is United States *ex rel.* Greathouse v. Dern, 289 U.S. 352 (1933).
[17] 333 P.2d 977 (Ariz. 1958). See also ELECTIONS, *infra.*
[18] ARIZONA CONSTITUTION, Art. 6, § 4.
[19] A.R.S. § 12-910(A).

the court on certiorari.[20] The case of *Mercado v. Superior Court*[21] goes far toward holding that such evidence would be inadmissible, if it does not in fact so hold. To the effect that such evidence is inadmissible see the California case of *Grief v. Dullea.*[22] Since the question apparently was not squarely presented to the Court, nor arguel by counsel, it would seem that this point is still unsettled.

In the *McDaniel* case, *supra,* the Court held that a writ of prohibition was properly issued notwithstanding the fact that an appeal could have been taken under the Administrative Review Act. The Court said,

> . . . [prohibition will lie] . . . if it fairly appears to the trial court that in a given case the administrative agency is acting without or in excess of its jurisdiction and that an appeal will not furnish a plain, speedy and adequate remedy at law.

The Court said that an appeal is not in all cases an exclusive and adequate remedy at law for a registrant who wishes to attack the jurisdiction of the board. The Court held that the granting of the writ was discretionary with the trial court and the appellate court is limited to consideration of abuse of discretion, and that since the record disclosed no abuse of discretion here the writ was properly issued.

Fairness of Agency Action

In *Southern Pacific Co. v. Corporation Commission*[23] the Court held that due process demanded the commission grant the petitioner a new hearing inasmuch as it claimed new facts were available. Such new facts, if proved, might affect the reasonableness of the agency action, which was based on findings of fact two and one half years earlier. The matter is not res judicata as to such facts and the petitioner was entitled to a new hearing.

In *George v. Corporation Commission*[24] it was held that the administrative agency is bound by its own rules and regulations so long as they remain in force and effect, though it has the power to change these rules. Failure to comply with such rules was held to be arbitrary, capricious, and a usurpation of power that the agency does not possess, hence its actions were void and subject to collateral attack.

[20] In City of Phoenix v. Rodgers, 44 Ariz. 40, 34 P.2d 385 (1934) the Court held that when certain writs were specified in the Arizona Constitution, Art. 6 § 6, the common law writs were meant. The case dealt with a writ of prohibition. However, certiorari is also provided for in that section. Therefore, absent a statute to the contrary, the common law rules regarding certiorari would seem to be controlling.

[21] 51 Ariz. 436, 77 P.2d 810 (1938).

[22] 66 Cal. App. 2d 986, 153 P.2d 581 (1944). See also 10 AM. JUR., *Certiorari,* § 19 that evidence dehors the record is not permitted in the absence of statute.

[23] 83 Ariz. 333, 321 P.2d 224 (1958).

[24] 83 Ariz. 387, 322 P.2d 369 (1958).

In *Timmerman v. Lightning Moving and Warehouse Co.*[25] the appeal was from a decision of the Corporation Commission to "renew" a certificate which had, on its face, expired. Referring to the action of the commission, the Court said:

> . . . [this is] . . . a classic example of an abuse of office by the exercise of a power which the Commission did not possess.

The case was treated as one in which the commission acted wholly without authority and it was permanently enjoined from issuing the certificate.

[25] 83 Ariz. 398, 322 P.2d 376 (1958).

Agency

AL COX

Loaned Servant

In *Larsen v. Arizona Brewing Co.*[1] plaintiff sought to hold defendant liable for the negligent act of a truck driver. Defendant was resurfacing a highway under contract with the state and subcontracted to have additional trucks furnished with drivers. One of the trucks and drivers so furnished was involved in a collision with plaintiff's vehicle.

A directed verdict for defendant was affirmed. Defendant's alleged violation of a contractual obligation to the state not to subcontract without written consent did not bring the case within any exception to the general rule that a party is not liable for the negligent act of an independent contractor or his servant. To impose vicarious liability upon defendant upon the principle of respondeat superior it must be shown that the negligent party was subject to defendant's control or right to control in the performance of the negligent act. There is an inference that a servant remains in the service of his general employer. Where there is no evidence to show that a master and servant relationship existed between defendant and the negligent third person the fact that such a relationship did not exist may be decided as a matter of law.

The case is in accord with the general rule[2] and that adopted by the *Restatement of Agency*.[3] An earlier Arizona case, *Lee Moor Contracting Co. v. Blanton*,[4] though cited by plaintiff in support of its contention that whether a master and servant relationship existed was a question of fact for the jury, supports the holding of the principal case when taken in its entirety.

[1] 84 Ariz. 191, 325 P.2d 829 (1958).
[2] Annot., 17 A.L.R.2d 1388, 1410 (1951).
[3] RESTATEMENT AGENCY 2d § § 220, 227 (1958).
[4] 49 Ariz. 130, 65 P.2d 35 (1937).

Attorney and Client

ARTHUR MILLER

Settlement by Attorney Binding on Client

United Liquor Company v. Stephenson[1] arose as an action to quiet title to a claimed appurtenant easement. At the close of the evidence in the trial, counsel for both sides announced that a settlement had been reached. The case was removed from the calendar for about two weeks and in the interim, defendant went over the head of her attorneys and conferred with the trial judge who thereafter held that defendant did not understand the terms of the settlement and therefore was not bound by it. Judgment was entered for defendant, denying any relief to the plaintiff.

The question presented on appeal to the Supreme Court appeared to be whether or not a client could expressly authorize her attorney to settle a claim and then escape being bound by the settlement on the ground that she did not fully understand the terms thereof.[2] The Court, following the rule adopted in *Smith v. Washburn & Condon*,[3] held that as a matter of law, a client is bound by a compromise settlement of a lawsuit where he has given his attorney express authority to settle and the settlement is not grossly unfair.[4]

Waiver of Attorney-Client Privilege by Guardian Ad Litem

In *Lietz v. Primock*[5] the Court dealt with the question of whether or not a guardian ad litem could waive the attorney-client privilege in the same way that the mentally incompetent ward might were it not for his legal disability. The Court adopted the reasoning of *Yancy v. Erman*,[6] which would appear to be the only other United States case where this question has been decided.[7] The Ohio court in that case pointed out

[1] 84 Ariz. 1, 322 P.2d 886 (1958).

[2] It should be noted that the Supreme Court found defendant's testimony in the trial below inconsistent with at least some of the allegations as to her lack of understanding of the settlement.

[3] 38 Ariz. 149, 297 Pac. 879 (1931).

[4] The holding is in accord with the majority rule. 7 C.J.S. *Attorney and Client*, § 105(a) at 928.

[5] 84 Ariz. 273, 327 P.2d 288 (1958).

[6] 99 N.E.2d 524 (Ohio 1958).

[7] 97 C.J.S. *Witnesses*, § 307.

that the attorney-client privilege is intended to *protect the client* either by preventing his lawyer from testifying or by permitting him to do so, and that there would be no reason to discriminate against an incompetent by denying him a right which he might most seriously need.

The Ohio case differed slightly in that the waiver there permitted an attorney to testify as a witness for the defense in a suit brought against the incompetent, while in this case, the relationship was invoked by the attorney in a suit where the incompetent was plaintiff and the attorney was one of the defendants.

The Court also held that a confidential relationship of attorney and client creates an exception to the general rule that opinion statements may not serve as a basis for actionable fraud, where such opinion is tainted with an intent to gain some advantage over the client either for the attorney or for another.[8]

Disbarment

In the Matter of Herbert Watson[9] involved disbarment proceedings brought pursuant to Rule 33(c) of the Supreme Court of Arizona. The attorney was charged, in two counts, of commingling a client's funds with his own in violation of Canon 11 of the A.B.A., and with failure to properly protect the interest of a client in a quiet title action. The Supreme Court found the evidence sufficient to justify disbarment.

Attorney's Charging Lien

X, an attorney, agreed to represent Y as plaintiff in an action for malicious prosecution. As his compensation, X was to receive "a fee minimum time charge, with a retainer thereon, plus an additional contingent fee *in the event of collection of any judgment obtained*" of one-third of any monies so collected. The action resulted in a verdict and judgment in favor of the client for $15,000.

Shortly after obtaining judgment, Y, to keep the funds out of reach of numerous creditors, assigned his rights under the judgment to attorney Z and also to W.[10] Z collected the judgment and was immediately served with a writ of garnishment by one of Y's creditors. In spite of this, Z paid over the proceeds, less his expenses and charges, to W. In

[8] The weight of authority supports this view. RESTATEMENT TORTS, § 525 (1938); 37 C.J.S., *Fraud*, § 10; 23 AM. JUR., *Fraud and Deceit*, § 16; PROSSER, TORTS, § 90 (2d ed. 1955).

[9] 85 Ariz. 54, 330 P.2d 1091 (1958).

[10] These assignments, both of which purported to transfer all of Y's interest in the judgment, were held to have been in fraud of Y's creditors and hence void.

the garnishment action brought against Z by the garnishor, X intervened, claiming that he was entitled to one-third of the funds Z had collected by virtue of his (X's) attorney's lien for that portion.

In *Linder v. Lewis, Roca, et. al.*,[11] the Court said that an attorney has an equitable lien in a fund where it appears that the parties looked to the fund itself for payment of the attorney,[12] i.e., where it appears that it was the intent of the parties that an equitable lien should be created.[13] The Court held "that the assignment made did not in any manner affect the charge against the fund in favor of [X] . . . His interest in it as the person helping create the fund is paramount and superior to the rights of other persons."[14] Since Z, after garnishment, chose to abandon his position as stakeholder and paid out the funds pending adjudication of the rights of the plaintiffs therein, he may be held liable to the garnishor[15] and to X, the intervenor.[16]

[11] 333 P.2d 286 (Ariz. 1958). See also CREDITOR'S RIGHTS, *infra*.
[12] Button's Estate v. Anderson, 112 Vt. 531, 28 A.2d 404, 143 A.L.R. 195 (1942).
[13] Barnes v. Shattuck, 13 Ariz. 338, 114 Pac. 952 (1911), affirmed, Barnes v. Alexander, 232 U.S. 117, 34 S.Ct. 276, 58 L.Ed. 530 (1913).
[14] Anderson v. Star-Bair Oil Co., 34 Wyo. 332, 243 Pac. 394 (1926).
[15] Potter v. Whitten, 170 Mo. App. 108, 155 S.W. 80, 88 (1913).
[16] Since an attorney's charging lien on a fund is superior to the claim of an ordinary creditor because the attorney had a hand in the creation of the fund, does it follow that in the circumstances presented by this case, the attorney, as an intervenor, has a superior claim to the garnishor. Can it be said that the fund which the attorney helped to create was still in the hands of the party defendant? The Court did not have to answer this question since the fund garnished was sufficient to cover the claims of both the garnishor and the intervenor.

Constitutional Law

DON ESTES

Fair Trade Act

Fair Trade Acts generally allow a manufacturer to set a minimum price on trade marked goods without violating state anti-monopoly laws. A provision of these acts, the non-signer clause, binds retailers to the price in the contracts, even if they are not parties to the contract, if they have notice.

California adopted the first Fair Trade Act in 1931,[1] and since then, forty-five states have enacted similar statutes.[2] Arizona adopted its Fair Trade Act[3] in 1936,[4] basing it upon the California statute[5] and in two recent cases,[6] followed California[7] and the United States Supreme Court[8] in upholding the constitutionality of the act, as applied to signers in the case of *Everybody's Drug v. Duckworth*[9] and non-signers in *General Electric Co. v. Telco Supply.*[10]

The highest courts of twenty-seven states have had the question of the constitutionality of these acts before them,[11] with sixteen holding them constitutional and eleven striking them down. However, since 1952, Arizona becomes the fifth to uphold the act, while eleven have declared them to be unconstitutional.

The Arizona statute[12] was held to be not in violation of the anti-monopoly prohibition of the Arizona Constitution,[13] and a valid legislative declaration of economic policy.

Rotation of Names on Ballots

The State of Arizona has been rotating names on paper ballots since

[1] CAL. BUS. & PROF. CODE § 16900-05.
[2] Those who have not adopted such legislation are Missouri, Texas and Vermont. See 19 A.L.R.2d. 1139 (1951).
[3] A.R.S. §§ 44-1421, 44-1424.
[4] Historical Note, A.R.S. §§ 44-1421, 44-1424.
[5] *Supra,* note 1.
[6] General Electric Co. v. Toledo Supply, 84 Ariz. 132, 325 P.2d 394 (1958); Everybody's Drug Co. v. Duckworth, 84 Ariz. 141, 325 P.2d 400 (1958).
[7] Scovill Mfg. Co. v. Skaggs Pay-Less Drug Stores, 45 Cal.2d 881, 291 P.2d 936 (1955).
[8] Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936).
[9] *Supra,* note 6.
[10] *Supra,* note 6.
[11] See Roger-Kent, Inc. v. General Electric Co., 99 S.E.2d 665 (S.C. 1957).
[12] *Supra,* note 3.
[13] ARIZ. CONST. Art. 14 § 15.

1912,[14] but until 1958, the candidates' names on voting machine ballots were required by statute[15] to be in alphabetical order. In *Kautenburger v. Jackson*,[16] this statute was held to violate the privileges and immunities clause of the Arizona Constitution.[17] The Court recognized the disadvantage and discrimination that would be shown a candidate by reason of his surname, and that the right to become a candidate for public office is a sufficient property right to be entitled to constitutional protection.

Qualifications for Office

A statute[18] prohibiting incumbents of elective offices from being eligible for nomination or election to any office other than the office so held, was found to be unconstitutional when applied to the office of Judge of the Supreme Court of Arizona. The appeal in the case of *Whitney v. Bolin*[19] was to declare an office of Judge of the Superior Court open for primary nominations when the incumbent became a candidate for Judge of the Supreme Court. The Court found the qualifications for Judge of the Supreme Court are enumerated specifically in the Arizona Constitution,[20] and the legislature is without authority to prescribe additional qualifications. The Court did not pass upon the effect of the statute when applied to any other public office.

Compensation in Condemnation Proceedings

Compensation awarded by a county board of supervisors does not preclude the property owner from seeking just compensation by a jury trial in condemnation proceedings. *Pima County v. Cappony*[21] decided that the statute[22] allowing the board to make compensation awards was not valid as the Arizona Constitution[23] provides for just compensation to be ascertained by a jury, as in other civil actions, and compensation from such a board is not the ascertainment for which the Constitution provides.

[14] Sec. 9, Ch. 84, L. '12, 1st S.S.
[15] A.R.S. § 16-551(C), 16-796.
[16] 333 P.2d 293 (Ariz. 1958). See also ELECTIONS, *infra*.
[17] ARIZ. CONST. Art. 2, § 13.
[18] A.R.S. § 38-296.
[19] 330 P.2d 1003 (Ariz. 1958). See also ELECTIONS, *infra*.
[20] ARIZ. CONST. Art. 7 § 13.
[21] 83 Ariz. 348, 21 P.2d 1015 (1958).
[22] A.R.S. § 59-601.
[23] ARIZ. CONST. Art. 2, § 17.

Police Pension Plan

The statutory provision[24] calling for forfeiture of pension compensation when a retired person receives a salary as an officer or employee of the state, a county, or municipality was upheld as a reasonable and rational classification in *Police Pension Board v. Denny*,[25] when the statute[26] was attacked as being discriminatory in depriving police officers of substantial and material rights enjoyed by other public employees. The Court said that to permit the retired officers to collect both the salary and the pension would be contrary to the spirit and purpose of all pension legislation.

Deposit of Public Monies

A statute[27] providing for deposits of public monies in qualifying banks, with active and inactive funds designated, and interest to be paid upon the inactive funds was held not a violation of the Arizona Constitutional prohibition of lending public credit.[28] In *Valley National Bank of Phoenix v. First National Bank of Holbrook*[29] the Court said merely because others are incidentally benefited by the deposits does not bring the transaction within the Constitutional provision as the purpose of the prohibition was to prevent the use of public funds, raised by general taxation, to aid enterprises engaged in private business. The historical background of the provision was the rational basis of the holding, with the Court explaining that it was to cover the abuses of public funds prevalent at the time the Constitution was enacted.

Right to a Hearing

The Corporation Commission, without notice, entered an order directing the Southern Pacific Company to install warning signals at its sole expense, following a decision of the Arizona Supreme Court.[30] The company appealed the order, and in *Southern Pacific Co. v. Corporation Commission*[31] the Court decided that the company had a right to a

[24] A.R.S. § 9-928 (A).
[25] 84 Ariz. 394, 330 P.2d 1 (1958).
[26] *Supra*, note 24.
[27] A.R.S. §§ 35-321 to 35-325.20.
[28] ARIZ. CONST. Art. 9, § 7.
[29] 83 Ariz. 286, 320 P.2d 689 (1958).
[30] Maricopa County v. Corporation Comm. of Arizona, 79 Ariz. 307, 289 P.2d 183 (1955).
[31] 83 Ariz. 333, 321 P.2d 224 (1958).

hearing on the question of whether or not a hazardous condition remained, to avoid transgressing the constitutional right of due process.

Definitions

In disciplinary proceedings against a structural engineer for professional misconduct, the Court, in the case of *State Board of Technical Registration v. McDaniel*,[32] held the statute[33] regulating these professions to be definite enough as not to violate due process. The distinction was found to be in the application of "architectural principles to an architect's services, and engineering principles to the engineering profession."[34] The Court said that with the rights and duties so defined, there could be no objection on the ground of indefiniteness.

Enjoining of Picketing

An order enjoining picketing was reversed in the case of *International Brotherhood of Carpenters and Joiners, Local 857 v. Todd L. Storms Construction Co.*,[35] as the statute[36] allowing such an order was declared unconstitutional in a decision[37] after the injunction was given.

A new trial was ordered to discover whether or not the union had a justifiable interest to protect by their picketing, as none of the employees were members of the union.

Double Jeopardy

The statute[38] allowing the state to dismiss a complaint and charge the defendant with a greater crime was held to be applied unconstitutionally in *Application of Williams*.[39] The defendant had been charged with second degree murder, the jury had been sworn, and the prosecu-

[32] 84 Ariz. 223, 326 P. 2d 348 (1958). See companion cases of State v. Beadle, 84 Ariz. 217, 326 P.2d 344 (1958), and State Board of Technical Registration v. Bauer, 84 Ariz. 237, 326 P.2d 358 (1958). See also ADMINISTRATIVE LAW AND PROCEDURE, *supra*.

[33] A.R.S. §§ 32-144, 32-101.

[34] Compare another recent decision on statutory construction, State v. Stockton, 333 P.2d 735 (Ariz. 1958) where Justice Phelps said in dicta, that to construe the term *animal* to include a gamecock would render the statute too vague and indefinite, and therefore in violation of the due process clause.

[35] 84 Ariz. 120, 324 P.2d 1002 (1958).

[36] A.R.S. § 23-1322.

[37] Baldwin v. Arizona Flame Restaurant, 82 Ariz. 385, 313 P.2d 759 (1957).

[38] A.R.S. § 13-1395.

[39] 333 P.2d 280 (Ariz. 1958). See also CRIMINAL LAW, *infra*.

tion had begun its case when the statute[40] was invoked and the defendant was then ordered held on a charge of first degree murder. The Court said since the evidence necessary for a conviction of second degree murder was also necessary for first degree the defendant had been placed in jeopardy twice, which violated the Arizona constitutional prohibition of double jeopardy.[41]

[40] *Supra*, note 39.
[41] ARIZ. CONST. Art 2 § 10.

Contracts

JOHN R. MCDONALD

Fraud in Inducement

What is the difference between a house and lot adjoining a burnt adobe service station and the same house and lot adjoining a service station constructed of brick and painted white? The plaintiff in *Lusk Corporation v. Burgess*[1] contended that there was sufficient difference upon which to predicate an action for fraud.

During the course of negotiations for the sale of a lot, defendant's agents told plaintiffs that a service station was going to be built on the lot across the alley but that it would be of burnt adobe and would conform to the architecture of the homes in the area. The agents further stated that a burnt adobe wall would be built between the two lots and that Texaco had already drawn the plans and were "all for it".

Six days after plaintiffs agreed to buy the lot, defendant conveyed the adjoining lot to third parties without restriction. Evidence indicated that negotiations for the transfer had been underway for a month before the representations were made to plaintiffs. A service station was subsequently built on the neighboring lot but it was constructed of red brick and was painted white, contrary to the surrounding architectural scheme. Barber and beauty shops were also built on the premises.

The Court, citing *Waddell v. White*,[2] had no difficulty in finding actionable fraudulent representations in the statements. Those relating to the intentions of Texaco were false and known to be false since the evidence showed that negotiations for the sale of the adjoining lot were commenced more than a month before the representations were made and were probably completed before plaintiffs executed their contract with the defendants. Those relating to Texaco's having already drawn the plans were also actionable, the Court found.

The measure of damages, the Court said, is the difference between the value of the property and the value it would have had if the representations had been true. Plaintiffs paid $15,030 for the property. Their expert witness testified that the property "as it sits now" was worth $13,000. He was unwilling, however, to attribute the entire difference to defendant's misrepresentations and was of the opinion that had the

[1] 332 P.2d 493 (Ariz. 1958).
[2] 56 Ariz. 420, 108 P.2d 565 (1940).

service station been built of burnt adobe as represented, the property would still not have a value of $15,000. On the basis of this testimony, the Court remanded the case for a new trial on the issue of damages, holding that plaintiffs had not proved the extent of damage to a reasonable *certainty*. Thus, the defendant procured a reversal on the rather embarassing position that even had its representations been true, the property was not worth the purchase price.

Broker's Contracts

A.R.S. § 32-2152 provides that a broker must be licensed in order to recover any commissions. In *James v. Hiller*[3] this provision was relied on as a defense to an action to recover on a broker's contract.

Plaintiff was licensed as a broker in New Mexico but not in Arizona. Defendant's land was in Arizona but the listing occurred in New Mexico and plaintiff acquired the purchaser in New Mexico. The purchaser later defaulted and defendant refused to pay plaintiff the balance of his commission.

A broker's contract is unilateral and the place of contracting is where the purchaser is acquired. The rights of the parties are determined by application of the law of the place where the contract was made. Thus, since the purchaser was acquired in New Mexico, the contract was made there and New Mexico law applied. The contract was valid in New Mexico, the Court held, and could therefore be enforced in Arizona.

In *Hassenpflug v. Jones*,[4] defendant, a real estate broker, purchased property under an assumed name of "Fletcher" and then purported, on behalf of her clients, the plaintiffs, to negotiate a purchase and sale of the property from "Fletcher" to the plaintiffs, and thus make a secret profit for herself. The Court held that plaintiffs need not rescind the contract with "Fletcher" as a condition to their right to recover damages from the defendant for the breach of a fiduciary relationship.

In *Mattingly v. Bohn*[5] the plaintiff was given the "sole and exclusive right" to sell defendants' property for a fixed period. Before the term of the contract expired defendants entered into a contract to sell the property to a third party and placed the deed in escrow. The buyers deposited $1,000 earnest money. In reversing the trial court, it was held that the plaintiff was entitled to recover damages measured by the amount of the agreed commission and that defendants' acts constituted a total breach of the contract, excusing the plaintiff from the necessity

[3] 85 Ariz. 40, 330 P.2d 999 (1958).
[4] 84 Ariz. 33, 323 P.2d 296 (1958).
[5] 84 Ariz. 369, 329 P.2d 1095 (1958).

of proving that he had a purchaser ready, willing and able to buy the property.

Forfeiture

Arizona Title Guarantee & Trust Co. v. Modern Homes[6] involved the effect of the acceptance of late payments in a contract for the sale of land in which time is stated to be of the essence.

Defendant held the deeds in escrow under land purchase contracts between plaintiff and various purchasers. On several contracts plaintiff had accepted late payments before the expiration of the periods provided in A.R.S. § 33-741 for forfeiture after default. In respect to these contracts the Court held that there had been no waiver of the "time is of essence" clauses and that plaintiff need not give notice of reinstatement before declaring a forfeiture. Before there can be a waiver, the Court said, there must be a right in existence at the time of the alleged waiver. Until the expiration of the statutory period, plaintiff was prevented by the statute from insisting on strict compliance with the clauses and could not declare a forfeiture until the period elapsed.[7] Thus, there was no waiver.

On the other group of contracts in question, plaintiff had accepted delayed payments after expiration of the grace periods provided by A.R.S. § 33-741 and could have, if it wished, declared a forfeiture. The "time is of essence" clauses were concededly waived, and the issue was the requirements for reinstatement of such clauses. As to these, the Court held that prior defaults were waived and a forfeiture could be declared only after the plaintiff gives the purchasers notice of intent to enforce the contract as written, a reasonable time to bring delayed payments up to date, and after expiration of a reasonable time, the additional period provided by the statute.[8]

Ambiguity

What is the meaning of the phrase "replacement new cost less depreciation"? In *Graham County Electric Cooperative, Co-op v. Town of Safford*[9] the validity of the contract turned on this phrase. The contract provided that if the Town of Safford extended its corporate limits, the then existing facilities of the Co-op in the area were to be sold to

[6] 84 Ariz. 399, 330 P.2d 113 (1958).
[7] Phoenix Title and Trust Co. v. Horwath, 41 Ariz. 417, 19 P.2d 82 (1933).
[8] The Court relied on a Washington case, Whiting v. Doughton, 31 Wash. 327, 71 Pac. 1026 (1903), and the Arizona case of Onekama Realty Co. v. Carothers, 59 Ariz. 416, 129 P.2d 918 (1942).
[9] 84 Ariz. 15, 22 P.2d 1078 (1958).

Safford on a "replacement new cost less depreciation" basis. In defense to an action brought by Safford to enforce the contract, defendant Co-op argued that the quoted phrase made the contract too vague and uncertain to be enforceable and that the court, in enforcing it, would be making an agreement for the parties. Defendant pointed out that there are many different methods of computing depreciation, such as the straight-line method and the percentage method, and that different results would be obtained depending on which of the methods was applied. The evidence indicated that the parties were unable to agree as to the method to be used.

The majority of the Supreme Court, in holding the contracts enforceable, stated that the fact there are many formulas for computing depreciation proves nothing unless it is shown that there is a material difference in results using the various methods, and that the defendant had not made the necessary showing.

The Court saw no reason for deviating from the dictionary definition of the word "depreciation," as a "falling of value . . . decline in value of an asset due to such causes as wear and tear, action of the elements, obsolescence, and inadequacy".[10] Several cases were cited in the opinion which had applied similar definitions of the term.[11] The dictionary meaning, it was said by the majority, should enable reasonable men to find "replacement new cost less depreciation".

Two of the justices vigorously dissented, saying that definitions are inadequate in that they cannot provide a formula by which it is possible to determine how the parties intended the price to be calculated. They quoted the methods described in 43 AM. JUR. 659, *Public Utilities and Services*, § 129:

> In general, there are two methods of estimating accrued depreciation of public utility property: (1) theoretical depreciation, based on the estimated life of the property; and (2) depreciation ascertained by observation and inspection. . . .

The dissenters were of the opinion that to use either one of these methods or a combination of both would be making an agreement for the parties and therefore the contract should not be enforced.

[10] WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1949).

[11] These cases are cited as authority merely for the definition of depreciation and contain no contract points: Addressograph-Multigraph Corp. v. United States, 78 F. Supp. 111, 112 (Ct. Cl. 1948), an income tax case; Downers Grove Community High School Dist. No. 99 v. Board of Education of Nonhigh School Dist. of DuPage County, 329 Ill. App. 208, 67 N.E. 2d 605 (1946), statute providing for tuition to school district; and Cumberland Tel. and Tel. v. City of Louisville, 187 F. 637 (1911), rate schedule interpretation.

Alternative Performance

In *Crouch v. Pixler*[12] the plaintiff was to drill an oil well on defendant's land. Plaintiff was to be paid by the foot, but if he encountered "rock in place" he was only to drill enough to confirm such fact. After drilling 495 feet plaintiff encountered what he thought was hard rock. He drilled 20 more feet and called in a mineralogist from the University of Arizona who confirmed this fact. Plaintiffs alleged full performance and the jury found full performance as a fact. Defendant, however, claimed that the above was only proof of part performance.

The Court held that where a contract calls for certain quantitative performance or a lesser performance if certain conditions occur, and these conditions do occur, the performance of this alternative is full performance.

Teacher Tenure

A.R.S. § 15-252 provides that if a teacher's contract is not to be renewed notice must be given by March 15. *School Dist. #6 of Pima County v. Barber*[13] held that this notice must be actually received by March 15, not merely mailed on March 15 as attempted by the defendant.

Consideration

Church v. Meredith[14] held that there was sufficient evidence in the lower court to sustain its finding that there was consideration for a promissory note.

[12] 83 Ariz. 310, 320 P.2d 943 (1958).
[13] 332 P.2d 496 (Ariz. 1958).
[14] 83 Ariz. 377, 321 P.2d 1035 (1958).

Corporations

WESTLYN C. RIGGS

A. Private Corporations

Ultra Vires Acts and Estoppel

In *Higgins v. Arizona Savings and Loan Association*[1] the plaintiffs applied for a loan from the defendant loan association to be secured by a mortgage on plaintiff's land. The defendant had notified plaintiffs that their application had been approved and later that the application had been rejected, as the land was not considered satisfactory to support the loan. The plaintiffs sued for breach of contract. Defendant contended that by statute[2] no loan could be made unless two appraisers had valued the land to be mortgaged and that only one appraiser had made an evaluation of plaintiff's land, and that since the provisions of the statute had not been complied with the contract to loan was ultra vires. The Court distinguished between corporate acts which were merely without authority and those which were illegal, and held that where an act was ultra vires because certain formalities were not complied with when entering into contracts within the scope of the corporation's charter, it could be estopped from alleging the failure to comply with the formalities as a defense. The Court felt that the statutory requirements were peculiarly within the knowledge of the officers of the association, and persons dealing with the association without notice of the nonperformance of the statutory formalities have the right to assume that they will be performed. Since the defendant represented to the plaintiffs that the application had been accepted and the plaintiffs changed their position in reliance on the representation, the doctrine of estoppel should be applied to meet the "ends of justice."

Liability for Fraud in Sale of Corporate Stocks

That any person who participated in or induced the unlawful sale of corporate stock is liable to the purchaser although such person has not received the consideration paid nor was a party to the sale, is illustrated by *Trump v. Badet*.[3] The plaintiff purchased stock in two corporations and thereafter participated in their management. The sales

[1] 85 Ariz. 6, 330 P.2d 504 (1958).
[2] A.R.S. § 6-410.
[3] 84 Ariz. 319, 327 P.2d 1001 (1958).

were induced by the defendants and the plaintiff sued to recover the purchase price alleging fraud on the part of the defendants. The Court in affirming the trial court's judgment for the plaintiff, held the following: (a) That while as a general rule no action of fraud lies against a person who was not a party to the sale nor received any of the consideration therefrom, the Arizona Securities Act[4] expressly provides that any person participating in or inducing the sale of securities is jointly and severally liable to the purchaser, (b) That the statutory exemption[5] of a sale in good faith by one other than the issuer or underwriter of the stock does not apply when there is a finding of fraudulent practices covered by the act,[6] and (c) That defendant's contention that no liability could be imposed as the stock was not required to be registered at the time it was issued by both plaintiff and defendants at the organization meeting of the corporation was without merit. This holding was based on the finding of fraudulent practices and the language of the statute[7] which granted exemption only to the original incorporators, and also the fact that the defendants had apparently admitted that plaintiff was not an incorporator.

Rights of Corporate Creditor

In *Creed v. State Equipment and Supply*[8] the plaintiff, a corporate creditor, sued a major shareholder in the corporation having mortgages on corporate property as security for loans made to it. The Court after finding that plaintiff's claim to the corporate property was prior to defendant's, held that an injured creditor, who had been wronged by acts which the corporation could not legally allow, may recover against a person converting corporate property.

B. Public Corporations

That the Corporation Commission cannot grant a certificate to a public motor carrier to operate except on public highways was reaffirmed in *Old Pueblo Transit co. v. Arizona Corporation Commission.*[9]

[4] A.R.S. § 44-2003.
[5] A.R.S. § 44-1844(3).
[7] A.R.S. § 1844(9).
[6] A.R.S. § 44-1991.
[8] 84 Ariz. 152, 325 P.2d 408 (1958). See also CREDITOR'S RIGHTS, *infra.*
[9] 84 Ariz. 389, 329 P.2d 1108 (1958).

Courts and Procedure

DICK RYKKEN and PHIL WEEKS

Judge's Right to Maintain Order

"What's going on here?" This apparently innocuous question triggered one of the more interesting series of events in Arizona law in 1958. The question was asked by the defndant in *State v. Van Bogart,*[1] an arson case, while the jury was being empaneled. In addition, the defendant made several other outbursts claiming that he was being "railroaded" and that he wanted to conduct his own case. Judge Hyder of the Maricopa County Superior Court warned him to control himself and finally threatened to gag him. With this, the defendant challenged the judge to go ahead with the result that the judge had him gagged until the jury was empaneled. Defendant's attorney continued the questioning of the proposed jurors while his client was gagged and then let the defendant conduct the rest of the defense.

The Supreme Court held that although it was error not to let the defendant question the jurors, it was not prejudicial in that nothing was shown by the defendant to the effect that any of the jurors was not qualified.

Another error cited by the defendant was also disallowed as the Court applied the old rule that a judge has the right and duty to maintain order in the court commensurate with the necessities of the case. *People v. Merkouris,*[2] a California case, is cited as authority. In that case, the threat of a gag was sufficient to maintain the desired order in the court. However, California authority is present to back the Arizona Court in *People v. Loomis*[3] in which the defendant was not only gagged, but strapped as well.

With this decision, the Arizona Supreme Court has applied an old rule with a new vigor.

Interrogatories

A less amusing, but more important decision was rendered on the controversial question of the use of interrogatories as provided in Rule 33, Arizona Rules of Civil Procedure, 16 A.R.S., to determine the exist-

[1] 331 P.2d 597 (Ariz. 1958). See also CRIMINAL LAW, *infra.*
[2] 46 Cal. 2d 540, 297 P.2d 999 (1956).
[3] 27 Cal. App. 2d 236, 80 P.2d 1012 (1938).

ence, amount, and nature of insurance of a defendant in an automobile injury case. In *Di Pietruntonio v. Superior Court*,[4] the Court ruled that such questions were not relevant to the trial and thus could not be determined by interrogatories. The Court said that insurance data was important only on the question of whether or not to settle the claim and did not affect the trial itself.

To arrive at this conclusion, the Court distinguished a number of cases throughout the country. *People ex rel Terry v. Fisher*[5] allowed the use of interrogatories to acquire this information. However, the Arizona Court distinguished that case because the Illinois Insurance Statutes require that all policies issued contain a clause stating that the injured party has a right to sue the insurance company if the defendant doesn't pay. This was said to imply that the insurance inures to the plaintiff and is thus a situation differing from Arizona's. California cases were distinguished on the same basis because a California statute specifically states that insurance inures to the benefit of the injured.

Federal courts are split on the issue with a New York district[6] and a Tennessee district[7] allowing the interrogatories and another Tennessee district[8] and a Pennsylvania district[9] disallowing them.

Arizona public policy, the Court said, has been stated in *Tom Reed Gold Mines Co. v .Morrison*.[10] In that case, the Court said that insurance was a personal matter in Arizona. In addition, the present Court quoted *Tom Reed* which says, "The fact that liability insurance was carried in no way affects the liability of the defendant and the injuries effect upon the jury is apparent." The present Court said that this Arizona law as given in the *Tom Reed* case is substantive in nature and should not be changed by a procedural interpretation differing from it. As the *Tom Reed* case arose on a voir dire examination of a juror, it is questionable whether this substantive Arizona law applies to a pre-trial examination.

A Kentucky case, *Maddox v. Grauman*,[11] mentioned in the Arizona case, provides one of the better discussions of this problem. In this case, pre-trial depositions asking insurance questions were allowed with the court stating that the question of relevancy is more loosely construed upon pre-trial examinations than at the trial. In addition, they state that the standard auto liability policy evidences a contract which inures to the benefit of every person who may be negligently injured by the assured as completely as if such injured person had been named in the

[4] 84 Ariz. 291, 327 P.2d 746 (1958).
[5] 12 Ill. 2d 231, 145 N.E. 2d 588 (1957).
[6] Orgel v. McCurdy, 8 F.R.D. 585 (1948).
[7] Brackett v. Wendall Food Products, 12 F.R.D. 4 (1951).
[8] McClure v. Boeger, 105 F. Supp. 612 (1952).
[9] McNelly v. Perry, 18 F.R.D. 360 (1955).
[10] 26 Ariz. 281, 224 Pac. 822 (1924).
[11] 265 S.W. 2d 939, 41 ALR.2d 964 (Ky. 1954).

policy. The court says that as it would be relevant to the subject matter if after the plaintiff prevailed, his judgment was unsatisfied, it should be equally so while the action is pending. The court goes on to state that the standard Kentucky law of refusing to allow insurance to be brought up at the trial is no way affected by their decision in this case.

The Arizona holding appears extremely controversial and may become even more so as the question of insurance becomes increasingly important by the enactment of Compulsory Liability Insurance laws throughout the country.

Notice

The case of *Wahl v. Hart*[12] involved the interpretation of A.R.S. § 11-705B, which requires notice of the proposed hearing to establish a county improvement district to be published in a newspaper of general circulation within the proposed district of improvement.

The question was whether the Arizona Weekly Gazette qualified as a newspaper of general circulation within such proposed district. The Arizona Weekly Gazette is the duly designated official newspaper of Maricopa County and, although it disseminates news on a variety of topics of interest to the general reader, it gives special prominence to legal news. It is delivered by mail only on subscription, and there were no subscribers within the proposed district. The Superior Court found that sufficient notice had not been given.

On appeal, the appellants unsuccessfully relied on *Burak v. Ditson*[13] which held that even though a newspaper was of particular interest to a particular class of persons, if it contained news of a general character and interest to the community, though limited in amount, it qualifies as a newspaper of general circulation. The Court said that similar publications have usually been held to be of general circulation, yet went on to say that the term "general circulation" is not wholly devoid of a quantitative connotation. "It implies a necessity for some circulation among those affected by the contents."

The actual holding of the case would seem to be limited to the newspaper not being one of general circulation *within the proposed district* as required by the applicable statute.

However, it might be inferred that Arizona will insist upon a greater circulation in the sense of number of people reached by the newspaper and less in the sense of substance, even when not dealing with a statute which insists upon circulation "within the proposed district". It would seem that the Court prefers a view which would insist upon a more

[12] 332 P.2d 195 (Ariz. 1958).
[13] 209 Ia. 926, 229 N.W.2d 227 (1930).

stringent requirement as to the size of the circulation than was required in the case cited by the appellants.

Service on an Attorney

An interesting interpretation of Rule 5(c), Arizona Rules of Civil Procedure, 16 A.R.S., and Rule 80(e) as to the service upon an attorney of record was given in *Schatt v. Stapley.*[14] In this case, notice to take defendant's deposition was served upon the defendant's attorney of record, who informed the server that he was no longer acting for the defendant, and defendant failed to appear. The plaintiff moved to strike defendant's answer and for a default judgment, notice of which was also served on the attorney of record, who once again told the server of his removal from the case. Default judgment was then granted for the plaintiff. The Supreme Court set aside the default judgment saying that service upon the attorney of record is insufficient when the server has knowledge that the attorney of record no longer actually represents the defendant and the plaintiff should have obtained permission from the court to serve the defendant personally.

Vacating Judgments

A construction of Rule 4(d)(1), Arizona Rules of Civil Procedure, 16 A.R.S., was given in *Lincoln-Mercury-Phoenix v. Base.*[15] The return of service stated that the server had left copies of the summons and complaint with a person over twenty-one at the place of abode of the defendant, and that the person who received the summons and complaint stated that she lived there. Upon the failure of the defendant to answer, a default judgment was rendered. The defendant filed a motion to vacate the judgment accompanied by an affidavit stating that at the time of the alleged service, defendant was out of the state, and that defendant had leased the premises to the person who received the service and that said person never told the defendant of the service. The affidavit was uncontroverted. On these facts, the Supreme Court affirmed the lower court's decision vacating the judgment.

In another action to set aside a default judgment, *Damiano v. Damiano,*[16] the contention of the appellant was that there was excusable neglect. In this case, the appellant was served by substituted service. The appellant failed to answer the complaint because he wrote the clerk of the court asking for the name and address of the plaintiff's attorney, which he received, and then wrote the attorney, but received no answer. Thus, he supposed that the action had been dropped. The Supreme

[14] 84 Ariz. 58, 323 P.2d 953 (1958).
[15] 84 Ariz. 9, 322 P.2d 891 (1958). See also CREDITORS RIGHTS, *infra.*
[16] 83 Ariz. 366, 321 P.2d 1027 (1958). See also DOMESTIC RELATIONS, *infra.*

Court affirmed the trial court's decision refusing to vacate the default judgment saying that this did not constitute excusable neglect.

In *Redman v. White*,[17] Redman executed a judgment against White which in turn was vacated by a court order procured by White. Thirty-three days after this order, Redman filed a motion to set aside the vacating order of the court, which was denied, and the plaintiff appealed. The Court held that improper procedure had been used by the plaintiff as a motion to set aside, made thirty-three days after the vacating order, was too late. Although not stated, presumably the Court was referring to Rule 59(d), Arizona Rules of Civil Procedure, 16 A.R.S., which requires a motion for a new trial to be filed within ten days.

Instructions

Rule 51, Arizona Rules of Civil Procedure, 16 A.R.S., was called into use in two cases citing as error instructions given in the trial court. In *Sult v. Bolenbach*,[18] the giving of instructions which neither party requested was cited as error. In *Romero v. Cooper*,[19] the cited error was the failure of the court to give instructions requested by the plaintiff. In both cases, the Supreme Court applied Rule 51 and held that the failure to make any objection in the trial court precluded any objection at the appellate level.

The absence of any mention of Rule 51 provided a more interesting Arizona case dealing with instructions. In *State v. Hudson*,[20] the defendant claimed he was drunk at the time of the murder for which he was tried. His attorney orally requested the judge to give the standard instruction on intoxication,[21] and the judge left the impression that he would comply as no objection was made by the state. However, this instruction was not given by the judge and both attorneys were given two opportunities to object to the instructions. On neither of these occasions did the counsel for the defendant make any objections. The failure to give the desired instruction was deemed reversible error by the Arizona Supreme Court with no mention made of the failure to object in the lower court.

Rule 272, Arizona Rules of Criminal Procedure, 17 A.R.S., provides that the civil rules will be applied as to instructions with certain exceptions. These exceptions include the right to make an oral request for instructions as differentiated from the written ones required in civil cases. However, there is no exception to provide that Rule 51, Arizona Rules of Civil Procedure, 16 A.R.S., should not apply.

[17] 331 P.2d 1096 (Ariz. 1958).
[18] 84 Ariz. 351, 327 P.2d 1023 (1958).
[19] 84 Ariz. 158, 325 P.2d 412 (1958).
[20] 331 P.2d 1092 (Ariz. 1958). See also CRIMINAL LAW, *infra*.
[21] A.R.S. § 13-132.

The case was submitted on briefs to the Supreme Court, but these briefs are of little help on this point, as the only mention of the failure to object appears in a fleeting comment in the State's brief which says that the defendant has probably waived his right to object, but that this may have been restored by his motion for a new trial.[22]

What precedent this case will provide for other criminal cases where no objection is made at the trial level is difficult to ascertain as the issue was not placed squarely before the court.

Criminal Procedure

In a matter of first impression, considered in *State v. Hill*,[23] the three-day time limitation for the motion for a new trial prescribed by Rule 308, Arizona Rules of Criminal Procedure, 17 A.R.S., was held to be jurisdictional, and the trial court's decision granting a new trial upon a motion of the defendant after this time limitation was reversed.

State v. Walker[24] held that an indictment which charged the defendant with robbery "on or about" a certain date was a sufficient allegation under Rule 118, Arizona Rules of Criminal Procedure, 17 A.R.S., which provides that an indictment or information need not contain an allegation of the time of the commission of the offense other than on or about such time.

In the same case, it was also held that the defendant, in order to be entitled to a new trial on the grounds of surprise, must have asked for a continuance or postponement during the trial, and the raising of the question on appeal for the first time was insufficient.

One of the assignments of error in the criminal case of *State v. Craft*[25] was that upon the defendant's motion requesting an examination of defendant with regard to his mental condition, the motion was granted, but no hearing nor ruling was had concerning the defendant's mental condition, and the case went to trial without such hearing. The Supreme Court held that this absence of hearing would have amounted to prejudicial error under Rule 250, Arizona Rules of Criminal Procedure, 17 A.R.S., if the hearing had been refused upon the request of the defendant, but since no request was made, nor was there an objection to the failure to have such a hearing, it did not amount to prejudicial error and the verdict was affirmed.

New Trials

In the cases of *Mayo v. Ephrom*[26] and *Blakely Oil v. Wells Truck-*

[22] Brief for appellee, p.12, Satte v. Hudson, citing Dugan v. State, 54 Ariz. 247, 94 P.2d 873 (1939).
[23] 85 Ariz. 49, 330 P.2d 1088 (1958).
[24] 83 Ariz. 350, 321 P.2d 1017 (1958). See also CRIMINAL LAW, *infra.*
[25] 333 P.2d 728 (Ariz. 1958). See also CRIMINAL LAW, *infra.*
[26] 84 Ariz. 169, 325 P.2d 814 (1958).

ways, Ltd.,[27] in which the lower court granted new trials, the Supreme Court reiterated the well-established rules that the granting of a new trial is within the sound discretion of the trial court. The Supreme Court also affirmed the trial court's decision in *Winterton v. Lannon*[28] on the ground that the evidence will be taken most strongly in favor of the trial court where there is any reasonable evidence to support it.

The Supreme Court held in *Singleton v. Valianos*[29] that a request for a directed verdict is not a prerequisite to an appeal from the denial of a motion for a new trial based upon the insufficiency of evidence to support the verdict.

Eight-hundred dollars in attorney's fees became the bone of contention in *Crouch v. Truman*.[30] Crouch was the defendant in a suit for damages which resulted in a judgment against him for $2,500 plus $800 in attorney's fees. Crouch appealed claiming that there was no evidence given regarding the fees, and they had been added by the judge after the verdict by the jury. The Supreme Court reversed the decision as far as the $800 was concerned. The plaintiff in the damage suit then sought a new trial below to add the attorney's fees. Crouch brought this action to the Supreme Court seeking a writ of prohibition preventing the judge from conducting the new trial. Along with this action came a memo from the judge certifying that the amount of attorney's fees was agreed upon at a private meeting between the two opposing attorneys with the judge present. As a result, he suggests that Rule 75(h), Arizona Rules of Civil Procedure, 16 A.R.S., be applied which allows the record to be changed to conform to what actually happened below.

The Arizona Court granted the writ of prohibition holding that whether a reversal without direction necessitates a new trial depends upon the intention of the appellate court and when the reversing error occurred after the verdict, no new trial should be had. The Court said that Rule 75(h), *supra*, didn't apply in that such an action should be taken prior to the time of decision on appeal and should be corrected by the trial court.

The basic reason behind the decision was that when a person has a full opportunity to develop his case and doesn't do so, the law does not call for a new trial to let him do what he should have done in the first trial.

Rule 59(a)(4), Arizona Rules of Civil Procedure, 16 A.R.S., the "newly discovered evidence" rule was discussed in *McGuire v. State of Arizona*,[31] which involved a paternity proceeding. After his conviction,

[27] 83 Ariz. 274, 320 P.2d 464 (1958).
[28] 85 Ariz. 21, 330 P.2d 987 (1958).
[29] 84 Ariz. 51, 323 P.2d 697 (1958).
[30] 84 Ariz. 360, 328 P.2d 614 (1958).
[31] 84 Ariz. 242, 326 P.2d 362 (1958). See also DOMESTIC RELATIONS, *infra*.

the defendant appealed on the ground that his attorney had just learned that he, the defendant, was sterile and claimed a new trial should be granted because of the "newly discovered" evidence. The Supreme Court pointed out that this rule did not apply in such a case, and besides, there had been evidence that the defendant had told the prosecutrix that he was sterile in the course of their activities.

Jurisdiction of the Courts

The petitioner in *Midway Enterprises Inc. v. Krucker*[32] made application to the zoning board of adjustment for territorial expansion of its business, and the board granted the application. This decision was reversed on appeal by the superior court, basing its reversal on an interpretation of the statute involved. The petitioner then, by writ of certiorari, contended that the superior court, by interpreting the statute, exceeded its jurisdiction. Petitioner relied on *State ex. rel. Morrison v. Thomas*,[33] which held that the trial court exceeded its jurisdiction when it misinterpreted a statute which prescribed a method for determining population in respect to the issuance of new liquor licenses. The Supreme Court denied the petition saying that on writ of certiorari the only question which it could consider was whether or not the superior court had jurisdiction, and, held that this case was distinguishable from *State v. Thomas* in that the misinterpretation of the statute in question in that case caused the court to exceed its jurisdiction because it was a statute dealing with the jurisdiction of the court, while here, the interpretation of the statute did not enlarge the court's jurisdiction, and therefore was not reversible by writ of certiorari.

A red light was given state courts regarding trying of Indians for traffic violations occurring in "Indian Country." *Matter of the Application of Ted Denetclaw, a Navajo Indian, for a Writ of Habeas Corpus*[34] held that under Title 18, U.S.C.A., § 1152, United States jurisdiction is exclusive over most criminal violations occurring in Indian Country. Indian Country includes by definition in Title 18, U.S.C.A., § 1151, "rights-of-way running through the reservation", *i.e.*, state highways.

In *Davies v. Russell*,[35] an action for writ of prohibition against the Superior Court of Coconino County, the petitioner, who had previously filed an action for separation from bed and board in Maricopa County, contended that the Coconino action for divorce filed by her husband should have been abated because of her previous action. The Court rejected this contention holding that the causes of action were not the same since they did not ask for the same relief, one of the requisites of

[32] 84 Ariz. 287, 327 P.2d 297 (1958).
[33] 80 Ariz. 327, 297 P.2d 624 (1956).
[34] 83 Ariz. 299, 320 P.2d 697 (1958).
[35] 84 Ariz. 144, 325 P.2d 402 (1958). See also DOMESTIC RELATIONS, *infra*.

making causes of action identical in order to work an abatement in a court of concurrent jurisdiction. The Supreme Court also held that the petitioner was erroneously allowed to file a supplemental complaint asking for divorce when the first action was for separation from bed and board. Further, under Rule 13(a), Arizona Rules of Civil Procedure, 16 A.R.S., the husband was not required to file a counterclaim for divorce to petitioner's action in Maricopa County, because at that time neither party would have met the jurisdictional requirements of residence in that county for six months.

It should be noted that some of the effect of this case has been negated by a recent amendment to A.R.S., § 25-311, which removes the requirement of residence in the county where the action is filed for six months next preceding the filing of the complaint for divorce, and now requires only that the petitioner be a resident of that county.

The question of ownership of a liquor license is not a question to be decided by the superintendent of liquor licenses or a Superior Court reviewing the superintendent's actions. *Kalastro v. Superior Court*[36] ruled that such a question should be decided in a separate action between the parties.

Change of Judge

The question of a change of judge for bias and prejudice was considered in two cases by the Supreme Court; *American Buyers Life Insurance Company v. Superior Court of Maricopa County,*[37] and *Hendrickson v. Superior Court.*[38] In the former it was held that under A.R.S., § 12-411, which provides for only one change of judge in any action, the voluntary disqualification of the judge upon the oral request of the litigant, without following the motion and affidavit prescribed by the statute, constituted the change of judge to which the litigant was entitled, even though the prescribed method was not followed. Consequently, the appellant was not entitled to another change of judge upon his motion and filing of affidavit in support thereof. In the latter case, *Hendrickson v. Superior Court,* the motion for change of judge and the affidavit in support thereof alleged that the disqualifying facts were unknown to the affiant until after the expiration of the time when the motion should have been made. The Superior Court judge denied the motion as a matter of law without a hearing, on the basis that it was not timely. The Supreme Court reversed the decision and held that when the motion for change of judge for bias and prejudice is based on disqualifying facts of which the petitioner has subsequently acquired knowl-

[36] 83 Ariz. 316, 320 P.2d 946 (1958).
[37] 84 Ariz. 377, 329 P.2d 1100 (1958).
[38] 85 Ariz. 10, 330 P.2d 507 (1958). See also DISQUALIFICATION OF JUDGE FOR BIAS AND PREJUDICE, *infra.*

edge, the motion is timely provided it is shown that such facts are true and that the petitioner had subsequently acquired knowledge of them. Therefore, the petitioner was entitled to a hearing to ascertain the truth of the affidavit supporting his motion.

Pleading

The pleadings in *Mullen v. Gross*[39] admitted that the water rights involved in this case were not percolating waters but the trial court found them to be such. The judgment was reversed on the ground that it is not within the court's province to raise issues and that findings against the allegations admitted by the pleadings are outside the issues and thus erroneous.

The Supreme Court in *Dixon v. Feffer*[40] affirmed the trial court's action under Rule 15(b), Arizona Rules of Civil Procedure, 16 A.R.S. The first two counts of plaintiff's complaint were on express contracts for materials furnished for a building for defendant, and the defendant's answer denied such contracts and set forth an express contract for construction of a building and counterclaimed for the breach thereof. At the conclusion of the trial, the plaintiff was allowed to amend his complaint to set forth an express contract for construction of the building. The Supreme Court held that the trial court was correct in permitting the plaintiff to so amend under Rule 15(b), "Amendment to Conform to the Evidence".

Rule 15(b), *supra,* was also used as a basis for the Court's affirmance in *Baxter v. Harrison.*[41] The answer of the defendant merely alleged the failure of the complaint to state a cause of action. After the deposition of the plaintiff was taken, and shortly before trial, the defendant moved for a summary judgment supported by an affidavit showing the plaintiff's lack of capacity to sue, which the court granted. The plaintiff contended that such motion was improper because of Rule 9(a), Arizona Rules of Civil Procedure, 16 A.R.S., which says that the issue of the lack of plaintiff's capacity to sue must be raised by a specific negative averment. However, the Supreme Court said that the treating of the affidavit of the defendant as an amendment to his pleading under Rule 15(b), *supra,* was proper and affirmed the summary judgment rendered in the trial court.

Miscellaneous

The Court pointed out in *Carp v. Superior Court of Maricopa County*[42] that a stay of execution is not an automatic feature of an ap-

[39] 84 Ariz. 207, 326 P.2d 33 (1958).
[40] 84 Ariz. 308, 327 P.2d 994 (1958).
[41] 83 Ariz. 354, 321 P.2d 1019 (1958).
[42] 84 Ariz. 161, 325 P.2d 413 (1958).

peal. In this case, the plaintiffs brought action against the State Board of Dispensing Opticians to compel them to issue licenses to practice to the plaintiffs. The plaintiffs secured a writ of mandamus against the Board and the Board appealed. Plaintiffs sought to have the writ enforced and the trial court said that it didn't have jurisdiction pending the appeal. Plaintiffs then brought this action to compel the lower court to enforce the writ of mandamus and the Supreme Court held that a stay of execution must be procured by a party making an appeal, and, in the absence of this, the court may enforce the judgment previously ordered. This is no departure from the law as it is followed throughout the country.

In *Hale v. Brown*,[43] the plaintiff assigned as error the granting of a summary judgment for the defendant at a hearing which was held less than ten days after the defendant's motion for summary judgment under Rule 56, Arizona Rules of Civil Procedure, 16 A.R.S. The plaintiff had made no objection to this time in the trial court. The Court held that since the time limitation of Rule 56(c), Arizona Rules of Civil Procedure, 16 A.R.S., was not jurisdictional, the failure to make an objection constituted a waiver. The Court also held that not only the pleadings, but also the facts shown on the record when the motion is made should be considered in the hearing on the summary judgment, and if there is any disputed material fact, the motion should be denied.

The question of the right of intervention was brought up in *Mitchell v. City of Nogales*.[44] Here, under a local ordinance, the plaintiff had the city attorney institute an action to enjoin the payment of money by the city under a contract. At the hearing the appellant sought to intervene but was denied intervention on the ground that his complaint presented issues identical to the city attorney's complaint. In construing Rule 24(b), Arizona Rules of Civil Procedure, 16 A.R.S., "Permissive Intervention", the Supreme Court affirmed the dismissal, holding that the appellant was adequately represented and did not have a right to intervene.

Stover v. Desmar[45] repeated the well-known rule that failure to file an answering brief to the Supreme Court constitutes a confession for the appellee.

Prince Development Corporation v. Beal[46] held that the owners of property could not be liable for contempt for maintaining a nuisance in violation of a court order when the property was in the hands of a receiver at the time of the alleged violation.

[43] 84 Ariz. 61, 323 P.2d 955 (1958).
[44] 83 Ariz. 328, 320 P.2d 955 (1958).
[45] 84 Ariz. 387, 329 P.2d 1107 (1958).
[46] 331 P.2d 1091 (Ariz. 1958).

Creditor's Rights

CLIFFORD G. BLEICH

Rights of Corporate Creditor

In *Creed v. State Equipment and Supply,*[1] the defendant was general manager, chairman of the board, and majority stockholder of a corporation. At a time when this corporation was indebted to both the plaintiff and the defendant, the claims of the plaintiff being prior to those of the defendant, the board of directors passed a resolution which authorized its officers to issue a bill of sale for all of the corporate property to the defendant, and to turn over all of the corporate assets to him in payment of his debt. This was done, which allegedly resulted in the eradication of the plaintiff's rights as a prior creditor. This action was brought for the conversion of the corporate property.

In holding as a matter of law that the defendant had converted the property of the corporation and noting that the bill of sale was void, the Court said that the corporation had no right to allow such acts and that a creditor who has been injured by such a preference has a right to recover against the party converting the corporate property.

Execution and Judgment

Substituted service failed to result in actual notice to the defendant in *Lincoln-Mercury-Phoenix, Inc. v. Base.*[2] A judgment by default was rendered against defendant upon her failing to appear, and her real property was then executed on, pursuant to the judgment, and sold at a sheriff's sale to the plaintiff.

The Supreme Court of Arizona, relying on a prior decision, held that when there is no notice and opportunity to be heard, so as to violate due process, the court lacks jurisdiction, and any judgment rendered thereunder is void.

The Court went on to say that any writ of execution that is rendered under a void judgment is also void, and that a subsequent execution sale does not pass any title to a purchaser.

[1] 84 Ariz. 152, 325 P.2d 408 (1958). See also CORPORATIONS, *supra.*
[2] 84 Ariz. 9, 322 P.2d 891 (1958). See also COURTS AND PROCEDURE, *supra.*

Homestead Exemption

The often debated question of the effect of divorce upon a pre-existing declaration of homestead was answered in *Phlegar v. Elmer.*[3] In this case, the family consisted solely of the husband and wife. The wife, the defendant in this action, recorded a declaration of homestead upon the property, and upon divorce was awarded the realty in question. After the divorce the plaintiff obtained a judgment against the defendant and her former husband and executed upon this realty which was subsequently purchased by the plaintiff at the execution sale. The plaintiff then brought this action to quiet title.

The defendant argued that A.R.S. § 33-1104 lists the only methods by which a homestead might be dissolved. The Court, in rendering judgment for the plaintiff, held that there could be no homestead exemption unless there was a family and said that A.R.S. § 33-1101 and A.R.S. § 33-1104 must be read together. The Court held that the dissolution of the family took away the right to have a homestead and without the family the homestead was dissolved.

Prior to this case, the question "What effect does divorce have upon the homestead declaration when the family for whose benefit the homestead was filed consists of only the husband and wife?", had been unanswered in Arizona. There is authority for the proposition that a divorce, regardless of the fact that the family consists solely of the husband and wife, has no effect upon a pre-existing homestead. However, the majority of jurisdictions appear to follow the rule applied by the Arizona Supreme Court in the principal case.[4]

Fraudulent Conveyances and Garnishment

In *Linder v. Lewis, Roca, Scoville and Beauchamp*[5] one Marches procured a judgment against Tolmachoff and made an assignment thereof to the garnishee. He also made an assignment of the judgment to Thomas, subject to the prior assignment to the garnishee. The trial court found that both of these assignments were made with the mutual intent of hindering the creditors of Marches, the assignor, and therefore were fraudulent conveyances under A.R.S. § 44-1007. After the garnishee had collected on this judgment from Tolmachoff, he was served with a writ of garnishment by a judgment creditor of Marches. Thereafter, the garnishee paid to Thomas the fund that he had collected from Tolmachoff and filed an answer to the writ in which he claimed to be an assignee of Marches and denied having any property of Marches in his possession.

[3] 84 Ariz. 204, 325 P.2d 881 (1958). See also DOMESTIC RELATIONS, *infra.*
[4] 97 A.L.R. 1095; 40 C.J.S. *Homesteads* § 160; 26 AM. JUR. *Homesteads* §§ 205, 206.
[5] 333 P.2d 286 (Ariz. 1958). See also ATTORNEY AND CLIENT, *supra.*

The Supreme Court said that there was ample evidence to support the conclusion that this conveyance was fraudulent, so that the fund collected on the judgment by the garnishee was subject to the writ of garnishment. The garnishee argued that he had, by paying the fund to Thomas, recognized that assignment as valid rather than the assignment to himself. The Court held that since this, too, was a fraudulent conveyance within the meaning of A.R.S. § 44-1007, the argument of the garnishee was without weight. The judgment of the lower court in favor of the garnishor was therefore affirmed.

Criminal Law

EDWARD I. KENNEDY

Habeas Corpus

Affirming the trial court in quashing appellant's petition for a writ of habeas corpus, the Court in *Vigileos v. State*[1] held the fact that the appellant was confined as a prisoner in the same section of the State Prison as adult prisoners while appellant was under eighteen years of age, was not a ground for writ of habeas corpus.

The Court also held that although appellant did not receive a preliminary hearing on the burglary charge of which he was convicted and did not waive such hearing, his failure to object before pleading on the merits as provided by Arizona Rules of Criminal Procedure[2] precluded him from raising this issue in the habeas corpus proceedings.

Discretionary Powers

In *State v. Van Bogart*[3] the trial court dramatically demonstrated its right to maintain order and preserve its dignity and legal decorum. The trial judge in ordering a recalcitrant defendant gagged when he persisted in disrupting the court was held not to have committed prejudicial error and thus did not deprive him of a fair trial.

Possession and Sale of Narcotics

In affirming a conviction for the sale and possession of narcotics the Court in *State v. Milton*[4] reiterated the maxim that testimony of a witness on cross-examination is no stronger than as modified by his direct and redirect examination. Consequently, a portion of his testimony may not be singled out to the exclusion of equally important testimony given by the witness, as a foundation for reversal.

Voluntary Intoxication

The participation in the consumption of two and three-fourths gallons of wine by the defendant on the day of the homicide was held

[1] 84 Ariz. 404, 330 P.2d 116 (1958).
[2] Arizona Rules of Criminal Procedure, 17 A.R.S.
[3] 331 P.2d 597 (Ariz. 1958). See aso COURTS AND PROCEDURE, *supra.*
[4] 331 P.2d 846 (Ariz. 1958).

to be sufficient evidence of intoxication to warrant an instruction on the effect of voluntary drunkenness in relation to malice aforethought as a necessary element of murder in the second degree. Failure to give such an instruction constituted reversible error in *State v. Hudson.*[5] In reaching this conclusion the Court applied A.R.S. § 13-132 and stated as a general rule voluntary drunkenness at the time a crime is committed is no defense. However, it is to be considered by the jury in determining the presence or absence of the necessary state of mind to constitute malice aforethought, which distinguishes murder from manslaughter.

Probation

In *Peterson v. Honorable Al J. Flood, Justice of the Peace,*[6] the Court construed A.R.S. § 13-1657 as a legislative grant to justice courts of the power to suspend the imposition of sentence and place defendants on probation.

Bogus Checks

In *State v. Wilson,*[7] the defendant, charged with attempting to obtain money or property by means of a bogus check,[8] elected to proceed with the trial following refusal to grant an instructed verdict. The Court stated that when the defendant does not stand upon his motion but elects to go forward with the proof, he runs the risk of supplying the deficiency upon which his motion is based. The Court then held that the defendant in proceeding with such proof provided ample evidence of his fraudulent intent in the form of a false phone number, wrong signature and admission that the account was closed. In addition the defendant contended the check in question was a company check. Consequently defendant's failure to provide a counter signature on the check constituted additional evidence of his fraudulent intent.

Circumstantial Evidence

In *State v. Andrade and Chavez,*[9] the Court reversed a burglary conviction with instructions to dismiss the information against the appellants. Citing *State v. Butler,*[10] the Court said, "to warrant a conviction on circumstantial evidence alone, the evidence must be consistent with guilt and inconsistent with every reasonable hypothesis of innocence." Mere presence of the defendants in an automobile in which items taken

[5] 331 P.2d 1092 (Ariz. 1958). See also COURTS AND PROCEDURE, *supra.*
[6] 84 Ariz. 256, 326 P.2d 845 (1958).
[7] 84 Ariz. 165, 325 P.2d 416 (1958).
[8] A.R.S. § 13-311.
[9] 83 Ariz. 356, 321 P.2d 1021 (1958).
[10] 82 Ariz. 25, 307 P.2d 916 (1957).

in a burglary were found established neither knowledge of the stolen items by the defendants, nor possession of the articles by the defendants.

Criminal Procedure

Urrea v. Superior Court[11] states that dismissal of a prosecution under Rule 236, Ariz. Rules of Criminal Procedure, 17 A.R.S. (failure to file a motion or bring to trial within sixty days) results in a grant of immunity by law from further prosecution for the same offense, unless the court at the time of the dismissal ordered a new prosecution to be instituted.[12]

Alibi

In *State v. Walker*[13] the Court recognized a conflict between the presumption that a defendant must know when the alleged crime was committed if he is to avail himself of the defense of alibi, and the statutory provision for faulty memory or inaccuracy of the date of occurrence. Citing Rule 118, Ariz. Rules of Criminal Procedure, 17 A.R.S., which provides that unless the time of commission of the crime is necessary under Rule 115, Ariz. Rules of Criminal Procedure, 17 A.R.S., an allegation in the information of "on or about such time", is sufficient. The Court then cited 23 C.J.S. *Criminal Law*, § 1431 at 1133, to the effect that a party will not be allowed to sit back and speculate on the result of the verdict and when decided against him claim the right to a new trial on the ground of surprise. To preserve the point he must ask for a continuance or a postponement at the time of the surprise.

Instructions

In affirming a conviction of murder in the first degree and the extreme penalty of death, the Court in *State v. Craft*[14] reviewed controversial instructions given to the jury at eleven a.m. on the day following its retirement to deliberate. The instructions were given without request by the jury to the effect that the jury should not be unreasonable or arbitrary and to honestly approach the problem with a view to arriving at a verdict if possible, without surrendering their conscientious convictions. The Court held the instruction not to be erroneous. Chief Justice Udall and Justice Struckmeyer rendered a separate concurring opinion cautioning that the use of such instructions by the trial courts should be rare, and as members of the Court, they would continue to

[11] 83 Ariz. 297, 320 P.2d 696 (1958).
[12] Rule 238, Arizona Rules of Criminal Procedure, 17 A.R.S.
[13] 83 Ariz. 350, 321 P.2d 1017 (1958). See also COURTS AND PROCEDURE, *supra*.
[14] 333 P.2d 728 (Ariz. 1958). See also COURTS AND PROCEDURE, *supra*.

carefully scrutinize the circumstances surrounding the giving of such instructions.

Double Jeopardy

In *Appication of Williams*,[15] a petition for a writ of habeas corpus, the state presented its case in chief in a prosecution of second degree murder. It then moved for and was granted a dismissal with instructions to file a new complaint in justice court on the grounds that the evidence presented at the trial showed an offense of a higher nature had been committed.[16] The Court, in upholding the constitutionality of A.R.S. § 13-1595 as a general proposition, pointed out a second trial would place the defendant in double jeopardy when, "the elements necessary to sustain a conviction for murder of the second degree are implicit in the evidence necessary to sustain a conviction of murder of the first degree." The trial court's ruling denying the defendant's application for a writ of habeas corpus was reversed with instructions to discharge the defendant.

Corpus Delecti

In *State v. Hernandez*[17] the defendant was convicted of having been an accessory to a kidnapping in that he had knowledge of the kidnapping or had harbored and protected the kidnapper.[18] Part of the evidence admitted by the trial court was a statement given by the defendant. The defendant appealed his conviction on the ground that the corpus delecti had not been sufficiently established prior to and independently of the defendant's statement. The Court reversed the trial court with directions to dismiss the information and in doing so clarified a basic principle of criminal law, paraphrased as follows: The degree of proof of corpus delecti required as a condition precedent to the admission of a defendant's confession or statement is adequate if it is sufficient to warrant a reasonable inference that the crime charged was actually committed by some person. To the extent that *State v. Burrows*,[19] or *State v. Thorp*,[20] required the independent proof to be clear and convincing, they were disapproved.

Admissibility of Statements

In *State v. Jordan*,[21] the Court, in an interpretation of A.R.S. §

[15] 333 P.2d 280 (Ariz. 1958). See also CONSTITUTIONAL LAW, *supra*.
[16] A.R.S. § 13-1595.
[17] 83 Ariz. 279, 320 P.2d 467 (1958).
[18] A.R.S. § 13-141.
[19] 38 Ariz. 99, 297 Pac. 1029 (1931).
[20] 70 Ariz. 80, 216 P.2d 415 (1950).
[21] 83 Ariz. 248, 320 P.2d 446 (1958).

13-1418, adopted from the Federal Rules of Criminal Procedure,[22] repudiated the Federal McNabb doctrine. The Court held, "unnecessary delay in arraigning a prisoner before a judicial officer did not ipso facto make inadmissible statements made by the defendant during the period he was detained." Rather, the test of admissibility is whether such statements were given voluntarily. To justify the exclusion of such statements, coercion or involuntariness must be demonstrated. The delay itself will be considered as a possible coercive factor.

Cruelty to Animals

In *State v. Stockton*,[23] the defendant was charged with cruelty to animals in violation of A.R.S. § 13-951. The trial court granted defendant's motion to quash the information. The State of Arizona then appealed since the trial court had failed to designate the grounds upon which it relied in quashing the information. The Court, in reviewing A.R.S. § 13-951 (Cruelty to Animals), upheld the trial court and in so doing refused to extend the scope of the statute in question to include gamecocks as animals. The Court cited *State v. Menderson*,[24] and *State v. Tsutomu Ikeda*,[25] saying:

> What a statute commands or prohibits in the creation of new crimes should be very definite and easily understood by the common man.

And that:

> Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts . . . to avoid.

[22] Rule 5(a), Federal Rules of Criminal Procedure, 18 U.S.C.
[23] 333 P.2d 735 (Ariz. 1958).
[24] 57 Ariz. 103, 111 P.2d 622, 624 (1941).
[25] 61 Ariz. 41, 143 P.2d 880 (1943).

Domestic Relations

ROBERT N. AXELROD

Homestead

In *Phlegar v. Elmer*,[1] the Court took notice of two statutes, A.R.S. § 33-1101 and A.R.S. § 33-1104. The former provides that every head of a family,[2] under certain conditions, may hold real property as a homestead, while the latter recognizes the methods by which a homestead may be abandoned. The Court stated that it is necessary in order to accomplish the purpose of the act to construe these two sections together. Applying this principle, it was declared that the homestead right does not continue after the dissolution of the family caused by a divorce decree. The family before divorce consisted only of the husband and wife. The defendant based her claim that she was nevertheless entitled to the benefit of the homestead exemption upon the abandonment provision of the latter statute. However, the Court recognized that this statute necessarily assumes the existence of a valid homestead right. Therefore, there being no such right because of the dissolution of the family, abandonment is not legally possible.

Community Property

It is well-settled in the State of Arizona that property acquires its status at the time of its acquisition. In *Craver v. Craver*,[3] the proceeds of a sale of decedent's separate property were held to be his separate property. The burden is upon him who claims the proceeds to be community property to prove such by clear and convincing evidence. A sale, which transmutes realty to personalty, does not in itself change the proceeds thereof to community property.

Paternity

McGuire v. State[4] involved a paternity proceeding. The action was brought under what is presently A.R.S. § 12-841 through 12-851. The

[1] 84 Ariz. 204, 325 P.2d 881 (1958). See also CREDITOR'S RIGHTS, *supra*.
[2] Lobban v. Vander Vries Realty & Mortgage Co., 48 Ariz. 180, 60 P.2d 933 (1936), as to what constitutes a family.
[3] 85 Ariz. 17, 330 P. 2d 731 (1958).
[4] 84 Ariz. 242, 326 P.2d 362 (1958). See also COURTS AND PROCEDURE, *supra*.

Court made specific reference to a particular section,[5] in which it is expressed that the function of the jury is limited to finding the defendant either guilty or not guilty, and that the amout to be paid by the defendant for lying-in and maintenance of the child is to be determined exclusively by the trial judge. Citing an earlier Arizona decision,[6] the Court observed that normally the testimony of the child's mother need not be corroborated as to paternity. The Supreme Court held that there was no error in an instruction to the jury, which stated in substance that the defendant could be found to be the father of the unborn child on the sole testimony of the mother, provided such testimony was credible.

Divorce

A statute which provides for the vacating of a judgment for excusable neglect may be applied to a judgment rendered in a divorce proceeding.[7] In *Damiano v. Damiano*,[8] such application was unsuccessful. The trial court found that there was no excusable neglect, the significant fact being that there was a period of 103 days between the service of summons and complaint on the defendant and the rendition of judgment, without the defendant filing an answer or otherwise making an appearance. The question whether a default divorce decree may be set aside on the ground of excusable neglect lies within the sound discretion of the trial court, unless it is shown that there is excusable neglect as a matter of law. The Supreme Court decided that there was no abuse of discretion in the instant case.[9]

Application of A.R.S. § 25-317 was necessary in *Hemphill v. Hemphill*.[10] All material allegations, including residential requirements, must be corroborated in order to sustain a judgment of divorce.[11] The requirement for corroboration under this statute was not met and therefore a divorce should not have been granted. The wife's admission in a sworn reply to a counterclaim, as to the residency of her husband, conflicted with her testimony as to her husband's whereabouts immediately prior to the trial. The importance of and necessity for this statute was indicated as being a preventative measure against obtaining a divorce by collusion or connivance.

A divorce decree, with a provision that the husband pay to his wife a specified sum of money each month for a period of six months *only*, was held not to be subject to modification in *Cummings v. Lockwood*.[12]

[5] A.R.S. § 12-845, subdivisions A and B.
[6] Rightmire v. Sweat, 83 Ariz. 2, 315 P.2d 659 (1957).
[7] Rule 60(c), Rules of Civil Procedure, 16 A.R.S.
[8] 83 Ariz. 366, 321 P.2d 1027 (1958).
[9] This case is also noted in COURTS AND PROCEDURE, *supra*.
[10] 84 Ariz. 95, 324 P.2d 225 (1958).
[11] In re Sweeney, 51 Ariz. 9, 73 P.2d 1349 (1937).
[12] 84 Ariz. 335, 327 P.2d 1012 (1958).

A.R.S. § 25-321, providing that the court may amend, revise, and alter alimony payments on petition of either party, and A.R.S. § 25-319, with a provision that the amount may be paid in one sum or in installments, should be construed together. Such construction requires that the former statute impliedly excepts from its operation an alimony award payable in a lump sum or an award in one sum payable in installments. To do otherwise would be to give no effect to A.R.S. § 25-319 where it is expressly provided that alimony may be in one sum.

Whether there was an abatement of a divorce action by reason of the pendency of a prior action for separation from bed and board was the issue presented in *Davies v. Russell.*[13] In deciding against the contention that there was such an abatement, the Court carefully noted that the two causes of action differed, in that the same relief is not demanded in both actions. This is evidenced by the fact that a decree of divorce terminates forever the marriage relationship, except by remarriage, whereas the parties, after a decree of separation from bed and board, may restore their marital status by having the decree vacated. Also, at the time of the decision of this case, there was a statutory requirement that in an action for absolute divorce the plaintiff must be a resident of the state for one year and of the county for six months immediately preceding the filing of the complaint. The county jurisdictional requirement affected greatly the decision of this case. This provision has since been superseded.[14]

In *White v. White*[15] the plaintiff commenced a quasi-in-rem action for separate maintenance in the Superior Court of Arizona against her husband, a domiciliary of Colorado. Service was had by registered mail. Twenty days later her husband was granted an *ex parte* divorce in Colorado. The divorce decree was silent as to any provision for support of plaintiff or the children. The trial court dismissed plaintiff's action on the ground the divorce decree extinguished her rights and was entitled to full faith and credit. This was reversed on appeal,[16] the Court holding the full faith and credit clause inapplicable since the Colorado decree was interlocutory and had not yet become final.

On retrial, the divorce having become final in the interim, the trial court again dismissed, relying on the full faith and credit clause. On this appeal the Court was faced with the question of whether a foreign divorce decree, where there was no personal jurisdiction over the wife, extinguished her right to support.

A court has no jurisdiction to adjudicate a personal claim unless

[13] 84 Ariz. 144, 325 P.2d 402 (1958). This case is also noted in COURTS AND PROCEDURE, *supra.*
[14] A.R.S. § 25-311. As amended Laws 1958, ¶ 38, § 2.
[15] 83 Ariz. 305, 320 P.2d 702 (1958).
[16] White v. White, 78 Ariz. 397, 281 P.2d 111 (1955).

it has in personam jurisdiction over the parties. Any attempt to do so would run afoul of the due process clause of the United States Constitution.[17] Accordingly, in *Vanderbilt v. Vanderbilt*,[18] the United States Supreme Court upheld an alimony award by a New York court rendered ten months after a valid Nevada divorce. In adopting the reasoning of these cases, the Arizona Supreme Court held that an *ex parte* divorce is entitled to full faith and credit only insofar as it terminates the marital status of the parties, and that it does not, by force of the full faith and credit clause, deprive the absent spouse of her personal right of support.

Although in the instant case the foreign divorce decree did not purport to extinguish the wife's right to alimony or separate maintenance, it is clear from the rationale of the decision, as well as those discussed above, that such a provision in a foreign judgment would be void under the due process clause where there was no jurisdiction over the wife.

Recognizing the problems created by *ex parte* divorces, the majority of states permit the wife to obtain alimony after a final *ex parte* divorce obtained by the husband.[19] A substantial minority allow recovery even where the wife has procured the *ex parte* divorce and later seeks alimony.[20] The Arizona statutes, however, have no such provision.[21] The Court in the instant case recognized that Arizona's statute regarding separate maintenance[22] contemplates a valid marriage relationship *at the time such action is instituted*, but since plaintiff filed her complaint before the divorce became final, the action came within the statute.

[17] Estin v. Estin, 334 U.S. 541 (1948).
[18] 354 U.S. 416 (1957).
[19] *E.g.*, Davis v. Davis, 197 Pac. 241 (Colo. 1921); Searles v. Searles, 168 N.W. 135 (Mich. 1918).
[20] Illinois, Massachusetts, and Utah permit it by statute. Karcher v. Karcher, 204 Ill. App. 210 (1917); Parker v. Parker, 97 N.E. 988 (Mass. 1912); Hutton v. Dodge, 198 Pac. 165 (Utah 1951).
[21] See A.R.S. §§ 25-319, 25-321.
[22] A.R.S. § 25-341.

Elections

PHILIP TOCI

Nomination by Other Than Primary Election

In *Cavender v. Board of Supervisors of Pima County,*[1] the plaintiffs, one a defeated candidate in the primary election and the other a non-participant, sought to have their names placed on the ballot for the general election. Both of the plaintiffs were registered Democrats and qualified electors of Pima County. The plaintiff's certificates of nomination were filed pursuant to A.R.S. § 16-601 which states, in effect, that candidates for public office may be nominated otherwise than by primary election by filing a certificate of nomination within ten days after the primary election and choosing a designation under which the candidate shall be placed on the ballot. The plaintiffs selected "Clean Government" as their designation. A writ of mandamus was applied for to compel the board of supervisors to accept the certificates of nomination and the writ issued, but was quashed by the lower court. In reversing the trial court it was said that the official registration of the plaintiffs as Democrats had nothing to do with their right to procure nomination "other than by primary election" under the provisions of A.R.S. § 16-601. The Supreme Court stated that plaintiffs choice of "Clean Government" as a designation did not make them members of a newly created party so as to preclude them from being placed on the ballot because they were not registered as such.

A similar situation was involved in *Board of Supervisors of Pima County v. Harrington.*[2] However, in this case the plaintiffs chose "Republican" as the designation under which they wished their names to appear on the ballot and in the primary election the Republican Party had failed to nominate candidates to the offices plaintiffs were seeking. The lower court refused to allow the names to be placed on the ballot and the Supreme Court affirmed, saying that although A.R.S. § 16-601 gives the right to a person seeking public office to have his name printed upon a ballot to be used at the general election, this is subject to the provisions of A.R.S. § 16-503 which states, "If no candidate is nominated

[1] 333 P.2d 967 (Ariz. 1958).
[2] 333 P.2d 971 (Ariz. 1958).

in the primary election for a particular office, then no candidate for that office for that party may appear on the general or special election ballot." Because the plaintiffs used the designation "Republican" and no candidate was selected by the Republican Party at the primary election for the offices sought by the plaintiffs they were not entitled to have their names appear on the ballot at the general election.

Preventing Candidates From Being Listed on Ballot

A writ of mandamus was sought in *Smoker v. Bolin*,[3] to compel the Secretary of State to take *no action* which would cause the name of a candidate to be listed on the ballot at the primary election. There were two vacancies on the Corporation Commission to be filled at the primary election; a two year period to finish the term of a deceased member and a regular term. The regular term was held by Brooks who had filed nomination petitions to succeed himself. The plaintiff challenged the legality of these petitions on the ground that Brooks did not specify in his nomination petitions which of the two terms he was seeking. It was held that a writ of mandamus would only issue to compel the performance of an act and would not be applied to restrain a public official from doing an act.

Filling of Unexpired Term by Election

Whether an unexpired term of a deceased member of the Corporation Commission could be filled by election was the question which arose in *Bolin v. Superior Court of Maricopa County*.[4] A member of the commission had died and his vacancy had been filled by Senner. Senner and others then filed nomination petitions to have their names placed on the primary election ballot to fill the unexpired term of the deceased. An injunction was granted by the lower court prohibiting the Secretary of State from certifying that there was an office to be filled by the electors for the unexpired term of the deceased. The Secretary of State applied for a writ of prohibition against the trial court to restrain the enforcing of this injunction. The Supreme Court issued an alternative writ and made it peremptory. The elections were held and Senner was elected. The Court stated that under the Arizona Constitution, Art. 15, § 1, A.R.S., the Governor has the authority to appoint a commissioner to fill the vacancy until a commissioner shall be elected at a general election. The point in issue here was whether "general election" means the general election at which the corporation commissioner would be elected in the usual course of events at the expiration of the full term of office

[3] 333 P.2d 977 (Ariz. 1958). See also ADMINISTRATIVE LAW, *supra*.
[4] 333 P.2d 295 (Ariz. 1958)

or whether it refers to the next general election closest in point of time after the vacancy occurs. It was decided that the latter construction was the proper one, the Court saying, ". . . the vacancy in the office of the Corporation Commission such as existed here must be filled at the next general election closest in point of time after the vacancy occurs."

State Elector Contesting The Nomination of U. S. Congressman

In *Harless v. Lockwood*,[5] it was questioned whether a candidate for the office of Representative to Congress came within A.R.S. § 16-1201, which provides that any elector of the state may contest the election of any person declared nominated to a *state office* at a primary election. Harless and Haldiman were rival candidates for the Democratic nomination for Representative to Congress and Haldiman was nominated. Harless filed a statement of contest in the Superior Court, and the court refused to take jurisdiction. Original proceedings in mandamus were brought to compel the court to take jurisdiction over the contest. Mandamus was allowed and it was said that the use of "state office" in A.R.S. § 16-1201 could be properly interpreted to include nominees for Representatives to the Congress of the United States.

Candidacy of Incumbent Superior Court Judge for Supreme Court

In *Whitney v. Bolin*,[6] the issue was raised as to whether the office of Judge of the Superior Court was vacated by the holder of that office filing nomination papers qualifying him as a candidate for a seat on the Arizona Supreme Court. An original petition in mandamus was brought to compel the Secretary of State to designate the office of Judge of the Superior Court vacated. The Supreme Court refused to issue the writ of mandamus in spite of the language of A.R.S. § 38-296 which says that no incumbent of an elective office shall be eligible for nomination or election to any other office than the one held. It was felt that this statute was in conflict with the express language of the Arizona Constitution, Art. 6, § 11, which allows judges of the Superior Court and Supreme Court to seek other judicial offices. The conflict was resolved in favor of the constitutional provision and thus A.R.S. § 38-298 had no application to the office of Judge of the Superior Court. The Supreme Court stated, "We hold that the Judge of the Superior Court is eligible for nomination and election to the Supreme Court and the office he now holds is not vacated . . ."

[5] 332 P.2d 887 (Ariz. 1958).
[6] 85 Ariz. 44, 330 P.2d 1003 (1958). See also CONSTITUTIONAL LAW, *supra*.

Rotation of Names of Candidates on Voting Machines

The necessity for rotation of names on voting machines was adjudicated in *Kautenburger v. Jackson.*[7] Jackson sought to enjoin the Board of Supervisors from using voting machines unless provision was made for the rotation of names of candidates in compliance with A.R.S. § 16-533, which provides for alternating the names of candidates on paper ballots. However, subsection (C) of A.R.S. § 16-533 states that the statute shall not apply where voting machines are used. In addition A.R.S. § 16-796 contains the provision that where voting machines are used the names of the candidates shall be in alphabetical order. The lower court declared A.R.S. § 16-796 unconstitutional and directed that the names be rotated on the machines. The Supreme Court affirmed the trial court, saying that is a known fact that where there are many candidates for the same office the names appearing at the head of the list have an advantage. Further, the legislature recognized this by providing that rotation of names be made on paper ballots.

[7] 333 P.2d 293 (Ariz. 1958). See also CONSTITUTIONAL LAW, *supra.*