SURVEY OF 1958 ARIZONA CASE LAW

PART II

Evidence

TOM SLUTES

Parol Evidence

In *Roseberry v. Heckler*[1] the Supreme Court held that a broker who had a listing which required him to secure a buyer on terms which would be satisfactory to the owner can not establish that he complied with the terms of the listing by oral evidence. This type of contract came under Paragraph 7 of A.R.S. § 44-101 and the broker was required to prove that the owner accepted the terms presented to him with written evidence.

Beaudry Motor Company v. Truax[2] cited the basic rule of parol evidence — that it will not be admitted to vary the terms of a written contract—but held that there was no written contract in this case. The defendant had signed a purchase order for a new car from Beaudry Motor Company but the latter hadn't signed it. There was a provision on the face of the instrument saying that the plaintiff would not be bound by the order unless the order was accepted by it. Also, there were discrepancies between the purchase order held by the defendant and the carbon copy which the plaintiff held; e.g., the cost of a radio was $24 higher and seat covers were an added expense on the plaintiff's copy. The Court held that these orders did not constitute integrated or partially integrated contracts and thus the defendant's oral testimony was properly admitted by the trial court.

Admissions

State v. Van Bogart[3] followed the earlier Arizona cases of *State v. Hernandez*[4] and *State v. Romo*[5] which held that admissions and incriminating statements of the defendant may be admitted in evidence in criminal cases but not until the corpus delecti is established by independent evidence. It was held that the independent evidence must reasonably support an inference of the corpus delecti, and it need not be established by clear and convincing evidence.

[1] 84 Ariz. 247, 326 P.2d 365 (1958).
[2] 84 Ariz. 126, 324 P.2d 1006 (1958).
[3] 85 Ariz. 63, 331 P.2d 597 (1958). See also COURTS AND PROCEDURE, and CRIMINAL LAW, *supra*.
[4] 83 Ariz. 279, 320 P.2d 467 (1958).
[5] 66 Ariz. 174, 185 P.2d 757 (1947).

In a somewhat related matter, the Court in *Hemphill v. Hemphill*[6] considered the effect in a divorce proceeding of a wife's admission in her pleadings of her husband's allegation of residence in the state for the required period. A.R.S. § 25-317 provides that no divorce shall be granted upon the testimony of a party unless it is corroborated by other evidence. The Court in this case held that there was insufficient corroboration of the husband's allegation because the wife's admission in her pleading was negated by her testimony at the trial — her evidence showing that she really did not know where her husband was until just before the trial.

Opinion Testimony

Two tort cases deal with opinion testimony, *Goodman v. Carson*[7] and *Gray v. Woods*.[8] In the latter case, apparently one of first impression in Arizona, the Supreme Court followed the general rule in other states and said that a highway patrolman, testifying as an expert witness, may give an opinion as to the point of impact in a traffic accident where his testimony is based on the damage to the vehicles involved, marks on the road, location of debris on the highway and other indicia at the scene.

In *Goodman v. Carson, supra,* the trial court admitted in evidence certain of the plaintiff's testimony in which he stated his opinion that the accident would not have occurred had the defendant acted differently. The Supreme Court held this to be error, in that a lay witness should confine his testimony to facts only.

In this case the trial court also allowed the plaintiff to testify concerning the speed at which the defendant's car was traveling at the time of the accident. The testimony was based upon experiments the plaintiff and his attorney had made just prior to the trial. This testimony was rejected by the Supreme Court by stating that testimony based upon experiment is not to be admitted unless the witness is an expert and the conditions under which the experiment were made are shown to be substantially the same as those existing at the time of the accident. In his dissent, Justice Struckmeyer objected to both of these rulings. His strongest objection was to the witness opinion rule, arguing that opinion testimony does no harm because the jury, realizing that it is an opinion, would pay it no heed unless it appears to be based on satisfactory data.

[6] 84 Ariz. 95, 324 P.2d 225 (1958). See also DOMESTIC RELATIONS, *supra.*
[7] 84 Ariz. 177, 325 P.2d 819 (1958).
[8] 84 Ariz. 87, 324 P.2d 220 (1958). See also TORTS, *infra.*

Judicial Notice

Murphy v. Gray[9] and *Sparks v. McClusky*[10] were two cases which discussed matters concerning judicial notice which heretofore had not been considered in Arizona. In *Murphy v. Gray, supra,* the Court said that judicial notice would not be taken of records in the county recorder's office, and that competent evidence must be used to establish the authenticity of such records. The *Murphy* case also reiterated the proposition that evidence of a change in property value should not be admitted in a case which seeks to remove equitable servitudes because such change doesn't justify the removal of restrictions.

The Supreme Court in the *Sparks* case said it would take judicial notice of the fact that no properties are assessed at full cash value. While there are no prior Arizona pronouncements on this point, the position is supported by 31 C.J.S. *Evidence* § 54, at 632 (1942), especially note 50 thereunder, which lists several cases in which facts of general notoriety concerning the valuation of property for tax purposes were judicially noticed.

This case also held that the plaintiff need not prove actual fraud in his suit which claimed that his property was being assessed at a higher rate than other like property in the county because the defendant's act in assessing the property in such a manner was admittedly intentional.

Negative Testimony

Southern Pacific Railway Co. v. Cavallo,[11] basically a tort case, involved two evidence points. In this case the plaintiff was struck at a railroad crossing by the defendant's train. He testified that he had heard the engineer blow his whistle only at the last minute and the engineer testified that he had blown it for a long time. The Supreme Court cited *Davis v. Boggs,*[12] an early Massachusetts case,[13] and 162 A.L.R. 9 (1946), both of which agree that mere negative testimony—which usually carries no probative value as against affirmative testimony to the contrary—may be equivalent to positive evidence that a signal was not given if the jury believes the witness was attentive and could have heard the signal had it been given.

On the other evidence point, the trial court allowed the plaintiff to introduce a document which purported to show that in 1953 an average

[9] 84 Ariz. 299, 327 P.2d 751 (1958).
[10] 84 Ariz. 283, 327 P.2d 295 (1958). See also TAXATION, *infra.*
[11] 84 Ariz. 24, 323 P.2d 1 (1958). See also TORTS, *infra.*
[12] 22 Ariz. 497, 199 Pac. 116 (1921).
[13] Menard v. Boston & Maine R. Co., 150 Mass. 386, 23 N.E. 214 (1890).

of 271 cars per day used the highway the plaintiff was traveling. There was no evidence as to who had made the counts, how many were made, or when they were made. The plaintiff claimed the document could be admitted either under Rule 44(a) or 44(q) of the Arizona Rules of Civil Procedure, but the Supreme Court disagreed. Rule 44(a) refers only to a record which the law requires to be kept — definitely not applicable here — and Rule 44(q) refers only to business records. It was held that the vague and uncertain origin of the document precludes it from being admitted into evidence as a business record.

Conflicting Evidence

County of Maricopa v. Shell Oil Co.[14] and *State v. Milton*[15] involved similar points of law which are well settled in Arizona. During the trials of both cases witnesses for the eventual prevailing sides made contradictory statements and the losing parties in each instance assigned these statements as error. The Supreme Court held in both cases that such contradictory statements were not sufficient to destroy the probative value of the testimony but that the evidence should be considered as a whole.

It was also held in both cases that when there is a conflict in the testimony, the Supreme Court will not disturb the trial court's judgment where there is reasonable evidence to support it.

Hearsay Testimony

Hudgens v. The Industrial Commission[16] was a workmen's compensation case which stated that the claimant may use circumstantial and hearsay evidence to sustain his burden of proof that there was a causal connection between his employment and his injury. A.R.S. § 23-942 says that the Industrial Commission need not be bound by the rules of evidence.

Sufficiency of Evidence

Finally, *Prince Development Corp. v. Beal*[17] held that there was insufficient evidence to support a finding of contempt against the defendants for violating an injunction concerning the manner in which the defendants operated their drive-in theater because at the time of the alleged violations of the injunction the defendants were wholly disconnected with the operation of the theater, it being under the control of a receiver.

[14] 84 Ariz. 325, 327 P.2d 1005 (1958). See also PROPERTY, *infra.*
[15] 85 Ariz. 69, 331 P.2d 846 (1958). See also CRIMINAL LAW, *supra.*
[16] 83 Ariz. 383, 321 P.2d 1039 (1958). See also WORKMEN'S COMPENSATION, *infra,* for more complete discussion.
[17] 85 Ariz. 74, 331 P.2d 1091 (1958). See also COURTS AND PROCEDURE, *supra.*

Insurance

PHILIP TOCI

Pacific Fire Rating Bureau v. Insurance Co. of North America[1] concerned the interpretation of a statute in the Arizona Insurance Code pertaining to insurance rating bureaus. The statute in question, A.R.S. § 20-363, provides that each rating organization shall permit any insurer to be a subscriber for any kind of insurance or subdivision thereof for which it is authorized to act as a rating organization. The plaintiff, North American Company, terminated its subscribership for "dwelling classes" and wished to retain subscribership for the remaining services of Pacific Fire Rating Bureau. Pacific Fire Rating Bureau then amended its constitution, the effect of which was to deny partial subscribership to the North American Company. The Director of Insurance approved this amendment. The Insurance Company of North America contended that under A.R.S. § 20-363 it could not be denied partial subscribership and such amendment was invalid in spite of the fact that the Director of Insurance had approved it. The Supreme Court upheld the view of the insurance company and affirmed the judgment of the lower court, saying, "While the Director may, under the statute, approve reasonable rules and regulations he cannot make or approve a rule [the amendment to Pacific Fire Rating Bureau's constitution] as here, that would conflict with the true meaning of the statute."

[1] 83 Ariz. 369, 321 P.2d 1030 (1958).

Labor Law

THEODORE MATZ

The plaintiff in *International Brotherhood Of Carpenters And Joiners Of America, Local No. 857 v. Todd L. Storms Construction Company*[1] was employing all nonunion help on his construction job. He refused to negotiate with the defendant union, and the record clearly showed that there was no dispute between the plaintiff and his employees as to wages and working conditions. Upon refusal to negotiate the union started peaceful picketing of the plaintiff's job, and this suit was brought to enjoin the picketing. A temporary injunction was issued by the superior court.

The case in the lower court was decided in favor of the plaintiff on the basis that the picketing violated A.R.S. § 23-1322. This statute provides, "It is unlawful for a labor organization to picket any establishment unless there exists between the employer and the majority of the employees of such establishment a bona fide dispute regarding wages or working conditions."

After the entry of the order for the temporary injunction the Arizona Supreme Court, in the case of *Baldwin v. Arizona Flame Restaurant*,[2] declared this section of the Arizona Revised Statutes unconstitutional as abridging the freedom of speech protected under the Fourteenth Amendment of the Constitution of the United States.

The Arizona Supreme Court reversed the order for the temporary injunction because the lower court had relied, in deciding the case, exclusively on A.R.S. § 23-1322.

[1] 84 Ariz. 120, 324 P.2d 1002 (1958). See also CONSTITUTIONAL LAW, *supra*.
[2] 82 Ariz. 385, 313 P.2d 759 (1957).

Municipal Corporations

FRANKLIN BRIDENHAGER

Interpretation of City Ordinance

The question presented in *Parrack v. City of Phoenix*[1] was whether the citizens of Phoenix had the authority to enact ordinances by initiative when the city council and mayor had the same power. The city charter granted both such powers.

This question was raised when the voters submitted an ordinance to the city council, which could pass it without alteration or could call a special election. The latter alternative was used, and the ordinance which raised the salaries of the city firemen was passed. But the officials of the city refused to heed such ordinance because they claimed that this power of initiative as granted in the charter conflicted with the mayor's and council's power.

In making permanent the mandamus compelling the city officials to abide by such ordinance, the Court relied upon the rule that if a city charter provides for different methods of expression, then these shall not affect or modify one another, but shall be accumulative, selective, and effective.[2] Such charter is to be read as a whole and its various provisions harmonized as far as possible.[3] Since, in the principal case, the authority to act was not exclusively conferred upon the city manager and governing body of the city, and there was no preliminary duty impossible of performance by the people, such as the holding of meetings, etc., then it is entirely possible for the courts to harmonize these provisions. Also, where the people have the power of initiative then such provisions should be construed liberally in their favor.[4]

Taxation by City

In *The City of Phoenix v. The Borden Company*[5] the sole question presented was whether the Borden Company in computing its tax base for the privilege license tax must include retail sales made beyond the

[1] 84 Ariz. 382, 329 P.2d 1103 (1958).
[2] City of Phoenix v. Yates, 69 Ariz. 68, 208 P.2d 1147 (1949).
[3] Glass v. Smith, 150 Tex. 632, 244 S.W.2d 645 (1951).
[4] *Ibid.*
[5] 84 Ariz. 250, 326 P.2d 841 (1958). See also TAXATION, *infra.*

corporate limits of the city. Although in this case the Court by construing the ordinance held that the retail sales outside the city should not be included in computing the tax, by dicta the Court implied that it could be done under a properly drawn ordinance. Even though there is a presumption that the governing body of the city was legislating with reference to the conduct of business within the territorial limits of the city,[6] and even though tax statutes will be most strongly construed against the taxing authority and in favor of the taxpayer, it is certainly possible to tax the company on the basis of sales inside and outside the city limits. Justice Phelps in the dissenting opinion felt the emphasis should be placed upon the fact that the license was for the privilege of doing business, and since everything except the sale was consummated within the city, then it would make no difference where the sale itself took place. Some ordinances have been given such a construction.[7]

Right of Taxpayer to Challenge City Expenditures

Does a taxpayer have an unqualified right to intervene in a suit which was commenced at his request to challenge an expenditure authorized by the mayor and city council? In *Mitchell v. The City of Nogales*,[8] the Court said "no" to this question. The mayor and city council adopted an authorization for the report and survey of electric and gas services. The plaintiff, a taxpayer, availed himself of the appropriate provision of the city charter and demanded of the city attorney that this be enjoined. The issues which the taxpayer sought to raise in his intervention were identical to those raised by the city attorney. It was held that where the city attorney of a municipal corporation commences a proceeding at the request of a taxpayer against certain city officials, and the court finds that he is proceeding with due diligence, the court may in the exercise of sound judicial discretion refuse to allow the taxpayer to become a party to such action.[9]

The reasons for not allowing a permissive intervention are twofold.[10] First, before a citizen may maintain such an action, it must be shown that the one who had a primary right to bring the suit has refused to do so. Second, the great possibility of purely vexatious law suits which would permit one who is not vested with duties or discretion in such matters to substitute his judgment and discretion for that of those to whom the law has confided them.

[6] Ferguson v. Shell Petroleum Corporation, 81 F.2d 193 (8th Cir. 1936).
[7] Arizona State Tax Commission v. Ensign, 75 Ariz. 220, 254 P.2d 1029 (1953); Arizona State Tax Commission v. Quebedeaux Chevrolet, 71 Ariz. 280, 226 P.2d 549 (1951).
[8] 83 Ariz. 328, 320 P.2d 955 (1958).
[9] See City of Cincinnati v. Kellogg, 153 Ohio St. 291, 91 N.E. 2d 505 (1950).
[10] Williams v. Stallard, 185 Ky. 10, 213 S.W. 197 (1919).

Power of Legislature to Modify Pension Statutes

In *Police Pension Board for the City of Tucson v. Denny*,[11] the Court considered whether the legislature could lawfully amend the Police Pension Act of 1937 so as to deprive the plaintiff of his pension payments during employment in any other capacity by a governmental unit. In reversing the trial judge, the Arizona Supreme Court answered this in the affirmative.

In 1933 the plaintiff became a member of the police department. In 1937 the legislature adopted a pension plan which provided monthly payments equal to one-half of the employee's average salary. The act was amended in 1952 by the legislature providing for suspension of the pension while the pensioner is employed by the state, county, or a municipality.[12] After receiving his pension the plaintiff entered into employment with the county, and consequently the board suspended his pension payments. The plaintiff argued that the 1952 amendment was unconstitutional as applied to him because the contractual right under the 1937 act had became vested and could not be abrogated by subsequent legislation. Upon this matter the courts generally are in conflict, and it being one of first impression here, the Court applied its own view. While it is difficult to accurately describe the nature of the relationship between plaintiff and the city, it would appear to be in the realm of quasi-contract, with a certain right being given to the officer that must be respected, subject to reasonable modification. The courts are fairly well in agreement in permitting, prior to retirement, reasonable legislative modification of pensions as the plans must be kept flexible to permit adjustment in accordance with changing conditions, and at the same time maintain the integrity of the system and carry out its beneficient policy.[13] Whether a particular modification of a pension plan is reasonable is for the courts to determine upon the facts of each case.[14] But upon the issue of reasonableness of foundation for classification contained in the statute, if the court is in doubt as to whether a reasonable basis therefore exists, the doubt will be resolved in favor of the constitutionality of the law.[15]

[11] 84 Ariz. 394, 330 P.2d 1 (1958). See also CONSTITUTIONAL LAW, *supra*.

[12] A.R.S. § 9-928: "Effect of Service as Public Officer upon Pension. A. A person who has been retired from service under the provisions of this article and awarded compensation in accordance therewith, and who after retirement receives a salary as an officer or employee of the state, county or municipality, shall forfeit and shall not receive at any time compensation for the period during which he receives a salary as such officer or employee, but upon termination of service as such officer or employee all the rights of the pension, other than the right to receive compensation for the period after retirement during which he receives a salary as an officer or employee of the state, county or municipality, shall be recognized."

[13] Kern v. City of Long Beach, 29 Cal.2d 848, 179 P.2d 799 (1947).

[14] Allen v. City of Long Beach, 45 Cal.2d 128, 287 P.2d 765 (1955).

[15] Schrey v. Allison Steel Mfg. Co., 75 Ariz. 282, 255 P.2d 604 (1953).

Challenge of Board of Supervisor's Orders

The last case regarding municipal corporations decided in Arizona was *Wahl v. Hart.*[16] The appellants brought an action to set aside an order of the Board of Supervisors of the county creating an improvement district. By statute,[17] improvement districts may be organized in areas without incorporated cities. The question involved was the sufficiency of publication and standing to raise the question of such sufficiency. The Court held that where the sufficiency of the notice of the meeting creating the district is in issue, a party ought not to be required to attend the meeting and raise the objection before he may take advantage of the statute and appeal.[18] Were it otherwise, one who did not have knowledge of the meeting by reason of lack of notice would never be able to present the question in court simply because he never had the opportunity to be heard by the Board.

[16] 85 Ariz. 85, 332 P.2d 195 (1958). See also COURTS AND PROCEDURE, *supra.*
[17] A.R.S. §§ 11-701 to 11-758.
[18] A.R.S. § 11-707: "Review of Action of Supervisors. Any party aggrieved by an act of the board of supervisors in the establishment of an improvement district may bring an action in the superior court of the county in which the district is located to set aside the action of the board, not later than twenty days after final determination by the board."

Partnership

GERALD RABY

Joint Adventure

The existence of a joint adventure was the question raised by interpleader proceedings in *Arizona Public Service Company v. Lamb.*[1]

The stakeholder was a ginning company claiming no interest in the balance of a grower's account which creditors were attempting to reach.

The fact that the growers (two brothers with independent farming operations) secured a crop loan jointly and issued orders on a joint account with the ginning company did not make them joint adventurers. The Court found neither a joint operation nor a venture for share in profits.[2] Therefore, creditors of the bankrupt brother (Joe Lamb) could not enforce their claims against the appellee (Ed Lamb).

The trial court had allowed the stakeholder the sum of $509.65 as costs of interpleading and had deducted this amount from the share due one claimant. The Supreme Court stated that this would be giving a preference which was unwarranted. Inasmuch as the sum was insufficient to satisfy all claimants, the Court held that they would have to share on a pro rata basis the amount remaining after deduction of the costs allowed the stakeholder.

[1] 84 Ariz. 314, 327 P.2d 998 (1958).

[2] "We have said a joint adventure is a special combination of two or more persons where in some special venture a profit is jointly sought, Ruby v. United Sugar Companies, S.A., 56 Ariz. 535, 109 P.2d 845 (1941), and that under all the authorities a share in the profits is necessary to create such a venture, Estrella v. Suarez, 60 Ariz. 187, 134 P.2d 167 (1943)." Arizona Public Service Company v. Lamb, Ibid.

Property

L. ALTON RIGGS JR.

Eminent Domain

An interesting application of the Arizona Constitution, Article 2, Section 17, to § 59-601 A.C.A., (now A.R.S. §§ 18-201—18-205) was made in *Pima County v. Nick Cappony.*[1] Where the board of supervisors awarded plaintiff $1,250.00 damages for removing certain improvements but made no award for the value of the property taken according to the power invested in the board by the legislature, plaintiffs had due notice of the proceedings but did not accept the award and instituted this action. Trial resulted in a judgment in the sum of $2,050.00 as compensation for property taken and $3,000.00 severance damages. The Supreme Court of Arizona held that the plaintiffs were not bound by the board's action. The Court voiced the opinion that the constitution states what an owner's rights are when private property is to be taken or damaged for public use. It prescribes that the owner shall have just compensation and the same shall be ascertained by the jury (unless waived) as in other civil cases in courts of record in the manner prescribed by law. In harmony with this constitutional mandate, § 27-909, A.C.A. 1939 (now A.R.S. § 12-1116) requires that all proceedings for condemnation must be brought in the superior court in the same manner as other civil actions. Thus to the extent that § 59-601, A.C.A. 1939 purports to empower the board to assess compensation or damages, it offends the Arizona Constitution, Article 2, Section 17, and cannot be given validity.

A similar holding is found in *State v. Leeson*[2] where the Court held that flooding of land is compensable under eminent domain provisions.

In *State v. Carlson*[3] the Arizona Supreme Court affirmed the trial court's allowance to lessees for loss of their building space through condemnation. The allowance consisted of damages for reduction in rented space to the end of the period of the existing lease, expenses incurred in removing, rearranging, and reconnecting fixtures, and damages to the leasehold interest for lease renewal option for two years, in the amount

[1] 83 Ariz. 348, 321 P.2d 1015 (1958). See also CONSTITUTIONAL LAW, *supra.*
[2] 84 Ariz. 44, 323 P.2d 693 (1958).
[3] 83 Ariz. 363, 321 P.2d 1025 (1958).

of $490.00. The Court held that a lessee is entitled to a sum which will adequately compensate him for his pecuniary loss as a result of the exercise of the power of eminent domain and is entitled to the value of an option of renewal in addition to the value of the unexpired term of the lease.

Where the state condemns only a part of the leasehold, the measure of damage is the difference between the value of the remainder before and after the taking. The Court recognized that there is no certain and exact rule for measuring damages where an option to renew a lease is impaired or diminished in value due to a condemner taking a portion of a leasehold, as in each case variable factors must be considered. However, there was sufficient evidence from which the trial court could mathematically compute the difference between the value of the remainder before and after the taking and determine the damages sustained. The Court further stated that it was reasonable to assume that a lessee with a successful business would continue to operate and thus the allowance of damage for the short-term renewal period was properly held not to be speculative.

County of Maricopa v. Shell Oil Company[4] reaffirms the rule of the *Carlson* case, *supra, i.e.*, when only a part of the property is taken, the measure of severance damages is the difference between the market value of the property not taken, before and after the taking.

Adverse Possession

The trial court was reversed in *Guenther and Shirley Co. v. The Presbytery of Los Angeles, et. al.*[5] Following the case of *Trevillian v. Rais*,[6] and various persuasive rulings from other jurisdictions, including: *Little Red River Levee District No. 2 v. Thomas*,[7] *Hastings v. Montgomery*,[8] *Murphy v. Seward*,[9] and *Abates v. Timbes*,[10] the Court determined that one who enters and takes possession of another's property under and in reliance upon a certificate of tax sale can initiate adverse possession under A.R.S. § 12-526.

In line with the above mentioned cases, the Court stated that the statutes of Arizona upon the subject of tax sales contain no provision with reference to the right of possession during the period of redemption, and a purchaser of a tax sale certificate has a lien only and does not have the right to possession. Since a tax sale certificate is only evidence which

[4] 84 Ariz. 325, 327 P.2d 1005 (1958). See also EVIDENCE, *supra*.
[5] 85 Ariz. 56, 331 P.2d 257 (1958).
[6] 40 Ariz. 42, 9 P.2d 402 (1932).
[7] 154 Ark. 328, 242 S.W. 552 (1922).
[8] 142 Okla. 47, 285 Pac. 89 (1929).
[9] 145 Miss. 713, 110 So. 790 (1926).
[10] 214 Ala. 591, 108 So. 534 (1926).

entitles the holder to a deed upon the happening of certain conditions, such holder has no right to possession until expiration of the redemption period. If he enters without the owner's consent, he is a trespasser, and from that moment a cause of action against him accrues, for his possession is a hostile, actual, visible apppropriation of the land, commenced and continued under a claim of right inconsistent with the claim of another and fulfills the requirements designated in A.R.S. § 12-521.

In *Joseph D. Cannon v. Arizona Game and Fish Commission, ex. rel. The Attorney General*,[11] the Supreme Court of Arizona affirmed the judgment against Cannon for contempt of court. Cannon forcibly entered leased land of M. E. Smiley Farms, Inc. and Arizona Game and Fish Commission. He then cut and removed trees and operated and excavated with heavy equipment thereon. After being issued a writ of restitution by the sheriff he subsequently re-entered the premises in callous disrespect of the orders of the court. The trial court issued a second order to show cause why he should not be punished for contempt. The significance of the case as relates to property law is that if the defendant who once has been convicted of forcible entry and detainer, subsequently acquires title or a right of possession to the property involved superior to the plaintiff's, he may file an independent action in the superior court of the county and establish such superior right of possession; but until he does so, he is bound to abide by the judgment in forcible entry and detainer.

Public Lands

Is the failure to verify a statement of equities filed with the Land Commissioner sufficient to preclude one's equities in land from being considered by the Commissioner? *Montierth v. State Land Department*,[12] answers this question in the negative. In this case the Supreme Court of Arizona affirmed the trial court which awarded a lease to Sparks, an applicant, who failed to verify a statement of equities, but who offered testimony that his cattle had run over the area for 30 years, had grazed there 20 years, and said area was within his fence enclosure. By dictum the Court added, even total failure to submit a statement does not preclude the Commissioner from proceeding to make his determination upon whatever record and testimony is available.

[11] 85 Ariz. 1, 330 P.2d 501 (1958).
[12] 84 Ariz. 100, 324 P.2d 228 (1958).

Sales

PHILIP TOCI

Breach of Warranty

Isenberg v. Lemon[1] concerned the question of damages recoverable for breach of warranty. Plaintiff was in the business of supplying painting contractors with housepaint and had several oral contracts to supply rubberized paint of a certain color, grade, and quality. Defendant was a paint distributor from whom plaintiff had been purchasing a rubberized paint called "Tempolite" which he and the contractors had found to be satisfactory. Defendant decided to manufacture his own paint and persuaded plaintiff to purchase it, rather than "Tempolite," and "guaranteed" that the new paint would be equal in quality to "Tempolite" in every respect.

The evidence showed that the new paint was worthless and that as a result the contractors had all cancelled their agreements with the plaintiff. The trial court awarded plaintiff damages based on loss of profits and loss of good will.

The Supreme Court stated that the general rule on damages for breach of warranty permits recovery only for the difference between the value of the goods at the time of delivery and the value which they would have had if they had been as warranted.[2] However, since the defendant here knew the purpose for which plaintiff bought the paint and was aware of the unusual damages which could result from the breach, "under all of the authorities," the Court said, recovery may be had for loss of profits and good will if the complaint is amended to encompass such loss.

Damages resulting from loss of good will need not be proved with mathematical precision and the trial court properly awarded them in the instant case. However, the Court said, loss of profits may be proved with at least "an approximation of mathematical precision" and a new trial should be awarded on this question, since the plaintiff neither alleged nor proved loss of profits.

On rehearing,[3] the Court revised its former opinion and held that the loss of profits could be shown without amending the complaint but

[1] 84 Ariz. 340, 327 P.2d 1016 (1958).
[2] Uniform Sales Act, A.R.S. § 44-269(G).
[3] Isenberg v. Lemon, 84 Ariz. 364, 329 P.2d 882 (1958).

that the evidence was still insufficient to sustain the loss found by the trial court.

Ellen v. Maricopa County[4] was an action brought by the county to recover the purchase price on a vitamin mixture sold it by the defendant. Plaintiff apparently relied on defendant's warranty that the mixture was the product of a named company as was specified in the defendant's bid. Judgment for the plaintiff was reversed on the ground that the evidence did not support a finding that the mixture was not manufactured as warranted.

Risk of Loss

Whether the risk of loss fell on the seller or the buyer in a contract for sale of a one-half interest in the license, equipment, and inventory of a tavern was the issue raised in *Levandoski v. Pacheco*.[5] The parties entered into a written agreement which recited in part, "I, J. E. Levandoski am selling my half interest in the . . . Tavern . . . to Marcus E. Pacheco . . . . If transfer is not approved half of profits in wages be turned to me J. E. Levandoski."

Plaintiff (buyer) paid most of the purchase price at the time the agreement was made, and the balance two or three days later. Subsequently, the transfer of the license was disapproved. The parties had agreed orally that the sale would be void in the event the transfer was not approved. Hence, plaintiff sued to recover the purchase price. Defendant contended that the risk of loss was on the plaintiff under the provisions of the Uniform Sales Act, A.R.S. § 44-222, which provides that when the property "is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not." The risk of loss was on the plaintiff, argued the defendant, and no recovery could be had unless plaintiff first returned or offered to return the goods. Since the goods had been stolen or destroyed by vandals the plaintiff could not recover if this theory were accepted.

The Supreme Court affirmed the judgment for plaintiff in the trial court. Defendant's contention was rejected, the Court saying that even though the provision of the contract relating to the "turn" of profits to the seller, in the event of disapproval of the license transfer, could be construed as indicative of an intention to transfer *possession*, that it did not require such a construction. The Court also said,

> It is reasonable to believe that the parties intended for the transaction to be final as of the date of the approval by the Super-

[4] 83 Ariz. 359, 321 P.2d 1023 (1958).
[5] 84 Ariz. 55, 323 P.2d 951 (1958).

intendent and that they further intended for the ultimate transfer of interest to then occur. Since the trial court could have found that there was no transfer of possession, or intention to transfer, the loss was appellant's and not appellee's.

The evidence indicated that the plaintiff did not actually take possession of the tavern before the liquor license was disapproved and one witness testified that the defendant "was there." It is not clear whether the Court regarded a transfer of possession as a requisite to the transfer of the property in the goods or whether it was merely regarded as evidence to establish the intent to transfer the property.

Retention of possession by the seller is generally not regarded as any evidence of an intention by the seller to *retain* the property in the goods in light of the unequivocal language of the Uniform Sales Act, A.R.S. § 44-219 (1).[6] However, language in some prior Arizona decisions would indicate a contrary view.[7] Though delivery of possession is strong evidence of an intention to *pass* title it is not usually a requisite thereto unless the parties have so agreed.[8]

On the other hand, where the intentions of the parties are not clear, a number of well-settled presumptions are applied to determine their intentions.[9] One of these is that the property is presumed to pass when the contract is made if the subject of the sale is identified and nothing remains to be done other than delivery of the goods and the payment of the price.[10] Also, payment of the whole price or of a considerable part of it is evidence of an intention to make an immediate transfer, since it is not very common for buyers to pay in advance.[11]

Conditional Sales

The question of whether the vendor of a car under a conditional sales contract could reclaim it from a bona-fide purchaser arose in *Dissing v. Jones*.[12] Plaintiff, an Oklahoma car dealer, sold a car to one Moore under a conditional sales contract without complying with the

[6] Uniform Sales Act, A.R.S. § 44-219 (1) provides: "Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed." (The rule applies to conditional contracts also. It has even been held to apply to technical conditional sales though it was not so intended. See Thomas J. Jewett, Jr., Inc. v. Keystone Driller Co., 185 N.E. 369, 87 A.L.R. 1298 (Mass).

[7] *E.g.*, Stephens-Franklin Motors v. Lambros, 71 Ariz. 389, 228 P.2d 267 (1951).

[8] VOLD, SALES, 131-133 (1931).

[9] 2 WILLISTON, SALES, § 263 (1948).

[10] 2 WILLISTON, *op. cit. supra* § 264.

[11] 2 WILLISTON, *op. cit. supra* § 265.

[12] 85 Ariz. 139, 333 P.2d 725 (1958).

Oklahoma statute requiring all liens to be stated on the back of the certificate of title. On the basis of this certificate Moore had an Oklahoma certificate of title issued to him reciting that the car was free of liens. Moore then came to Arizona and sold the car to the defendant. The trial court held that plaintiffs were estopped to assert paramount title against the defendant. In affirming the trial court, it was said that the plaintiff was estopped to claim ownership of the car for two reasons: (1) the plaintiff seller had clothed the third party, Moore, with the indicia of complete ownership, and (2) where one of two innocent parties must suffer from the act of a third, the loss must be borne by him whose act or omission made the loss possible.

In the words of the Court, "If the plaintiffs had listed the conditional sales contract in the space provided therefor when the assignment was made to the purchaser, undoubtedly the same would have been reflected on the Oklahoma certificate of title. The defendant would not have purchased the car and no loss would have resulted."

Plaintiffs relied on *Ragner v. GMAC*[13] to the effect that an encumbrance on personal property valid in the state where property is located is valid when secretly removed to this state. The Court said that this decision was not in conflict with the *Ragner* case because there was no element of estoppel involved in the latter.

[13] 66 Ariz. 157, 185 P.2d 525 (1947).

Taxation

MARVIN FORTMAN

Overassessments

In *Sparks v. McCluskey*,[1] the issue was whether an intentional over-assessment of the plaintiff's lands as compared to other lands within the county, although made in good faith as a long term program to bring to date all evaluations, could be placed in the category of illegal assessments because of their discriminatory character.

There was evidence that the plaintiff's assessed valuations showed varied increases of 300 to 600 percent over the previous year. It was also found that the assumed value of properties of a like class in the county were not proportionately increased, but their assessed values from the previous year were merely carried forward.

The assessor's contention was that the discrepancy was the result of a long term program to bring to date all valuations in Maricopa County. The evidence did not indicate how many years might elapse before the program would be complete and equalization effected.

It was held that if the result of intentional acts by the assessor is discriminatory, the assessments cannot stand regardless of his good faith. The Court said it could not approve of grossly unequal evaluations for an indefinite number of years until the taxing officials could get around to using the same method of evaluation on other like properties.

Taxation by City

City of Phoenix v. Borden Company,[2] involved the interpretation of a Phoenix ordinance.[3]

The Borden Company maintained a processing plant within the corporate limits of Phoenix and retailed its products both within and without the corporate limits. The Borden Company brought this action against the City of Phoenix to determine whether in computing its tax

[1] 84 Ariz. 283, 327 P.2d 295 (1958). See also EVIDENCE, *supra*.
[2] 84 Ariz. 250, 326 P.2d 841 (1958). See also MUNICIPAL CORPORATIONS, *supra*.
[3] Phoenix City Ord., No. G-93, § 2 (imposes a privilege tax on the gross proceeds of sales of every person selling any tangible personal property whatsoever at retail, except bonds and stocks).

base for the privilege license tax[4] it must include retail sales made outside the corporate limits of the City of Phoenix. The Court held that the tax should be computed only on the retail sales made within the city limits.

It was felt that the Phoenix City Council could have measured the tax based upon the gross amount of goods or products manufactured or processed within the corporate limits as they did in another paragraph of this ordinance. The Court reasoned that if the legislative body had intended to compute the tax on gross retail sales of all personal property, the provisions of the applicable paragraph would have so stated as the paragraph relating to meat products did. However, the legislators must have intended a distinction, and therefore, the Court would not reconstruct the language of the ordinance to give it that effect.

In a dissent by Justice Phelps, he concluded that the ordinance was clearly meant to tax retail sales of tangible personal property sold by firms doing business in Phoenix, whether or not the retail sale occurred within or without the city limits, as the taxable incident is the engaging in business in Phoenix.

Mining Tax

The power of the State Tax Commission to assess both a mining tax and retail tax on brick manufacturers was challenged in *State Tax Commission v. Wallapai Brick and Clay.*[5]

The plaintiffs were brick manufacturing companies who were engaged in the business of removing clay from the ground, forming it into brick and selling it to contractors. They contended that the making of brick after the initial removal of the clay from the ground was manufacturing, and therefore exempted from the purview of A.R.S. § 42-1310.[6] They also contended that because of A.R.S. § 42-1321(3) which exempts sales of tangible personal property when sold to a person licensed as a contractor, they were also exempt from the retail sales tax imposed by A.R.S. § 42-1312.[7] The commissioner's position was that the taxing statutes should be interpreted as imposing upon the operation of the plaintiff's businesses both the mining tax and the sales tax.

[4] *Ibid.*

[5] 85 Ariz. 23, 330 P.2d 988 (1958).

[6] A.R.S. § 42-1310 subdivision (a) of par. 2 (imposed a tax on the gross proceeds of sales from any business engaged in the mining, quarrying or producing of any mineral product for sale, profit or commercial use).

[7] A.R.S. § 42-1312 (levies a retail sales tax on the sale of tangible personal property).

In rejecting the plaintiffs' first contention, the Court held that the legislature had not exempted all forms of manufacturing from the application of A.R.S. § 42-1310, and the removal of clay from the earth's surface and the fabrication thereof into finished bricks was a business within the provisions of this statute.[8] On the second question the Court held the plaintiffs were entitled to be exempt from the retail sales tax as the legislature did not intend to tax any income of a person more than once.[9]

Taxation of Sales to United States

The sole question presented in *State Tax Commission v. Al Stovall Manganese*[10] was whether or not sales of ore made to the United States government may be taxed by the State of Arizona. The Court held that under § 73-1308, A.C.A. 1939 which was in effect when the sale was made, a sale of tangible personal property to the United States government was not taxable under the statute.

Note: § 73-1308, A.C.A. 1939 was repealed.[11] It seems clear from the enactment which repealed it that sales of tangible personal property by persons engaged in businesses covered in the revised statute will now be taxed upon the value of the entire product mined, quarried, produced or prepared for sale even though it is sold to the United States government or its agencies.[12]

[8] The Court reasoned that since A.R.S. § 42-1311 referred to manufacturing and it modified A.R.S. § 42-1310, A.R.S. § 42-1310 did include a business whose income was derived from manufacturing.

[9] Crane Co. v. Arizona State Tax Commission, 63 Ariz. 426, 163 P.2d 656, 659; 163 A.L.R. 261 (1945). (Those engaged in mining, timbering, etc., are not taxable on a retail sale basis.)

[10] 84 Ariz. 333, 327 P.2d 1011 (1958).

[11] Sec. 15, ch. 136, L. '54.

[12] A.R.S. § 42-1310(2)(a).

Torts

RICHARD KEEFE

Attractive Nuisance

In *MacNeil v. Perkins*[1] the plaintiffs, three boys, 11, 13, and 16 years of age were injured while attempting to ignite some dynamite caps which they had taken from a powder magazine on the defendant's land. The Supreme Court sustained the trial court's instruction on the attractive nuisance doctrine and adopted the view of the *Restatement of Torts*.[2] The judgment for plaintiffs against both the defendant land owners and their caretaker was affirmed.

There is considerable authority to the effect that the doctrine of attractive nuisance is not applicable to a child over the age of 14 who has not been found incompetent.[3] However, the Arizona Supreme Court felt that the question of whether the plaintiffs understood the dangerous nature of the dynamite caps was properly given to the jury.

Wrongful Embalming

Damages were sought for embalming without express permission in *Hale v. Brown*.[4] Plaintiff's husband died while at work and plaintiff was denied recovery by the Industrial Commission.[5] The deceased's body was taken to the defendant undertaker, and he embalmed it before a complete autopsy was performed. The plaintiff alleged that the unauthorized embalming prevented a determination of whether the cause of death was gas poisoning, and hence plaintiff was unable to obtain benefits under the Workmen's Compensation Act. On appeal from a summary judgment for defendants, the Court sustained the trial court as the uncontroverted medical evidence showed that embalming would not prevent a determination that the cause of death was due to gas

[1] 84 Ariz. 74, 324 P.2d 211 (1958). See also ATTRACTION AS ELEMENT OF ATTRACTIVE NUISANCE DOCTRINE, *infra*.

[2] RESTATEMENT, TORTS, § 339 (1934). The unqualified adoption of the RESTATEMENT view seems to overrule Salt River Valley Water Users' Association v. Compton, 39 Ariz. 491, 8 P.2d 249 (1932) insofar as that case required that the child be attracted to the defendant's land by the instrumentality which injured him.

[3] 65 C.J.S. NEGLIGENCE, § 29(11) at 469 (1950); Belt Railroad Co. v. Charters, 123 Ill. App. 322 (1905); Pollard v. Oklahoma City Railroad Co., 36 Okla. 96, 128 Pac. 300 (1912); Abbott v. Alabama Power Co., 214 Ala. 281, 107 So. 811 (1926).

[4] 84 Ariz. 61, 323 P.2d 955 (1958). See also COURTS AND PROCEDURE, supra.

[5] Hale's Estate v. Industrial Commission, 78 Ariz. 202, 277 P.2d. 1014 (1955).

poisoning, and since no damages were sustained from the embalming, the summary judgments were properly granted.

Two judges dissented on the theory that embalming without authority would sustain an action for at least nominal damages and since there was some question whether there was or was not authority to embalm, the question should have been given to the jury.

Fraud

In *Mayo v. Ephrom*[6] and *Sult v. Bolenbach*[7] the Court was confronted with almost identical situations. In each case the seller of land misrepresented the capacity of a well on his land to induce the purchaser to buy the land. Both sellers contended that where the purchaser undertakes an independent investigation the seller is released from liability for representations. The Supreme Court held that where a person performs only a partial investigation and still relies in part upon the representations of the adverse party and is thereby deceived, a cause of action will lie, and there was sufficient evidence from which the jury could find this to be the case.

The Court was confronted with the problem of fraud based on an opinion rendered by an attorney to a mentally incompetent client in *Lietz v. Primock*.[8] The Court held that the relationship of attorney and client creates an exception to the general rule and permits statements of opinion to serve as a basis for actionable fraud, where such opinion is tainted with an intent to gain some advantage over the client, either for himself or for another party.

Governmental Immunity

The sometimes harsh result that occurs when a person is denied recourse under the doctrine of governmental immunity is strikingly illustrated in *Lee v. Dunklee*.[9] The plaintiff's infant son died as a result of the negligence of an employee of the defendant, while the infant was being treated in the county hospital. The trial court sustained defendant's motion to dismiss and the Arizona Supreme Court affirmed solely on the ground of governmental immunity. The Court rejected plaintiff's contention that since the hospital admitted and treated both indigent and paying patients, and since the county was under no mandatory duty to maintain the hospital, the doctrine of governmental immunity did not apply.

[6] 84 Ariz. 169, 325 P.2d 814 (1958). See also COURTS AND PROCEDURE, *supra*.
[7] 84 Ariz. 351, 327 P.2d 1023 (1958). See also COURTS AND PROCEDURE, *supra*.
[8] 84 Ariz. 273, 327 P.2d 288 (1958). See also ATTORNEY AND CLIENT, *supra*.
[9] 84 Ariz. 260, 326 P.2d 1117 (1958).

The Court conceded the harshness of the result and indicated a need for re-examination of the doctrine, but felt that any modification of what it considered the majority rule should be left to the legislature.

Last Clear Chance

In *Southern Pacific Co. v. Cavallo*[10] the Court after a careful analysis of the facts decided that the trial court's instruction on last clear chance was error. The Court found that if the plaintiff had not reduced his speed upon learning of his peril, he would have traveled beyond the train crossing before the train arrived. Thus it was decided that plaintiff was not in a position of peril from which he could not extricate himself, and last clear chance did not apply. The sufficiency of warning signs to indicate the existence of the railroad crossing was also considered by the Court, and it found that under the circumstances the plaintiff had adequate warning of the crossing.

In addition to the above the plaintiff also predicated his claim on the negligence of the defendant's employees in failing to give adequate warning of the approach of the train, and the Court felt that the failure to give such warning would amount to actionable negligence. However, since it was not clear on which basis the jury returned a verdict for plaintiff, the case was remanded for a new trial.

Malicious Prosecution and False Imprisonment

Wisniski v. Ong[11] was an action against a store owner and his employee for malicious prosecution and false imprisonment. The defendants had signed a criminal complaint charging plaintiff with theft, as one of the defendants claimed to have seen plaintiff take a box of pills without having paid for it. Plaintiff, in the civil action, alleged that she had purchased the pills elsewhere prior to entering the defendant's store. The jury found for the plaintiff and the defendants' motion for judgment n.o.v. was granted. Plaintiff, on appeal, contended that since she was ultimately acquitted in the criminal action, as a matter of law there was want of probable cause for prosecution.

The Court held that while the lack of probable cause for malicious prosecution is ordinarily a question for the court alone, where there is a conflict in the evidence it is for the jury to determine. Since the jury must have found that the plaintiff did not steal the pills they impliedly found that plaintiff could not have been seen taking them. Thus the subsequent prosecution for theft was maliciously instigated and without

[10] 84 Ariz. 24, 323 P.2d 1 (1958). See also EVIDENCE, *supra*.
[11] 84 Ariz. 372, 326 P.2d 1097 (1958).

probable cause. The Court rejected defendants' claim that because they signed the complaint on the advice of the assistant city attorney probable cause existed as a matter of law. It was held that such a defense was valid only if there was a showing of full disclosure of all the facts to the attorney, and as the defense was an affirmative one, the burden of proof was on the defendants and had not been sustained.

As to the claim of false imprisonment the Court held that the plaintiff by her own testimony had precluded a finding of imprisonment as she testified that at no time was she afraid to leave the store.

It should be noted that recent additions to the criminal code[12] cover arrest on suspicion of shop lifting and may possibly alter the future results of cases similar to the *Wisniski* case.

Negligence, Contributory Negligence & Negligence Per Se

In *Gray v. Woods*,[13] immediately prior to the collision with defendant's truck, the car in which the decedent had been riding was stopped crosswise directly in the defendant's line of traffic. The accident occurred at night as the defendant was negotiating a mountain incline. Prior to the accident the defendant had dimmed his lights to signal another car to pass; the lights were on dim at the moment of impact. The evidence indicated that there was straight and unobscured vision 540 feet prior to the point of impact, and that the defendant could see approximately 175 feet with his dim lights and could have seen over 1000 feet with his bright lights. An Arizona statute[14] requires that a person driving at night use light of a sufficient intensity to reveal persons or vehicles for a safe distance in advance of the vehicle.

In an action for wrongful death, the trial court granted an instruction based on unavoidable accident. The Supreme Court in reversing and remanding followed a recent Arizona decision,[15] and held that such an instruction was error inasmuch as there was no evidence tending to show that the death of the decedent resulted from any cause other than the negligence of someone. The Court affirmed the lower court's holding that the defendant's driving while on dim beams did not constitute negligence per se, but was a jury question. The Court also held that the plaintiff was entitled to an instruction on last clear chance under the circumstances of the case.

In *Larsen v. Arizona Brewing Co.*[16] the plaintiff alleged that the defendant was negligent in failing to properly warn persons traveling

[12] A.R.S. §§ 13-673 to 75.
[13] 84 Ariz. 87, 324 P.2d 220 (1958). See also EVIDENCE, *supra*.
[14] A.R.S. § 28-942.
[15] Town & Country Securities Co. v. Plas, 79 Ariz. 122, 285 P.2d 165 (1955).
[16] 84 Ariz. 191, 325 P.2d 829 (1958). See also AGENCY, *supra*.

on an arterial highway of a crossing used by defendant while resurfacing a section of the highway under a contract with the state. The collision occurred five miles from the site of the resurfacing job.

The contract between the state and the defendant required that warning devices be placed only in the areas where the actual work of resurfacing was being done. Thus, the Supreme Court found that there was no duty to warn the plaintiff at the point where the accident occurred. The evidence also established that a warning sign was posted by defendants 300 feet from the intersection where the accident happened, and the Court decided that as a matter of law this constituted adequate warning to the plaintiff.

The Court held in *Smith v. Gates*[17] that the mere fact that the mechanical hand signal on defendant's truck was in the left turn position after an accident does not conclusively prove that the signal was given continuously for 100 feet prior to making the turn, as required by statute.[18] The trial court was therefore justified in finding the defendant guilty of negligence in making a left hand turn across the center of the highway.

The question of the duty owed to an invitee was presented in *M.G.A. Theaters v. Montgomery*.[19] The plaintiff, a patron at defendant's drive-in-theater, was injured when run over by a car driven by another patron as she sat on the ramp in front of her car watching the movie. The trial court, with the Supreme Court affirming, found the defendant proprietor liable by holding that the defendant owed to the plaintiff the duty of maintaining in a reasonably safe condition that part of its premises occupied by the plaintiff as an invitee, and there was sufficient evidence from which a jury could find defendant had not done so.

The Court also noted that where a proprietor knows, or in the exercise of ordinary care should know that his patrons are using an area not as originally intended, he extends an implied invitation for such use.

In *Beliak v. Plants*[20] the Arizona Supreme Court reversed the trial court for giving an instruction to the jury to the effect that, "the driver of an automobile is not required to anticipate the sudden appearance of children in his pathway under ordinary circumstances." The plaintiff, a five-and-one-half year old boy, was playing in the middle of a dead-end street, and was injured when struck by defendant's car as defendant was backing from his driveway into the street. The Court held that the facts did not justify the above instruction as there was evidence tending to show that the defendant knew that small children sometimes played

[17] 84 Ariz. 270, 327 P.2d 94 (1958).
[18] A.R.S. § 28-754.
[19] 83 Ariz. 339, 321 P.2d 1009 (1958).
[20] 84 Ariz. 211, 326 P.2d 36 (1958). See also COURTS AND PROCEDURE, *supra*.

in the street, and under the circumstances reasonable care required the defendant to anticipate that children might suddenly get into the path of the automobile.

Possibly more significant than its holding is the dicta of the *Beliak* case. The Court stated that because of his tender years, the plaintiff is not legally responsible for his acts either of commission or omission, and therefore could not be guilty of contributory negligence. This raises by about a year the age at which a child is as a matter of law free from contributory negligence.[21] The age of the plaintiff was also held to justify an instruction that the driver of a car must exercise greater caution for the protection of a child than for an adult.

In *Wolfe v. Ornelas*[22] an instruction by the trial court based on a reduced speed statute[23] gave the impression to the jury that under all conditions (even as to a person traveling on a favored highway at a lawful rate of speed) speed must be appropriately reduced at intersections, otherwise it is a violation of statute and thus, negligence per se.

The Supreme Court reversed the decision based on the fact that the statute must be read in its entirety; therefore an instruction based on one subsection alone was insufficient. The Court held that the reduce-speed statute requires only that a motorist traveling on a favored highway reduce his speed when approaching an intersection if actual or potential hazards make it appropriate to do so and the question of whether or not it is appropriate, is for the jury. Hence, there can be no negligence per se until such time as it is found that the existing conditions warranted a reduction of speed.

In *Thompson v. Quandt*[24] the plaintiff, a pedestrian, though by statute given the right of way over vehicles, was found by the trial court to be guilty of contributory negligence for his failure to exercise reasonable care under the circumstances. The defendant, an operator of an auto, was attempting to make a left hand turn which would cross the plaintiff's path as he passed through the intersection from east to west. Evidence was presented to show that the plaintiff did not attempt to observe oncoming traffic.

In affirming the decision of the trial court in favor of the defendant, the Supreme Court held that the jury was warranted in finding the defendant not negligent in making his turn, as an emergency situation was thrust upon him by an approaching vehicle from the east, thus making it necessary to expedite his turn in order to avoid a collision with the other vehicle.

[21] De Amado v. Freedman, 11 Ariz. 56, 89 Pac. 588 (1902); Womack v. Preach, 64 Ariz. 61, 165 P.2d 657 (1946).
[22] 84 Ariz. 115, 324 P.2d 999 (1958).
[23] A.R.S. § 28-701.
[24] 83 Ariz. 343, 321 P.2d 1012 (1959).

Wrongful Death

The plaintiffs in *Baxter v. Harrison*[25] were the parents of the married decedent but were not his personal representatives. They attempted to bring an action for his wrongful death. The Supreme Court stated that where the deceased is married and owns personal property at the time of his death, an action for wrongful death may only be brought by the personal representative, or upon his failing to do so within 90 days after the accrual of the action, then by the surviving spouse.

[25] 83 Ariz. 354, 321 P.2d 1019 (1959). See also COURTS AND PROCEDURE, *supra*.

Trusts

GARY KELTNER

The year 1958 saw but a single Arizona decision in the field of trusts and that decision was more notable in its implication than in its expression. The lone case was that of *Knight v. Rice*[1] in which a beneficiary of a trust was allowed to maintain an action for the recovery of trust proceeds which had erroneously been distributed to another beneficiary. The action was sustained in spite of the fact that the trust had, by written instrument, been terminated, and in spite of the fact that this same instrument purported to ratify all acts of the trustee and acknowledged the full satisfaction of all claims of the beneficiaries in the trust. The Court, however, did not discuss these matters in its opinion, the appeal being based solely on questions of estoppel.

The situation arose when, in 1939, Knight and Rice entered into an agreement for the purchase, subdivision, and sale of a certain tract of land. All proceeds of the enterprise were to be paid to a corporate trustee for distribution in accordance with an instrument of trust which was to be drawn. This instrument provided that the proceeds were, upon the joint and written authorization of both, to be distributed equally between Knight and Rice. This trust continued until 1949, at which time the trust was closed, the actions of the trustees ratified, and full satisfaction of all claims admitted. An accounting thereafter revealed that Knight had never been repaid certain advances with the result that Rice had received an overpayment of trust funds to the extent of $8587.03. Knight then brought this action for the recovery of the overpayment and, upon the trial, it was proven that Knight had at all times had access to the records of the venture, that his secretary had made entries in the books, knew of the discrepancy and had called it to the attention of Knight. It was concluded that Knight had, as early as 1945, realized that the books were not in order and yet had continued, throughout the remaining four years of the trust, to sign the written authorizations of equal distribution. It was further shown that upon termination of the trust Rice had invested the money received and that he had subsequently sold his investment, realizing an uncertain gain. Upon the basis of these facts the trial court held that Knight was estopped from making further claims against Rice. Upon appeal the Supreme Court reversed, pointing out that one of the essential elements of estoppel,

[1] 83 Ariz. 379, 321 P.2d 1037 (1958).

that of detrimental reliance, had not been established. Accordingly, the Court held that Rice had been unjustly enriched in the amount of $8587.03 and rendered judgment for Knight in that sum.

In the light of the foregoing decision, it therefore seems fair to conclude that the beneficiary of a trust may, in a proper case, be estopped to assert a claim thereunder.[2] As to the effect of the purported ratification and acknowledgment of full satisfaction, the issue remains in doubt, as the question was apparently not raised.

[2] This conclusion would seemingly be in accord with the general rule. "A beneficiary may be estopped . . . to assert claims under a trust." BOGERT, HANDBOOK OF THE LAW OF TRUSTS, (3rd ed. 1952), at 696.

Water Rights

BOB BALDOCK

Mullen v. Goss[1] was an action to quiet title to and restrain defendants from interfering with the plaintiff's right to use certain waters located on the public domain. The controversy arose as to the water from three springs to which the plaintiff claimed a prior right to appropriate, and also water from a well. The plaintiff's claim to the well water was apparently based on the theory of appropriation. The defendant's answer alleged a prior right of appropriation as to the spring waters, and an allegation that the well water was percolating and on his land and that he was therefore entitled to the exclusive enjoyment of it. The Court reversed, stating that the trial court's finding that the spring waters were percolating could not be sustained, despite some support in the evidence for its conclusion, because the parties by their pleadings had admitted the waters in question were not percolating by both relying on alleged prior appropriations. Since the trial court made no finding as to priority, the case was ordered remanded. As to the well water, the Court reversed the lower court's finding that the well was located on defendants' property as the only direct evidence indicated the contrary.

The Court rejected plaintiff's claim to water from a fourth spring based on adverse possession. The evidence indicated that the spring was located on land to which defendant had a grazing allotment, and that defendants' cattle had been running in the vicinity. The Court felt that if these facts were established in the trial court it would defeat any claim to adverse possession since the plaintiff's possession would not have been exclusive.

[1] 84 Ariz. 207, 326 P.2d 33 (1958). See also COURTS AND PROCEDURE, *supra*.

Wills and Administration

GARY KELTNER

The 1958 decisions of the Arizona Supreme Court on the subject of Wills and Administration might be clasified into four main categories: 1). Duties of an Executor Regarding the Termination of Probate; 2) Effect of a Termination of Probate; 3) Presentment of Claims Against the Estate; and 4) Construction of Wills. Each of these topics is discussed in order.

Duties of an Executor Regarding the Termination of Probate

That the duties of an executor are limited to the winding up of a decedent's estate and are of a temporary character was forcefully emphasized by *Pintek v. Superior Court.*[1] This was an action for mandamus to compel the termination of the probate of a decedent's estate. Upon the refusal of the superior court to issue the desired writ, mandamus was sought. The Supreme Court concluded that mandamus was, under A.R.S. § 12-2021,[2] the proper remedy, provided: 1) the respondents were under a duty to close and distribute the estate; and 2) the estate was in a position to be closed. In regard to the first of these essentials, it appeared from the facts that letters testamentary had been issued some six years prior to the institution of the present action, but that the estate had not been closed or distributed. It was offered in justification that the estate could not be closed until all minors who were beneficiaries under the will had reached their majority. In rejecting this contention the Court said:

> The duties of an executor *are limited to the winding up of the estate of a decedent and are temporary in their character.* In the absence of a statute otherwise providing, the duties of an executor are: 1) to reduce to possession the personal assets of the testator; 2) to pay the testator's debts; 3) to pay legacies; and 4) to distribute the surplus, if any, among the testator's next of kin.[3] (Emphasis added by the Court.)

[1] 84 Ariz. 279, 327 P.2d 292 (1958).

[2] "A writ of mandamus may be issued by the supreme or superior court to any person, inferior tribunal . . . to compel, when there is not a plain, adequate and speedy remedy at law, performance of an act which the law specially imposes as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled. . . ."

[3] RESTATEMENT, TRUSTS, § 6, Comment b (1935).

The Court justified its conclusion with the statement that "It is the policy of the law that administration be had with dispatch and that distribution be made as soon as possible. This policy is made manifest in the provisions of our code with the subject."[4] The Court fortified its decision in this regard by its finding that there existed a similar duty under the provisions of the will. Having thus determined the existence of a duty to close the estate and to distribute the surplus, the Court next proceeded to the question of whether or not the estate was in a position to be closed. In this respect, it was argued that such a determination lay in the discretion of the probate judge, but the Court countered by citing the fact that the probate judge had indicated that the estate should be closed (having based his refusal to grant mandamus on other grounds[5]) and further stated that to allow the probate to continue indefinitely without good cause would be an abuse of discretion. The Court therefore issued the desired writ, ordering the respondents to act with dispatch and diligence in terminating the probate of the estate.

Effect of a Termination of Probate

Fernandez v. Garza[6] vividly illustrated the point that the probate and distribution of an estate is not conclusive of the rights of strangers, i.e., third persons whose claims rest neither on heirship nor upon their rights as creditors. This case involved an attempt by one Garza to have a decree of final accounting and distribution set aside. The basis of Garza's claim was, first, that she was the owner of part of the property embodied in the decree, and second, that she was attempting to prove such ownership in litigation which was pending against the administratrix at the time of the decree of distribution and the discharge of the administratrix. It was her contention that such decree and discharge would operate to dissipate the pending suit.[7] The Court met the first of these contentions with the statement that as Garza was not claiming as either an heir or a creditor of the estate, "but as a stranger," her rights could not have been determined by the probate court, and

[4] A.R.S. Title 14, Chapter 5. See specifically, A.R.S. § 14-669.

[5] Judge Udall, presiding, apparently felt that as the petition called for a review of all prior preceedings involving the same estate, that the matter was more properly one for the cognizance of the Supreme Court. The other proceedings were: Pintek v. Superior Court, 78 Ariz. 179, 277 P.2d 265 (1954); Pintek v. Superior Court, 81 Ariz. 255, 304 P.2d 392 (1956). (In this connection, see 1956 Survey of Arizona Law 154); and Pintek v. Kesmer, which was pending at the time of this action.

[6] 83 Ariz. 318, 320 P.2d 948 (1958).

[7] Garza v. Fernandez, 74 Ariz. 312, 248 P.2d 869 (1952), in which the Supreme Court reversed a summary judgment in favor of Fernandez, the administratrix, and remanded for trial.

that to the extent that the decree of such court involved property owned by one other than the deceased, it was a nullity for lack of jurisdiction.[8] In rejecting the second argument, the Court held that the decree of final distribution and the discharge of the administratrix could not operate to dissolve the pending suit. Accordingly, the Court concluded that the legal position of the appellee could in no way be enhanced by the overthrow of the probate decree, while, on the other hand, a refusal to overturn such decree would in no way prejudice her legal position. Such being the case, the appellee had stated no ground for relief and the decision of the trial court was reversed, the probate decree being reinstated.

Presentment of Claims Against the Estate

Brainard v. Walters[9] was a case of first impression in which the Court was squarely presented with the question of whether or not an unliquidated claim in tort[10] can be prosecuted after the expiration of the period allowed for presentation of claims to administrators without having been presented during that period. The Court's conclusion that the claim was not barred rested on its construction of the following three statutes:

> A.R.S. § 14-570: A. All claims *arising upon contracts,* whether due, not due or contingent, shall be presented to the executor or administrator within the time limited in the notice to creditors, and any claim not so presented is barred forever . . . . (Emphasis added.)
>
> A.R.S. § 14-577: The holder of a claim against an estate shall not maintain an action thereon unless the claim is first presented to the executor or administrator . . . .
>
> A.R.S. § 14-576: If an action is pending against the decedent at the time of his death, plaintiff shall in like manner present his claim to the executor or administrator for allowance or rejection as required in other cases. No recovery shall be had in the action unless proof is made of the presentation.

The Court, in holding that the word "claim," as used in the statutes, was not applicable to unliquidated claims arising in tort, relied heavily

[8] Horne v. Blakely, 35 Ariz. 39, 274 P. 173 (1929).
[9] 85 Ariz. 60, 331 P.2d 595 (1958).
[10] The action was for damage to an automobile which resulted from a collision allegedly caused by the negligent driving of the deceased.

upon three outside decisions.[11] The Court concluded saying, "the statute only applies to claims arising upon contract." Does this, then, mean that the result would have been different had the claim been an unliquidated claim arising through a contract?

Construction of a Will

In re Shields' Estate[12] the question presented was whether or not parol evidence was admissible to show what the term "notes and mortgages," as used in a will, was intended to encompass. It was contended that as the deceased owned no notes or mortgages at the time of the will's execution, nor thereafter until the time of his death, there was a latent ambiguity. The ambiguity would justify the admission of parol evidence to show that the intended bequest included certain contracts for the sale of realty owned by the deceased and which were carried on his books, in his writing, as "mortgages." It was insisted in reply that, first, there was no latent ambiguity present and, second, granting there be such an ambiguity and that parol evidence is admissible, it would not be admissible to establish that which the deceased intended to say, but did not. The Court met the first of these objections, that there was no latent ambiguity present, with the conclusion that the will, although clear and intelligible on its face, became insensible in the light of the extrinsic fact that the deceased did not own or possess any notes and mortgages. This, the Court stated, constituted a latent ambiguity such as to justify the admission of parol. The Court then disposed of the second argument with the statement that, although ". . . parol evidence will not be permitted to show what the testator intended to say," such evidence is admissible ". . . to show what the testator intended by what he said." With the drawing of this distinction, the Court concluded that it was reasonable to believe that the deceased intended, by use of the words "notes and mortgages," to include his contracts for the sale of real property.

The Arizona Court, then, apparently follows the general rule that parol evidence is admissible, upon the discovery of a latent ambiguity, for the purpose of discovering the meaning of the words used.[13]

[11] These decisions were: Hornbeck v. Richards, 80 Mont. 27, 257 P. 1025 (1927); Becker v. State, 312 P.2d 935 (Okla. 1957); and National Automobile and Casualty Insurance Co. v. Ainge, 34 Cal. 2d 806, 215 P.2d 13 (1950), in which the court stated, "Ever since what is now section 707 was amended to include the phase [sic] 'arising upon contract,' it has been regarded as defining what claims are meant by the other sections."

[12] 84 Ariz. 330, 327 P.2d 1009 (1958).

[13] 94 A.L.R. 47 at 48 (1935).

Workmen's Compensation

JOHN LEWIS

Judicial Estoppel

Lord Kenyon once said that a man shall not be permitted to "blow hot and cold." This was an expression of the Latin maxim *allegans contraria non est audiendus*—he is not to be heard who alleges things contradictory to each other. *Worthington v. Industrial Commission*[1] seems to be a unique application of this maxim.

Worthington was killed in an automobile accident. The driver of the car, Lipscomb, was also killed. The two men were returning from a mine near Yuma owned by the Little Horn Mining Company, a partnership, which was insured under Workmen's Compensation. Lipscomb was a partner in the firm. Worthington's widow, in the capacity of executrix of his estate, sued Lipscomb's estate for wrongful death. Lipscomb's estate defended on the ground that Worthington, at the time of his death, was an employee of the Little Horn Mining Company and Lipscomb, as a partner in the firm, was Worthington's employer; and therefore under A.R.S. § 23-1022, the widow's exclusive remedy was against the Industrial Commission. The case never went to trial and was settled for $7,000. The widow then claimed death benefits under the Workmen's Compensation Act.

The commission denied compensation on the ground that Worthington was not an employee at the time of his death. The Supreme Court affirmed the decision of the commission denying compensation, saying that when the widow, as executrix, brought the action for wrongful death she made ". . . an assertion and representation that decedent was not an employee at the time of the accident . . . . She cannot now be allowed to say she made the recovery of $7,000 on a false basis."

Though the Court did not attach a label to the theory of its decision in the instant case, it appears to have been an application of the doctrine of *judicial* estoppel. In this type of estoppel the usual element of prejudicial reliance by the opposite party is, to a greater or lesser extent, absent.[2]

> The general rule as to estoppel to assume inconsistent positions in judicial proceedings . . . has been expressly stated to apply, or

[1] 85 Ariz. 104, 333 P.2d 277 (1958).
[2] 31 C.J.S. *Estoppel* § 117 (1942).

has been applied so as to estop a party to assume inconsistent positions in successive proceedings. For this doctrine to be applied, it is commonly required that parties be the same, and that the same questions be involved. However, some authorities have held that the parties need not be the same where the position assumed in the former proceeding was successfully maintained . . . judicial estoppel arising from pleadings or testimony in former proceedings may operate for the benefit of persons who were not parties to the former proceeding.[3]

The foundation of the doctrine of judicial estoppel has been pointed out by the Arizona Supreme Court previously in *Martin v. Wood.*[4]

This doctrine is said to have its foundation in the obligation under which every man is placed to speak and act according to the truth of the case, and the policy of the law to suppress the mischiefs from the destruction of all confidence in the intercourse and dealings of men, if they were allowed to deny that which by their solemn and deliberate acts they have declared to be true.

It seems that the doctrine is sound, but there may arise situations where its application would seem to be unduly harsh if carried to its dryly logical extreme. For example, suppose a person is injured to the extent of $10,000 and, under a mistake of law, brings an action against A. As the proceedings develop the plaintiff becomes more and more doubtful about A's legal responsibility. This doubt results in a very small settlement, say, $100. Then the plaintiff proceeds against B who is legally responsible, as the plaintiff has belatedly discovered. In such a situation it would seem that the value of the doctrine in putting an end to litigation might be misplaced unless it was weighed against the apparent harshness and injustice of its application under the circumstances.

When the injured party chooses the wrong defendant it would seldom seem to be based on wilful misrepresentation or unconscionable conduct. Moreover, it would be a rare defendant who would place much reliance upon the plaintiff's representation of a legal conclusion.

In the *Worthington* case the Court concluded that Mrs. Worthington was inconsistent. By bringing the action for wrongful death in the capacity of executrix, she impliedly asserted that her husband was not an employee, for if he had been, her exclusive remedy would have been

[3] 31 C.J.S. *Estoppel* § 119 (1942).
[4] 71 Ariz. 457, 229 P.2d 710 (1951).

against the Industrial Commission. In subsequently seeking compensation from the commission she alleged that her husband had been an employee. The Court's conscience was repelled by the thought of allowing her to say that her recovery in the wrongful death action had been on a "false basis." Since she recovered under the former assertion she could not be allowed to recover on another which impliedly repudiated it.

If the Court was correct in concluding that the inconsistency was sufficiently unconscionable to bring the doctrine of judicial estoppel into play, the case is at least somewhat unique, for in bringing the prior wrongful death action the plaintiff was acting in her capacity as executrix of the estate, whereas in the proceedings before the commission she was acting in another capacity, that of an alleged beneficiary under the Workmen's Compensation Act. Should her acts in one capacity forfeit her rights in another? The authorities on the question presented by this case are not numerous, but some have allowed recovery and found no estoppel.[5]

However, at the present time, the law in Arizona seems to warn litigants not to conduct themselves inconsistently with the matter at hand, no matter what their legal capacities may be at the time.[6]

Hearsay Evidence

It is the law of administrative agencies generally, both federal and state, that hearsay evidence may properly be admitted and may usually be given probative effect if it is of the type upon which responsible persons are accustomed to rely in serious affairs.[7] The problems arise, not on the question of admissibility of such evidence, but on the probative value which may be attached to it.[8] The vast majority of case law on the subject has arisen because of the agency's *reliance* on hearsay in making its findings.[9] Few cases can be found where the reviewing court has actually reversed an agency's finding because of *failure* to rely on hearsay.[10] *Hudgens v. Industrial Commission*[11] appears to fall within this unique class.

In the *Hudgens* case the petitioner sought compensation for a heart injury allegedly caused by the lifting of doors in the course of his job as a carpenter. He worked alone and was unable to testify about his

[5] E.g., Newark Paving Co. v. Klotz, 91 Atl. 91 (1914).
[6] Since this article went to press, the Worthington case was reversed on rehearing. 85 Ariz. 310, 338 P.2d 363 (1959).
[7] DAVIS, ADMINISTRATIVE LAW, 455 *et. seq.* (1951).
[8] 2 LARSON, WORKMEN'S COMPENSATION LAW § 79.00 (1952) 278.
[9] DAVIS, *op. cit. supra*, note 1, at 458.
[10] One of these is NLRB v. Ohio Calcium Co. 133 F.2d 721 (6th Cir. 1943).
[11] 83 Ariz. 383, 321 P.2d 1039 (1958). Also noted in EVIDENCE, *supra*.

activities on the day the alleged injury occurred because of his health. His superintendent testified that some time within three or four days preceding the attack petitioner had hung four doors (but no one actually saw him do so). The physician who attended petitioner shortly after his heart attack testified that in the course of his diagnosis the petitioner said the pain commenced ". . . after I had lifted some heavy door jambs." The physician also testified in response to a hypothetical question, that lifting of 75 lb. *doors* "could be considered adequate physical exertion to be a precipitating factor."

The Supreme Court, recognizing that the burden of proving that the exertion of the job precipitated the heart attack was on the petitioner, and that this fact must be the "only possible inference drawable from the evidence" in order for the award to be set aside, held that the only permissible inference from the evidence was that the injury was caused by the hanging of heavy doors. Thus, the Industrial Commission was reversed on the ground that the evidence of causal connection, although hearsay, was so strong that it permitted no inference to the contrary.

In support of their decision the court merely stated:

> [To sustain this burden of proof] . . . [h]e may rely upon circumstantial evidence, Martin v. Industrial Commission, 73 Ariz. 401, 242 P.2d 286, and the Commission may properly admit hearsay evidence, Kelsey v. Industrial Commission, 79 Ariz. 191, 286 P.2d 195.

There is a multiplicity of views on the extent to which an administrative agency *may* rely on hearsay, although the authorities are almost non-existent on the extent to which they *must* so rely.

The orthodox "legal residuum rule" is followed, usually in modified forms, in the majority of jurisdictions, although it has been under constant attack ever since it was announced.[12] The case which originated the rule was *Carroll v. Knickerbocker Ice Co.*[13] That case involved the construction of a statute purporting to abrogate the technical rules of evidence in compensation proceedings similar to A.R.S. § 23-942.[14] The New York court construed the provision to apply only to the technical rules of admission and exclusion and held it had no application to the

[12] WIGMORE, EVIDENCE 40-41 (3rd ed. 1940); HOROVITZ, WORKMEN'S COMPENSATION 240-241.

[13] 113 N.E. 507 (N.Y. 1916).

[14] A.R.S. § 23-942 provides:

> The commission shall not be bound by the rules of evidence or by the technical or formal rules of procedure other than as provided in this chapter. The commission may conduct investigations in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out the spirt of this chapter.

quality of evidence needed to sustain a finding on review. For the latter purpose, the court insisted upon a "residuum" of evidence which would be competent by common-law statements. This rule, if strictly followed, would, in effect, bind the agency to common-law rules of evidence insofar as the court of review is concerned in determining the evidence sufficient to sustain the agency's findings.

The rigors of the "legal residuum rule" have been modified by most courts, including New York.[15] The most liberal view is that followed in California and a few states[16] which allows an award to be sustained entirely on hearsay evidence in a proper case. The *Hudgens* case is a manifest indication that Arizona does not follow the "legal residuum rule." Since the commission was there reversed on the basis of hearsay it would seem to be a permissible conclusion that Arizona will follow the more liberal trend in reviewing the commission's findings when based upon hearsay evidence.

Earning Capacity

Petitioner was a heavy laborer with only a fourth grade education. He was injured severely in the course of employment. He had worked in heavy labor most of his life. His employer made a job for him, which did not require heavy labor, to keep him on. This job was merely on a "temporary basis because his physical condition was such that he was not otherwise qualified to retain a responsible position in industry" and because he had been in their employ at the time of the injury. The commission determined the loss of earning capacity by comparing his wages after the injury with those before the injury. This award was set aside by the Supreme Court in *Wammack v. Industrial Commission*.[17] The Court decided the earnings from subsequent temporary jobs are not the measure,

> . . . The Commission is to determine as nearly as possible whether in a competitive labor market the subject in his injured condition, can probably sell his services and for how much . . . . There must be some evidence that the man is able to adequately perform the services in the classification prescribed. Davis v. Industrial Commission, 82 Ariz. 173, 309 P.2d 793.

[15] See, e.g., Altschuller v. Bressler, 46 N.E.2d 886 (N.Y. 1943).
[16] State Compensation Insurance Fund v. Ind. Acc. Comm., 231 P. 996 (Calif. 1924); Humphries v. Boxley Bros. Co., 135 S.E. 890, 49 A.L.R. 1427 (Va. 1926).
[17] 83 Ariz. 321, 320 P.2d 950 (1958).

This seems to follow the general rule that ". . . the labor market in which claimant establishes his earning capacity should not be an abnormal one."[18]

Gallo v. Industrial Commission[19] is an illustration of the "boom and bust" doctrine. The case also discusses the effect of A.R.S. § 23-1044 as to requirements for modifying an award. At the time of the injury in the course of employment, the petitioner was earning $208 per month. The award was given when § 56-957 A.C.A. 1939[20] was in effect. Seven years later, when A.R.S. § 23-1044 was in effect, the award was ordered terminated because the petitioner was earning $280, and therefore his earning capacity was not impaired. The Court said that since the award was given under the 1939 code, § 56-957 A.C.A. 1939, *supra*, still governed because the change caused by A.R.S. § 23-1044(F)[21] affects vested rights and is therefore not retroactive.[22] The requirements under § 56-957, A.C.A., *supra*, to change a final award were the showing of an increase in earning capacity subsequent to the award resulting from a change in physical condition. These two requirements were shown in this case, but the Supreme Court still set aside the award of the commission terminating the benefits, being of the opinion that the "boom and bust" doctrine of *Whyte v. Industrial Commission*[23] governed. The Court said: "In determining increased earning capacity the commission must exclude any increase or decrease in wages due solely to business booms or depres-

[18] 2 LARSON, WORKMEN'S COMPENSATION LAW § 57.35 (1952) 17.
[19] 83 Ariz. 392, 322 P.2d 372 (1958).
[20] Section 56-957 (c) and (d) A.C.A. 1939 provide:
(c) In cases not enumerated in subsection (b), where the injury causes partial disability for work the employee shall receive, during such disability, compensation equal to fifty-five (55) per cent of the difference between his average monthly wages before the accident and the monthly wages he is able to earn thereafter, but the payment shall not continue after the disability ends, or the death of the injured person, and in case the partial disability begins after a period of total disability, the period of total disability shall be deducted from such total period of compensation.
(d) In determining the percentage of disability, consideration shall be given, among other things, to any previous disability, the occupation of the injured employee, the nature of the physical injury, and the age of the employee at the time of the injury. In case there is a previous disability, the loss of one eye, one hand, one foot, or otherwise, the percentage of disability for a subsequent injury shall be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury.
[21] A.R.S. § 23-1044(F) provides:
For the purposes of subsection C of this section, the commission shall, not later than nine months from the time the physical condition of the injured employee becomes stationary, determine the amount which represents the reduced monthly earning capacity, and upon such determination make an award of compensation which shall be subject to change only in the event of a subsequent change in the physical condition of the injured employee resulting from the injury and affecting his earning capacity.
[22] A.R.S. § 1-244: "No statute is retroactive unless expressly declared therein."
[23] 71 Ariz. 338, 227 P.2d 230 (1951).

sions." The Court was of the opinion that the increase in the petitioner's wages was the result of a general business boom.

The Court, in a general discussion of the difference between § 56-957 A.C.A. (c) and (d), *supra*, and A.R.S. § 23-1044(F), *supra*, said that the latter substantially changes the same section in the 1939 code and allows the commission to modify an award only upon the showing of a subsequent change in the physical condition of the injured party.

Res Judicata

The res judicata aspect of the commission's findings was discussed in *Dickey v. Industrial Commission.*[24] Dickey was denied compensation on rehearing of the commission on April 11, 1951. The language of the denial was unequivocal. However, in this decision the commission further ordered that if Dickey became totally disabled by silicosis, the commission would consider his claim. No appeal was taken from this order, and over 5 years later Dickey filed a petition based on new evidence relying on his right to reopen the original application. The "further order" of the commission, the Court held, was merely an attempt to apply A.R.S. § 23-1268(B)[25] which failed because the statute applies only where "compensation previously granted has been terminated," and in this case, compensation had never been granted. Therefore the order was final and, as it was not appealed within the statutory time provided, the Supreme Court said that it became res judicata.

Judicial Review

The petitioner in *Wammack v. Industrial Commission of Arizona, supra,* applied for a second rehearing to the commission, but prior to any formal action by the commission, a petition for writ of certiorari was filed in the Supreme Court. The Court had held that "While a party has the privilege of applying for a second rehearing, he is not compelled to do so in order to exhaust his administrative remedies. . . ."

[24] 83 Ariz. 283, 320 P.2d 470 (1958).

[25] A.R.S. § 23-1268 (B) provides:

Where the disablement has terminated and within one year thereafter, or in case of silicosis or asbestosis within two years thereafter, the disablement recurs as a result of the occupational disease for which an award has been made, the commission may order resumption of compensation if claim therefor is made within sixty days after recurrence of the disablement.

Miscellaneous

In *Warner v. Industrial Commission*[26] the Superior Court held that the claimant, seeking to have his case reopened and compensation increased, did not bear the burden of showing that his physical condition had worsened due to the accident, and affirmed the commission's finding as it was reasonably supported by the evidence.

Aircraft Instrument Corp. v. Craft[27] involved conflicting evidence as to whether the party seeking compensation was an employee or an independent contractor. The commission found the party to be an employee. In affirming this finding the Court stated the conclusion of the commission must be given the same "considerations" as those of a "jury or trial court."

The petitioner claimed disability by reason of "kissing spines" resulting from a back injury during employment, and doctors differed in their testimony as to the causal connection between "kissing spines" and the claimed disability in *Lopez v. American Smelting & Refining Co. and the Industrial Commission.*[28] The Court concluded that where a case calls for expert testimony and there is a conflict in medical testimony, the commission is free to decide which expert it chooses to believe.

In *Harrington v. Industrial Commission,*[29] decedent went to Phoenix on business. There he picked up a customer and was driving toward Tucson, his home, with the customer. Due to a disagreement the customer left the car at Chandler and deceased was seen proceeding in the direction of Tucson. He was next seen speeding back toward Coolidge, away from Tucson, in the general direction of Chandler and Phoenix, when the fatal accident occurred. The conduct of the deceased prior to the accident permitted more than one inference, the Court said, and the finding of the commission that the deceased was not within the scope of employment was one of these. The Court said in cases where the evidence is uncontradicted but permits more than one inference, the finding of the commission is conclusive upon review.

The petitioner in *Sheridan v. Industrial Commission*[30] alleged that he suffered a back injury in the course of employment. His testimony as to the date of the injury was corroborated by the testimony of a fellow workman. The medical testimony showed a causal connection between the injury and the alleged accident. The Supreme Court decided the commission was wrong in denying compensation as there was no evidence to support such a finding.

[26] 85 Ariz. 150, 333 P.2d 733 (1958).
[27] 85 Ariz. 14, 330 P.2d 729 (1958).
[28] 84 Ariz. 7, 322 P.2d 890 (1958).
[29] 84 Ariz. 356, 328 P.2d 311 (1958).
[30] 84 Ariz. 264, 327 P.2d 90 (1958).