REPORTED CASES

Determined in the

SUPREME COURT

of the

STATE *of* NEW MEXICO

1921-1922

IRA L. GRIMSHAW, Reporter

VOLUME 27

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THE SUPREME COURT OF THE STATE OF NEW MEXICO

HERBERT F. RAYNOLDS.....Chief Justice
FRANK W. PARKER.....Justice
STEPHEN B. DAVIS, JR.....Justice

Personnel of court from October, 1921 to November 1, 1922.

CLARENCE J. ROBERTS.....Chief Justice
HERBERT F. RAYNOLDS.....Justice
FRANK W. PARKER.....Justice

JOSE D. SENA.....Clerk
IRA L. GRIMSHAW.....Reporter and Law Clerk

HARRY S. BOWMAN.....Attorney General
A. M. EDWARDS.....Assistant Attorney General

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REPORT OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE STATE OF NEW MEXICO

JANUARY TERM, 1921

[No. 2326. Sept. 2, 1920.]

STATE v. MARTINO.

SYLLABUS BY THE COURT.

1. Objection to the indictment, which was in all respects regular in form, to charge defendant as a principal in the second degree according to the outward form, rather than the legal effect, of his acts, **held** to be properly overruled. P. 3

2. Evidence examined, and **held** to justify the overruling of a motion for a directed verdict of acquittal. P. 4

3. Where homicide is committed while the doors of a dwelling are being broken by defendant and his companion, evidence of such breaking is admissible as a part of the res gestæ. P. 5

4. Evidence examined, and **held** to justify the court's refusal to take from the jury the consideration of the question of the guilt of the defendant of murder in the first and second degrees, and to confine them to manslaughter. P. 5

5. A principal in the second degree is guilty of the crime the same as the principal in the first degree, and may be tried and convicted, even although the latter has been acquitted or convicted of a lesser degree of the offense. P. 6

6. Instructions requested are properly refused, when the court has covered the same ground by other proper instructions. P. 6

7. The appellant was charged in the indictment with murder as a principal in the second degree. The principal in the first degree, who did the shooting, testified for the prosecution. On cross-examination he was asked the following questions: "Why did you shoot Joe Laval that night?" "Did you

and Dominic Martino go to the kitchen that night when you went there for the purpose of assaulting or shooting Joe Laval?" It is held that the court committed error in sustaining objection to these questions upon the theory that answers to the same tended to characterize the grade or quality of the act, of which the appellant was entitled to avail himself. P 6

8. The rule, requiring counsel to explain to the court the kind and character of the evidence sought to be elicited from a witness in order to preserve a question for review in this court, has no application, where the witness is upon cross-examination, and where the question itself is self-explanatory of the character of evidence sought to be elicited. P. 8

Appeal from District Court, Colfax County; Lieb, Judge.

Dominic Martino was convicted of murder in the second degree, and he appeals. Reversed, and cause remanded, with directions to award a new trial.

J. Leahy, of Raton, for appellant.

N. Meyer, Assistant Attorney General, for the State.

OPINION OF THE COURT.

PARKER, C. J. The appellant was tried and convicted of murder in the second degree, and sentenced to a term in the penitentiary, from which judgment this appeal is taken. He was charged as a principal in the second degree; that is to say, one Joseph Savant was charged with murder in the first degree in regular form, and the appellant was charged as being present, aiding, abetting, and assisting said Savant in the commission of the murder.

The facts appearing from the record are as follows: On the night of the homicide appellant and the said Savant had been down town, and returned about half past 10 o'clock to the home of the deceased, with whom they boarded. They were intoxicated, and made a great deal of noise around the house. Appellant knocked at the kitchen door of the deceased's house, and asked for liquor, which request was refused by the deceased, he telling appellant to go to bed. Appellant then went to his

bunk room, and took something out of his trunk, saying, "I am going to show you that I can make you open the door." "I will show you if you are the boss of me; I will see which is the boss." Returning to the yard near the kitchen door, the appellant engaged in bad language toward the deceased, and the appellant and Savant broke in the kitchen door. Appellant then called to the deceased, and invited him to come outside, and threatened him, and said that he would "fix him." The deceased then entered the kitchen from an adjoining bedroom, and the shooting began. At this time deceased had no gun, and he returned to his bedroom and procured a shotgun. When he returned to the kitchen another shot was fired, and he immediately returned the fire. All of the shooting, so far as appears from the evidence, was done by the defendant, Savant, and the appellant did no shooting. Upon firing the last shot by Savant the deceased fell, and thereupon the appellant entered the kitchen and jumped upon the deceased, and struck him on the neck with a pistol which he had, but which, so far as appears from the record, he did not fire. As he was striking the deceased, the appellant said, "There, I am better than you are, and will make your brains jump." The shot which the deceased fired from his shotgun took effect upon Savant, and he soon became unconscious from the effects of the wound although he afterwards recovered and testified as a witness in the case.

It will thus be seen that the actual killing was done by the defendant, Savant, and that the appellant was present, aiding, abetting, and assisting Savant in the commission of the crime, and he was so charged in the indictment.

[1] A motion was made to quash the indictment, which motion was overruled. The motion was based, as near as we can determine, upon the following grounds: (1) That no conspiracy is alleged; (2) that the allegation of aiding, abetting, and

assisting is a mere conclusion of law; (3) that the indictment does not charge that the appellant instigated the killing; (4) that it is not alleged that the appellant induced, counseled, or suggested the killing, or co-operated with Savant to take the life of the deceased; (5) that the indictment does not allege that appellant was aware of the intent on the part of Savant to shoot and kill; and (6) that the indictment does not allege that intent to take life was in the minds of both Savant and the appellant.

A sufficient answer to all of these objections is to be found in 1 Bishop's new Cr. Law, § 648; 2 Bishop's New Cr. Proc. § 3; 1 Bishop's New Cr. Proc. § 332, and Bishop's Directions and Forms, §§ 113-115, and it will be unnecessary to cite our own or other cases. The indictment was in all respects regular in form.

[2] At the close of the evidence for the state, appellant moved for a directed verdict of acquittal upon the grounds that (1) There was no sufficient evidence touching the aiding, abetting, or assisting by appellant; (2) the evidence for the state showed that appellant did not aid, abet, or assist in the commission of the crime; (3) there is no evidence that appellant and Savant entered the home of the deceased with the intent to take his life; (4) the indictment does not allege that the homicide was committed while appellant and Savant were engaged in the commission of a felony; (5) the indictment does not charge any conspiracy between defendant and Savant, and because the evidence shows that Savant shot and killed deceased, acting upon his own resolution and without any agreement with appellant; and (7) there was no sufficient evidence before the jury touching the crime charged.

The fourth, and the first clause of the fifth, ground of the motion repeat objections to the indictment theretofore made in the motion to quash, and need not be again considered. The grounds of the motion

(1), (2), (3), (4), (7), and the latter clause of (5), go to the question of the sufficiency of the evidence to support a verdict. The brief outline of the evidence given above clearly shows that appellant was the chief actor in the fatal encounter. He seems to have done all the talking and threatening, he assisted in breaking down the door, and, as soon as the deceased fell, jumped upon him and beat him with a pistol. After they had broken open the door, appellant invited deceased out and threatened to "fix" him. It is clear that appellant participated in the common design to overcome and subdue deceased and to go as far as to kill him if necessary. The court, in overruling the motion for a directed verdict, so properly held.

[3] After the motion for a directed verdict was overruled, appellant moved to take from the jury the evidence touching the breaking of the door upon the ground that it was done to obtain liquor, and not done in order to assault and kill the deceased, and because the indictment did not charge the homicide as having been committed while the defendants were engaged in the commission of a felony. The facts show that the breaking was a part of the res gestæ, and were properly before the jury for such inferences as they might properly draw therefrom. This motion was therefore necessarily overruled.

[4] Thereupon appellant moved to take from the jury the consideration of the guilt of appellant of murder in the first and second degrees and confine them to manslaughter. Just why this motion was made is not clear from the brief. There is an intimation that it was made upon the ground that the indictment did not charge homicide as committed while in the commission of another felony, and that therefore, under the facts, there could be no murder in the first or second degree. We fail to follow the argument. As before seen, the breaking in of the door was a part of res gestæ, and the evidence was

introduced, not to show a particular grade of crime, but merely to describe the circumstances under which the crime was committed. The court was therefore correct in denying the motion.

[5] Appellant argues that he could not be tried and convicted until after the conviction of Savant, the principal in the first degree. A misconception of the principles governing these matters is here disclosed. The doctrine invoked applies only to accessories before or after the fact, and has no application to principals in second degree, or as sometimes styled, accessories at the fact. The principal in the second degree is guilty of the crime the same as the principal in the first degree, and may be convicted although the latter be acquitted, or convicted of a lesser grade of the crime. Bishop's New Cr. Law, § 648; 2 Bishop's New Cr. Proc. § 3; 1 R. C. L. Accessories, § 19; Territory v. McGinnis, 10 N. M. 275, 61 Pac. 208; State v. Jarrel, 141 N. C. 722, 53 S. E. 127, 8 Ann. Cas. 438, and note.

[6] The appellant complains of the refusal of the court to give certain instructions requested by him. The subject-matter of the requested instructions was fully covered by instructions given by the court of its own motion. The appellant, therefore, cannot complain here of the court's action.

[7] Appellant raises a serious question in regard to the exclusion of testimony offered by him. Savant, the principal in the first degree who did the shooting, testified for the prosecution. On cross-examination by counsel for appellant he was asked the following questions:

"Why did you shoot Joe Laval that night?"

"Did you and Dominic Martino go to the kitchen, this night when you went there, for the purpose of assaulting or shooting Joe Laval?"

"On the night that you testified that Joe Laval was shot and killed, did the defendant, Dominic Martino, know that you had a pistol, and before you fired the shot out near the fence?"

The court sustained the objection to each of these questions, and the witness was not allowed to answer. As to the last question above quoted, the appellant cannot complain of the action of the court, for the reason that the witness was afterwards permitted to testify that he did not believe that appellant knew that he had a pistol because he had not told him.

As to the first two questions, above quoted, a serious question is presented. The questions went to the very essence of the transaction which resulted in the death of Laval. While it is true that a principal in the second degree is guilty of a substantive, independent offense, and may be convicted of even a higher degree of homicide than the principal in the first degree may have been convicted, or may be convicted even if the principal in the first degree has been acquitted, it nevertheless remains true that the principal in the second degree, like any other defendant, is always entitled to show the real nature and character of the crime. In the case under consideration the appellant was entitled to show, if he could, that the deceased was killed by the witness Savant in lawful self-defense, and if the jury should be convinced of that fact he would be entitled to an acquittal. The evident object of the first question above quoted was to show by the witness that he never shot at the deceased or attempted in any way to harm him, until after the deceased had shot the witness in the face with a shotgun, and that he did the shooting, as he believed, in order to protect himself from death or great bodily harm. An examination of the testimony of the witness shows that this was his attitude towards deceased. All of the shooting which he had done prior to the fatal shot was done evidently for the purpose of intimidating the deceased and inducing him to give him and the appellant liquor, and was not done with intent to harm the deceased. It is clear, therefore, that the

exclusion of the evidence called for by the question was harmful to the appellant, and, there being no legal objection to the evidence, it was error to exclude the same.

[8] The Attorney General seeks to justify the action of the court in excluding this testimony upon the principle that, where an objection is sustained to a question, it is necessary, in order to preserve the question for review by this court, for counsel to explain to the court the kind and character of the evidence sought to be elicited from the witness. He cites 2 Elliott on Ev. § 886; and Palatine Ins. Co. v. Santa Fé Mercantile Co., 13 N. M. 241, 82 Pac. 363. The doctrine there announced is correct, but it has no application to the circumstances in this case.

It is to be noted in this connection that the question first above quoted requires no explanation to the court; it being self-explanatory. No answer which the witness could make to the question would be irrelevant or immaterial. Any answer he might make to the question would tend to characterize the nature and quality of his act in shooting the deceased. It is further to be noted that this witness was asked this question upon cross-examination, and counsel for appellant were not charged with knowledge of what the answer of the witness would be. He was not appellant's witness. Counsel for appellant, therfore, would not be expected to be able to state to the court what the witness would answer. Under such circumstances the rule requiring a statement by counsel, advising the court of the nature of the testimony which the witness would give, has no application. 3 C. J. Appeal and Error, §§ 736, 737.

It follows that the judgment should be reversed for the error of the court in excluding the testimony mentioned, and the cause should be remanded to the district court, with directions to award a new trial; and it is so ordered.

ROBERTS and RAYNOLDS, JJ., concur.

[No. 2345. Sept. 2, 1920.]

BELL v. KYLE et al.

SYLLABUS BY THE COURT

1. Ordinarily the findings of fact of the trial court will not be disturbed when they are supported by any substantial evidence. P. 11

2. The evidence of a witness to an admission of notice of a fact which, if received prior to a purchase of land would prevent the party from rescinding the transaction on the ground of fraudulent representations, and which, if received after the purchase and payment of the purchase price, would not affect his right, was properly disregarded by the court as immaterial, where the witness failed to be able to show that the notice was received prior to the purchase. P. 12

3. A question not raised in the court below will ordinarily not be considered here. P. 13

4. Where a vendor takes a vendee to a spring and falsely and fraudulently represents to the vendee that the spring is upon the land to be conveyed, and the vendee is ignorant of the facts, and could ascertain them only by survey of the land, and where there are no circumstances present calculated to arouse the suspicions of the vendee, he is entitled to rely upon the representations, and may rescind the contract and recover the purchase price paid upon discovery of the fraud. P. 13

Appeal from District Court, Dona Ana County; Medler, Judge.

Action by H. G. Bell against Rose Kyle and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Young & Young, of Las Cruces, for appellants.

Mark B. Thompson, of Las Cruces, for appellee.

OPINION OF THE COURT

PARKER, C. J. This is an action brought by the appellee, H. G. Bell, against the appellants, Rose Kyle and W. J. Kyle. It is alleged in the complaint that the appellee entered into negotiations with the appellants for the purchase of a certain tract of land; that the appellant W. J. Kyle, husband of the appellant Rose Kyle, acting as agent for said Rose Kyle, represented and stated to the appellee that a certain spring of water, situated at and near a cer-

tain ranch house, was situated upon the property of the appellant Rose Kyle, and that such property was designated by the public surveys as the west ½ of the northeast ¼ and the north ½ of the northwest ¼ of section 15, in a certain township and range; that appellee, relying upon said representations, purchased the said land, and paid therefor the sum of $3,000; that the representations aforesaid, as to the location of the said spring of water, were falsely and fraudulently made; that the appellee was unaware of the falsity of said representations, and relied solely upon the same in the purchase of said land; that in truth and in fact the said spring of water was situated in section 2 of the same township, and about two miles from the land conveyed to the appellee by the appellants; that thereafter, as soon as the appellee learned of the true location of said spring of water, he offered to reconvey the premises to the appellants, and demanded of them the purchase price thereof, which said offer and demand the appellants refused. The appellee tendered the deed for cancellation, and offered to reconvey to the appellants. He prayed for the recovery of the purchase price and for the cancellation of the conveyance, and for general relief.

The appellants answered, admitting the conveyance and payment of the purchase price of $3,000. They denied, in toto, the false and fraudulent representation and averred that the appellee well knew at the time of said purchase that the said spring was not upon the lands which he purchased. They interposed a second defense, to the effect that at the time of the transaction set out in the complaint there was also assigned to the appellee a lease upon 3,844 acres of land, and a sale to him by the appellants of 125 head of cattle, and that the said sale of cattle and said assignment of said lease were made upon the express condition that the plaintiff would purchase the land in section 15, above described; that said lease was of the value of $1,500, and that

appellee still held and retained the possession thereof.

Appellee replied, admitting the assignment of the lease to him and tendering assignment thereof to the appellants; he denied all other allegations of the answer.

The case was tried to the court without a jury, and resulted in a judgment for appellee. The court canceled the deed and the contract between the parties was ordered to be rescinded. The court also gave judgment for the purchase money. The court further canceled and ordered the assignment of the lease to be surrendered and delivered to the appellants. From this judgment appellants have appealed.

Counsel for appellants have discussed the assignments of error under several heads, which will be considered in the order in which they appear in the briefs.

[1] The first proposition argued in the briefs is to the effect that fraud will never be presumed, and cannot be established except by strong and satisfactory proof. It is argued under this proposition that the proof in this case did not even preponderate in favor of the appellee, and it is assumed that the court, in order to find for the appellee, must have indulged in a presumption that the transaction was fraudulent. We fail to follow the argument, or to understand the application of the cases cited. It is to be assumed that fraud will never be presumed, and that the burden of establishing the same rests upon him who asserts it, and that the proof must be clear and convincing. But in this case three witnesses testified for the appellee, and three witnesses testified for the appellants. The judge saw and heard the witnesses testify, and, sitting as a jury, it was within his province and duty to determine the truth of the matters controverted. He believed the witnesses for the appellee who testified that the

false and fraudulent representation was made, and induced the purchase of the land and the payment of the purchase price. It is familiar law in this jurisdiction that the verdict of a jury, or the findings of the trial court, will not be disturbed when they are supported by any substantial evidence. This has been the rule since Candelaria v. Miera, 13 N. M. 360, 84 Pac. 1020.

[2] During the introduction of the testimony a witness by the name of Chaves was on the stand, and was being examined as to a certain conversation with the appellee which he had had about June 1st, in which the witness stated that the appellee had admitted to him that the appellants had explained about the spring not being upon the land conveyed. The witness was unable to say that the appellee had admitted that the appellants had informed him about the spring not being on the land before the trade was made in March, prior to the alleged conversation. At the close of the testimony a motion was made by counsel for appellee to strike the evidence of the witness out as immaterial. The court, in ruling upon the motion, said:

"This last part of the conversation I will let in, but I won't consider any part of it: I will let it stay in the record."

Counsel for appellants argue that this action of the court was erroneous, because the evidence tended to corroborate the testimony of appellants and to contradict the testimony of appellee in the case. The objection to the testimony was that it was immaterial. It is to be remembered that the transaction was had in March, and the conversation testified about by the witness was had in June, after the damage had been done to the appellee. It appears elsewhere in the testimony that the appellee did confront appellants with the fact that he had been defrauded, and that the spring was not on the land which he had purchased from them, but that he ascertained those facts after he had paid the

purchase price. It might well be that the witness, Chaves, had the conversation about which he testified, but so long as the admission did not relate to information acquired by the appellee from the appellants prior to the time he made the purchase, the testimony of the witness Chaves was entirely immaterial. For this reason there was no error in the action of the trial court.

[3] Appellee failed to attach to his complaint a copy of the deed, a cancellation of which, and recovery of the purchase price, were the subject-matter of the action. Upon his offering the deed in evidence, objection was interposed upon this ground, whereupon the court announced that he would allow the introduction of the deed and would allow a trial amendment and consider the same as made. To this action by the court no objection was interposed. In other words, the action of the court in allowing the trial amendment and considering it as made, thus authorizing the introduction of the deed, was in no way questioned by counsel for appellants in the court below. For this reason the error, if any, is not available.

[4] The last and most important question raised by counsel is as to when, and when not, a vendee may rely upon representations by the vendor as to location of and improvements upon land. The proposition put forward by appellants is that a vendee may not rely upon false representations as to the location of, or improvements upon, land where the means of knowledge are equally open to both parties. The law requires contracting parties to be vigilant and to exercise due caution, and if the means of information are alike accessible to both, so that, with vigilance, prudence, and diligence the parties might respectively rely upon their own judgment, they must be presumed to have done so. Whatever might be said as to the accuracy of the proposition as applied to other circumstances, it is not deemed to have application to the facts in this

case. A brief review of the circumstances attending the transaction, as they appear from the testimony, will be enlightening. The appellee and his brother, who, as agent, opened the negotiations, were strangers to the property. The appellants at that time well knew that the spring was not on section 15, but was on section 2, two miles away from the land which they sold. The appellants took the appellee to the spring which was upon section 2, and, according to the findings of the court below, knowingly, falsely and fraudulently announced to him that the spring was upon the land which they proposed to convey for the $3,000. Not a single circumstance appears from the testimony which would be calculated to put the appellee upon notice of the falsity of this representation. He had no reason, therefore, to doubt the truth of the statement. All that he was bound to know was that he was buying 160 acres of land according to a certain description by legal subdivisions. These figures, abstract of title, and deed gave him no clue whatever as to where the land actually was upon the face of the earth. The appellee was, by no circumstance attending the negotiations, called upon to investigate the boundaries of the tract of land which he was purchasing; and, even if his suspicions had been aroused by any circumstance, the only way he could have located the land upon the surface of the earth would have been to have employed a surveyor to locate the boundaries. The parties, therefore, were not upon an equal footing, and they did not have the same means of knowledge, readily accessible, and under such circumstances it is clear, upon principle and from the authorities, that the appellee was entitled to rely upon the representation.

The most satisfactory discussion of this branch of the law with which we are familiar is to be found in Pomeroy's Equity Jurisprudence (3d Ed.). In

volume 2, section 891, of that work, the eminent author says:

"The foregoing requisite, that the representation must be relied upon, plainly included the supposition that the party is justified, under all the circumstances, in thus relying upon it. This branch of the rule presents by far the greatest practical difficulties in the decision of cases, because, although the rule is well settled, and is most clearly just, its application must depend upon the facts of each particular case, and upon evidence which is often obscure and conflicting. In determining the effect of a reliance upon representations, it is most important to ascertain, in the first place, whether the statement was such that the party was justified in relying upon it, or was such, on the other hand, that he was bound to inquire and examine into its correctness himself. In respect to this alternative, there is a broad distinction between statements of fact which really form a part of, or are essentially connected with, the substance of the transaction, and representations which are mere expressions of opinion, hope or expectation, or are mere general commendations. It may be laid down as a general proposition that, where the statements are of the first kind, and especially where they are concerning matters which from their nature or situation may be assumed to be within the knowledge or under the power of the party making the representation, the party to whom it is made has a right to rely on them, he is justified in relying on them, and, in the absence of any knowledge of his own, or of any facts which should arouse suspicion and cast doubt upon the truth of the statements, he is not bound to make inquiries and examination for himself. It does not, under such circumstances, lie in the mouth of the person asserting the fact to object or complain because the other took him at his word; if he claims that the other party was not misled, he is bound to show clearly that such party did know the real facts; the burden is on him of removing the presumption that such party relied and acted upon his statements."

Circumstances, however, may be present which will deprive a person to whom representations have been made of the right to rely upon them, and the same author, in section 892, arranges those sets of circumstances under four heads, as follows:

"(1) When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statements; (2) when, having the opportunity of making such examination, he is

charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence; (3) when the representation is concerning generalities equally within the knowledge, or the means of acquiring knowledge, possessed by both parties; (4) but when the representation is concerning facts of which the party making it has, or is supposed to have, knowledge, and the other party has no such advantage, and the circumstances are not those described in the first or second case, then it will be presumed that he relied on the statements; he is justified in doing so."

The author further amplifies the doctrine in section 893 by showing that necessarily a person who has received a false representation, but who in fact institutes an independent inquiry and learns the true facts, would not be in a position to claim that he had been defrauded, simply because the other party had made the fraudulent representation. He further points out that the same result would follow when, after representation, the party receiving it has given to him a sufficient opportunity of examining into the facts, and when his attention is directed to the sources of information, and he commences, or purports to commence, an investigation. In such case he would be charged with the knowledge of all the facts which he might have obtained had he pursued the inquiry to the end with diligence and completeness. The same author, in section 895, further amplifies the principles governing these matters, and points out that a further qualifying rule controls all of the principles heretofore stated, and is to the effect that, where a representation is made of facts which are, or may be, assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The mere existence of opportunities for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to

the party would be inferred. The doctrine of constructive notice does not apply where there has been such representation. The author says:

"If one party—a vendor, for example—claims that the invalidating effects of his representations are obviated, and that the purchaser was not misled by them, either because they were concerning patent defects in the subject-matter, or because he was from the outset acquainted with the real facts, or because he made inquiry, and had thereby ascertained the truth, the foregoing qualification plainly applies; it is plainly incumbent on the vendor to prove the alleged knowledge of the purchaser by clear and positive evidence, and not to leave it a matter of mere inference or implication; an opportunity or means of obtaining knowledge is not enough."

The principles above set out have often been specifically applied to cases like the present one. Thus in Smith on Law of Frauds, § 164, it is stated:

"In an action to rescind, where it appears that the defendant pointed out to plaintiff certain land which constituted a part of the subject-matter of an exchange which was not in fact the actual land conveyed, it is sufficient ground for rescission. A purchaser is not required to have land surveyed to ascertain the location where representations have been made to him."

In 20 Cyc. 32, it is said:

"It is a general principle, however, that if no confidential relations exist between the parties, and if the facts represented or concealed are not peculiarly within the knowledge of the party charged, and the other party has available means of knowing the truth by the exercise of ordinary prudence and intelligence, and nothing is stated or done to prevent inquiry by him, he must make use of his means of knowledge, or he cannot complain that he was misled. * * * On the other hand, if the fact represented is one which is susceptible of accurate knowledge, and the speaker is or may well be presumed to be cognizant thereof while the other party is ignorant, and the statement is a positive assertion containing nothing so improbable or unreasonable as to put the other party upon further inquiry or give him cause to suspect that it is false, and an investigation would be necessary for him to discover the truth, the statement may be relied upon."

The author of the article in Cyc. applies this general statement to specific matters, on page 55 as follows:

"As a general rule, if a vendor of property, in order to induce a sale, makes positive assertions as to any material fact which is peculiarly within his own knowledge and of which the purchaser is ignorant, such as title, area, boundaries, location, rents, profits, or income, or incumbrances, [they] may be relied on by the purchaser without further investigation; and, if the statements are false and fraudulent and cause damage to the purchaser, he may hold the vendor liable in damages."

The authors collect numerous cases supporting the texts, some of which will be examined.

In Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638, the plaintiff was unacquainted with the location of property in the vicinity of St. Paul. The defendant professed to take him out upon the ground, and point out the property which he proposed to trade to the plaintiff, but in fact he fraudulently pointed out other property, differently located. The defendant argued that the representation was not relied upon because the plaintiff, when he made the selection from the plats, knew exactly what property he was getting. The court pointed out that an inspection of the plat would not inform the plaintiff as to the actual location of the lots on the ground. It was argued that the plaintiff was guilty of negligence in not availing himself of the means at hand and examining its true location, and for that reason he was not entitled to relief. The court said:

"As between the original parties, one who has intentionally deceived the other to his prejudice should not be heard to say, in defense, that the other party ought not to have trusted him."

The court rescinded the contract.

In Roberts v. French, 153 Mass. 60, 26 N. E. 416, 10 L. R. A. 656, 25 Am. St. Rep. 611, the misrepresentation was as to the length of the boundary lines of a certain lot of land. The court held that, not-

withstanding the vendee saw the land and saw the monuments marking the boundaries, he had a right to rely upon the representation that the lines had been actually measured by the person making the representation, and that they were of a certain length.

In McGibbons v. Wilder, 78 Iowa 531, 43 N. W. 520, a false representation was made as to the location of a certain block in the city of Sioux City, Iowa. It appeared that nothing less than the employment of a competent surveyor to go upon the ground, and possibly the adjacent ground, with his instruments, would have enabled the plaintiff to ascertain the true corners of the land. The trial court submitted an inquiry to the jury in the nature of a request for a special finding as to whether the plaintiff, by the exercise of reasonable diligence, could have ascertained the truth with respect to the facts contained in the false representation. The Supreme Court of Iowa held that this was erroneous for the reason that a party may rely upon representations as to the ownership of property, its location, and the like, and that, to entitle him to recover for fraudulent representations, he is not bound to show that he instituted inquiry by consulting records or plats, or employing a surveyor or the like.

A case often cited is Slaughter's Administrator v. Gerson, 13 Wall. (U. S.) 379, 20 L. Ed. 627. In that case the false representation was that a certain steamboat drew not more than 3½ feet of water, while as a matter of fact she was grounded upon her first trip in 5 feet of water. It appeared that the plaintiff's intestate made a personal examination of the boat before purchasing, and took with him his own ship carpenters to examine the boat and ascertain how much water she drew. The court held that under these circumstances Slaughter could not rely upon false representation. This case is of no application to the case at bar because the facts are entirely different, and it well illustrates the principle,

hereinbefore pointed out, that where a vendee undertakes to make a personal investigation he is chargeable with all of the knowledge which would result from a thorough examination, and cannot rely upon false or fraudulent representations.

In McKinnon v. Vollmar, 75 Wis. 82, 43 N. W. 800, 17 Am. St. Rep. 178, the defendant showed the plaintiff a piece of land, heavily timbered with pine timber, as the land he was selling him, while as a matter of fact the land described in the conveyance was a different piece of land, about one mile distant. The court held, for this reason, and a further fraudulent representation as to the amount of timber on the land, the contract might be rescinded and the purchase price recovered.

In Kirkland v. Lott, 2 Scam. (Ill.) 13, 33 Am. Dec. 435, the defendant resisted a suit upon a note given for the purchase price of some lots in a certain town in Illinois, upon the ground that he had been fraudulently shown a piece of ground by the plaintiff which was not the ground which he, in fact, bought, and that he relied upon the representation. The court said:

"If the plaintiffs had made no representations as to the location of the lots, the defendant would reasonably have sought, and might have obtained, correct information from some other source; and it is not for the plaintiffs to say that it was his folly not to have done so, when their representations were the cause of his omission. Credulity on his part is no excuse for fraud on theirs."

In Bradley v. Bosley, 1 Barb. Ch. (N. Y.) 125, a fraudulent representation was made as to the location of certain lots which were taken in exchange for a farm. The court said:

"It is very evident, from the whole case, that the defendant knew he was dealing with a man who was wholly unacquainted with the situation and quality of the land in the Illinois lot; and who relied upon the representation of those facts to enable him to form a proper estimate of what he could afford to allow for that lot, in part payment of the price he had fixed upon the Le Roy farm. * * * It is true a

purchaser has no right to rely upon the price which a vendor asks for property, or even upon his statement of what it is worth, as evidence of its real value, but must form his own estimate of the value of the property, after ascertaining the facts upon which its value depends. Still, if the vendor, knowing that the purchaser is unacquainted with the land, makes a false representation as to any matter which, if true, would materially enhance the value of the property, he is in equity bound to make good his representation."

In Carmichael v. Vandebur, 50 Iowa, 651, the vendor, through his agent, pointed out to the vendee certain improvements as being upon the land covered by a certain certificate of sheriff's sale, which was false and fraudulent. The court said:

"If the jury found that the defendants' agent, White, took Carmichael upon the land, and as an inducement to him to purchase pointed out these improvements, and that the defendants, with knowledge of the fact, assigned the certificate knowing, as they claim they did, that it did not cover the homestead and improvements, they are in no position to urge that Carmichael should have made further inquiry."

In Gunther v. Ullrich, 82 Wis. 222, 52 N. W. 88, 33 Am. St. Rep. 32, the defendant made false representation that certain lots which he was exchanging with the plaintiff for a stock of goods were within the city limits of Milwaukee. The vendor did not resort to any artifice to prevent or dissuade the plaintiff from making inquiries as to the true location of the lots, and the plaintiff had present means of information as to their location prior to the date of making the exchange. The court said:

"It is too well-settled in this state to require discussion that where the proposed purchaser is ignorant of the location he has the right to rely upon a positive statement made by the vendor in that respect, and hold him responsible if it proves untrue, although there was no intentional misrepresentation."

In Cottrill v. Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549, the action was for damages for false representations made in the exchange of shares of stock in a corporation for a certain lot of ground

in the city of St. Louis. This was an action by the vendor for damages for false representations as to the value of the stock and is not applicable to the facts in this case, except in its discussion of general principles governing some phases of this subject. Appended to this case is an extensive note where many authorities are collected.

The cases relied upon by counsel for appellants are inapplicable to the facts in this case. He cites Long v. Warren, 68 N. Y. 426. That was an action at law to recover damages for false representations and deceit in the sale of a farm by the defendant to the plaintiff. The representations were as to the non-existence on the farm of a noxious weed or grass known as quack grass. It appears, however, in that case, that the plaintiff and defendant in company visited the farm and looked it over, and the court concluded from the evidence in the record that the defendant did make a false representation as to the size of the piece of land which was covered by this quack grass, and that the plaintiff relied upon the statement, and was thereby induced to purchase the farm. The defendant did not attempt, by artifice or otherwise, to dissuade or hinder the plaintiff from making an inspection of the farm. He had twice passed across the farm in company with his companion, Kinney. In view of those facts and others which the court points out as to the ease with which this noxious grass could be discovered by any person looking for it, it said:

> "Now the rule of law in such case was early thus laid down. Where the matter is not peculiarly within the knowledge of the defendant, and the plaintiff has the means of obtaining correct information, apart from the statements made to him, he may not recover upon the false declaration. * * * The representations must be such that the vendee has no means of discovering their falsity. If he does not avail himself of the means of knowledge within his reach, he will not be entitled to the aid of a court of equity."

The court held that the plaintiff, under the circumstances, could not recover.

In Board of Commissioners v. Younger, 29 Cal. 172, the facts were very peculiar. The board of commissioners had made a rule that they would convey certain lands under their jurisdiction to actual occupants only, and at a price of $1.25 per acre. The defendant filed an application describing a piece of land by metes and bounds, and courses and distances, and concluding the description with the words, "containing about 72 acres of land." The deed was executed by the commissioners, and the defendant, upon being informed that the purchase price was $90, paid the same and received his deed. He made no representations and was asked no questions at the time of the conclusion of the transaction. The court held that this was a case where the application of the doctrine that, where each party to a transaction has an equal opportunity to know the facts, the person is not entitled to rely upon any representation made by the other party. In that case, however, it appears that the board of commissioners had maps and plats in their office from which they could tell at a glance that the conveyance contained much more land than they received the purchase price for, and that they had as much, or more, information as the defendant.

In Messer v. Smyth, 59 N. H. 41, a defendant resisted the foreclosure of a mortgage upon the ground that the plaintiff had made false representations as to the productiveness of the farm and its capacity to produce crops at the time he sold it to the defendant. The trial resulted in a verdict for the defendant. The judgment of the court below was upheld in the supreme court of New Hampshire, upon the theory that the representations made by the plaintiff related to the quantity of hay which had been cut on the farm, and the quantity and quality of apples that he had raised, the amount of pasturage he had had therefrom, the expense of carrying it on, and the income of it. These were all representations of fact peculiarly within the knowledge of the person

making them, and it was held that the representations were such that they might, under the circumstances, be relied upon. This case is against rather than for the position taken by counsel for appellants.

Counsel for appellants also cite Slaughter's Adm'r v. Gerson, 13 Wall. (U. S.) 379, 20 L. Ed. 627, which we have heretofore pointed out as inapplicable to a case of this kind, the facts in that case being that an independent investigation was made by the purchaser of the steamboat.

In Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126, a misrepresentation of a matter of law had been made to a wife by her husband, to the effect that all of his property was his sole property, and that none of it was community property. Relying upon that representation, she brought a suit for divorce against her husband, in which she omitted to make any claim for her interest in the community property. After discovering that the representations of her husband was false, she brought an action for a division of the community property against her late husband's executor. The court very properly held that this was a false representation of law, upon which she had no right to rely when she had finally come to the point of bringing an action for divorce against him.

In Saunders v. Hatterman, 24 N. C. 32, 37 Am. Dec. 404, the defendant sold to the plaintiff a tract of land lying in a neighboring county, which the plaintiff had never seen. At the time of the sale defendant stated that the land was worth about $3 per acre, and that it had sold for $500 or $600, and that it was good land. It was alleged by the plaintiff that the representations were false, and known to be false by the defendant when he made them. The court said:

"The true rule is stated to be that the seller is liable to an action of deceit, if he misrepresent the quality of the thing sold, in some particulars in which the buyer has not equal means of knowledge with himself; or if he do so in such a

manner as to induce the buyer to forbear making the inquiries, which for his own security and advantage he would otherwise have made. 2 Kent's Com. 487. The misrepresentation must be of a kind, the falsehood of which was not readily open to the other party."

The court held that there was no right of action under the circumstances, upon the theory that the mere expression of opinion that the land was worth a certain sum of money is a representation upon which a vendee is not entitled to rely.

In Lawson v. Vernon, 38 Wash. 422, 80 Pac. 559, 107 Am. St. Rep. 880, there was an action for damages for a false representation as to the location of certain town lots in a certain town in Washington. It appears that an agent of the vendor pointed out the supposed lots, and they were not the lots conveyed to the plaintiffs. The plaintiffs went into the possession of the lots shown them, and made improvements thereon. It was held that it was immaterial whether the representation was fraudulent or not, if in fact it was false, and that the plaintiffs were entitled to judgment for damages for the improvements.

In Mamlock v. Fairbanks, 46 Wis. 415, 1 N. W. 167, 32 Am. Rep. 716, an action was brought to set aside a contract by which the plaintiff purchased of the defendant a certain note and mortgage, on the ground of false and fraudulent representations made to the agent of the plaintiff at the time of the purchase, as to the adequacy of the mortgage and security, and as to the responsibility, identity, and residence of the parties who executed the mortgage. The court correctly held that the plaintiffs, having means in their own hands and neglecting to protect themselves, could not recover. It is to be seen that this case has no application to a case like the present one.

In Silver v. Frazier, 3 Allen, 382, 81 Am. Dec. 662, an adjoining owner induced an agent of the plaintiff to believe that the property line between

the two owners would encroach upon a certain cellar which he had had dug and over which he was about to erect a residence; that the agent, in the owner's absence, was induced to move the site of the building to a more convenient and far less desirable part of plaintiff's land. The court held that there was no cause of action. It is pronounced by the court as being without precedent, and the judgment of the court was put upon the ground that the voluntary misrepresentation by the stranger to title was not the proximate cause of the injury to the plaintiff.

In Brown v. Bledsoe, 1 Idaho 746, the plaintiff bought a mine, and claimed that certain false representations were made to him about the mine before he bought the same. What those representations were does not appear from the report of the case, and the plaintiff went on and made large expenditures upon the mine after the representations had been made. Under those circumstances the court held that he had no cause of action.

In Crocker v. Manley, 164 Ill. 282, 45 N. E. 577, 56 Am. St. Rep. 196, a suit was brought to set aside a conveyance of land made in exchange for stock of a mining company, on the ground of fraudulent representations. It was held that the action could not be maintained, for the reason that the plaintiff himself visited the mine and examined the same, and was in no way deceived as to the property or the quality of its ores, and had as much information in regard to the mine as the other party, and therefore did not rely upon the representations as to its value.

In Harwell v. Martin, 115 Ga. 156, 41 S. E. 686, a sale of standing timber was made for $8,000. One of the tracts, instead of containing 1,200 acres, as specified, contained only 358.7 according to actual survey. The plaintiff was taken upon the ground and shown the timber, and was informed that the whole 1,200 acres was of the same general quality. He made no investigation as to the area of the tract, but relied upon the representation of the

vendor. The court held that the plaintiff, under these circumstances, had no cause of action. This case goes further in support of appellants' contention than any we have seen, but we do not deem it in accord with the trend of authority. It may be that this holding in this case is justifiable upon the ground upon which it seems to be placed, viz. that representations as to quality may ordinarily not be relied upon by the vendee, where he has an opportunity to examine the land. But the facts in the case show that there was a false representation as to the quantity, and in this particular the case seems to be out of line with authority unless, indeed, it was a case where the disparity between the area, falsely represented at 1,200 acres, was so great from the actual area (358.7) as to amount to actual notice of the false character of the representation.

In Washington Central Imp. Co. v. Newlands, 11 Wash. 212, 39 Pac. 366, a vendor made representations that he had contracted for the building of a $9,000 hotel, on lots within 60 feet of the lots which he sold to the vendee. There was nothing in the facts pleaded to show that there was no opportunity to view the premises, or that such a view would not disclose the falsity of the representation. The allegation was that the representation was made that the hotel was already in the process of erection, and there was no excuse for the vendee not to verify such representation.

It is clear that, under the circumstances shown by the record in this case, the vendee was authorized and entitled to rely upon the representation that the spring was upon the land that he bought, and to rescind the contract upon ascertaining the falsity of the representation. He could not investigate the truth of the representation without employing a surveyor, as he did after he made the purchase, and there were no suspicious circumstances present which would put an ordinarily prudent man upon

inquiry. Upon both reason and authority, the vendor should not be heard to say that the vendee ought not to have relied upon the representation. It is, of course, to be noted in this connection that the appellants deny they made the representations, and they both averred and testified that they not only did not make the representations, but that they flatly informed the vendee that the spring was not upon the land. The court, however, found the facts otherwise, and the case is to be viewed upon the theory that the representations were made.

It follows from all of the foregoing that there is no error in the record, and that the judgment should be affirmed; and it is so ordered.

ROBERTS and RAYNOLDS, JJ., concur.

[No. 2371. April 27, 1920.]

JOYCE-PRUIT CO. v. GEORGE.

Appealed from District Court, Roosevelt County; McClure, Judge. Proceeding between the Joyce-Pruit Company and Cleve George. Judgment for the latter, and the former appeals. Affirmed. G. L. Reese, of Portales, for appellant. T. E. Mears, of Portales, for appellee.

OPINION OF THE COURT.

RAYNOLDS, J. This cause is identical with, and governed by, cause No. 2370, First National Bank of Elida, Appellee, v. Cleve George et al., Appellants, 26 N. M. 176, 189 Pac. 240, decided at this term of court. Therefore the judgment of the district court will be affirmed; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

[No. 2402. Sept. 3, 1920.]

VALENCIA WATER CO. v. NEILSON ET AL.

SYLLABUS BY THE COURT.

1. An appellate court will not decide abstract, hypothetical, or moot questions, disconnected from the granting of actual relief, or from the determination of which no practical relief can follow. P. 31

2. Section 5723, Code 1915, construed. **Held,** that an interested party, dissatisfied with the decision of the board of water commissioners upon any matter appealed to it and from the state engineer, may appeal from such decision of the board by filing a notice of appeal with the board and serving same upon all parties interested within 30 days after such decision by the said board; that the board of water commissioners fixes the amount of the bond to be given by the appellant, and is required to enter an order allowing the appeal. If such order is entered in time, it is the duty of the appellant to procure and file a transcript, or the record of all proceedings with reference to the controversy, in the office of the clerk of the district court to which the appeal is taken within 60 days. If by reason of the nonaction of the board this cannot be done within such time, the appeal might be perfected at any time within three months. If the board fails to meet and act within three months, then the notice of the appeal and bond become functus officio, and the decision of such board can be reviewed only upon petition and by writ of certiorari, directed to said board and served upon the clerk thereof. A district court has no jurisdiction to entertain an appeal, where the same has not been allowed by said board within three months from the date of the decision appealed from, and purported action by the district court in docketing and dismissing an appeal not so allowed was without jurisdiction. P. 31

3. An appellate court has no jurisdiction of an appeal in a matter as to which the lower court was without jurisdiction. P. 33

Appeal from District Court, Valencia County; Mechem, Judge.

Application by the Valencia Water Company for an extension of time for the appropriation of waters of a creek, opposed by F. G. Neilson and others, who also sought the granting of their permits to appropriate. Application granted by the state engineer, and application of Neilson and others denied, and Neilson and others appealed to the board of water

commissioners, where the applications were consolidated, and from a decision of the board the company appealed, and from the action of the district court in docketing and dismissing the appeal, the company appeals. Appeal dismissed.

George C. Taylor and E. W. Dobson, both of Albuquerque, for appellant.

Marron & Wood, of Albuquerque, for appellees.

OPINION OF THE COURT.

ROBERTS, J. Appellant was an applicant for appropriation of water under application No. 35 in the office of the state engineer, in which it sought to appropriate certain waters of Bluewater Creek. Its application was allowed, and some work done, various extensions of time applied for and granted, and some time prior to August 2, 1917, it made a further application for extension of time. Appellees were applicants for permit to appropriate waters of said creek under applications Nos. 1,036, 1,037, 1,038, 1,039, and 1,041. The appellees objected to the extension of time applied for, and asked that said extension be refused and their permits to appropriate granted. The state engineer granted the extension asked for under permit 35, and refused the applications of appellees. From this order an appeal was taken to the board of water commissioners, where the applications were consolidated for the purpose of the hearing. The board heard the evidence, and on the 12th day of January, 1918, entered its order denying the application of appellant for the extension of time, and granting and approving appellees' applications for permits to appropriate. In February thereafter, and presumably within 30 days, appellant filed notice of appeal with the board of water commissioners, and possibly a bond; this fact not clearly appearing. If the appeal was ever allowed by the board, and the bond approved, such fact has not been made to appear here.

In October, 1919, appellees here filed in the office of the clerk of the district court of Valencia county, that being the county in which the appropriation was sought, an affidavit by Francis E. Wood, an attorney at law, reciting the facts as to the judgment and decision of the board of water commissioners, the notice of appeal, and that affiant was advised that a bond was filed, and that no further steps had been taken, and a motion was filed, asking the court of Valencia county to dismiss the appeal. Over the objection of appellant, the court docketed the appeal and dismissed it, because of the failure of appellant to perfect the said appeal, or to docket the same in the district court within six months from the time same was granted, or, as the district court put it, the appellant had allowed two terms of the district court to pass since the appeal was allowed without docketing the same in said court. From this order of dismissal, appellant has appealed to this court, and has discussed questions which, in view of our conclusion, are of no importance.

[1] It is well settled that an appellate court will not decide abstract, hypothetical, or moot questions, disconnected from the granting of actual relief, or from the determination of which no practical relief can follow. In re Englehart, 17 N. M. 299, 128 Pac. 67, 45 L. R. A. (N. S.) 237, Ann. Cas. 1915A, 54; Costello Land Co. v. Allen, 17 N. M. 343, 128 Pac. 79; Roswell Nursery Co. v. Mielenz, 18 N. M. 417, 137 Pac. 579; Alldredge v. Alldredge, 20 N. M. 471, 151 Pac. 314; State ex rel. v. Holloman, 25 N. M. 117, 177 Pac. 741. Appellant's contention here, if it should prevail, would result in the remanding of the case to the district court, with instructions to set aside its order dismissing the appeal.

[2] Article 1, of chapter 114, Code 1915, regulates the statutory appropriation of water for irrigation and other purposes. It provides for a state engineer, to whom all applications for permits to appropriate water are made in the first instance,

and creates a board of water commissioners, to be composed of three members, and authorizes an appeal to said board from any action or refusal to act by the state engineer in regard to any application for permit to appropriate water or extension of time applied for, etc. Section 5721, Code 1915, gives the right of appeal to said board from the state engineer, and provides:

"Notice of such appeal shall be served upon the state engineer and all parties interested within thirty days after notice of such decision, act or refusal to act, and unless such appeal is taken within said time, the action of the state engineer shall be final and conclusive."

Section 5723 provides that the decision of the board shall be final, subject to appeal to the district court of the district where such work or point of desired appropriation is situated—

"to be taken within sixty days from the date of said decision, upon notice served in the manner and within the time in this article provided for service of notice of appeal from decisions or acts of the state engineer, and upon filing a cost bond in such sum as the board may fix with two or more sureties," etc.

The language thus far quoted is somewhat confusing, but we believe it was the intention of the Legislature to require notice of the appeal to be given within 30 days from the decision; the filing of the cost bond, which it will be observed is essential, in order to effect an appeal, to be within 60 days; and the perfecting of the appeal by procuring and filing the transcript within such time, provided the board of water commissioners meet and allow an appeal, which action is seemingly required by the provision of the statute hereafter quoted. If said board has acted promptly, and has allowed the appeal, then it would be the duty of the appellant to file the transcript within 60 days. We quote further from the statute:

"If for any good reason said board should fail to meet and act upon any such appeal within 90 days after the filing of

notice thereof with the clerk of said board, the case may be taken before the district court of the district wherein the work done or point of desired appropriation in controversy is situated upon petition and by writ of certiorari directed to said board and served upon the clerk thereof."

From this it would appear that it was essential that the board shall meet and enter an order allowing the appeal, and that this should be done within 3 months from the date of the entry of the order appealed from; that failure upon the part of the board to so meet and allow the appeal would render the notice of appeal and bond functus officio, and the remedy of the party desiring the appeal would be by certiorari. In other words, it was the intention of the Legislature that prompt action on said appeal should be had and if this could not be procured, by reason of the failure of the board to meet and act, then the matter should be taken before the proper district court by writ of certiorari, in which event, of course, the district court would be able to secure prompt action.

[3] Such being the facts, and the law applicable construed as above, the following conclusion is inevitable: Appellant's notice of appeal and bond, if one was given, which is to say the least doubtful, became functus officio at the expiration of 3 months from the time of such notice of appeal so filed; no order of the board having been procured within that time allowing the appeal. This being true, the district court had no jurisdiction thereafter to entertain the appeal, or appellees' motion to docket the case and dismiss the appeal. In other words, there was no appeal, and no action of the district court was required in the premises. This being true, appellant was in no manner prejudiced by the action of the district court, docketing the case and dismissing the appeal, and their rights were not affected thereby. That court had no jurisdiction in the premises, and it is well settled that an appellate court has no jurisdiction of the appeal in a matter

as to which the lower court was without jurisdiction, except to determine such question of jurisdiction.

For this reason the appeal to this court will be dismissed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

[No. 2444. Sept. 3, 1920.]

[On Rehearing, Sept. 21, 1920.]

ASHLEY v. JONES.

SYLLABUS BY THE COURT.

Questions, not raised in the court below, will not be considered on appeal.

Appeal from District Court, San Juan County; Holloman, Judge.

Action by William Ashley against Tom Jones, brought before a justice of the peace and taken to the district court on certiorari. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank A. Burdick, of Farmington, and A. M. Edwards, of Santa Fe, for appellant.

J. M. Palmer, of Farmington, for appellee.

OPINION OF THE COURT.

ROBERTS, J. The point involved in this appeal is as to whether appellee was entitled to statutory exemption as to certain moneys owing appellee which had been garnished. The case originated before a justice of the peace, and was taken to the district court by certiorari. The district court upheld appellee's right to the exemption.

In this court the judgment is attacked upon numerous grounds, not called to the attention of that court by exceptions or in any other manner, for which reason the questions raised will not be considered here. Fullen v. Fullen, 21 N. M. 212, 153 Pac. 294.

The judgment is affirmed.

PARKER, C. J., and RAYNOLDS, J., concur.

[No. 2377. Sept. 3, 1920.]

STROUP ET AL v. FRANK A. HUBBELL CO.

SYLLABUS BY THE COURT.

1. A trespass, of a continuous nature, the constant recurrence of which renders a remedy at law inadequate, unless by a multiplicity of suits, affords sufficient ground for relief by injunction. P. 36

2. A judgment is to be construed with reference to the findings of fact made by the court. P. 38

Appeal from District Court, Bernalillo County; Raynolds, Judge.

Action by A. B. Stroup and another against the Frank A. Hubbell Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Marron & Wood, of Albuquerque, for appellant.

Simms & Botts, of Albuquerque, for appellees.

OPINION OF THE COURT.

ROBERTS, J. The bill of exceptions in this case was stricken out for the reasons stated in the same entitled case appearing in 25 N. M. 525, 184 Pac. 976. There is thus here for consideration only such alleged errors as are claimed to appear in the record proper. The case was tried by the court, part of the evidence being taken before the court and the remainder by an examiner. Findings of fact were made by the court. The complaint and findings show the following facts: Appellant and appellees were the owners of adjoining real estate, all subject to irrigation from ditches leading from the Rio Grande river. Appellant's land was slightly higher in elevation than the adjoining land of appellees. Beginning with the crop season of 1913 and continuously thereafter for each crop season to and including the year 1917, it was alleged that appellees planted a given field adjoining appellant's land to crops of sweet clover, and during one season some other crop; that during each of the said years, after appellees' crop was planted and growing and giving promise of maturing, appellant carelessly, neg-

ligently, and willfully conducted upon its land, above and adjoining said fields of appellees, so planted as aforesaid, large quantities of water greatly in excess of the needs and requirements of appellant's land for irrigation, and permitted said water to run down and stand against an embankment between appellant's and appellees' said land; that said water carried alkali, and was permitted to stand and seep under and onto the fields and growing crops of appellees, and stand thereon in large quantities, and ruined a designated portion of the crop so planted, and injured the land and rendered it sterile and nonproductive; that this negligent and willful act had been repeated many times during each irrigation season; that appellees had been damaged in a large sum, which the court in its findings fixed at $200 each year, and the total at $1,000. Judgment was rendered for this sum, and appellant was enjoined and restrained "from causing or permitting ditch water or irrigation water to flow down against and stand against the land of the plaintiff described in the complaint, and from causing or permitting said water to seep or percolate onto the land of the plaintiffs described in the complaint."

[1] But two points are discussed by appellant in its brief. The first is that the pleadings and findings demonstrate that the appellees had an adequate remedy at law, and were not entitled to proceed in equity. The complaint and findings show a trespass of a continuing nature, the constant recurrence of which renders the remedy at law inadequate, unless by multiplicity of suits, and this affords sufficient ground for relief by injunction. In High on Injunctions (4th Ed.) par. 697, the author says:

"So where the acts of trespass are constantly recurring although each act taken, by itself, would neither be destructive of the estate nor inflict irreparable injury, and the legal remedy would therefore be entirely adequate to redress each act taken alone, equity will restrain such trespasses, basing the relief upon the utter inadequacy of the remedy at law."

Further, at paragraph 702(a), the author says:

"So where a trespass upon land is repeated and continuous, and, if continued, will result in the destruction of the substance of the estate, relief is properly allowed."

In the case of Boston & Maine Railroad v. Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275, the railroad company sued to restrain the defendant from trespassing upon its premises, the court said:

"It seems to us clear that the bill in this case may be maintained. If the plaintiff were to sue at law, the amount recoverable could not be large in comparison with the amount expended in litigation, and every trespass would give a new right of action. Hence there would arise a great multiplicity of suits. At some time the plaintiff would be entitled to the protection of a court of equity, and there is no reason why, on the facts of this case, the remedy by injunction should not be granted at once. This court has now full jurisdiction in equity, and can put in force the remedies appropriate to that jurisdiction."

In the present case appellees would have had a right of action for each separate trespass, many times repeated during each growing season, but the remedy at law would be very expensive in proportion to the benefits received, and there would arise a great multiplicity of suits. We think the appellees were entitled to proceed in equity. Cases will be found where similar equitable relief was sought and granted. Shields v. R. Ditch Co., 23 Nev. 349, 47 Pac. 194; Parker v. Larsen, 86 Cal. 236, 24 Pac. 989, 21 Am. St. Rep. 30.

The second point made is that the decree in effect prohibits the appellant from irrigating, and therefore from making any use of his land adjoining the appellees, and is for this reason erroneous. The judgment is to be construed with reference to the findings of fact made by the court (23 Cyc. 1102), and, when so construed, it will be seen that it does not have the effect for which appellant contends; that the purpose of the decree was to perpetually

enjoin and restrain the appellant from causing or permitting water which is artificially brought upon its land to be placed thereon in large quantities far beyond its requirements for irrigation. Such water because of the physical contour of the land on appellant's side creates a lake, which stands against appellee's land and destroys the growing crops thereon. There is no question in the case as to the right of appellant to use reasonable quantities of water for the purpose of irrigating its land. It is the unnecessary water which appellant puts upon its land, "negligently and willfully," to which the injunction applies.

In the case of Gibson v. Puchta, 33 Cal. 310, plaintiff, who was the owner of a mine, sued the defendant, claiming that defendant was irrigating land and permitting the water to seep through into the mine. The court said:

"The defendant had the undoubted right to cultivate and plant this tract of land; and, having planted it, there can be little question that he had the same right to irrigate it for the purpose of maturing his crop. In irrigating his land the defendant is subject to the maxim, 'Sic utere tuo ut alienum non lædas.' An action cannot be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to the plaintiffs. He is responsible to the plaintiffs only for the injuries caused by his negligence or unskillfulness, or those willfully inflicted in the exercise of his right of irrigating his land."

The question is discussed in Wiel on Water Rights (3d Ed.) § 461. In a note to the text the author says:

"Damage from seepage from irrigation and from ditches used in irrigation is held not actionable in the absence of negligence, but actionable when negligent."

[2] In the present case we have not only the element of negligence, but, if the findings are correct, a willful act. We do not think the decree read in connection with the findings is susceptible of the construction which appellant would place upon it,

and that its effect is only to forbid the negligent and willful flooding of appellant's land by which the injury to the appellees results.

The judgment will be affirmed; and it is so ordered.

PARKER, J., concurs.

RAYNOLDS, J., having tried the case below, did not participate.

[No. 2453. Sept. 3, 1920.]

GRAY v. TITSWORTH et al.

SYLLABUS BY THE COURT.

1. Where a complaint in a suit for forcible entry and detainer fails to allege possession by the plaintiff at the time of the entry by defendant, but the fact of possession is proven, without objection, the complaint will be deemed amended so as to allege the fact of possession—following Canavan v. Canavan, 17 N. M. 503, 131 Pac. 493, Ann. Cas. 1915B, 1064. P. 40

2. Evidence held to support the findings. P. 40

3. In a case of forcible entry and detainer the inquiry is confined to the question of actual, peaceable possession of the plaintiff, irrespective of whether rightful or wrongful, and the forcible ouster of the plaintiff by the defendant. P. 41

Appeal from District Court, Lincoln County; Ed Mechem, Judge.

Suit by Sarah C. Gray against George A. Titsworth and others. Judgment for plaintiff in justice court, and in the district court on an appeal and a trial de novo, and defendants appeal. Affirmed.

Geo. W. Prichard, of Santa Fe, for appellants.

J. F. Bonham and C. A. Perkins, both of Carrizozo, for appellee.

OPINION OF THE COURT.

ROBERTS, J. Appellee filed suit against the appellants before a justice of the peace of Lincoln county for forcible entry and detainer. The complaint in reality stated a cause of action in ejectment only, but the parties in the court below treated

it as an action in forcible entry and detainer, and it was tried upon that theory. Appellee had judgment before the justice of the peace, and an appeal was taken to the district court. There, upon a trial de novo, appellee again had judgment for possession, and appellants have brought the case to this court for review.

[1] It is argued that the complaint fails to state a cause of action in forcible entry and detainer, in that it does not allege that appellee was in possession of the real estate in question at the time appellants entered and took possession of the same. This objection would be meritorious, but it was waived in the court below. No objection was there interposed to the complaint, and the appellee was allowed to introduce proof of her possession, without objection. In fact, one of the appellants testified that at the time they entered upon the premises Mr. Gray, husband of appellee, had some wagons and other property upon it. The missing allegation having been supplied by proof, without objection, the complaint will be deemed amended, so as to allege the fact of possession. In the case of Canavan v. Canavan, 17 N. M. 503, 131 Pac. 493, Ann. Cas. 1915B, 1064, this court held that where a material, even jurisdictional, fact, omitted from the complaint, is as fully litigated, without objection, as if such fact had been put in issue by the pleadings, it is the duty of the trial court, and this court on appeal, to amend the complaint in aid of judgment, so as to allege the omitted fact.

[2] The only remaining question in this action is as to whether the findings and judgment of the court are sustained by the evidence. Appellants argue that there was no proof of either (a) possession by the appellee, or (b) forcible entry and detainer by appellants. We have read the transcript carefully, and find evidence supporting the judgment. In fact, George Titsworth, one of the appellants, testified that Mr. Gray, appellee's husband,

had some wagons on the lot and allowed campers to come in and use it as a wagon yard. This would show possession in appellee. Appellee testified that appellants piled lumber and other material on the lot while she and her husband were temporarily absent, and, when requested to remove their goods, refused to do so. This was sufficient to make out a case of forcible entry and detainer.

[3] Appellants argue the question of title, and undertake to show that appellee had no legal title to the lot in question. In a case of forcible entry and detainer, the inquiry is confined to the question of actual, peaceable possession of the plaintiff, irrespective of whether rightful or wrongful, and the forcible ouster of the plaintiff by the defendant. Murrah v. Acrey, 19 N. M. 228, 142 Pac. 143.

Finding no error in the record, the judgment is affirmed; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

[No. 2405. Jan. 24, 1921.]

[Rehearing Denied June 4, 1921.]

JONES v. ROCKY CLIFF COAL MINING CO.

1. A. and wife owned certain property. They executed a warranty deed in blank as to grantee and delivered it to B., the president of a corporation C., who kept it unchanged for six years, and then had C.'s name written in as grantee and recorded. In the meantime D., who claimed to be the intended grantee in the original deed, secured and recorded a quitclaim deed from A. and wife conveying to her said property for the nominal consideration of $1, while the original deed was still in the possession of B., with no grantee named. B. was acting both for the corporation and for D. in the transaction, and neither C. nor D. knew of the other's claim. **Held** that, at the time of the execution and delivery of the quitclaim deed, the warranty deed was ineffective as a conveyance, and the title, being in A. and wife, passed by the quitclaim deed to D., and this notwithstanding the consideration therefor was only nominal. P. 44

ON MOTION FOR REHEARING.

2. Under a parol agreement to convey land, the payment of the full purchase price, without some further part performance, such as delivery of possession, the making of valuable improvements, etc., is not sufficient to vest an equitable title in the purchaser. P. 48

Appeal from District Court, McKinley County; Raynolds, Judge.

Suit by Annie A. Jones against the Rocky Cliff Coal Mining Company and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

J. O. Seth, of Santa Fe, for appellant.

E. A. Martin, of Gallup, and McFie & Edwards, of Santa Fe and Gallup, for appellee.

STATEMENT OF THE CASE.

This is a suit to quiet title in statutory form brought by Annie A. Jones, appellee, against the appellant, Rocky Cliff Coal Mining Company, and others. The defendants with the exception of appellant made default. Appellant answered denying title in appellee, asserting title in appellant, and praying that title be quieted in it. The case was tried to the court, a judgment entered quieting title to the property in the appellee (plaintiff), from which the appellant (defendant) appeals.

STATEMENT OF THE FACTS.

On August 1, 1910, Elmer and Ellen Wilson, his wife, were the owners of lots 17 to 24, inclusive, of block 26, of the Railroad addition to the town of Gallup. On that day they executed a warranty deed for said premises in which the name of the grantee was left blank. The deed after execution was left with Sam Bushman, the attorney who prepared it, for two years, and then by him delivered to the defendant Stephen Canavan, who during all this time was president of the appellant, the Rocky Cliff Coal Mining Company, a corporation, which he apparently controlled. This deed was in the possession of Canavan unchanged until about two years prior to

the trial of this case in the district court in December, 1918.

Canavan, at the time the Wilsons executed the deed last mentioned, was indebted to the appellee, Annie A. Jones, in some sum of money, and he agreed with her to purchase for her the lots in question in consideration of the cancellation of this indebtedness. After the deed mentioned was obtained by Canavan, he showed it to the appellee, stating to her that it was her deed, and that he would keep it safely for her. Nothing was said between them as to the name of the grantee not appearing therein. The appellee paid the taxes on the property from the time the deed was made until the trial of the case. It does not appear that either the appellant or appellee ever went into actual possession of the property.

In the year of 1915 there was some disagreement or difficulty between the appellee and Canavan in El Paso, at which time some threats were made, from which appellee inferred that Canavan intended to deprive her of the property, and upon the advice of counsel appellee secured from Wilson and wife, the grantors in the original deed, a quitclaim deed to the same property for the nominal consideration of $1. At the time this quitclaim deed was executed and delivered to appellee (on July 11, 1916), the original deed mentioned was still in the possession of Canavan unchanged, with no grantee named therein. Thereafter Canavan requested Bushman, who had written the original deed, to write the name of the appellant, the Rocky Cliff Coal Mining Company, therein as grantee, which Bushman did. This occurred late in 1916, and was filed for record in September, 1917.

Canavan testified that the property was purchased for the appellant, the Rocky Cliff Coal Mining Company, paid for with its money by check upon its bank account for $300, drawn by him, and the grantee's name left blank on account of financial

troubles of himself and the corporation. This testimony is corroborated in a vague sort of way by the attorney Bushman, who wrote the deed. He testified in substance that he wrote the deed and that the deed was executed in his office and he saw it executed and delivered to Canavan by Mrs. Wilson; that his recollection was that $300 consideration was paid, and "as near as I remember a check was given by Canavan, and I think it was the Rocky Cliff's check, signed by him, given to Mrs. Wilson"; that the name of the grantee was left blank at the direction of Canavan; that he could only state his impression from the conversation who was the actual grantee. "I gathered the impression at the time from the conversation that occurred that Mr. Canavan was buying for the Rocky Cliff Coal Company."

Upon cross-examination the following testimony was elicited by attorney for appellant from appellee:

"Q. Don't you know whether or not you gave anything for this quitclaim deed, plaintiff's Exhibit G? A. I think she said to me you have already paid for this, but to make it legal pay the dollar, and it is good, for it is already paid for.

"Q. Who said that? A. My lawyer.

"Q. Mrs. Pearce? A. Yes, or words to that effect.

"Q. You don't know whether she gave the dollar for it or not? A. I suppose she did; I don't know.

"Q. You didn't talk to Mrs. Wilson about it when you got that deed? A. I talked to her about making it for me. Would she be willing to do that. While it was not necessary —Mr. Canavan hadn't given me the deed.

"Q. Did she say she would give it to you? A. She said yes, she knew it had been bought for me.

"Q. Did she ask you to pay her any thing for it? A. No, she didn't ask me. She said it had been paid for. I cannot remember what she did say about it. I know she said that much."

OPINION OF THE COURT.

BRICE, District Judge (after stating the facts as above). [1] Many assignments of error are advanced in this court, but it will be unnecessary to consider them separately. If there was error in the

admission of testimony, it was harmless, as will be seen from the view we take of the case.

At the time the quitclaim deed was made to appellee, the title was in the grantors named in that deed, for until some name was inserted as grantee in the original deed it was ineffective as a conveyance.

"The deed in blank passed no interest, for it had no grantee. The blank intended for the name of the grantee was never filled, and until filled the deed had no operation as a conveyance. * * * There are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it; the blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named." Allen v. Withrow, 110 U. S. 128, 3 Sup. Ct. 523, 28 L. Ed. 90.

Even though the deed was delivered to the corporation, and it had implied authority to fill in its name as grantee, following the rule of some courts (1 Dev. on Real Estate [3d Ed.] § 457), there is no evidence from which the court could infer the corporation authorized its name to be inserted as grantee in the deed. But assuming that the corporation did authorize Canavan to authorize Bushman to fill in its name as grantee in the deed, at the time this was done the appellee had obtained title through the quitclaim deed from the Wilsons. Mabie-Lowrey Hdwre. Co. v. Ross et al. (26 N .M. 51), 189 Pac. 42. The consideration of $1 given for the quitclaim deed is sufficient consideration to pass title, unless it was made in bad faith. 2 Dev. on Real Estate (3d Ed.) §§ 813, 814. Whether or not a purely nominal consideration is a sufficient protection of a bona fide purchaser against a holder of an unrecorded deed is not necessary to determine (Ten Eyck v. Witbeck, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809); for it is our conclusion that, at least until the grantee's name had been inserted in the original deed, the title remained in the Wilsons, for the deed was ineffective until some grantee was named

therein. Allen v. Withrow, supra.; Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095, 41 L. R. A. (N. S.) 637.

The deed under which appellant claims being ineffective as a conveyance at the time of the execution and delivery of the deed to appellee, and she having no knowldge of any interests of the appellant in the property, the quitclaim deed conveyed a good title.

Courts have long disagreed over the construction of deeds executed without a grantee being named therein. Some hold that such a deed is absolutely void; others that an agent duly authorized in writing only could fill in the name of the grantee; others that parol authority could be given, but the grantee's name must be written in before delivery; others that such parol authority could be exercised after delivery; others that the delivery of such a deed would carry with it implied authority for the intended grantee to fill in his own name as grantee at any time. The most extreme cases are to the effect that when such deed is duly executed and delivered to the intended grantee, who long thereafter held the property in actual, open, adverse possession, that such possession coupled with the deed was effective in passing title, although the name of grantee was never supplied.

The following authorities contain the several views of the courts on the subject: Barden et al. v. Grace et al., 167 Ala. 453, 52 South. 425, Ann. Cas. 1912A, 537 and note at page 538; Allen v. Withrow, 110 U. S. 128, 3 Sup. Ct. 517, 28 L. Ed. 90; Montgomery v. Dresher, 90 Neb. 632, 134 N. W. 251, 38 L. R. A. (N. S.) 423 and note; Guthrie v. Field, 85 Kan. 58, 116 Pac. 217, 37 L. R. A. (N. S.) 326; McGrew v. Lamb, 60 Colo. 463, 154 Pac. 91; U. S. v. Lumber & Mfg. Co. (D. C.) 198 Fed. 893; Reed v. Reed, 98 Miss. 354, 53 So. 691, Ann. Cas. 1913A, 1194; Lafferty v. Lafferty, 42 W. Va. 789, 26 S. E. 264; Cribben v. Deal, 21 Or. 215, 27 Pac. 1047, 28 Am. St. Rep. 749; Sayles v. Queirolo, 71 Misc. Rep.

566, 130 N. Y. Supp. 806; 3 Washburn on Real Property (6th Ed.) § 2091; 2 Tiffany on Real Property, § 434 (p. 1597), also section 461 (p. 1745); Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095, 41 L. R. A. (N. S.) 637; Vanderbilt v. Vanderbilt, 54 How. Prac. 250; 1 Devlin on Real Estate (3d Ed.) § 457; Osby v. Reynolds, 260 Ill. 576, 103 N. E. 556, Ann. Cas. 1914D, 387, and note at page 390; Threadgill v. Butler, 60 Tex. 599; 8 R. C. L. p. 956.

We do not find it necessary to pass upon this question, as the deed under which appellant claims contained the name of no grantee, nor was he ever in possession of the property so far as the record shows, at the time of the execution, delivery, and recording of the quitclaim deed to appellee; and this falls short of coming within any of the rules of construction we have found.

It follows that the judgment of the district court ought to be and is affirmed, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

ON MOTION FOR REHEARING.

BRICE, District Judge. The appellant has filed a motion for rehearing, in which it is claimed that at the time the quitclaim deed was made to appellee the appellant had the equitable title to the property in controversy, which equitable title was created by or resulted from appellant's paying the Wilsons the purchase price for said premises, together with the fact of the execution of the deed by the Wilsons with the name of the grantee blank and its delivery to appellant.

Assuming that the quitclaim deed, bearing a nominal consideration, was not effective as against a prior equitable title (which question it is unnecessary to decide), then, if appellant was possessed of such equitable title at the time of the execution and delivery of the quitclaim deed by appellee, it would

appear that appellant's motion for a rehearing should be sustained.

[2] Under a parol agreement to convey land, the payment of the full purchase price without some further part performance, such as delivery of possession, the making of valuable improvements, etc., is not sufficient to vest an equitable title in the purchaser, Ward v. Stuart, 62 Tex. 333; Grindling v. Rehyl, etc., 149 Mich. 641, 113 N. W. 290, 15 L. R. A. (N. S.) 466; 5 Pomeroy, Equity Jurisprudence, § 2246; Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; Note to Houston v. Townsend, 12 Am. Dec. 120; Osborne v. Osborne, 24 N. M. 96, 172 Pac. 1039; Scheuer v. Cochem, 126 Wis. 209, 105 N. W. 573, 4 L. R. A. (N. S.) 427; 25 R. C. L. 68.

If an equitable title was vested in appellant, it must necessarily have resulted, either from the execution and delivery of the deed with the grantor's name left blank, or else on account of the payment of the purchase money, together with the execution and delivery of such deed. We are assuming, for the sake of argument, that such payment was made by appellant, and that the deed in question was delivered to it with authority, express or implied, to fill in its name as grantee, and, acting under such authority, it authorized Bushman to fill in its name. That there is authority for the contention of the appellant is found in decisions of the Texas courts:

"Here it clearly appears that the purchase money was paid to McDonough, and that the sale and conveyance was, in every respect, complete, save that the name of the grantee was not inserted in the deed. It also appears that it was intended by the parties that the title should vest in Latham at once, and he was expressly authorized by McDonough, at the time the deed was delivered, to insert his own, or any other, name in the deed as grantee. This was a power coupled with an interest vested by McDonough in Latham for the benefit of the latter, and is therefore irrevocable." Threadgill v. Butler, 60 Tex. 601.

And this case was followed by the Court of Civil Appeals of Texas in the case of Schleicher v. Runge et al., 37 S. W. 982, and Fennimore v. Ingham, 181 S. W. 513.

In the Threadgill Case, just quoted from, Latham, after a sale of the property to Butler, wrote his name in as grantee in a deed from McDonough to Latham. In that suit by the heirs of McDonough against Butler, which was brought after the deed had been properly corrected, it was held that Latham still had power to perfect the instrument by inserting his name as grantee. This case would not be authority in the case at bar because the quitclaim deed to the appellee had been executed before the insertion of the appellant's name as grantee.

The case of Schleicher et al. v. Runge et al. (Tex. Civ. App.) 37 S. W. 982, would seem to support appellant's contention, for it is held that, notwithstanding the name of the grantee was never filled in during his lifetime, his heirs were entitled to recover the land from the heirs of the grantor; and the same conclusion was reached by the Court of Civil Appeals of Texas in the case of Fennimore v. Ingham, supra. If the conclusion of the Texas Court of Civil Appeals is correct, then our original opinion is not the law. In the early days of Texas, it became a custom to transfer real property by the execution and delivery of deeds with the grantee's name in blank, with authority to write in the name of the grantee or any other name as grantee in such conveyance, and title was passed by delivery of the deed until some purchaser inserted his own name therein. It is believed that this custom affected land titles to such a degree that Texas courts took this into consideration in adopting this rule (Schleicher v. Runge, 37 S. W. 982); but we are unable to assent to the doctrine laid down in these decisions.

If the deed in question conveyed any title, it was a legal title. We have held such deed to be void, at

least until the intended grantee's name was supplied. It void, then such deed was ineffective as a conveyance; a nullity. If a nullity, title to the property was not affected by its execution and delivery. We cannot see how efficacy could be given to it by reason of the fact (if it be a fact) that appellant had paid the purchase money. The payment of the purchase money was ineffective to transfer the equitable title, and the void deed did not add to its efficacy. 2 Tiffany on Real Property (2d Ed.) § 461, p. 1145; also section 434, p. 1597; 25 R. C. L. 655; Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 366.

Our conclusion is that no equitable title was vested in appellant at the time of the execution and delivery of the quitclaim deed to appellee, for which reason the motion for rehearing should be, and is, denied.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2406. Jan. 24, 1921.]

JONES v. ROCKY CLIFF COAL MINING CO.

SYLLABUS BY THE COURT

One claiming title to real estate under a deed ineffectual as a conveyance because executed with the name of the grantee in blank, but whose name was later inserted as grantee, is burdened with the proof of explaining and justifying such change in the instrument, to give it validity as a conveyance.

Appeal from District Court, McKinley County; Raynolds, Judge.

Suit by Annie A. Jones against the Rocky Cliff Coal Mining Company and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

J. O. Seth, of Santa Fe, for appellant.

E. A. Martin, of Gallup, and McFie & Edwards, of Santa Fe, for appellee.

STATEMENT OF THE CASE.

This is a suit to quiet title in statutory form brought by Annie A. Jones, appellee, against the appellant, Rocky Cliff Coal Mining Company, and

others. The defendants with the exception of appellant made default. Appellant answered denying title in appellee, asserting title in appellant, and praying that title be quieted in it. The case was tried to the court, a judgment entered quieting title to the property in the appellee (plaintiff), from which the appellant (defendant) appeals.

STATEMENT OF THE FACTS.

It is conceded by the briefs of both parties that Elizabeth G. Kunz and husband, O. W. Kunz, were the owners of the property in question on the 16th day of June, 1916. The evidence shows them to be the common source from which both the appellant and appellee claim title. Prior to the 16th day of June, 1903, the appellee gave Canavan $650 with which to purchase said property. At this time appellee was employed by Canavan and a more or less confidential relation existed between them. Thereafter Canavan exhibited to appellee a warranty deed executed by said Elizabeth Kunz and husband purporting to convey said property, in which the name of the grantee was left out; stating to her that the deed was hers; that he would hold it for her for safe-keeping. She went immediately into actual possession of the property and resided on it until some time in 1913 or 1914, and thereafter rented it and collected the rent from tenants occupying the property holding under her until January 11, 1918; during all of which time she paid all taxes thereon.

The only evidence introduced by appellant Rocky Cliff Coal Mining Company was the deed originally taken by Canavan, which had been changed by inserting therein the name of said Rocky Cliff Coal Mining Company as grantee. This deed recited a consideration of $650. It was filed for record in February, 1917. The name of appellant as grantee was supplied at some time between the date of its being exhibited to appellee after delivery to Canavan by the grantors, and the date of its record in

1917. The appellee had no actual knowledge of any claim of appellant to the property prior to the recording of this deed. There is no testimony to show who the grantor intended should be grantee in said deed; to whom it was delivered; who, if any one, was authorized to fill in the name of grantee; the consideration, if any, paid by appellant; the reason the grantee's name was left blank; how the appellant secured possession of the deed; when or by whom its name was supplied as grantee.

In the year of 1915 the appellee and Canavan had some sort of difference in El Paso, Tex., at which time Canavan made threats from which appellee inferred that he intended to deprive her of this property. Thereupon, acting on advice of her attorney, she secured a quitclaim deed from Elizabeth G. Kunz and husband, grantors in the original deed, reciting a nominal consideration of $1. This deed was dated June 15, 1915, and was filed for record June 19, 1915, and recorded the same day.

OPINION OF THE COURT.

BRICE, District Judge (after stating the facts as above). This is a companion case to cause No. 2405 (27 N. M. 41), between the same parties and decided at this term of the court.

At the time Canavan exhibited the deed to appellee, it had been executed by the grantors named therein, but was blank as to grantee. This was in 1903. It next appears at the trial of this case many years later with the name of appellant written in as grantee. In its original state this deed was ineffectual as a conveyance (Jones v. R. C. Coal M. Co. et al., supra), and the burden was on appellant at the trial to explain and justify the change, which it did not meet. Devlin on Real Estate (3d Ed.) §§ 456, 456A, and 463; Jones v. Rocky Cliff Coal Mining Co. et al., supra.

The quitclaim deed from Elizabeth Kunz and husband to appellee was sufficient proof of title in her, as against appellant's claim.

No substantial error appearing, this cause ought to be and is affirmed, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2464. Jan. 8, 1921.]

[Rehearing Denied March 2, 1921.]

DUNN et al. v. HITE et al.

SYLLABUS BY THE COURT

1. Where A. signs a note as surety for B., payable to C., and gives a chattel mortgage on property owned by him to secure the payment of the note on which he is surety, and B. also gives a chattel mortgage on property owned by him to secure the payment of the note, and later the maturity of the note is approaching, and A. and B. enter into a written contract with C., by the terms of which it is agreed that B. is to sell all his cattle to D. at a given price per head, and payment for the same is to be applied on the note, and A. agrees that, if the money received is not sufficient to pay the note, he will give his individual note, due in six months thereafter, and secure the same by chattel mortgage, and B.'s cattle are sold under the agreement and the money is applied, and there remains a deficiency, and A. refuses to carry out the terms of the subsequent contract, **held,** that the subsequent contract did not supersede and cancel the original note and mortgage, and that C. had a right to proceed by foreclosure thereon. P. 57

2. Contracts, illegal because opposed to statute, or to public policy, or to good morals, cannot be ratified but contracts obtained by actual fraud, by undue influence, by breach of fiduciary duty, and the like may be confirmed or ratified. If a party possessing the remedial right to have a contract avoided on the ground of fraud has obtained full knowledge of all the material facts involved in the transaction, has become fully aware of its imperfection and of his own rights to impeach it, or ought and might, with reasonable diligence become so aware, and all undue influence is wholly removed, so that he can give a perfectly free consent, and he acts deliberately, and with the intention of ratifying the voidable transaction, then his confirmation is binding, and his remedial right, defensive or affirmative, is destroyed. P. 57

Appeal from District Court, Lea County; W. A. Dunn, Judge pro tem.

Suit by D. W. Dunn and another against N. W. Hite and another to foreclose a mortgage. From a judgment of foreclosure, defendant named appeals. Affirmed.

J. C. Gilbert, of Roswell, for appellant.

Reid, Hervey & Iden, of Roswell, for appellees.

OPINION OF THE COURT.

ROBERTS, C. J. On November 11, 1916, T. Lonnie Hite was indebted to the firm of Harrison & Dunn in the sum of approximately $40,000, which was represented by a note, secured by a chattel mortgage on cattle owned by the said T. Lonnie Hite. The note and mortgage had been running for some time, and had been hypothecated by Harrison & Dunn with a bank in Kansas City, Mo. T. Lonnie Hite had been indicted for larceny of cattle, and was tried and convicted, and the case was pending on appeal in the Supreme Court. The Kansas City bankers, so Harrison & Dunn represented, were dissatisfied with the security and refused to carry the paper longer. Mr. Harrison, of the firm of Harrison & Dunn, on the date above named, came to Lea county and had a conference with T. Lonnie Hite, and advised him as to the status of the paper and that they would have to have additional security in order to carry it longer. T. Lonnie Hite and Harrison went together to the residence of N. W. Hite, the father of T. Lonnie Hite, accompanied by a notary public, and from the findings of fact made by the court the following may be stated as the facts there occurring:

The situation of the son was explained to the father, and it was represented that the cattle owned by T. Lonnie Hite were amply sufficient to secure the note; that the Kansas City bankers, however, were dissatisfied, and were pressing Harrison & Dunn to take up the paper; that if N. W. Hite, the

father, would sign the note with his son, and give a separate mortgage on cattle owned by the father as additional security, Harrison & Dunn would advance to the father the sum of $1,600, which was necessary to liquidate an outstanding mortgage on the cattle, and that the father would never be called upon to pay any greater sum than the $1,600; that they would give to the father a written agreement to the effect that he would not be required to pay a further sum; that the father signed the note and mortgage, and Harrison started to write on the typewriter their agreement which they were to make, but secured the old gentleman's acquiescence in a delay in preparing it until Harrison returned to Farwell, Tex., at which time he agreed that he would write out the agreement and send it to N. W. Hite. The elder Hite agreed that Harrison should take the note and mortgage with him. Harrison never sent to the father the said agreement.

The above facts were denied by Harrison, and there was also other proof; but, as the court found the facts in accordance with the foregoing, they must be accepted. Early in May, the following year, and shortly before the maturity of the paper, which was to run for six months, Harrison & Dunn, or their agent, visited Lea county and made an agreement, in conjunction with Serris & Tyson, by which Serris & Tyson agreed to buy all the cattle owned by T. Lonnie Hite, included in the mortgage, at a given price per head, and to pay such price upon delivery, which money was to be credited on the note. The following provision of the contract is only important here:

"It is agreed between N. W. Hite and Coe Howard, agent for Harrison & Dunn, that in the event sale of the said T. L. Hite cattle is made by T. L. Hite, as provided herein, and in consideration of N. W. Hite being released from the note and mortgage held by Harrison & Dunn against said cattle, that if there is any deficiency between the amount which said cattle bring and the Harrison & Dunn loan, that the said N. W. Hite agrees to execute a good and sufficient chattel

mortgage on a sufficient number of cattle separately owned by him, to satisfactorily secure the amount of the deficiency, the note to be made bearing date June 4, 1917, due six months thereafter, interest at the rate of 10 per cent. per annum."

The T. Lonnie Hite cattle were gathered and sold according to the terms of the contract, and the amount realized was insufficient to satisfy the note and mortgage by something like $8,000; in other words, after applying the selling price of the T. Lonnie Hite cattle, the total obligation of the Hites then outstanding, including the $1,600 owed by the father, amounted to approximately $8,000. The elder Hite refused to pay this sum, and suit was brought against both the Hites to foreclose the mortgages given to secure the indebtedness. It was alleged that T. Lonnie Hite owned a very small number of cattle not applied toward the payment of the indebtedness, which it was sought to subject thereto, and to recover the balance from the father under his mortgage. From the judgment foreclosing the mortgage against N. W. Hite, he appeals.

In his answer to the complaint in the foreclosure suit, N. W. Hite set up the facts as to the execution by him of the original mortgage, and claimed that he should be relieved from liability, save and except the $1,600, on the grounds (1) that there had been no delivery of the note and mortgage, and (2) that he had been induced to enter into the contract by fraud and deceit. The appellees replied, setting up the subsequent contract, and alleging that, by reason of the recitals therein contained and the acts taken thereunder, appellant was estopped from setting up the defense. The court, from the facts, concluded as a matter of law that Hite, by his act in signing the subsequent contract, recognized the note as a subsisting obligation of his own and waived all defenses against it. There are several questions argued, but a consideration of only two is essential to a disposition of the case.

[1] First, it was argued that the second contract had the effect to completely supersede and take the place of the original note and mortgage, and that the suit should have been brought for specific performance of the second contract. This contention, however, is without merit, as a reading of the language above quoted from the contract will show. Such contract was executory, and only upon compliance therewith by the Hites could they have claimed cancellation of the original note and mortgages. If they had delivered the cattle, and N. W. Hite had executed the new note and mortgage for the deficiency, as he agreed to do, then clearly the original note and mortgage would have become of no force and effect; in other words, would have been satisfied.

The next question is as to the effect of the subsequent contract upon the original note and mortgage executed by N. W. Hite. According to the findings of the court, appellant had the right originally to have avoided, or to have set aside, the note and mortgage on the ground of fraud. Did he lose that right by the subsequent contract, in which he recognized the original note and mortgage as valid and subsisting, and his liability thereon?

[2] Appellant argues that the original contract was not subject to confirmation, in that it was illegal, because obtained in contravention of the statutes of this state; but there is no merit in this. The rule is that contracts, illegal because opposed to statute, or to public policy, or to good morals, cannot be ratified, because the ratification itself would be equally opposed to statute, good morals, or public policy; but contracts obtained by actual fraud, by undue influence, by breach of fiduciary duty, and the like, may be confirmed or ratified, because the parties alone are concerned. See note to section 964, Pom. Eq. Jur. The rule on the subject of confirma-

tion or ratification of a voidable contract is stated by Mr. Pomeroy (2 Pom. Eq. Jur. § 964) as follows:

"Where a party originally had a right of defense or of action to defeat or set aside a transaction on the ground of actual or constructive fraud, he may lose such remedial right by a subsequent confirmation, by acquiescence, and even by mere delay or laches. Wherever a confirmation would itself be subject to the same objections and disabilities as the original act, a transaction cannot be confirmed and made binding for confirmation assumes some positive, distinct action or language, which taken together with the original transaction, amounts to a valid and binding agreement. In general contracts which are void from illegality cannot be ratified and confirmed; contracts which are merely voidable because contrary to good conscience or equity may be ratified, and thus established. If the party possessing the remedial right has obtained full knowledge of all the material facts involved in the transaction, has become fully aware of its imperfection and of his own rights to impeach it, or ought, and might, with reasonable diligence, have become so aware, and all undue influence is wholly removed so that he can give a perfectly free consent, and he acts deliberately, and with the intention of ratifying the voidable transaction, then his confirmation is binding, and his remedial right, defensive or affirmative, is destroyed."

Many cases are cited in support of the text. In the case of Crooks v. Nippolt, 44 Minn. 239, 46 N. W. 349, the court in discussing the subject said:

"The invariable rule is that the right to rescind may be exercised upon discovery of the fraud; that any act of ratification of a contract, after knowledge of facts authorizing rescission, amounts to an affirmance, and terminates the right to rescind."

These authorities, it seems to us, are conclusive upon the question here presented. By the second contract N. W. Hite recognized the validity of the original note and mortgage, and his liability thereon, and the court was right in entering judgment against him.

For the reasons stated, the judgment will be affirmed; and it is so ordered.

PARKER and RAYNOLDS, JJ., concur.

[No. 2467. Feb. 11, 1921.]

STATE v. McDANIELS et al.

SYLLABUS BY THE COURT

1. Severance of trial of two or more defendants jointly indicted for the same offense is discretionary with the trial court, and its action will not be reviewed by this court unless such discretion is abused. P. 60

2. Where the court expressly limits testimony as to admissions or confessions made by one defendant to such defendant alone, it is not error to deny a separate trial to each defendant. P. 60

3. The admission or rejection of a confession in a criminal case in the first instance is for the court to determine. If, after it is admitted by the court as voluntary, a conflict of evidence arises as to its voluntary character, the question of whether voluntary or not is for the jury under proper instructions. P. 61

Appeal from District Court, Grant County; Ryan, Judge.

Jesse D. McDaniels and Harry Tellos were convicted of second degree murder, and they appeal. Affirmed.

J. H. Shettler and Alvan N. White, both of Silver City, for appellants.

H. S. Bowman, Assistant Attorney General, for the State.

OPINION OF THE COURT.

RAYNOLDS, J. The appellants, Jesse D. McDaniels and Harry Tellos, were indicted and tried jointly at the September, 1919, term of the district court for the county of Grant for the murder of Alfonso Cordova, resulting in a verdict of guilty of murder in the second degree. Motion for a new trial was overruled and appellants sentenced to the penitentiary, McDaniels for a period of 99 years and Tellos for 75 years, from which verdict and sentence the appellants appealed to this court.

The appellants rely upon two propositions for reversal of the judgment of the court below: First, that the court erred in refusing to grant the motion

of the appellant McDaniels for a severance and a separate trial; and, second, that the confession of the appellant Tellos was improperly admitted because it was not voluntary.

[1] The law in regard to both of these propositions is well settled in this state. Severance of trials where two defendants are jointly indicted is a matter of discretion of the trial court, and is not a ground for reversal unless such discretion is abused. This doctrine is laid down in the case of Territory v. Clark, 15 N. M. 35, at page 44, 99 Pac. 697, and the general proposition as above stated is found with numerous cases cited in 16 C. J. 784, § 2006, note 68.

[2] It is argued, however, by the appellant McDaniels, that a severance should have been granted him because of admissions and confessions made by Tellos involving the appellant McDaniels. This contention is without merit in this case, as the rights of McDaniel were properly safeguarded by an instruction of the court hereinafter set out. The general rule is as follows:

> "If one of several defendants jointly indicted has made admissions or confessions involving another defendant, the court may in its discretion order a separate trial, so that admissions or confessions while evidence against one may not prejudice the other, unless the prosecuting attorney expressly declares that such statements will not be offered in evidence on the trial. It is not error to deny a separate trial on such ground where the court expressly limits testimony as to the admissions or confessions made by one defendant to such defendant alone." 16 C. J. 787, § 2009.

See, also, Ball v. U. S., 163 U. S. 662, 672, 16 Sup. Ct. 1192, 41 L. Ed. 300; Commonwealth v. Bingham, 158 Mass. 169, 33 N. E. 341; People v. Hotz, 261 Ill. 239, 103 N. E. 1007, 1014.

The trial court as appears from the transcript limited the testimony of the appellant Tellos, and expressly charged the jury that such confession did

not affect the appellant McDaniels. The instruction given by the court was as follows:

"There has been introduced in evidence before you statements purporting to have been made by the defendant Harry Tellos at the time he was in the custody of the sheriff. It is for you to determine beyond a reasonable doubt whether such statements were made, and I charge you that if you believe from the evidence that such statements were made, you may not consider them in any respect as bearing upon the guilt or innocence of the defendant Jesse D. McDaniels."

[3] As to the second proposition, that the confession of the appellant Tellos was improperly admitted because it was involuntary, this court in the case of State v. Anderson, 24 N. M. 360, 367, 174 Pac. 215, 217, reviews the law in regard to confessions and makes the following statement:

"In State v. Ascarate, 21 N. M. 191, 153 Pac. 1036, we discussed, in detail, the law of confessions. We held, among other things, that the contents of confessions were inadmissible where the confession was involuntarily made; that preliminary evidence should be taken to determine whether the confession was voluntary, and, if the court then found it was voluntarily made, evidence of the contents thereof became admissible. If a conflict of evidence as to voluntary character of the confession subsequently ensued, the matter became one for the determination of the jury, under proper instructions."

See, also, U. S. v. De Amador, 6 N. M. 173, 178, 27 Pac. 488; Faulkner v. Territory 6 N. M. 464, 489, 30 Pac. 905; Territory v. Emilio, 14 N. M. 147, 156, 157, 89 Pac. 239; State v. Armijo, 18 N. M. 262, 267, 135 Pac. 555.

In the present case the court followed the law as laid down in the above quotation and, after determining that the confession was admissible, instructed the jury on the question as to whether it was voluntary or involuntary, upon which the evidence was conflicting, as follows:

"You are instructed that this statement (statement of Harry Tellos, admitting complicity in the crime), if you find it was made by the defendant Harry Tellos, may be considered by you against the defendant Harry Tellos; but the

statement will not be given any weight by you whatever if you believe from the evidence, or entertain any reasonable doubt from the evidence, that the statement was not made freely and voluntarily, or that it was induced by force, threats, or coercion, or any exterior influence that operated to deprive it of freedom."

By this instruction the court safeguarded the rights of the appellants and properly left to the jury the question of whether the confession was voluntary or involuntary. We have carefully read the entire record and have come to the conclusion that the defendants had a fair trial and that there is no ground for reversal in the case.

The judgment of the lower court is therefore affirmed, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2461. Feb. 15, 1921.]

STATE v. SANCHEZ.

SYLLABUS BY THE COURT.

1. Murder in the second degree is murder with malice, but without deliberation, and it is error to instruct that murder in the second degree is murder with malice and without deliberation and premeditation. P. 63

2. The words "premeditation" and "aforethought" are synonymous, and mean thought of beforehand. State v. Smith, 26 N. M. 482, 194 Pac. 869, followed. P. 64

Appeal from District Court, Taos County; Ryan, Judge.

Cruz Sanchez was convicted of murder in the second degree, and he appeals. Reversed and remanded, with directions.

E. R. Wright and J. J. Kenney, both of Santa Fe, and E. Y. Cheetham, of Taos, for appellant.

N. D. Meyer, Assistant Attorney General, for the State.

OPINION OF THE COURT.

RAYNOLDS, J. Cruz Sanchez, was indicted for the murder of Francisco Martinez at the June, 1918, term of the district court in and for Taos county. To this indictment he pleaded not guilty, was tried, and verdict of guilty of murder in the second degree returned by the jury. Motion for new trial was made, overruled, excepted to, and an appeal granted to this court.

At the close of the state's case defendant's counsel requested the court to withdraw from the consideration of the jury the crime of murder in the first degree. This motion was granted ,and the court instructed on murder in the second degree. No evidence was offered by the defense. From certain admissions and statements testified to have been made by accused after the killing, he apparently attempted to justify the homicide on the ground of self-defense.

[1] Appellant assigns numerous errors, only one of which need be considered in this opinion as it is controlling. It is assigned as error that the court in its instruction No. 7 gave an erroneous definition of murder in the second degree as being murder with malice aforethought, but without deliberation and premeditation. The instruction complained of, as far as material for consideration in this case, is as follows:

"* * * The court charges you that, if you believe from the evidence beyond a reasonable doubt that the defendant on the 10th day of November, 1918, or at any other time within six years next prior to the 5th day of June, 1919, did shoot off and discharge a loaded pistol towards the said Francisco Martinez, thereby inflicting in and upon the body of him, the said Francisco Martinez, a mortal wound, of which said mortal wound the said Francisco Martinez then and there died, and that such shooting, wounding, and killing was done by the defendant with malice aforethought and without deliberation and premeditation and without legal excuse or justification, then you should find the defendant guilty of murder in the second degree."

This case is controlled by the case of State v. O. W. Smith, 194 Pac. 869, decided at this term of court, 26 N. M. 482, where murder in the second degree is defined. Prior to the decision of the Smith Case no definition of murder in the second degree had been attempted in the decisions of this court except the statutory definition, which, after setting out specific instances of murder in the first degree, said that "all other kinds of murder shall be deemed murder in the second degree." In the Smith Case, supra, we held that murder in the second degree was murder with malice, but without deliberation. It will thus be seen that the instruction of the court as hereinbefore set out is erroneous in stating that murder in the second degree is murder without premeditation. Murder in the second degree is murder without deliberation, but it is murder with premeditation or with malice aforethought, the word "aforethought" being synonymous with the word "premeditation," the distinguishing feature between murder in the first degree and murder in the second degree being the presence or absence of deliberation; but the element of premeditation or aforethought is present in both degrees of the crime.

[2] The instruction is also faulty because confusing. The statement is made in the instruction that "* * * such * * * killing was done with malice aforethought and without deliberation or premeditation," etc. We have held that the words "aforethought" and "premeditation" are synonymous, and the instruction in effect tells the jury that in order to constitute murder in the second degree they must find that the killing was done with premeditated malice (malice aforethought) and without deliberation and premeditation.

There are other errors assigned, but it is not necessary to consider them as the one herein decided is controlling.

The case is therefore reversed, and remanded to the district court, with directions to award a new trial; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2465. Feb. 16, 1921.]

FIRST NAT. BANK OF ROSWELL v. BONNER et ux.

SYLLABUS BY THE COURT.

The verdict of a jury or the findings of a trial court, when supported by substantial evidence, will not be disturbed upon appeal.

Appeal from District Court, Chavez County; Brice, Judge.

Replevin by the First National Bank of Roswell against B. B. Bonner and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Tomlinson Fort, of Roswell, for appellant.

J. C. Gilbert, of Roswell, for appellees.

OPINION OF THE COURT.

RAYNOLDS, J. This is an action in replevin brought in the statutory form to recover certain live stock, including 14 head of sheep, against B. B. Bonner, and his wife, Mrs. B. B. Bonner, by the First National Bank of Roswell. The complaint alleged that the plaintiff was entitled to the immediate possession of the live stock, which were covered by a mortgage given by B. B. Bonner to it, and which he had authorized plaintiff to take over and take possession of, and which were wrongfully detained by the defendant Mrs. B. B. Bonner. The mortgage in question covered the live stock as described in the complaint, and "all the sheep, horses, cattle, owned by Bonner, whether described as above or otherwise." The defendant B. B. Bonner entered his appearance, but filed no answer. Defendant Mrs.

B. B. (Estelle) Bonner filed her separate answer denying the plaintiff's right to possession of the 14 head of sheep and the right of Bonner to mortgage them, and by way of cross-complaint alleged that she became the owner by gift of the 14 head of sheep when they were lambs, and that since that time she had been the owner and in possession of them until they were replevined by the plaintiff. She further alleged that she had been damaged by reason of the replevin suit in certain amounts, including attorney's fees, and prayed judgment in her behalf for the sheep and for attorney's fees. Upon motion of the plaintiff the count for attorney's fees was stricken. Plaintiff replied, denying the allegations of the answer. The case was tried by the court without a jury, and judgment rendered in favor of the defendant. From this judgment the plaintiff appealed. In the final judgment the court found that the sheep were the separate property of Mrs. Bonner, having been previously given to her. Requested findings of fact and conclusions of law were made by the appellant, which were refused by the court.

The appellant assigns eight errors, but by the statement in his brief says that the case resolves itself into a single question, whether or not there is sufficient evidence to support the finding of the court that the 14 head of sheep contained in the mortgage of the First National Bank were the separate property of Mrs. B. B. Bonner, or whether they were the property of her husband, either in his own right or as head of the community, and whether the evidence supports the further finding that these sheep were not subject to the mortgage of the First National Bank.

We believe that the appellant has properly stated the sole proposition upon which this case turns, that is, whether or not the sheep in question were the separate property of Mrs. B. B. Bonner. If they were her separate property and she did not join in

the mortgage, they were not thereby transferred to the appellant bank. The evidence in the case was conflicting as to the rights of the appellee in the sheep in question, but there is substantial evidence to sustain the findings of the lower court that these sheep were the separate property of the appellee, and that they had been a gift to her. We have carefully read the record in order to ascertain whether appellant's proposition that there is no substantial evidence to support this finding is, or is not, correct, and we are forced to the conclusion that there is ample evidence to support the finding. It has been often decided by this court that the findings of a trial court or the verdict of a jury, when supported by substantial evidence, will not be disturbed upon appeal. This case is governed by that principle, and we see no reason to depart from it.

The judgment below is therefore affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2446. Feb. 25, 1921.]

[Rehearing Denied March 17, 1921.]

HARRINGTON v. CHAVEZ.

SYLLABUS BY THE COURT.

1. Actual, exclusive possession of real estate is sufficient to enable the person in possession to maintain trespass against a stranger. P. 69

2. In proper cases, where the other necessary elements of equitable jurisdiction are present, injunction will lie to restrain a live stock owner from willfully or knowingly driving or turning his stock upon the premises of a prior owner. P. 70

3. The appellate court will not review the evidence further than to determine whether or not there was substantial evidence supporting the finding or verdict. P. 70

Appeal from District Court, Bernalillo County; Hickey, Judge.

Suit by Virgil P. Harrington against Gabriel Chavez. From a judgment for plaintiff, defendant appeals. Affirmed.

Rodey & Rodey, of Albuquerque, for appellant.

Marron & Wood, of Albuquerque, for appellee.

OPINION OF THE COURT.

ROBERTS, C. J. Appellee had possession of the tract of land known as the Antonio Sedillo grant, situated in Bernalillo and Valencia counties, this state. He filed a complaint in equity against the appellant to restrain him from grazing his sheep on said tract of land, and alleged that appellant had willfully, purposely, and knowingly theretofore driven some 1,600 head of sheep onto said land for the purpose of grazing thereon, and, unless restrained, would continue to do so; that the damage committed by said grazing was irreparable because of the inability on the part of the appellee to procure feed or grazing for his cattle to replace that which was destroyed by the appellant. The appellee held said land under a lease which expired on the 1st day of May, 1919. The suit was filed on March 31, 1919.

A temporary injunction was asked and granted and the case did not come on for final hearing until May, after the expiration of appellee's lease. The court found that the temporary injunction had been rightfully issued, but did not make the injunction permanent because of the fact that appellee's lease had expired. Damages in the sum of $2,000 were awarded appellee for the depasturing of his lands by appellant's sheep. From this judgment the appeal is prosecuted.

Twelve errors are assigned, but from the argument of the appellant the points really made are:

First, that appellee had no such rights in the property as would authorize him to sue for damages or protect such rights by injunction. The argument advanced to sustain this contention is that appellee

had only limited or qualified possession, and consequently did not have the right to recover damages for the depasturing of the land, or to enjoin threatened trespasses thereon.

The court found by its first finding that the appellee was in possession of the land in question, and that this finding was justified by the evidence is not seriously disputed. In fact, the objection made to this finding by the appellant in the court below was not based upon the fact that appellee was not in possession, or that the evidence failed to show that he had possession of the land, but went only to the fact that he was not entitled to the possession.

[1] The rule is thus stated in 26 R. C. L. p. 956:

"Actual exclusive possession of real estate is always sufficient to enable the person in possession to maintain trespass against a stranger. Even a person who has acquired possession illegally may maintain trespass against any one who unlawfully disturbs his possession."

And in 28 Am. & Eng. Encyc. of Law, p. 573, it is said:

"Where actual possession is sufficient to maintain trespass against mere tort-feasors, and a mere intruder cannot, plaintiff's possession being admitted or proven, show want of title in him, nor can he put the plaintiff on proof of his title. Bare possession is always sufficient to maintain trespass against one unable to show a better title than plaintiff."

See, also, 38 Cyc. 1017.

In the case of Harris v. Keehn, 25 N. M. 447, 184 Pac. 527, 7 A. L. R. 1099, this court sustained the right of a tenant in possession under an unexpired lease to recover damages from one who disturbed or deprived him of such possession.

The appellee, being in possession of the premises, had a right to recover damages for the depasturing of the land while he had such possession and to restrain future trespasses thereon; the necessary elements of equity jurisdiction being present.

[2] "In proper cases, where the other necessary elements of equitable jurisdiction are present, injunction will lie to restrain a live stock owner from willfully or knowingly driving or turning his stock upon the unenclosed premises of a private owner."

This was the holding in the case of Hill v. Winkler, 21 N. M. 5, 151 Pac. 1014, following the case of Light v. U. S., 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570, and the allegations of the complaint in this case entitling the appellee to equitable relief were well within the rule announced in the above cases.

[3] And, secondly, as to whether the evidence in the case warranted the judgment. The evidence is conceded by appellant to be conflicting, but he argues that the weight of the evidence was against the right to recover. He further contends that the rule so long established, and so consistently adhered to that the appellate court will not review the evidence further than to determine whether or not there was substantial evidence supporting the finding or verdict, is erroneous and should not be followed. Notwithstanding the able argument advanced by the appellant, we are satisfied that the rule which prevails is correct, and must decline to depart therefrom.

For the reasons stated, the judgment will be affirmed; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2483. Feb. 25, 1921.]

SANDOVAL v. CHAVEZ.

SYLLABUS BY THE COURT.

In a suit for an injunction to restrain trespass upon real estate and to recover damages for prior trespass, the action was predicated upon alleged compliance with the provisions of section 39, Code 1915, relative to marking the boundary of unfenced land and giving notice. The trial court found that the boundaries of the land of plaintiff had not been carefully and conspicuously marked, and that a willful trespass had not been proven. **Held,** that the findings were supported by substantial evidence.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Suit by Isidro Sandoval against Gabriel Chavez. Judgment for defendant, and plaintiff appeals. Affirmed.

Lawrence F. Lee, of Albuquerque, for appellant.

Rodey & Rodey, of Albuquerque, for appellee.

OPINION OF THE COURT.

ROBERTS, C. J. Appellant filed this action in the court below against appellee to restrain him from pasturing his sheep upon lands owned by the appellant in Tp. 10, R. 2 W., and one section of land in Tp. 9, R. 3 W. The complaint alleged that the appellant was the owner of all the odd-numbered sections of land in the township first named, having purchased the same from the Santa Fe railroad Company, and set forth facts to show that appellant had carefully and conspicuously marked the line or lines of the land, so that such mark could be easily seen by persons handling droves and flocks and herds of animals, and that he had served personal written notice, giving a description of such land by government surveys upon the appellee, warning him against trespass on such lands. Damages for the depasturing of the lands theretofore by appellee were sought. Appellee denied that the lands had been marked as required by said section 39, denied any willful trespass, and claimed the right to pasture the government lands in such township. Upon issue joined the case was heard by the court, and there was evidence introduced by appellant which would have warranted the relief sought, both as to the marking of the boundaries of appellant's land and as to the damages sustained. Appellee introduced evidence to show that the lands of the appellant had not been plainly and conspicuously marked and to rebut the willfullness of the trespass. At the conclusion of the evidence upon the trial, appellee asked that the judge go out with the attorneys and per-

sonally view the land and the marking lines of appellant's land. Appellant interposed no objection to the personal inspection by the judge. The judge did, in company with the attorneys on either side, visit the township in question, inspected the lands in question, and later made findings of fact, the sixth and seventh findings being as follows:

"(6) That the lands of the plaintiff, Isidro Sandoval, as set out in these findings of fact, and set forth in the complaint, were not in fact on the 5th day of November, 1918, or at the time set forth in the complaint, or at any other time material to the issues in this cause, carefully and conspicuously marked as to the lines of said lands, nor in any such manner that the marks or marking of said lands could be easily seen by the herders of the defendant or by persons handling the sheep of the defendant, but that, on the contrary, the court further finds that the plaintiff did not conspicuously mark the boundaries of his lands so that those in charge of animals for the defendant would be able to know where the lines were.

"(7) That in fact the plaintiff has failed to sustain the allegations of his complaint as to the careful and conspicuous marking thereof, and likewise the allegations thereof that the defendant or his agents knowingly, willfully, and maliciously trespassed on said lands, and, on the contrary, finds that those in charge of the flocks of the defendant could not and did not in fact know where the lines of plaintiff's lands were, so as to prevent trespassing thereon by animals under their charge in the exercise of the defendant's right to a right of way over the sections held by plaintiff in private ownership, and the court finds that neither the defendant nor his agents intentionally trespassed on plaintiff's lands."

Judgment was entered for the appellee, to review which this appeal is prosecuted.

Appellant assigns numerous errors, but in his brief asserts that there are only two questions for the consideration of this court: (1) Did and has appellee, Gabriel Chavez, the right to drive and pasture his sheep upon and over the lands of Isidro Sandoval; and (2) if Gabriel Chavez did not have such right, what is the measure of damages to which Isidro Sandoval is entitled? The answer to the first question depends upon the facts shown by the evi-

dence. This court held in the case of Gutierrez v. Montosa Sheep Co., 25 N. Mex. 540, 185 Pac. 273, that a party could recover damages for willful trespass upon his lands, notwithstanding the fact that they were neither fenced nor the boundaries thereof marked, where the evidence showed that the offending party knew the boundaries of the complaining party's land, and willfully and purposely drove his flocks upon it and depastured it. We also held in the case of Jastro v. Francis, 24 N. M. 127, 172 Pac. 1139, that a complaining party was not entitled to an injunction to restrain trespass upon odd-numbered sections in a given township, the even-numbered sections being government land, where he did not mark the boundaries of his land as required by section 39, Code 1915. In this case appellant attempted to show compliance with this section, the material portion of which reads as follows:

"Any person, persons, company or corporation who may claim the benefits of the protection of this section, shall carefully and conspicuously mark the line or lines of his or its lands, so that such mark may be easily seen by persons handling such droves, flocks or herds of animals, and shall post a notice upon such land conspicuously, warning against trespassing thereon; or shall serve personal written notice giving description of such land by government surveys or by metes and bounds."

Appellant's testimony, and that of his witnesses, was to the effect that he had placed from five to six posts to the mile along the line in a substantial manner, the posts on two sides being hewn off and the letter S put on the side next his land and the section number put on the government side, and that these posts could be easily and plainly seen, so that herders would know when they were entering upon his sections. There was evidence on the part of the appellee to the effect that the posts could not be seen because of the conditions of the country and the growth of small timber, and that the country in places was very hilly. The court, as stated, viewed the country in question and found that the lines had

not been plainly and conspicuously marked. The question as to whether in any case the court can view the premises in litigation over objection is not involved in this case, because the appellant acquiesced in the view. Nor is it material as to whether the trial judge was entitled to treat the knowledge gained by the view as independent evidence and to make his findings accordingly, as held in some of the cases (Hatton v. Gregg, 4 Cal. App. 537, 88 Pac. 592; Brown v. Colo., etc., Development Co., 47 Colo. 294, 107 Pac. 258; Weiant v. Rockland Lake Trap Co., 61 App. Div. 383, 70 N. Y. Supp. 713; Id., 174 N. Y. 509, 66 N. E. 1118), or that the impressions in such a case are not evidence, but only to be used by the court in applying the evidence adduced upon the trial, as held by some of the courts. See the cases cited in note to section 889, Thompson on Trials. For, in either view of the law, the finding made by the trial court as to the marking of the boundaries of appellant's land is sustainable. Appellant attempts to argue that there was no substantial evidence adduced upon the trial showing that the lines had not been plainly and conspicuously marked, but this contention is not supported by the record before us. As to the willfulness of the trespass, the same is also true.

If we are correct in the foregoing, the second question becomes wholly immaterial.

For the reasons stated, the judgment will be affirmed; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2488. Feb. 25, 1921.]

BRENON MFG. CO. v. MARTIN & SWEENY.

SYLLABUS BY THE COURT.

1. Covenants in a contract are to be construed to be either dependent or independent of each other according to the intention and understanding of the parties and the common sense of the case. P. 77

2. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance precedent; and so it is where no time is fixed for performance of that, which is the consideration of the money or other act. P. 78

Appeal from District Court, Chaves County; Brice, Judge.

Action by the Brenon Manufacturing Company, a copartnership consisting of Theodore O. Loveland and James S. Records, against Martin & Sweeny. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. J. Nisbet, of Roswell, for appellants.

R. D. Bowers, of Roswell, for appellees.

OPINION OF THE COURT.

ROBERTS, J. Appellants brought suit against appellees on a promissory note for $80. The note was dated November 13, 1915, and was made due and payable two months after date, but the time was extended to July 13, 1916. Appellees answered, admitting the execution of the note set forth in the complaint, but denied that they owed appellants any sum thereon. Appellees also filed a counterclaim, in which they set up that the note was given in compliance with the terms of a certain contract between the parties; copy of the contract being attached as an exhibit to the counterclaim. The contract was for the carrying on of an advertising campaign for appellees' business; they being merchants engaged in a general mercantile business at Dexter, N. M. The purpose was the formation of a club and the giving of premiums, etc. The first provision of the contract was as follows:

"On your approval of this order, deliver to me at your earliest convenience, f. o. b. factory or distributing point,

the Claxton piano, watches, silverware and advertising matter described on this and reverse side, in payment for which I herewith hand you my six notes, payable to your order, aggregating $490. If order is not approved and shipped by you the notes are to be canceled and returned to me."

This was followed by certain agreements to be performed by the Brenon Manufacturing Company not material here. Further material provisions of the contract were as follows:

"I hereby certify that my last twelve months' sales were not less than $24,000, and upon this figure my next twelve months' sales to be $28,400, and that if 1 22/27 per cent. of my gross sales does not amount to four hundred ninety dollars ($490) for the next twelve months, you will pay me the deficiency in cash, and immediately upon approval of this order send your bond for $490 to cover this agreement with me.

"To make the last above paragraph binding upon you I agree to furnish you within ten days approximately 150 names and addresses of persons whom I believe will make good club leaders and members. I agree to take the shipments promptly, carry out the trade extension campaign plan, promptly meet all notes and other obligations entered into under this agreement, keep the piano well displayed in my store, issue premium deposit checks to the amount of each purchase, and every thirty days of this contract to report to you my gross sales, and promptly furnish you all information you request to enable you to push the trade extension campaign."

Appellees alleged that appellants had failed to increase their gross sales, so that 1 22/27 per cent. of their said gross sales did not amount to $490, as they had stipulated to do; that the said percentage amounted to only $348.98, which left appellants owing them the sum of $141.02, which they set off as against the $80 note and asked judgment for the balance.

Appellants demurred to the counterclaim upon the ground that the conditions of the contract above set forth were dependent, and that the appellees had not alleged performance of the agreement on their part; i. e., that they had not alleged the prompt payment of the money represented by the note in ques-

tion. The demurrer was overruled, and a reply was filed, and the case was tried to the court, and a judgment was entered on the counterclaim.

The single question for determination in the case is whether or not the provisions of the contract were dependent or independent. The trial court held, as stated, that the provision as to the payment of the note in question was independent, and upon this theory sustained the recovery. It is to be observed that the note in question fell due some four months before the time within which appellants were required to comply with the terms and conditions of the contract on their part to be performed, and that appellants during such time had the right to sue and recover on the note. The rule of law in such cases is thus stated in Elliott on Contracts, vol. 2, § 1580:

> "When upon consideration of the whole instrument it is clear that the one party relied upon his remedy, and not upon the performance of the conditions by the other, such performance is not a condition precedent. On the other hand, where it is clear that the intention was to rely on the performance of the condition, and not on the remedy, the performance is a condition precedent."

[1] It is a general rule that covenants are to be construed to be either dependent or independent of each other, according to the intention and understanding of the parties and the common sense of the case. It is clear, when we view the notes given, the due date of the same, together with the contract of which they form a part, that the appellants were not relying upon the conditions of the contract to enforce payment of the notes, but took unto themselves the right to enforce payment by an action on the notes, and this they could do at the due date, notwithstanding that thereafter there remained covenants on their part to be performed. Upon the failure to so perform by them, appellees have only the right to recover damages, or to resort to the remedy provided by the contract; i. e., to recover

from the appellants such sum as their sales might fall below a designated amount.

[2] In a note to the case of Fordage v. Cole, 1 Saun. 320, will be found a very interesting discussion of the subject of dependent and independent covenants. The rule is thus stated:

"If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that, which is the consideration of the money or other act."

See, also, the cases of Sheeren v. Moses, 84 Ill. 448; International Text-Book Co. v. Martin, 221 Mass. 1, 108 N. E. 469.

From what has been said it necessarily follows that the judgment of the trial court was correct and will therefore be affirmed; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2521. Feb. 25, 1921.]

FIRST STATE BANK OF BERNALILLO v. STATE.

SYLLABUS BY THE COURT.

1. Where taxes are assessed against a corporation owning real and personal property for the year 1919, the fact that it winds up its affairs and ceases to do business on March 10, 1919, does not entitle the district court, under Code 1915, § 5475, to abate that portion of its taxes on its personal property from March 10th to the end of the year, and to fix and determine the amount of taxes due on its real estate for the year in question. P. 81

2. The phrases in the statute "any errors of other kinds by which any injustice may be done any taxpayer," and "any taxpayer complaining of such injustice may submit his complaint," etc., refer only to errors appearing in the assessment book by which injustice is done the taxpayer. Bond-Dillon

Co. v. Matson, Treasurer, 27 N. M. 85, 196 Pac. 323, followed. P. 82

Appeal from District Court, Sandoval County; Hickey, Judge.

Proceedings by the First State Bank of Bernalillo for abatement of taxes. Judgment for plaintiff, and the State appeals. Reversed and remanded, with instructions to dismiss.

John Venable, of Albuquerque, and O. O. Askren, Attorney General, for the State.

OPINION OF THE COURT.

RAYNOLDS, J. This is an appeal by the State Tax Commission from a judgment of the district court of Sandoval county abating the taxes of the appellee, the First State Bank of Bernalillo, for the year 1919. The appellee by its counsel on April 5, 1920, filed its petition addressed to the district attorney and presented it to the court on May 5, 1920. No evidence was taken by the court, nor offered by the appellee. After an order had been entered granting the relief prayed for, to which order appellant objected and excepted, an appeal was taken to this court.

Petition of the appellee bank alleged, in substance, that an injustice had been done it in the assessment against it for the year 1919; that it had returned its capital stock for assessment and taxation for that year at $25,000 and "the banking house and premises, in which the business of the said bank was conducted, and in which a part of the capital stock of said bank was invested"; that it had liquidated its affairs and ceased to operate on March 10, 1919; that the value of said building and premises, in which part of the capital stock is invested, is $5,000. The petition further states that the corporation should pay taxes on its capital stock from January 1, 1919, to March 10, 1919, and that from the 10th of March, 1919, the date of liquidation, it should pay

taxes upon the value of said building and premises, i. e., $5,000; that at the rate of taxation on this basis of value and proportionment petitioner is only liable for taxes in the amount of $187.21, instead of $443.75, the amount appearing on the tax roll as due for taxes. Petitioner requests that the matter be submitted to the court, and an order be asked for from the court changing and correcting said assessment to show that the total tax due from petitioner is $187.21, instead of $443.75.

On May 4, 1920, an order was entered granting this relief and further ordering the collector to accept and receive $187.21 in full payment of all taxes of petitioner for 1919, and to execute a receipt in full for the taxes for said year against said petitioner, the First State Bank of Bernalillo.

The appellant, the State Tax Commission, assigns four errors, all of which may be considered under one general assignment that the court below was without jurisdiction of the parties and the subject-matter of the action. The appellee bank, the petitioner below, evidently sought relief from its taxes for 1919 under the provisions of Code 1915, § 5475, which is as follows:

"The assessment book when delivered to the county treasurer, properly verified by the affidavit of the county assessor, and properly certified by the county commissioners, as required by law, shall constitute his authority to collect the taxes therein set forth, and he shall not be held liable for any irregularity or illegality in any of the proceedings prior to his receiving said assessment book; and the amounts to be paid as taxes as shown by said assessment book, shall not be altered, reduced or in any manner changed, except by direction of the district or Supreme Court; but this prohibition shall not extend to the correction of obvious clerical errors in names, description of property or computation of amount of taxes. If the treasurer shall discover any errors of other kinds in said assessment book by which any injustice would be done to any taxpayer, it shall be his duty to report the same to the district attorney, and any taxpayer complaining of any such injustice may submit his complaint to the district attorney; and if the district attorney is satisfied that correction or change should be made so as to avoid

injustice to the taxpayer, it shall be his duty to submit the matter to the district court and ask for an order of that court that such change or correction should be made, without cost to the taxpayer injuriously affected."

This section has been considered by the court in other cases, but the precise point here raised has never been passed upon. We held in Bond-Dillon Co. v. Matson, Treasurer, 27 N. M. 85, 196 Pac. 323, decided at this term of court, that the district court was without jurisdiction to substitute its judgment for that of the duly constituted taxing authorities on the question of the value of the taxpayer's property, when that question, after notice and hearing, had been submitted to such authorities and the value fixed by them. Here, however, the power of the court under the statute to abate, cancel, and modify the assessment rolls when the taxpayer alleges an injustice has been done him is called in question and is for decision.

[1] It will be noticed that the words "any such injustice," as used in the statute, refer to errors of other kinds in the assessment book by which any injustice would be done any taxpayer. The taxpayer complaining of any such injustice is confined to errors of other kinds (other than obvious clerical ones referred to) in the assessment book by which any injustice would be or is done. In this case no error in the assessment book by which any injustice is done petitioner is alleged or proved. The property was properly assessed for the year 1919, and the subsequent action of the corporation in discontinuing business does not relieve it from its liability to pay taxes assessed against it. In fact, the policy of the law in this state, as shown by Laws 1917, c. 112, § 36, providing that no corporation shall be dissolved until all taxes levied upon or assessed against it shall be fully paid, indicates clearly that it does not countenance the abatement of taxes of a corporation upon its dissolution. On this proposition alone—that is, the fact that there is no error in the assess-

ment book by which any injustice is done the petitioner—the case should be reversed as the petitioner fails to come within the class of taxpayer sought to be protected from injustice done him by errors in the assessment book.

[2] The question, however, of the construction of this section is one of importance, and its meaning should be settled at this time. The evident purpose of the act from its language is: First, to allow the treasurer to correct obvious clerical errors, such as clerical errors in names, description of property, or computation of the amount of taxes; second, it is made the duty of the treasurer, if he shall discover any errors of other kinds in any assessment book by which any injustice would be done any taxpayer, to report the matter to the district attorney, so that the district attorney, if satisfied, shall submit the matter to the district court, and ask for an order making the change or correction which should be made; third, it allows any taxpayer complaining of any such injustice—that is, any injustice because of any errors of other kinds than obvious clerical ones in the assessment book—to submit his complaint to the district attorney, and, if the district attorney is satisfied that the corrections should be made, it is his duty to submit the matter to the district court and ask for an order that such change or correction should be made.

Any taxpayer complaining of any such injustice may submit his complaint to the district attorney. As stated in South Springs Ranch Co. v. State Board of Equalization, 18 N. M. 531 at page 570, 139 Pac. 159, the action of the district attorney is not final in refusing or failing to submit the matter in question to the district court. His arbitrary refusal to do so amounts to legal fraud and brings the taxpayer within the class of those entitled to equitable relief. The evident purpose of the act was to prevent or prohibit the treasurer making any changes in the assessment book, except on the order of the district

or Supreme Court. He could correct or make changes for obvious clerical errors specified therein. If he discovered other errors in the book (errors other than obvious clerical ones mentioned) which would work injustice to the taxpayer, he is bound to report the matter to the district attorney and have the court correct it. The taxpayer who complained of any such injustice—i. e., an injustice that would work against him on account of the errors in the book—could also file his complaint in the district court. What was the remedy against injustice that the Legislature sought to give to the taxpayer, and from what injustice is he entitled to have relief?

The general principles applicable to taxation are thus stated by Cooley, on page 255, vol. 1, Taxation:

"It being thus manifest that there are serious and often insurmountable difficulties in the way of equal and perfectly just taxation, it remains to be seen what is the rule of law where in any particular case the inequality can be pointed out and demonstrated.

"Theoretically tax laws should be framed with a view of apportioning the burdens of government, so that each person enjoying government protection shall be required to contribute so much as his reasonable proportion and no more. The tax law which comes nearest to accomplishing this is in theory the most perfect.

"If by 'justice' equality in taxation is meant, the operations of the government must come to a stop from the absolute impossibility of fulfilling it. * * * No single tax can be apportioned so as to be exactly just, and any combination of tax is likely in individual cases to increase instead of diminishing the inequality.

"In the exercise of the power to tax, the purpose always is that a common burden shall be sustained by common contributions, regulated by some fixed general rule and apportioned by the law according to some uniform ratio of equality. So the power is not arbitrary, but fixed, and rests upon fixed principles of justice, which have for their object the protection of the taxpayer against exceptional and invidious exactions, and which are to have effect through established rules operating impartially. The apparent equality of any particular exaction cannot support it in accordance with law, nor, on the other hand, can seeming injustice of the levy actually authorized by law defeat it, provided it is made under such general rules as the wisdom

of the Legislature has determined are needful and proper for the general good. The impossibility that government should be administered even by the most conscientious rulers without injust consequences in particular cases is universally recognized, and the state is therefore considered to have performed its full duties when it has devised and established such general rules and regulations as seem calculated to reduce such consequences to the minimum."

Cooley on Taxation, vol. 1 (3d Ed.) pp. 4 and 5.

If the term "injustice" is used in its ordinary sense, the taxpayer could by presenting his petition to the court and satisfying the judge that an injustice had been done him set at naught the whole system of assessment and collection of taxes and place in the hands of the courts the final determination of all questions of fact, law, and policy regarding taxation. We do not believe that the Legislature by this section intended to thus turn over to the courts the power and authority to pass upon all these questions.

As stated in Bond-Dillon Co. v. Matson, supra, the taxpayer is entitled to relief in equity on a proper showing, but the injustice for which the statute is intended to afford a remedy is, by its terms, such injustice as is caused by any errors of other kinds (other than obvious clerical ones mentioned) discovered by the treasurer or taxpayer in said assessment book. In this case there was no such error, the assessment book showing a regular and proper assessment. The statute is intended to protect the treasurer and give him certain powers in regard to the assessment book after it comes into his hands. Errors appearing thereon which work injustice are to be corrected, but the power of the treasurer and of the courts does not, under this statute, extend to overturning, correcting, or modifying every action or step by the taxing authorities in the assessment and collection of taxes and substituting the judgment of the courts for that of the taxing authorities in all questions of fact, law, and policy in regard to taxation.

The case before us is clearly one where no such injustice was done to the petitioner through errors in the assessment book, and therefore not a case in which he was entitled to the relief prayed for and obtained.

For the reasons above stated, the case is reversed and remanded, with instructions to dismiss the petition; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2544. Feb. 25, 1921.]

BOND-DILLON CO. v. MATSON, Treasurer, et al.

SYLLABUS BY THE COURT.

1. Where it appears from the complaint of a taxpayer, seeking relief from excessive valuation of his property on the ground that an injustice has been done him under section 5475, Code 1915, that plaintiff has returned his property for taxation, that the assessor has valued it at $139,000, which valuation has been reduced to $100,000 by the board of county commissioners sitting as a board of equalization, and again raised to $139,000 by the State Tax Commission, after notice and hearing in each instance of increase or reduction, the district court cannot assess said property, substituting its judgment for that of the duly constituted taxing authorities as to the value of the plaintiff's property, and, independently and in disregard of said taxing authorities, fix the value of plaintiff's property for taxation. P. 89

2. The phrases in the statute, "any errors of other kinds by which an injustice would be done any taxpayer," and "any taxpayer complaining of such injustice may submit his complaint," etc., do not mean such alleged "injustice" as the taxpayer maintains was done him in the alleged overvaluation of his property after its value for assessment and taxation has been fixed upon notice and hearing by the duly constituted taxing authorities, but referred only to errors appearing in the assessment book by which injustice is done the taxpayer. P. 95

Appeal from District Court, Bernalillo County; Hickey, Judge.

Suit by the Bond-Dillon Company against O. A. Matson, treasurer, and another. Judgment for

plaintiff on demurrer, and defendants appeal. Reversed and remanded, with instructions.

John Venable, of Albuquerque, for appellants.

The general rule is that if one fails to follow the remedies provided by statute for review for an erroneous assessment of taxes, he can have no remedy in the courts unless the defect is jurisdictional. Cooley, vol. 2, page 1387, 3rd Edition.

Altschul v. Gittings, 80 Fed. Rep. 200; Price v. Kramer, 4 Colo. 546; Barnett v. Jaynes, 26 Colo. 279; Peninsular Iron, etc., Co. v. Crystal Falls T'p, 60 Mich. 510; Meade v. Haines, 81 Mich. 261.

The statutory remedy is exclusive. It is supposed to be adequate to all the requirements of justice, and it is a person's own folly if he fails to avail himself of it. Cooley on Taxation, vol. 2, page 1389, 3rd Edition.

Emery v. Bradford, 29 Cal. pp. 85-87; Republican Life Insurance Co. v. Pollak, 75 Ill. 292; Chicago, etc., R. Co. v. Cole, 75 Ill. 591; Patterson v. Baumer, 43 Iowa 477.

The remedies provided by statute for the relief of the tax payer from injustice in his assessments are special proceedings provided by law for such relief and the taxpayer must follow the course provided by statute for his relief before the court can acquire jurisdiction of the subject-matter under the statute. Cooley on Taxation, vol. 2, Third Edition 1379.

State v. Bishop, 34 N. J. L. 45; State v. Parker, 34 N. J. L. 49; Parsons v. Durham, 70 N. H. 44; page 1079, vol. 37 of Cyc.

For excessive assessments where fraud is not charged there can, generally speaking, be no relief in equity. The remedy must be such as the statute has given.

Hazard v. O'Bannon, 38 Fed. Rep. 220; Washington Market Co. v. District of Columbia, 4 Mackey 416; New York & C. G., etc., Exchange v. Gleason,

121 Ill. 502; People v. Ashley Lots, 122 Ill. 279; La Salle & P. H. & D. R. G. Co. v. Donoghue, 127 Ill. 27.

The judgment of the State Tax Commission in such cases is conclusive if they keep within their jurisdiction, although, if fraud is charged, there may be a remedy in equity. Cooley, vol. 2, pages 1382-1385, 3rd Edition.

Central Pac. R. Co. v. Placer County, 43 Cal. 365; People v. Ashley, 46 Cal. 523; People v. San Francisco Supervisors, 50 Cal. 228; Farmers' & M. Bank v. Board of Equal., 97 Cal. 318; Girvin v. Simon, 116 Cal. 604; Ottawa Glass Co. v. McCaleb, 81 Ill. 556; Union Trust Co. v. Weber, 96 Ill. 346; East St. Louis Connecting R. Co. v. People, 119 Ill. 182; Illinois & St. I. R. & C. Co. v. Stookey, 122 Ill. 358; 133 Ind. 513; Ward v. Beale, 91 Ky. 60; Bath v. Whitmore, 79 Me. 182; McDonald v. Escanaba, 62 Mich. 555; State v. Hynes, 82 Minn. 34.

The mode of reasoning by which assessing boards have reached their conclusions is not reviewable by the courts. Republic Life Insurance Co. v. Pollak, 75 Ill. 292; People v. Big Muddy and Iron Co., 89 Ill. 116; English v. The People, 96 Ill. 556; The New York & C. Grain and Stock Exchange v. Gleason, 121 Ill. 502.

Laurence F. Lee, of Albuquerque, for appellee.

The authority to grant relief from unjust and unconscionable assessments is not exclusive to the taxing boards or commissions. Section 5475, of the 1915 Code.

This statute and this portion of the statute is in full force and effect. The tax law of 1917 and 1919 in no way abrogated this portion of the statute, which fact is recognized by the provision in Section 2, Chapter 101 of the Laws of 1919, where the right of an appeal is granted from the district court to the Supreme Court in actions instituted under this section. As is known, it was formerly held by this court that there was no right of appeal from a de-

cision of the district court upon a proceeding instituted under Section 5475. Those decisions themselves recognize the right of an aggrieved taxpayer to proceed in the district court; then the 1919 Law recognized this right and the necessity of an appeal and passed Chapter 101 of the 1919 Laws in order to grant.

In cases appellants cite constitutional provisions took matters out of jurisdiction of courts.

OPINION OF THE COURT.

RAYNOLDS, J. This is an appeal by O. A. Matson, treasurer and ex officio collector of Bernalillo county, and the State Tax Commission, from an order overruling defendant's demurrer and a judgment of the district court of Bernalillo county abating and canceling certain taxes of the appellee for the year 1919. The appellee filed its complaint in the district court of Bernalillo county against said Matson on January 21, 1920, alleging, among other things, that it was engaged in the wholesale grocery business throughout the years 1918 and 1919; was the owner of certain personal property consisting principally of its stock of groceries; that it had returned all of said personal property in accordance with law for taxation in Bernalillo county, but that subsequently the assessor of said county assessed appellee's personal property for taxation at a valuation greatly in excess of its true value; that appellee appealed to the board of county commissioners of said county as a board of equalization, asking that the assessment be reduced, which relief the board granted. The complaint further stated that the appeal was taken from this action of the board of county commissioners, acting as a board of equalization, to the State Tax Commission, and that the State Tax Commission reversed the action of the board of equalization of the county and assessed appellee's property at the value of $139,000, which

is the same valuation as appears on the books of the county treasurer. Appellee alleged:

"That the value of all property owned by it during 1919, as fixed as is in such cases provided by law, is $100,000, and that the assessment appearing on the books of the treasurer for 1919 as $139,000 is excessive and unjust."

The appellee further alleged in its complaint that it paid on account of the 1919 taxes the sum of $2,000, being the first half of the amount due on a valuation of $100,000, and it prayed judgment that the assessment of its property for the year 1919 be fixed at $100,000; that the amount of the assessment in addition thereto be canceled as illegal and void; and that the treasurer be ordered to correct the tax rolls of the county in accordance with such judgment.

To this complaint, the appellant, treasurer, demurred on various grounds, among which were that the complaint filed herein does not state facts sufficient to constitute a cause of action under the laws of the State of New Mexico; and that under the laws of the State of New Mexico the court is without jurisdiction to hear the complaint of the plaintiff. The demurrer was overruled. The defendant, appellant, refusing to plead further, the case went to trial before the court upon the complaint and evidence submitted. After hearing the evidence the court rendered judgment granting the relief asked for by the appellee, to which order and judgment defendant objected and excepted, prayed and was granted an appeal to this court.

[1] The sole question raised in this case is whether or not the district court had jurisdiction in a case of this kind. It appears that the only ground for relief was an alleged excessive valuation of the stock which the appellee had on hand. The appellee had returned his property at the valuation of $100,000. The assessor had raised the valuation of his stock to $139,000. The board of county commis-

sioners, sitting as a board of equalization, had reduced it to $100,000. On appeal, the State Commission had again raised it to $139,000. Suit was instituted in the district court, and the court below, after hearing the evidence, again reduced the assessment to $100,000. No fraud, discrimination, oppression, illegality, or other ground for equitable relief is urged; the sole proposition being that the assessor and the State Tax Commission valued appellee's property at an excessive amount and at a greater value than the appellee itself had returned it for taxation, and "that the value of all the property owned by it during 1919, as fixed as is in such cases provided by law, is $100,000, and that the assessment appearing on the books of the treasurer of said county for 1919 is excessive and unjust."

The general principles involved and the jurisdiction of the courts in matter of this kind are stated by Cooley as follows:

"The courts either of common law or of equity are powerless to give relief against erroneous judgments of assessing bodies, except as they may be especially empowered by law to do so. This principle is applicable to statutory boards of equalization which are only assessing boards with certain appellate powers, but whose action, if they keep within their jurisdiction, is conclusive except as otherwise provided by law." Cooley on Taxation (3d Ed.) vol. 2, p. 1382.

This suit is brought under Code 1915, § 5475. The part of said section which is material to this case is as follows:

"If the treasurer shall discover any errors of other kinds in said assessment book by which any injustice would be done to any taxpayer, it shall be his duty to report the same to the district attorney, and any taxpayer complaining of any such injustice may submit his complaint to the district attorney; and if the district attorney is satisfied that correction or change should be made so as to avoid injustice to the taxpayer, it shall be his duty to submit the matter to the district court and ask for an order of that court that such change or correction should be made, without cost to the taxpayer injuriously affected."

The appellee, in support of the jurisdiction of the court in a case of this kind, cites and relies upon the case of South Spring Ranch Co. v. Board of Equalization, 18 N. M. 531, at page 569, 139 Pac. 159, at page 173, where the court refers to this statute, namely, Laws 1913, c. 84, § 23, being Code 1915, § 5475, where the following language is used:

"The word 'injustice' would seem to be the broadest term which the Legislature could have employed in this connection. Any case of overvaluation of the property of the taxpayer would seem clearly to be an injustice within the meaning of the act. It is to be further noticed that an injustice which is discovered after the tax rolls come into the hands of the collector is to be relieved against, under the terms of the section. Therefore, it would seem clear that the fact that the state board had increased the assessed valuation of property of any particular class would not deprive any taxpayer in that class from seeking the relief provided for. In other words, the action of the State Board of Equalization is not final as against the claims of any taxpayer in the state. The section requires the taxpayer to submit any claim of injustice to the district attorney of the proper county, and if the district attorney is satisfied that injustice has been done to the taxpayer, it is his duty to submit the matter to the district court and ask for an order correcting the injustice without cost to the taxpayer. In this way relief is afforded to each individual taxpayer, without any cost or expense to him. If he can show that, by reason of the action taken by the state board, he is compelled to pay taxes upon more than one-third of the actual value of his property, it is to be assumed that the district attorney will promptly present the matter to the district court and secure the relief to which the taxpayer is entitled. It is true that the section provides that the district attorney must be satisfied of the injustice before he will be required to make application to the district court. This provision may make the district attorney one of the taxing officers of the state, and there seems to be no appeal from his refusal to present the complaint of the taxpayer to the district court. It does not follow, however, that his judgment upon the matter is necessarily final. To tax the citizen on more than one-third of the actual value of his property is illegal, under the taxing laws of this state. If it is illegal, and the taxpayer resorts to all the means provided by law to correct the injustice, it would seem that the courts necessarily still remain open to him for redress. The taxpayer who has been wronged by overvaluation of his property, and who has had no notice of the action which results in injury, and who has applied to the district attorney for

relief without avail, certainly has the right to relief in the courts. If the taxpayer presents to the district attorney substantial evidence of the injustice complained of, and the district attorney refuses to act, his arbitrary refusal to submit the matter to the court would amount to legal fraud. This would bring the taxpayer clearly within the right to equitable relief against the excessive portion of the tax. 37 Cyc. 1263; 2 Cooley on Taxation (3d Ed.) 1459; Merrill v. Humphrey; 24 Mich. 170; County of Cochise v. Copper Queen, etc., Co., 8 Ariz. 221, 71 Pac. 946; Gove v. Tacoma, 26 Wash. 474, 67 Pac. 261."

The question involved in this case came before the court on certiorari challenging the jurisdiction of the State Board of Equalization to equalize by classes throughout the state, both between the classes of property in the same county and between counties throughout the state, and the right of the individual taxpayer in cases of excessive assessments was not involved. What was said in regard to the individual taxpayer was by way of explanation and illustration to meet the contention advanced that the action of the State Board was a denial of due process of law to the taxpayer. This appears from the language of the court on page 570 of 18 N. M., on page 173 of 139 Pac:

"It is not our purpose to discuss critically or in detail in this case the remedies of taxpayers against unequal or excessive assessments, because the question is not involved and cannot be decided. What has been said is for the purpose of demonstrating that the argument offered against the action of the state board is not well founded."

Again on page 572 of 18 N. M., on page 174 of 139 Pac.:

"The power to deal with individuals would seem to be conferred exclusively on the county taxing officers by the various provisions of the statute, except in cases of direct appeal to the State Board. But we cannot decide this question because it is not involved. We simply decide that petitioners are not in a position to raise the question."

In the case of Ute Creek Ranch Co. v. McBride, 20 N. M. 377, at page 380, 150 Pac. 52, at page 53, discrimination against the taxpayer is admitted by

the pleadings, and it is further admitted that the taxpayer was without legal remedy, having no notice of the increase in his assessment, as shown by the following quotation:

"In this case it is apparent that these plaintiffs had no legal or statutory remedy, they having no notice of the proposed action of the State Board of Equalization, and no notice of the action until after the alleged injury had been inflicted."

In State v. Superior Lumber & Mill Co., 23 N. M. 606, at 613, 170 Pac. 58, overvaluation of the taxpayer's property is admitted by the pleadings, and the case of South Springs Ranch Co. v. Board of Equalization, supra, is followed. In State v. Superior Lumber & Mill Co. the court denied the state the right to collect taxes in excess of the value at which plaintiff had returned his property. The language used in the opinion at page 609 of 23 N. M., at page 59 of 170 Pac., shows conclusively that no notice or opportunity to be heard upon this change or increase was given the taxpayer, and the case differs materially from the present one. In the present case it is admitted by the pleadings that all the steps which are alleged in the complaint have been taken by the appellee to correct his assessment. The contention is made that when such steps have been taken, even though it is admitted that the valuation of the property is excessive, nevertheless the court is without power to give the plaintiff relief. This particular point was not raised or passed upon in any of the previous cases. It involves the construction of this statute and the question as to whether or not the district court can substitute its judgment as to the valuation of property for the judgment of the duly constituted taxing authorities. When the question of the value of plaintiff's property has been determined adversely to him by the assessor and the State Tax Commission and in his favor by the board of county commissioners as a board of equalization, after notice and hearing at

each of the proceedings, can he then ask relief of the district court and have it determine, as an original matter of fact, the value of his property for taxation?

We are of the opinion that the jurisdiction of the district court under the above statute does not extend to cases of this kind. The court could, as in the Superior Lumber Mill Case, deny the state the right to collect taxes on a valuation admitted to be excessive where the overvaluation was not discovered until after the tax rolls had come into the hands of the collector and it appeared that the valuation had been fixed without notice or hearing by the taxing authorities. It could, as in the case of State v. McBride, supra, restrain the action of the taxing authorities in case where discrimination against taxpayers is admitted; but in our opinion it could not set aside the findings of the assessor and the State Tax Commission and independently determine that their decisions in matters of fact were wrong and fix the value of a taxpayer's property after that matter, upon hearing, had been determined by the taxing authorities. In other words, the district court does not make assessments and fix values as was done in this case. Not only was the value of the appellee's property fixed by the court at certain value, but the determination of that question by the taxing authorities was in effect set aside and held for naught, and the treasurer was ordered to correct his books and receive only the amount due as taxes without interest or penalties on the valuation fixed by the court.

There is language used in the case of State v. Superior Lumber & Mill Co., 23 N. M. 606, 170 Pac. 58, which would seem to imply that the taxpayer may have relief from any injustice discovered on the assessment book after it comes into the hands of the collector, but that case is distinguished from the present one as hereinbefore pointed out. It cannot

be successfully maintained that the Legislature, after providing an elaborate system of assessment and the ascertainment upon notice and hearing of property values, intended by this statute to leave to the judgment of the district and Supreme Courts the final determination of whether or not an injustice in the broad sense of the term had been done the taxpayer and to grant him relief if the court should find such injustice had been done. The injustice for which the taxpayer is entitled to relief is not an injustice caused by errors of judgment of the taxing authorities in fixing an alleged overvaluation on his property when, as here, he has had notice and a hearing on the question of the determination of the value of said property.

[2] The taxpayer is entitled to relief in equity on a proper showing, but the injustice for which the statute is intended to give relief is, by its terms, such injustice as is caused by any errors of other kinds (other than the obvious clerical ones) discovered by the treasurer or taxpayer in said assessment book and does not contemplate such overvaluation as is alleged as a ground for relief in this case. The statute is intended to protect the treasurer and give him certain powers over the assessment books when they come into his hands. Errors appearing thereon which work injustice are to be corrected, but the power of the treasurer and the courts under this statute does not extend to the overturning, correcting, or modifying every action or step taken by the taxing authorities in the assessment and collection of taxes and substituting the judgment of the courts for that of the taxing authorities in all questions of fact, law, and policy in regard to taxation.

For reasons above set forth, the case is reversed and remanded, with instructions to sustain the demurrer and dismiss the complaint, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2473. March 1, 1921.]

PARK v. MILLIGAN.

SYLLABUS BY THE COURT.

1. Where, in a contract for the sale of real estate, the deed is to be delivered on payment of the price in full, and there is no provision or agreement in regard to possession of the property during the performance of the contract the vendee has gone into possession with the consent or acquiescence of the vendor, a tender of a deed to the property and a demand for performance by the vendor, in the absence of special circumstances, are prerequisites in order to successfully maintain ejectment against the vendee. P. 100

2. Questions, points, issues, and matters not raised, presented, or passed on in the court below are not reviewable on appeal. P. 98

Appeal from District Court, Santa Fe County; Holloman, Judge.

Ejectment by E. Y. Park against M. M. Milligan. Judgment for defendant, and plaintiff appeals. Affirmed.

A. B. Renehan and Carl H. Gilbert, both of Santa Fe, for appellant.

J. H. Crist, of Santa Fe, for appellee.

OPINION OF THE COURT.

RAYNOLDS, J. This is a suit in ejectment brought by the appellant, Park, against the appellee, Milligan, for a certain lot situated in the town of Stanley, N. M. From a judgment in favor of appellee, the appellant, plaintiff below, appeals to this court.

On August 14, 1915, appellant and appellee entered into a written agreement which is as follows:

"This agreement made this fourteenth day of August, one thousand nine hundred and fifteen, between E. Y. Park of Stanley, New Mexico, party of the first part, and Doctor M. M. Milligan, of Stanley, New Mexico, party of the second part, witness:

"Party of the first part agrees to sell to party of the second part, for one hundred twenty-five dollars, lot number twelve (12) block ten (10) with all buildings, improvements, etc., thereon, in the Tarr & Douglas addition to the town site

of Stanley, Santa Fe county, N. M. Deed to be delivered upon payment in full of price.

"Party of second part agrees to pay twenty dollars in cash, receipt of which is hereby acknowledged, and to pay the balance of one hundred and five dollars within one year from above date. [Signed] E. Y. Park.

"[Signed] M. M. Milligan."

The $20 receipted for in the above agreement was paid on its execution. A few weeks thereafter the appellant left the state of New Mexico and remained away until July, 1917. In the meantime the appellee had taken possession of the property, although there was no stipulation in the contract whereby this right was granted. The appellant, however, left the keys to the house upon the property with the postmaster and receipt for $30. During the absence of the appellant the appellee paid the $30 on the purchase price by leaving it with the postmaster at Stanley; it having been agreed between the parties before appellant departed that the payment should be made in this manner. No further payments were made during the year. In October, 1916, several months after the expiration of the year provided for in the contract, the appellee wrote a letter to appellant at Savannah, Ga., but this letter was never received by the appellant. In the letter the appellee stated that he would make arrangements for a payment with the First National Bank of Santa Fe, if that was satisfactory to the appellant. In July, 1917, appellant returned to New Mexico, and finding the appellee in possession of the property demanded that he vacate, and told him (appellee) that inasmuch as the purchase price had not been paid, the contract would be canceled. Appellee made no response to the demand to vacate and made no effort to pay the balance due on the contract; nor did appellant tender a deed and demand performance. About three weeks later, after consulting his lawyer, appellee tendered the balance of the purchase price of the property, which tender was refused; appellant stating that he had already

declared the contract forfeited. Some time later the appellant again told the appellee that he had reconsidered and would accept the money tendered to make the conveyance. Appellee at this time stated that he did not have the money and could not pay. Subsequently, the parties met at Santa Fe, and a conversation took place in which the appellant offered to adjust the matter, but appellee again stated that he did not have the money at that time. On January 5, 1918, appellee having failed to pay for the land, and refused to vacate, appellant served formal notice to vacate, which was disregarded, and 15 months thereafter, April, 1919, suit in ejectment was started.

After trial before the court without a jury, judgment was rendered against the appellant and this appeal taken.

[2] Appellant assigns 21 errors, most of which relate to findings of fact upon which there is a conflict of evidence, and they need not be considered, both on this account and because the appellant in his brief states that there is practically no dispute concerning the facts and a purely legal question is raised by this appeal. The appellant contends that, inasmuch as the contract of sale did not give the appellee any right to possession pending the consummation thereof, the only way in which the contract would be available to the appellee by way of defense to an ejectment suit would be by showing that the appellee had fully complied with its terms and was at the time of the institution of the suit entitled to specific performance of the contract. Appellant further contends that inasmuch as no right of possession was given by the contract, the appellee was either a trespasser or at best a licensee at the time he originally took possession of the property, and that in any event his holding become tortious on the demand of the appellant for possession. The fundamental error with this argument is that the action was tried below on the theory that appellee had

rightfully gone into possession and the question as to his being a trespasser or licensee was never raised by the pleadings or evidence, or considered by the court. This is shown by the record. The appellant did not question the right of appellee to possession, except on the ground that appellee had not performed his contract within the time limited. Appellant had also declared the contract forfeited, but the right of possession by the appellee under the contract was not raised. The question below concerned the performance of the terms of the contract by the parties. Appellant now seeks to shift his ground and maintain that as the contract gave no right to possession to appellee, he (the appellee) was entitled to none, and was either a trespasser or licensee, and that ejectment will lie against him. The appellant cannot thus shift his ground and raise questions which were not presented to the trial court, as has been often decided. Questions, points, issues, and matters which are not jurisdictional, not raised, presented, or passed upon below, are not reviewable on appeal. Chambers v. Bessent, 17 N. M. 501, 134 Pac. 237; Medler v. Childers, 17 N. M. 530, 131 Pac. 490; Childers v. Lahann, 19 N. M. 301, 142 Pac. 924; State v. Chaves, 19 N. M. 575, 145 Pac. 250; State v. Klasner, 19 N. M. 474, 145 Pac. 679, Ann. Cas. 1917D, 824; Fullen v. Fullen, 21 N. M. 212, 153 Pac. 294; State v. Ascarate, 21 N. M. 191 153 Pac. 1036; Murry v. Belmore, 21 N. M. 313, 154 Pac. 705; In re Dexter-Greenfield Drainage Dist., 21 N. M. 286, 154 Pac. 382; State v. Graves, 21 N. M. 556, 157 Pac. 160; Clark v. Queens Ins. Co., 22 N. M. 368, 163 Pac. 371; State ex rel. Baca v. Board, 22 N. M. 502, 165 Pac. 213; State v. Montes, 22 N. M. 530, 165 Pac. 797; Hopkins v. Norton, 23 N. M. 187, 167 Pac. 425; Maxwell v. Page, 23 N. M. 356, 168 Pac. 492, 5 A. L. R. 155; Morril v. Masten, 23 N. M. 563, 170 Pac. 45; Morstad v. A. T. & S. F. Ry. Co., 23 N. M. 663, 170 Pac. 886; Woods v. Fambrough, 24 N. M. 488, 174 Pac. 996; James v. Bd.

of County Com., 24 N. M. 509, 174 Pac. 1001; Palmer v. Farmington, 25 N. M. 145, 179 Pac. 227; Biggs Tie & Pole Co. v. Arlington, L. Co., 25 N. M. 613, 186 Pac. 449; Sandoval v. Unknown Heirs, 25 N. M. 536, 185 Pac. 282; Kelly v. La Cueva Ranch Co., 25 N. M. 674, 187 Pac. 547; Prichard v. Fulmer, 25 N. M. 452, 184 Pac. 529; Alvarado M. & M. Co. v. Warnock, 25 N. M. 694, 187 Pac. 542; Albuquerque & Cerrillos Coal Co., v. Lermuseaux, 25 N. M. 686, 187 Pac. 560.

[1] The trial court apparently took the view that the negotiations had not been closed at the time the suit was instituted; that by the action of the parties the year in which the contract was to have been performed was extended from time to time, and that up to the date when the suit was instituted appellant had not tendered a deed and demanded performance by the appellee. This view is borne out by the record and by the statement of facts hereinbefore made. At the time the appellant instituted his suit, he was not, according to the court's findings, the owner in fee simple and entitled to possession of the lot in question. The contract of purchase was outstanding, and the appellee was in possession of the property under a construction of the contract upon which both parties had acted. At no time had the appellant put the appellee in default by tender of a deed and a demand for performance. The possession by the appellee from the inception of the contract had been acquiesced in by the appellant. Both parties were never ready and willing to perform the contract at the same time, and the negotiations had extended the time of performance and kept the contract in force up to the date of this action. Appellant also testified that he desired the return of the property; that he did not care for the performance of the contract and the money which was due him under it.

Under these circumstances, we think the trial properly decided that appellant was in no position

to bring ejectment and that his action should fail. It is an elementary proposition of law, and admitted by both sides to this controversy, that the plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary. The plaintiff, the appellant here, made no showing to sustain the allegations in his complaint in ejectment, i. e., that he was the owner in fee and entitled to the possession of the lot in question.

Finding no error in the record, the decision is therefore affirmed, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2481. March 2, 1921.]

NEW MEXICO REALTY CO. v. NORMENT et al.

SYLLABUS BY THE COURT.

Under Laws 1899, c. 22, § 25, no sale or title to any property sold at tax sale, in accordance with the act, shall be invalidated by any proceedings, except upon the ground that the taxes had been paid before sale, or the property was not subject to taxation. Maxwell v. Page, 23 N. M. 356, 168 Pac. 492, 5 A. L. R. 155, followed.

Appeal from District Court, Santa Fe County; Holloman, Judge.

Suit by the New Mexico Realty Company against J. W. Norment and others to quiet title. Decree for defendants, and complainant appeals. Affirmed.

F. W. Clancy, of Santa Fe, for appellant.

A. M. Edwards, of Santa Fe, for appellee.

OPINION OF THE COURT.

RAYNOLDS, J. This was a suit to quiet title to six lots in the city of Santa Fe, Nos. 125 to 130, both inclusive, in what is known as the Valuable Building Lots addition, of which plaintiff claimed to be the owner. The defendants Norment and Security Investment & Development Company appeared and answered, setting up title acquired by Norment from a tax sale deed made February 11, 1911, upon a tax certificate sold to the county April 7, 1906, for

the delinquent taxes for the year 1904, and transfer of that title to his codefendant and the subsequent transfer by the company to Ed Hesch. Hesch afterwards intervened, claimed the lots, and the court decided in his favor and entered judgment that he was the owner of the lots. From said judgment this appeal is taken.

The facts are not disputed, being matters of record. The trial court refused to make certain findings for the appellant on the ground that they were immaterial under the view he took of the case. Appellant offered evidence and proved that on July 15, 1903, Oliver E. Cromwell and wife conveyed lots 125 to 130, both inclusive, to one Charles Seymour, and on May 25, 1905, Charles Seymour conveyed the lots to the appellant. On May 25, 1882, one E. C. Manning conveyed to T. B. Meyers lots 66 and 201 of the Valuable Building Lots addition, and on December 31, 1884, Meyers reconveyed the two lots to Manning. It appears Meyers never owned any other lots of the Valuable Building Lots addition, nor did any other person by the name of Myers own any of said lots. In the year 1899 to 1902, both inclusive, entries on the tax rolls show that lots 66 and 200 were assessed to J. B. Meyers at a valuation of $450, but on the tax rolls of 1903 and 1904 there were assessments to J. B. Myers of lots 66 to 200 at a valuation of $450. It seems that the name of J. B. Myers on the tax roll was erroneous and T. B. Myers was intended. After Myers reconveyed the lots to Manning, he made no return of them for the purpose of taxation, and the assessments from 1899 to 1904 were made by the county assessor against lots 66 and 200, from 1899 to and including 1902, and lots 66 to 200 on the tax roll of 1903 and 1904.

All the foregoing facts were shown by the evidence and were embodied in findings asked by the plaintiff, appellant, but were refused by the court as before stated.

The appellant assigns 18 errors, which deal entirely with the refusal of the court to make findings of fact requested by the appellant. The appellant contends that the assessment for 1904 was erroneous and invalid, and that no title derived from tax sale thereunder can have any legal value because said assessment was due to a clerical error in the office of the assessor. The court below, as shown by the record, took the view that this case was controlled by Maxwell v. Page, 23 N. M. 356, 168 Pac. 492, 5 A. L. R. 155, where chapter 22, section 25, of the Laws of 1899, in regard to attacking the title of property sold at tax sale, is considered. Section 25 of the act is as follows:

"No bill of review or other action attacking the title to any property sold at tax sale in accordance with this act shall be entertained by any court, nor shall such sale or title be invalidated by any proceedings except upon the ground that the taxes * * * had been paid before the sale, or that the property was not subject to taxation."

In the present case neither of these defenses given by the statute is available to the appellant. The taxes had not been paid before the sale, and it is admitted that the property was subject to taxation. The case is therefore clearly within Maxwell v. Page, and we see no reason to depart from the law laid down in that case.

The decision of the lower court is therefore affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2541. March 18, 1921.]

TIMM et al. v. WHITE.
SAME v. EARICKSON et al.

SYLLABUS BY THE COURT.

Although it is improper under the statute for the liability of the parties on a cost bond to be limited by any stipulated amount, yet where a bond limiting the liability to a stipulated amount has been approved by the clerk of the district court,

the appeal will not be dismissed, but the appellee's remedy is to move in this court for a proper bond.

Appeal from District Court, De Baca County; Brice, Judge.

Actions by H. F. Timm and another against John F. White and against A. J. Earickson and others. On motion to dismiss appeal. Motion denied.

E. F. Faircloth, of Santa Rosa, for appellants.

Chas. F. Fishback and Harold Nuzum, both of Ft. Sumner, and Patton & Hatch and R. E. Rowells, all of Clovis, for appellees.

OPINION OF THE COURT.

ROBERTS, C. J. In this case appellant filed a cost bond with the clerk of the district court, which was approved. The penalty in the bond was filed at $100. Appellees moved to dismiss the appeal because no sufficient bond was given; it being their contention that it is improper under the statute to limit the liability under such a bond, because the appellant is required to execute a bond to pay all costs which may be assessed against him. Appellees are correct in their contention, and the bond is improper in this regard, but it met with the approval of the clerk of the district court, and we held in the case of Bank of Commerce v. Duckworth, 26 N. M. 437, 194 Pac. 367:

"The cost bond referred to is to be approved by the clerk, and we believe that, where appellant has tendered a cost bond which has been so approved, it would be going beyond the letter of the statute to hold that an appellant must tender, not only a bond which will be approved by the clerk, but one which will withstand the judicial scrutiny as to form and sureties."

Appellees' remedy is to move in this court for a new bond. The motion to dismiss the appeal will be denied; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2485. March 2, 1921.]

[Rehearing Denied March 23, 1921.]

In re CARDONER'S ESTATE. BUJAC v. WILSON.

SYLLABUS BY THE COURT.

A claim against the estate of a deceased person by an attorney for a retainer, alleged to have been agreed to between the decedent, in her lifetime, and the attorney, cannot be maintained upon the uncorroborated testimony of the attorney, but, under the requirements of section 2175, Code 1915, there must be produced some independent evidence which in and of itself tends to corroborate the claimant as to the making of the agreement for the retainer.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Proceeding by E. P. Bujac for the allowance of a claim against the estate of Aline Mathilde Julia Bouvard Cardoner, deceased, opposed by Joseph R. Wilson, as executor. Judgment for claimant, and the executor appeals. Reversed and remanded, with directions.

A. B. McMillen, of Albuquerque, for appellant.

Marron & Wood, of Albuquerque, for appellee.

OPINION OF THE COURT.

PARKER, J. A claim was filed against the estate of the deceased by the appellee for the sum of $3,692.85. The proceeding resulted in judgment allowing the claim for the sum of $2,952.85. In order to justify the allowance of this claim against the estate it was necessary for the court to find that appellee had been employed by the decedent in her lifetime at an agreed retainer of $3,500 and expenses in the prosecution of certain litigation which she had both in this country and in Spain. The testimony by the appellee was that this contract was oral, and that no one else was present at the time of the making of the contract. He sought to corroborate his testimony to meet the requirement of sec-

tion 2175, Code 1915, which requires corroboration in case of suits against the estates of deceased persons where the claim depends upon claimant's own testimony in respect of any matter occurring prior to the death of the decedent. The testimony put forward by the appellee as corroboration is a power of attorney executed by the decedent appointing appellee her attorney in fact, with power to prosecute the legal business contemplated between the parties. This power of attorney is evidence of the appointment of appellee as the attorney of the decedent, but in it nowhere is mentioned anything concerning the amount of compensation to be received by him, or the time and manner of payment thereof. This clearly is not corroboration of the fact that there was an agreed retainer of $3,500. Appellee also relies upon a letter written by himself to the decedent, in which he asks her to send $1,000, together with another small item for expenses, which he would apply partly on expenses and partly as a retainer. To this letter the decedent replied, stating that she was, in accordance with his request, mailing him a check for the amount requested. The most that can be said for these two letters is that the decedent recognized the justice of a claim for a retainer, but it makes no mention of the retainer, and fails to reach the point at issue so as to corroborate the testimony of the appellee. Appellee likewise relies for corroboration upon the testimony of Judge Charles R. Brice, but an examination of that testimony discloses that it in no way corroborates him. Judge Brice was not present at the time of the alleged employment of the appellee, and knows nothing about the terms of any such employment. He does testify that in Albuquerque he met the decedent for the first and only time, and during a conversation of a general character, which was had between the witness and the decedent, the subject of appellee going to Spain to attend to her business was mentioned, as well as his employment to collect

certain claims against a Mr. Wilson, who resided in Philadelphia. His testimony discloses that at that time the employment was prospective and had not yet been consummated, and the witness did not undertake to say that he knew anything about the terms of the employment. It thus appears that there was no corroboration of the vital fact necessary to sustain this judgment, namely, that the decedent employed the appellee and agreed to pay him $3,500 as a retainer. The proof of that fact rests solely on appellee's testimony.

Section 2175, Code 1915, was enacted in 1880, and has remained in the same form ever since that time, and is as follows:

> "In a suit by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

This section has been many times before the territorial court and this court for consideration. It was first considered in Gildersleeve v. Atkinson, 6 N. M. 250, 27 Pac. 477. In that case the question presented was whether the purchase price of an interest in a land grant had been fully paid by the vendee during his lifetime. Gildersleeve, the vendor, claimed that the vendee never fully paid the purchase price for the conveyance of his interest in the land grant, and that he, the decedent, and his administratrix, owed him the sum of $10,000 as a portion of said purchase price. Objection was made to the claim against the administratrix upon the ground that the testimony of the claimant was not corroborated. In order to meet this requirement Gildersleeve produced a witness, who testified that he at one time sought from Atkinson an option on the land grant, and that Atkinson told him that if anything might occur, or would occur, he should see Mr.

Gildersleeve about it, who was interested with him in the Anton Chico grant. Gildersleeve further produced Judge Henry L. Waldo as a witness, who testfied that in a conversation with Atkinson he said to Atkinson that Gildersleeve claimed that Atkinson had agreed to divide the profits on the sale of the grant. Gildersleeve further produced a letter from Atkinson to the effect that in event of a sale of the land grant he would allow Gildersleeve reasonable attorney's fees for his services in connection with the title to the grant. The court analyzes the effect of each one of these items of proof, and shows conclusively that they failed to amount to any corroboration of the claim made by Gildersleeve that there was an unpaid balance of $10,000 upon the purchase price of the land grant. After a lengthy discussion of the different authorities on corroboration in the various phases of legal procedure, such as the corroboration of an accomplice, the attesting witnesses to wills, the corroboration of the complainant necessary to overcome a sworn answer in chancery, and necessary to establish perjury, the court points out that corroborating evidence in those classes of cases is not of the technical kind contemplated by the statute, but is evidence to overcome what would otherwise be a balance or equilibrium in the state of proof, or to aid the credibility of a witness. The court points out that under this statute this is not the kind of corroboration contemplated, and announces its definition of the kind of corroborative evidence so required as follows:

"Corroborating evidence is such evidence as tends, in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegation or issue, if unsupported, would be fatal to the case; and such corroborating evidence must of itself, without the aid of any other evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports. And such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or point in issue."

In other words, the court held that the kind of corroboration contemplated by the statute is not corroboration of a general character calculated to aid the credibility of the witness, but it is such evidence as, in and of itself, tends to establish the essential fact necessary to a recovery. The next case in which this statute was referred to is Byerts v. Robinson, Administratrix, 9 N. M. 427, 54 Pac. 932. In that case the maker of a promissory note attempted to show, as against the administratrix of the estate, that he had paid a certain note during the life-time of the payee. He offered evidence to corroborate him in this matter, which was for some reason excluded by the court below, and the case was reversed for this reason. The court, however, cites and relies upon Gildersleeve v. Atkinson, supra.

In Johnson v. Baca, 13 N. M. 338, 85 Pac. 237, the defendant sought, as against the plaintiff administratrix, to attach conditions to a promissory note not appearing upon the face thereof. The court held that this could not be done for the reason, not only that the testimony offered varied the terms of the note sued on, but that the evidence of the defendant was not corroborated as required by this section.

In Joseph v. Catron, 13 N. M. 202, 81 Pac. 439, 1 L. R. A. (N. S.) 120, the question was not involved, but the court referred to the statute as standing in the way of a recovery without corroboration upon a new trial which was awarded.

In Gillett v. Chavez, Administrator, 12 N. M. 353, 78 Pac. 68, the claimant against an estate testified that there had been a settlement of the partnership affairs of himself, the decedent, and one other, and an account stated upon which he sought to recover against the estate. He was not corroborated in this statement, and it was held by the court that no recovery could be had for this reason.

In Childers, Executrix, v. Hubbell, 15 N. M. 450, 110 Pac. 1051, the plaintiff sought to recover for money paid, laid out, and expended to and for the use of the decedent. The plaintiff held two checks of the decedent covering the amount sued for, and it was claimed that these checks amounted to corroboration of the testimony of the plaintiff, that he had paid, at the instance of the decedent, the sum of money represented by the checks. The court held that this testimony was entirely insufficient by way of corroboration.

In Radcliffe v. Chaves, 15 N. M. 258, 110 Pac. 699, the plaintiff had been the attending physician of the decedent, and made claim against the administrator for the value of his services. The physician produced corroboration of his testimony as to his services to the decedent by witnesses, who testified to the rendition of the services, and he produced his book of account, showing the various items of charge against the decedent. This was held properly to be sufficient corroboration.

In National Rubber Supply Co. v. Oleson, 20 N. M. 624, 151 Pac. 694, the question was whether a certain shipment of goods was an absolute sale, or whether the same was conditional. The evidence relied upon for corroboration of the witness who had testified that the sale was conditional was a notation in the bill of sale as follows: "Ship January 1st." This notation was held to be equivocal, and not to corroborate the witness. A considerable review of some Canadian authorities is had in the case, but the case of Gildersleeve v. Atkinson is adhered to, and all of the preceding cases in this jurisdiction were cited.

In Union Land & Grazing Co. v. Arce, 21 N. M. 115, 152 Pac. 1143, the grantor testified that a certain deed purporting to have been executed by him was a forgery. In corroboration of that testimony the defendant put his wife upon the stand, and she

testified that her alleged signature to the deed was likewise a forgery, and one of the attesting witnesses was called and testified that he did not witness the execution of any such instrument. We held that these facts were corroboration of the testimony of the alleged grantor that he had never executed the deed. The Canadian cases are reviewed, where, in some of them, some very loose language is used to the effect that a statute almost identical with ours requires nothing more than corroboration of the witness as to his credibility rather than corroboration of the fact essential to a recovery. In that case we held that the testimony of the wife and the attesing witness denying their signatures was circumstantially corroborative of the testimony of the alleged grantor in which he denied the execution of the instrument. In that case we adhered to the principle announced in the Gildersleeve-Atkinson and National Rubber & Supply Co.-Oleson Cases referred to above. We have been referred to a case from 45 Nova Scotia, 62, In re Estate of C. E. Kaulbach. In that case a claim was filed against the estate for $500 for services as publisher of a newspaper under a contract. It was necessary for the claimant, in order to recover, to establish that he had delivered to the employer the subscription list of the subscribers to the newspaper. The employer had died, and the same question arose in regard to his recovery against the estate of the deceased person upon his uncorroborated evidence. The Canadian cases are reviewed, but the Nova Scotia court holds that the kind of corroboration required is such as is pointed out in Gildersleeve v. Atkinson, supra.

It seems clear upon a review of our previous cases that the doctrine announced in the Gildersleeve-Atkinson Case has never been departed from. The corroboration required is not the general corroboration of the witness as to his credibility, but it is

some form of evidence which tends, in and of itself, to establish the essential fact necessary to a recovery. This may be done circumstantially in case direct evidence is not available, as we held in the Union Land & Grazing Co. Case. But in the case at bar not a single word of testimony and not a single line of written evidence reaches the essential point necessary for the plaintiff to recover, namely, Did the decedent contract with him for a retainer of $3,500?

In may be said in closing that this may be an unwise rule. It is so suggested by Mr. Wigmore in his work on Evidence (3 Wig. on Ev. § 2065), where he points out that a claimant against an estate, although the court believes absolutely in his testimony and feels sure that he ought to recover, as we feel free to say we do in this case, is nevertheless precluded by an arbitrary rule of law from having what he is justly entitled to. If the rule is bad in policy, it is for the Legislature, and not the court, to modify it. The doctrine so firmly established as to the true construction of the statute is undoubtedly sound, and must be adhered to.

It follows from all of the foregoing that the judgment of the court below was erroneous, and should be reversed, and the cause remanded, with directions to proceed in accordance herewith; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2469. Feb. 5, 1921.]

[Rehearing Denied March 26, 1921.]

BUJAC v. WILSON.

SYLLABUS BY THE COURT.

1. The question as to whether a communication between counsel and a client is privileged is a judicial question, which cannot be determined by counsel himself, but the same must be submitted to the court for determination. P. 114

ON MOTION FOR REHEARING.

2. On a determination by the court as to whether a given communication between attorney and client is privileged, documents or letters involved need not be produced before the court for inspection until it has been judicially determined that they are not privileged. P. 115

3. That during the time a witness was acting as attorney for his client he wrote certain letters alleged to be privileged does not, standing alone, establish their privileged character, but the circumstances under which they were written and the reasons for writing them should be shown. P. 115

Error to District Court, Bernalillo County; Hickey, Judge.

Proceedings in the matter of the estate of Aline Mathilde Julia Bouvard Cardoner, deceased, between Etienne de P. Bujac against Joseph R. Wilson, executor. Judgment for the executor, and Etienne de P. Bujac brings error. Modified and affirmed.

Marron & Wood, of Albuquerque, for plaintiff in error.

Alonzo B. McMillen, of Albuquerque, for defendant in error.

OPINION OF THE COURT.

PARKER, J. There was a proceeding in the probate court of Bernalillo county involving the estate of Aline Mathilde Julia Bouvard Cardoner, deceased. During the progress of the hearing charges and counter charges were made between plaintiff in error and Joseph R. Wilson, executor of the estate of Mrs. Cardoner. Mr. Wilson was an attorney at law, as was also plaintiff in error. Prior to the proceeding in question plaintiff in error had been employed by Mme. Pauchet, the daughter of Mrs. Cardoner, to represent her, and the disparaging letters on both sides were written to Mme. Pauchet. With the view of probing the whole matter the district judge before whom the case was then pending upon appeal from the probate court made an order upon Mr. Wilson and plaintiff in error to produce

the correspondence in question, so that the matter might be fully investigated in the court, and such action as was deemed proper might be taken by him by disciplining counsel if they had been guilty of professional misconduct. At first plaintiff in error indicated entire willingness to submit to the court copies of all of his correspondence upon the subject, but he afterwards protested against doing so upon the ground that the communications were privileged. In taking this position plaintiff in error did not disclose to the court the substance and effect of the correspondence so that the court might itself determine whether the same was privileged or not. On the other hand, he undertook to decide for himself that the correspondence was privileged, and that therefore he was at liberty to decline to produce the same. The court made an order upon plaintiff in error, requiring him to produce this correspondence, and from this judgment this writ of error has been sued out.

[1] There is a fundamental error in the position taken by plaintiff in error in this case. It is not for counsel to decide whether a communication with his client is privileged, but it is a matter for judicial determination after the communications have been produced and submitted to the court.

Thus it is said in 1 Thornton on Attorneys at Law, § 96:

"Whether a communication by a client to his attorney was made in confidence is a question of fact to be disposed of by the court. It is requisite, in every instance, that it shall be judicially determined whether the particular communication in question is really privileged; and, in order that such determination may be advisedly made, it is indispensable that the court shall be apprised, through preliminary inquiry, of the characterizing circumstances. The general rule is that there is no presumption of privilege, although its allowance in a clear case may be founded upon the voluntary statement of the attorney that his knowledge of the fact, concerning which he is requested to testify, was acquired in professional confidence. But the witness is not entitled to decide the question for himself. This province of the court cannot be

thus usurped. If it could be it is obvious that the rule under consideration, which is designed to promote the administration of justice, might readily be used for its obstruction and become in consequence too pernicious to be tolerated. The privileged character of the communication must appear."

See, also, Jeanes v. Fridenberg, 3 Clark 199, 5 Pa. Law, J. 65; Mitchell's Case, 12 Abb. Prac. (N. Y.) 249; People's Bank of Buffalo et al. v. Brown et al., 112 Fed. 654, 50 C. C. A. 411.

Counsel for plaintiff in error cites sections 97, 99, and 115 of Thornton on Attorneys, but the propositions there set out are not relevant to the question before the court.

It follows from the foregoing that the judgment of the district court was correct, and should be affirmed; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

ON MOTION FOR REHEARING.

PARKER, J. [2] A motion for rehearing has been filed. In the opinion we said that an attorney might not decide for himself whether a given communication with his client was privileged, but that it is a matter for judicial determination "after the communication has been produced and submitted to the court." This is too broad a statement. The proper statement of the proposition is that it is a judicial question as to whether a given communication is privileged, to be determined by the court after an examination into the attending and characterizing circumstances under which the communication was made. The documents or letters themselves need not be produced before the court for inspection until it has been judicially determined that they are not privileged. In re Niday, 15 Idaho 559, 98 Pac. 845.

[3] In this case the plaintiff in error merely shows, by his answer to the motion to require him to produce the letters, that the communications were sent by him to his client "while he was retained and

acting as her attorney and representing her interests, and the same were and are privileged communications." The fact that during the time he was acting as attorney for his client he wrote the letters does not, standing alone, establish their privileged character. The circumstances under which they were written and the reasons for writing them should be shown.

Our former opinion, modified as herein stated, will be adhered to; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2550. March 18, 1921.]

NORRIS v. McDONALD.

SYLLABUS BY THE COURT.

Findings of fact by a trial court will not be disturbed on appeal, where such findings are supported by substantial evidence, and where the trial court heard the testimony and saw the witnesses.

Appeal from District Court, Otero County; M. C. Mechem, Judge.

Action by William T. Norris against D. A. McDonald for specific performance. Judgment for defendant, and plaintiff appeals. Affirmed.

E. L. Medler and W. Joe Bryan, both of El Paso, Tex., for appellant.

J. L. Lawson, of Alamogordo, and Holt & Sutherland, of Las Cruces, for appellee.

OPINION OF THE COURT.

ROBERTS, C. J. This action was instituted by appellant to enforce specific performance of a verbal contract, under which it was claimed that appellee had agreed to make a written lease for certain real estate located in Alamogordo, N. M. Appellee answered, denying the material allegations of the complaint, and set up that the lease was for one year, and that appellant had failed to pay the rent, and by counterclaim he asked judgment for the rent

due and a lien upon certain property in the building on the premises. The court, after hearing the evidence, made findings and rendered judgment for the appellee.

In this court appellant argues that the findings made by the court were contrary to the weight of the evidence. We have read the record, and find tnat the evidence was conflicting, and that the findings made by the court are supported by substantial evidence. It has been uniformly held in this court that findings of fact by a trial court will not be disturbed, where such findings are supported by substantial evidence, and where the trial court heard the testimony and saw the witnesses. Byerts v. Schmidt, 25 N. M. 219, 180 Pac. 284; Springer v. Wasson, 25 N. M. 386, 183 Pac. 398.

The judgment of the trial court will therefore be affirmed; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2368. March 21, 1921.]

TROY LAUNDRY MACHINERY CO. v. CARBON CITY LAUNDRY CO. et al.

SYLLABUS BY THE COURT.

1. The action of replevin provided for by sections 4340 et seq., Code 1915, is exclusive of all other remedies for the recovery of the possession of goods and chattels. An action in the nature of detinue at common law is not maintainable in this jurisdiction. P. 119

2. Replevin at common law was maintainable in cases where there was an unlawful taking and an unlawful detention of personal property, and in such a proceeding there was a seizure under a writ of replevin of the subject-matter of the litigation at the beginning of the proceeding, while detinue at common law was maintainable for the recovery of personal property in all cases, where there was an unlawful detainer, regardless of the manner of taking, and recovery of the property was had only after judgment. P. 119

Appeal from District Court, McKinley County.

Action by the Troy Laundry Machinery Company against the Carbon City Laundry Company and

another. Judgment for defendants on demurrer, plaintiff appealed, and the judgment was reversed. On rehearing. Judgment below affirmed.

Bert D. Richards, of Gallup, for appellant.

E. A. Martin, of Gallup, and McFie, Edwards & McFie, of Santa Fe, for appellees.

OPINION OF THE COURT.

PARKER, J. The Troy Laundry Machinery Company, a corporation, brought suit in the district court of McKinley county against the Carbon City Laundry Company and the McKinley County Bank, corporations, to recover the possession of certain laundry machinery. It alleged that it was the owner and entitled to the immediate possession of the property, and that the defendant wrongfully and unlawfully withheld and detained the same from plaintiff. It prayed for the recovery of the property in specie, or, in the alternative, that in case the property could not be delivered, to recover the value thereof, together with damages for the wrongful detention and for the use thereof. No affidavit in replevin was made, nor was any bond given the sheriff, and no writ of replevin was issued, but an ordinary summons was issued and served upon the defendants. The action was instituted upon the theory that recovery of goods and chattels may be had in an action like the common-law action of detinue, and no attempt was made to follow the statute governing the action of replevin. A demurrer was interposed by the defendant, the McKinley County Bank, raising the proposition that the complaint failed to state a cause of action because there is in this jurisdiction no action in the nature of detinue, and that the sole action for the recovery of personal property in specie is the action of replevin, in which action the statute requires the filing of an affidavit and bond. The court sustained this demurrer, and the plaintiff, electing to stand upon its complaint, the court rendered judgment, dismissing the com-

plaint. From this judgment the appeal to this court was taken.

In our former opinion in this case we held that the court was in error in dismissing the complaint upon the theory that the statute referred to was not exclusive of all remedies to recover the possession of personal property, and that the action, in the nature of an action of detinue, might be maintained. A motion for rehearing has been filed, and upon more thorough consideration of the case we have concluded that we were in error in the former opinion.

[1, 2] Replevin at common law was maintainable in cases where there was an unlawful taking and an unlawful detention of personal property. Detinue at common law was maintainable for the recovery of personal property in all cases where there was an unlawful detainer, regardless of the manner of taking. In replevin there was a seizure under a writ of replevin of the subject-matter of the litigation at the beginning of the proceeding. In detinue recovery of the property was had only after judgment. In 1847 the Legislature of the then territory passed an act on the subject of the recovery of personal property, which has, with some slight amendments which are immaterial to this consideration, remained the law to this day. The provisions of this act, together with the amendments referred to, were re-enacted by chapter 107 of the Session Laws of 1907, and now appear as sections 4340 et seq., Code 1915. Section 4340 is as follows:

"Any person having a right to the immediate possession of any goods or chattels, wrongfully taken or wrongfully detained, may bring an action of replevin for the recovery thereof and for damages sustained by reason of the unjust caption or detention thereof."

It is to be observed that this section provides for an action in all cases where, under the common law, either replevin or detinue might have been maintained. It provides that when goods or chattels have

been "wrongfully taken or wrongfully detained," the action may be brought. If the conjunction "and" had been employed in the statute instead of the disjunctive "or," it might well be said that the Legislature intended the action provided for to be an action in the nature of replevin only. But having provided that the action may be maintained when the goods or chattels are wrongfully detained, it is clear that the statute was designed to cover also cases which, under the common law, would authorize an action of detinue only. A similar statute was considered in Michigan, in the case of Hickey v. Hinsdale, 12 Mich. 99. There the statute provided that—

"Whenever any goods or chattels shall have been unlawfully taken or unlawfully detained, an action of replevin may be brought for the recovery thereof," etc. Comp. Laws 1857, § 5005.

The court, after speaking of replevin and detinue at common law, said:

"The object of this provision of our statute was to extend the remedy by replevin, so as to include both classes of cases. But in both equally there must be an unlawful detention at the time of the institution of the suit."

So in Indiana, under a statute which provided that "when any personal goods are wrongfully taken or unlawfully detained," etc., it was held that this statute included both common-law detinue and replevin. Wilson v. Rybolt, 17 Ind. 391, 79 Am. Dec. 486.

Section 4344, Code 1915, a part of the same act, provides as follows:

"Before the writ of replevin shall be issued, the plaintiff, or some creditable person in his stead, shall file in the office of the clerk of the district court an affidavit alleging that the plaintiff is lawfully entitled to the possession of the property mentioned in the complaint, that the same was wrongfully taken, or wrongfully detained by the defendant, and that the right of action accrued within one year."

It appears from this section that before any process may issue in this action of replevin, so provided by statute, there must be filed an affidavit setting up the matters specified in the statute. Section 4348 of the same act provides that the writ of replevin shall be executed by delivering the goods and chattels to the plaintiff and by summoning the defendant to answer the action of the plaintiff. Section 4345 of the same act provides that before such a writ of replevin shall be executed, the plaintiff must enter into a bond with sufficient sureties to the officer to whom the writ is directed in double the value of the property, conditioned for the prosecution of the suit with effect, and that he will, without delay, make return of the property if a return is adjudged, etc. Section 4350 of the same act provides for the judgment which shall be rendered, and is to the effect that in case the plaintiff fails to prosecute his suit with effect, and without delay, judgment shall be given for the defendant against the plaintiff and his sureties for the value of the property taken, and it shall be in the option of the defendant to take back such property or the assessed value thereof. It seems clear from a survey of the whole act that it was designed to cover the whole field of proceedings to recover the possession of goods and chattels, regardless of whether they were merely wrongfully detained from the person entitled to the immediate possession of the same. A complete remedy and procedure is prescribed in the act itself, and nothing whatever is left in doubt or to be controlled by any of the common-law forms of procedure. This being so, in order to recover the possession of goods and chattels, a writ of replevin must be secured from the court, and this can be secured from the court only upon the filing of an affidavit, such as is mentioned in the statute. The writ may be required to be served only upon the giving of the bond also specified. We believe the statute of New Mexico is the only one in the country which has remained in its

present form. In all of the other states, so far as we are advised, it appears from the statutes themselves that it was the intention of the Legislature to allow the bringing and maintaining of an action of replevin without a seizure of the property under a writ of replevin, and as an ordinary action resembling the action of detinue at common law. There is provision in most of the statutes for the suing out of the writ, either at the commencement of the action or at any time subsequent thereto, prior to answer by the defendant or, in some cases, prior to the entry of judgment. Thus in Kansas the statute provides:

"The plaintiff in an action to recover the possession of specific personal property may, at the commencement of the suit, or at any time before answer day, claim the immediate delivery of such property, as provided in this chapter." Code Civ. Proc. § 176. Batchelor v. Walburn, 23 Kan. 733.

Under this statute the court held, of course, that the cause might proceed as an ordinary action without the issuance of any writ of replevin, and consequently without any affidavit or bond. The same thing is held in Wisconsin, in Dudley v. Ross, 27 Wis. 679. In that case the court said:

"Under the old practice no writ of replevin could issue until the plaintiff, or some one in his behalf, made and filed with the clerk an affidavit, stating, among other things, that the plaintiff was lawfully entitled to the possession of the property unjustly taken and unjustly detained, by the defendant. * * * Upon such a statute, of course, no such question as the one before us could be involved in doubt. But the present statute no longer makes the proper affidavit an essential prerequisite to the commencement of the action. The plaintiff may, at the time of issuing the summons, or at any time before answer, claim immediate delivery of the property; and, where he proceeds for the delivery in the first instance, he must make an affidavit showing," etc. "But suppose the plaintiff does not claim the immediate delivery of the property, and it has been wrongfully taken under an alleged tax warrant, is the action of replevin then an appropriate remedy? It seems to us that it is."

So in Nebraska the statute provides that the plaintiff may, at the commencement of the suit, or at any time before answer, claim the immediate delivery of such property. The Nebraska court holds, necessarily, that the action may be maintained in that jurisdiction with or without the affidavit and bond. Racine-Sattley Co. v. Meinen, 79 Neb. 33, 114 N. W. 602. So the Supreme Court of Missouri holds that their statute expressly authorizes an action of replevin by merely filing a petition without affidavit. White v. Grace, 192 Mo. App. 610, 184 S. W. 947. In Arkansas the statute provides that the plaintiff in an action to recover possession of personal property may at the commencement of the action, or at any time before judgment, claim its immediate delivery by filing an affidavit, etc. Of course, under this statute the action may proceed to judgment without an affidavit and bond, as the court holds in Schattler v. Heisman, 85 Ark. 73, 107 S. W. 196. The same holding under the same kind of a statute is had in Idaho in Bates v. Capital State Bank, 21 Idaho 141, 121 Pac. 561. See, also, 23 R. C. L. Replevin, § 87, where it is pointed out that in the modern statutory action the seizure of the property is not essential to the right to maintain the action. This is due to the language of the statutes in nearly all of the states, and New Mexico seems to be about the only state which has neglected to make proper provision by statute for the maintenance of the action without the issuance of a writ and the seizure of the property at the beginning of the proceeding. This is evidently an oversight of the legislative department, but it is one which cannot be remedied by any forced construction of the statute by the courts.

It follows that the former opinion should be withdrawn from the files, and that the district court was correct in its judgment, and the judgment should be affirmed, and it is so ordered.

ROBERTS, C. J., concurs.

RAYNOLDS, J., having tried the case in the court below, did not participate in this opinion.

[No. 2269. Feb. 4, 1921.]

[Rehearing Denied June 4, 1921.]

GOLDEN GIANT MINING CO. v. HILL.

SYLLABUS BY THE COURT.

1. Expenditures made for work performed, labor done, and repairs made upon a stamp mill do not tend to develop the mineral claim, or facilitate the extraction of ore therefrom, and consequently do not constitute any part of the sum required to be expended for annual assessment or improvement work, under section 2324, U. S. Rev. St. (U. S. Comp. St. § 4620). P. 128

2. Where one enters into possession of a mineral claim under a contract with a locator, by which the person entering undertakes to do the required assessment work, or do other work which would have been sufficient to constitute assessment work, he will not be heard to assert the forfeiture of the claim for nonperformance of the assessment work, where such nonperformance was the result of his own default, nor will he be permitted to take advantage, at any time, of the information obtained by him on account of such relation. P. 136

3. The failure to do the annual assessment work upon a mining claim does not of itself forfeit the claim, a relocation by a third party being essential to work a forfeiture of the original locator's rights. P. 143

ON SECOND MOTION FOR REHEARING.

4. Where the trial court determined an issue as to whether there existed a fiduciacy relation between appellant and appellee, and by agreement of appellee permitted appellant to file an amended reply raising such issue, the question having been presented to the Supreme Court in the briefs of both parties, the issue was properly before the Supreme Court. P. 144

Appeal from District Court, Grant County;

Action by the Golden Giant Mining Company against C. W. Hill. Judgment for defendant, and plaintiff appeals. On motion for rehearing. Reversed and remanded, with instructions.

K. K. Scott, of Breckenridge, Tex., and A. N. White, of Silver City, for appellant.

Wilson & Walton, of Silver City, for appellee.

OPINION OF THE COURT.

BRICE, District Judge. Heretofore we handed down an opinion reversing the judgment of the court below, but upon more mature consideration we are satisfied that we fell into error in some particulars in the former opinion. That opinion will therefore be withdrawn.

This is an action brought by the Golden Giant Mining Company, a corporation, against C. W. Hill, to recover possession of two mining claims, resulting in a judgment against the plaintiff in the district court, from which it has prosecuted this appeal.

The facts briefly are as follows:

The appellant, Golden Giant Mining Company, is a domestic corporation, and for some time had been the owner of two unpatented lode mining claims in Grant county, located as the "Mammoth" and the "Ninety-six" claims. One D. J. Hayden was its president, and the owner of 80,000 of its 100,000 shares of capital stock. On January 16, 1915, the said Hayden and the appellee, Hill, entered into a written contract, whereby Hayden agreed to sell appellee 55,000 shares of his 80,000 shares of capital stock of the appellant corporation, to be paid for by the payment of $3,000 in cash, and $7,000 to be used:

"First, in the securing and paying a first-class engineer to examine the Golden Giant group of mines and the equipment thereof, and to formulate plans for successfully operating the same; second, in securing six Wilfry tables and one Huntington mill and installing the same, and in paying all expenses incurred in making all necessary improvements and repairs to the buildings, machinery, and equipments on said mining claims; third, in paying for all machinery, repairs, mechanics, material, and labor bills in putting the said Golden Giant mining plants and its accessories in perfect working condition and in operating the same continuously; fourth, in

opening up and putting in perfect working condition the Golden Giant shafts and in operating the same when put in shape so to do."

The balance of the purchase price for said stock was to be paid from mining operations upon the property. Appellee went into possession of the mining property in February, 1915, under the terms of said contract with Hayden. He secured an assignment to the corporation of a certain outstanding lease to third parties of the property, and which is mentioned in the contract. The improvements on the mining claims in controversy consisted of houses, stamp mill, pumping plant, hoist, etc., of tne value of $25,000 or more, or at least the improvements cost this sum. After taking possession of the mining properties, the appellee and associates spent $3,000 thereon for "labor and materials," as testified to by him, to be used to erect a tramway, "and everything for rebuilding the works inside, labor for shafting, money for bricks." These improvements were very largely made on the stamp mill located on the claims, and none of it was spent in the extraction of minerals, or the development of the mining claims themselves.

On June 9, 1915, appellee wrote Hayden a letter, showing that he was operating the mining property under the terms of said contract. In this letter he discouraged Hayden coming to the mine to work, advising him that it would be cheaper to employ Mexican labor than to pay Hayden for anything he could do, saying:

"And still until the mine will pay it is hardly worth your while to spend your time here."

Also:

"I think you had better accept the position mentioned or open an office and practice your profession. You will then be with your family and you can resign or quit office at any time that the mine or mill make enough money to let you live as a gentleman, and which I hope will not be long."

He further stated:

"I have got everything repaired (had to put new flues in boiler—rotted out), and the engine, mill, tables—everything running smooth; no belts coming off; no trouble to hold 80 pounds steam. Governor handles engine with throttle wide open; no choking of mill; and last Saturday we run all the old stuff in the mill and thoroughly tested everything out and it is all O. K. We have not done anything this week —waiting for repairs for hoist. * * * So I think we will be running next week with double shift, and as soon as Mr. R. is able to come down it will not be long until the floors are filled with other tables and appliances for saving values."

Also:

"I do not anticipate any trouble with mill and will do the assessment work if nothing else."

On August 6, 1915, the contract was canceled by mutual consent, and nothing further was done on the property during that year, although the appellee remained and resided in a house on the property until after the 1st of January, 1916.

After midnight on the 31st day of December, 1915, that is, on the morning of the 1st day of January, 1916, the appellee for himself began the relocation of the Mammoth claim under the name of "Hill No. 1," built a monument at one corner, and placed the required notice therein, and later complied with the law in putting up monuments and doing the necessary discovery work. On June 1, 1916, he relocated the "Ninety-Six" mining claim under the name of the "Bessie," and likewise complied with the law in the manner of locating and doing discovery work. He has been in possession of said claims since said attempted relocation.

Appellant, on December 31, 1915, filed for record its proof of labor on the two claims as follows:

"On the Ninety-Six (96) lode mining claim installation of new flues in boiler to the approximate cost of twenty-five dollars ($25.00); mucking out and retimbering eighty (80) foot tunnel to the approximate cost of seventy-five dollars ($75.00); erection of water filter in gulch to the approximate

cost of twenty-five dollars ($25.00); repairs on pump, pipe line and on watering works to the approximate cost of twenty-five dollars ($25.00).

"And on the Mammoth lode mining claims resetting Wilfrey tables on cement pillars and repairing mill and buildings, etc., of the approximate cost of two hundred fifty dollars ($250.00); building tramway from gulch to top of hill of the approximate cost of one hundred fifty dollars ($150.00); repairing engine and boiler to the approximate cost of fifty dollars ($50.00); overhauling hoist to the approximate cost of fifty dollars ($50.00)."

Appellee and other witnesses on his behalf testified, with reference to the work done, that on the Ninety-Six claim it was all done for the purpose of running the mill, and did not tend to develop, or afford any means for the extraction of ores from the claim. Appellee testified that the tunnel was not retimbered, but was only cleaned out, but did not deny that $75 was spent thereon, also that the tunnel was used to furnish water for the mill; that no work by way of shafts or tunnels was done on the claims in 1915. The evidence clearly supports appellant's proof of labor on the Mammoth, but all such work done was in connection with the stamp mill situated on the premises. Such expenditures were not made by the corporation, but were made by appellee under his contract with Hayden, and by appellee's associates, Flores and Randin, who were stockholders of the corporation. The amount expended was something over $3,000.

[1] It is apparent from the foregoing statement of facts that the question is clearly presented as to what kind of labor or improvements upon a mining claim will satisfy the requirements of the federal statute (section 2324, R. S. U. S. [U. S. Comp. St. § 4620]) in regard to annual expenditures. In this case no work was performed upon either of these two mining claims for the purpose of developing them as mining claims, or for the purpose of facilitating the extraction of ores therefrom. The money was expended upon a mill for the purpose of putting

the same in running order for the treatment of some tailings, on or near the premises, and of such ores as might thereafter be extracted from the mines themselves. We assume that the repair of the mill would constitute annual labor or improvement as much as the construction of the mill in the first instance. If one will satisfy the requirements of the statutes as to annual expenditure, the other would likewise do so. The question is, Will the erection or repair of a mill upon a mining claim, or group of claims, designed to treat and reduce the ores from said mines, satisfy the requirements of the federal statute in regard to the annual expenditure required to hold the claim? The federal statute (section 2324, R. S. U. S.), among other things, provides:

"On each claim located after the tenth day of May, eighteen hundred seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * And upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made. * * * "

Just what character of labor or improvements is required is not specified in the statute. The Land Department of the government has taken a definite stand upon this question, and is firmly committed to the doctrine that the labor or improvements contemplated by the federal statutes are such as bear some direct relation to the development of the mine, and which tends to facilitate the extraction of ores therefrom.

In Monster Lode Mining Claim, 35 Land Dec. 493, the question was as to whether a stamp mill upon a mine, used exclusively for that mine, could be considered an improvement going to make up the required expenditure of $500 in order to obtain the patent. The Secretary of the Interior held that it was not, quoting from Highland Marie and Manila Lode Mining Claims, 31 Land Dec. 37, and citing

Smelting Co. v. Kemp, 104 U. S. 636, 655, 26 L. Ed. 875, and other land decisions.

In Highland Marie and Manila Lode Mining Claims, 31 Land Dec. 37, it is pointed out that, while in a sense the mill promotes the development of the mine, because it enables the owner to reduce the ores without freighting them to reduction work, the relation of the mill to the mine is too remote to be said to facilitate the development of the mine and the extraction of ores therefrom. The Secretary of the Interior cited and relied upon Smelting Co. v. Kemp, 104 U. S. 636, 655, 26 L. Ed. 875. In Schrim-Carey and Other Placers, 37 Land Dec. 371, a lime kiln was held not to be an improvement on a placer claim, located upon the lime deposit, within the requirements of the statute. In Fargo Group No. 2 Lode Claims, 37 Land Dec. 404, a road partly on and partly off a mining claim, used to transport machinery and supplies to and ore from the mine, is held not to be an improvement within the $500 requirements for patent. In Zephyr and Other Lode Mining Claims, 30 Land Dec. 510, it is held that work done according to a system for the development of a group of contiguous claims owned by one person is to be considered as an improvement within the $500 requirement.

The Secretary of the Interior points out that the same kind of improvements required annually are required under the $500 expenditure section of the federal statute, and for that reason the kind of improvement in that case was held to be sufficient for a patent.

In Smelting Co. v. Kemp, 104 U. S. 636, 655, 26 L. Ed. 875, the principal question was whether in a court of law a patent to a mining claim might be collaterally attacked because the land officers had made a mistake of law in issuing the same, and the court held that it could not. In the course of the discussion, however, Mr. Justice Field defined the

meaning of the words "labor" and "improvements" under the federal statute, and said that they mean such labor and improvements as are performed or made for the development of the mine to facilitate the extraction of the metals it may contain. In his definition he included such improvements as are applicable to placer mining, and says that the work or improvement may "be at a distance from the claim itself, as where the labor is performed for the turning of a stream or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material." This statement in no way modifies the general doctrine previously stated by him, namely, that the labor or improvement which satisfies the statute is something which directly facilitates the development of the mine and the extraction of ores therefrom, because in the case of a placer mine the diverting of a stream of water is necessary for the purpose of extracting the ores from the gravel, and a flume to carry away the debris is necessary in order that the mining may be continued. This definition of the statutory requirements is perhaps the earliest after the adoption of the statute.

In Fredricks v. Klauser, 52 Or. 110, 118, 96 Pac. 679, 682, the court said:

"There was no machinery or other fixtures of importance at the mines, the preservation of which necessitated a watchman, when the development work had ceased, and, this being so, the worth of the actual labor performed by Arbuckle in endeavoring to increase the world's wealth by making an honest effort to discover valuable minerals is the only credit to which he is entitled."

It is further said in this case:

"The word 'improvement,' as thus used, evidently means such an artificial change of the physical conditions of the earth in, upon, or so reasonably near a mining claim as to evidence a design to discover mineral therein or to facilitate its extraction, and in all cases the alteration must reasonably be permanent in character."

In Altoona Quicksilver Mining Co. v. Integral Quicksilver Mining Co., 114 Cal. 100, 45 Pac. 1047, the jury had been instructed that annual expenditure might consist in digging, etc., "or, if the mine be idle, it may consist of the services of a watchman or custodian in looking after the property and taking care of the same." The court said:

"To constitute a general rule, this would require some qualification. If this sort of care was necessary to preserve tunnels, buildings, or any structures erected to work the mine, and which would be necessary in case work were resumed, I see no reason why it would not constitute work upon the mine as much as the erection of such structures in the first instance would. But if there was only the naked claim to be looked after, and a watchman were placed there merely to warn prospectors, and thus prevent a relocation, it would not be labor upon the mine in the sense of the statute."

In Hough v. Hunt, 138 Cal. 142, 70 Pac. 1059, 94 Am. St. Rep. 17, the same court in discussing whether the services of a watchman could be held to be assessment work, pointed out when and when not the same would be allowable as annual expenditures, and held that, where there were structures upon the mine which were likely to be lost if not cared for, and the structures would be required when work would be resumed, the services of a watchman might be allowed as assessment work.

In Merchants' National Bank v. McKeown, 60 Or. 325, 119 Pac. 334, the court said:

"The expense of the keeper is only allowable as annual labor when the mine is temporarily idle and the work is to be resumed again, the watchman being necessary to preserve the property needed when the work is resumed, and cannot be so applied from year to year indefinitely as a substitute for the annual labor."

In Doherty v. Morris, 17 Colo. 105, 28 Pac. 85, the court held that labor performed by the owner of a mine in constructing a wagon road thereto for the purpose of better developing and operating the same may be treated as a compliance with the law, relating to the annual assessment work thereon.

The decision was based upon the language used in Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875, and the application of the doctrine that work done outside of the claim may be work done on the claim is applied to a road.

In Nevada Exploration & Mining Co. v. Spriggs, 41 Utah 171, 181, 124 Pac. 770, 773 the court was discussing the principle that a system or plan of development was sufficient to meet the requirement of the annual expenditure on each of a group of claims, and in that connection said:

> "We think that what is intended by the use of the term 'system' or 'general system' of work means simply this: That the work, as it is commenced on the ground, is such that, if continued, will lead to a discovery and development of the veins or ore bodies that are supposed to be in the claims, or, if these are known, that the work will facilitate the extraction of the ores and mineral."

It was upon this theory that the Utah court cited Doherty v. Morris, 17 Colo. 105, 28 Pac. 85, and approved the same. But it is to be noticed that the court adhered to the proposition that work, in order to comply with the annual expenditure requirement, must be calculated to facilitate the discovery in or extraction of ores from the mine.

In Book v. Justice Mining Co. (C. C.), 58 Fed. 113, the court was likewise discussing the principle which allows work to be done outside of or upon one of a group of claims for the benefit of all. But in that case the doctrine is reiterated that such work must be done for the purpose of prospecting or developing the mine.

In Power v. Sla, 24 Mont. 243, 61 Pac. 468, while the court had under consideration the question of pleading, it nevertheless adhered to the same doctrine that the annual expenditure, in order to hold a mining claim, must be made for the development of the claim and to facilitate the extraction of the minerals it may contain.

In Lockhart v. Rollins, 2 Idaho, 540, 21 Pac. 413, a man had been employed as a watchman to take care of the buildings and improvements upon a mining claim at a salary of $500 a year. The improvements consisted of buildings, engine, boiler, machinery, hoisting works, etc., which were used in the development of the mine. The court held that the services of this watchman fulfilled the requirements of the federal statute; but it is to be observed that the improvements consisted of the instrumentalities necessary to be used, and which had been used by the owners in the actual working and development of the mine. In this case there are cited several cases in which the question was as to whether certain kinds of labor upon a mine would entitle the person performing the same to a mechanic's lien. This part of the opinion we do not regard as sound. Work and labor upon a mine within a mechanic's lien statute may or may not be the same thing as work and labor upon a mining claim within the requirements of the annual expenditure statute. The two requirements are founded upon an entirely and distinct principle.

In Snyder on Mines, § 498, the doctrine of the cases is summarized as follows:

> "The test in all cases which should be applied to 'annual labor' is whether the work or improvements tend to develop the claim, and facilitate the extraction of the mineral and valuable contents therefrom. Any labor or improvements meeting this requirement will satisfy the statute; nothing else will."

In Lindley on Mines (3d Ed.) § 629, it is said:

> "A stamp mill, even though located upon and used exclusively in connection with that particular mining claim, is not a satisfactory improvement, for it does not facilitate the extraction of the mineral from the claim; and the same rule applies to a lime kiln and to excavation for the foundation of a smelter."

In Sexton v. Washington, etc., Co., 55 Wash. 389, 104 Pac. 614, a road built into a small unorganized

mining district by all the miners owning claims it was held might be considered as work upon and for the development of all such claims, citing with approval Doherty v. Morris, 17 Colo. 105, 28 Pac. 85. This case certainly goes to great length in the application of the doctrine in regard to roads serving as annual assessment work.

We have made a thorough examination of all the cases upon this subject, and find a comparative unanimity of opinion. The cases all, in effect, agree that work and labor or improvements to satisfy the statute must bear some direct relation to the development of the claim or the extraction of ores therefrom. In the case of labor actually performed in mining or improvements in the way of hoisting machinery, there is no difficulty. The relation of the same to the improvement of the claim is direct and apparent. In the case of a watchman, where he guards and protects machinery or improvements directly connected with the mining operations upon the property, there can be no controversy as to the applicability of such work as annual expenditure. In the case of roads over which machinery and supplies for the development and working of the mine are hauled to the mine, and ore is hauled from the mine, the applicability is less direct and logical. It may be said, however, that if hoisting machinery with which waste and ores are to be removed from the mine is an improvement, a road over which such machinery is hauled to the mine is likewise such an improvement. So it may be said that such road over which the ore, when raised to the surface, may be hauled directly facilitates the development of the mine and the extraction of the ores, because they must be removed from the shaft or tunnel in order to continue the mining operations. In this sense the holding that the services of a watchman and the building of roads is work upon the mine is justifiable.

On the other hand, it is to be observed in this connection that the federal statutes contain not a single word relative to the reduction of ores and the extraction of the precious metals therefrom. The legislation on the subject deals solely with mining operations, and Congress has not concerned itself by a single expression with reduction works or the reduction of ores, except in section 2337, R. S. U. S. (U. S. Comp. St. § 4645), which provides that five acres of noncontiguous, nonmineral land may be embraced and included in an application for a patent for a lode claim, and that the owner of a quartz mill or reduction works, not owning a mine in connection therewith, may likewise receive a patent for his mill site. It is contemplated by the congressional legislation therefore that reduction works are to be separate and apart from mining operations, and mill sites upon which reduction works are to be erected by the owner of a claim must consist of noncontiguous and nonmineral lands. No annual expenditure is required to be made upon mill sites, and the improvements thereon bear no relation whatever to the mining operations in so far as the federal legislation is concerned. A mill erected upon noncontiguous and nonmineral lands would as much facilitate the development of a mine in connection therewith as a mill erected upon the mine itself, and yet no one would contend, we believe, that such an improvement would satisfy the requirements of the federal statute.

From what has been said it would seem clear that the work and labor performed, and repairs made upon the mill in question in this case do not meet the requirements of the federal statute in regard to annual expenditure upon the mining claims of the appellant.

[2] The district court held: That at the time of the relocation of the ground in controversy by the appellee he occupied no fiduciary, contractual, or other relation with the appellant, so as to preclude

him from making such relocation. An issue was made in the pleadings in this regard, and presented in the briefs of the parties in this court. The relation existing between the parties at the time appears from the statements of facts, which inferentially are drawn from the evidence, and in our judgment no other inference could be drawn therefrom. That at the time or prior to the cancellation of the contract between appellee and Hayden the appellee conceived the idea of relocating the mines for his own benefit and in his own name. This inference is drawn from the fact that he remained in a house upon the mine and lived there for several months after the termination of the contract, and did attempt to relocate the land at the very first opportunity. The explanation given by him to the effect that he had no money to go elsewhere is so unreasonable that it cannot be taken as substantial evidence in the face of his acts in connection therewith. He apparently had sufficient means for subsistence without labor during this time, and was only away once from the claim for a few days. We can easily understand that he might not have the means to remain upon the claim without work to obtain them, but our reason will not be convinced that he remained upon the claim without other reason than that he had no means to go elsewhere. The evidence shows that appellee had no particular knowledge of the value of the mine or its improvements, nor had he seen it, until after he went into possession under the terms of the contract with Hayden. That the information he had with reference to the mine of material value was obtained by him while it was in his possession under the contract to purchase the controlling interest. While he had no contract with the corporation, his contract with its principal stockholder, under which he took and held possession for six months during the year 1915, created such a relation with Hayden as that would preclude him from relocating the same to Hayden's disad-

vantage to the same extent as had such contract been directly with the corporation. The contract provided that all improvements placed upon the mine by appellee should vest in the corporation in case of its cancellation, so that the corporation was a beneficiary in the contract, and to that extent interested therein.

Under the law a mine owner has the whole calendar year within which to do the assessment work, and he is not limited to doing any particular part of it at any particular time. 2 Lindley on Mines, § 624. But the duty to perform exists during all of that time, and one in possession under contract to purchase, or under a lease, is duty bound to perform the annual assessment work to prevent a forfeiture by relocation.

In the case of Godfrey v. Faust, 18 S. D. 567, 101 N. W. 718, the Boston & S. D. Company, through its superintendent, had a contract for the purchase of the Dave and Faust lodes, and their superintendent did the necessary representation work upon the mines. It was contended that this was not proper, as they were not authorized to do the work. The court said:

"The work, therefore, done by the Boston & S. D. Co. under the contract above referred to, inured to the benefit of the defendant, as it was not only the right of the Boston & S. D. Co. to do the assessment work, but, being in possession upon this contract, it was its duty to do the work in order to preserve the defendant's right to the property."

In the case of Lowry v. Silver City, etc., Mining Co., 179 U. S. 196, 21 Sup. Ct. 104, 45 L. Ed. 151, lessors of a mining claim attempted to make relocation thereof, and the Supreme Court of the United States said:

"This was plainly an attempt on the part of the plaintiffs in error—two of whom were lessees of the defendant in error—under the forms of law to appropriate to themselves property which for years had been in the unchallenged possession of the defendant in error, and upon which it had expended

many hundreds of dollars. That such attempt was unsuccessful in the courts is no more than was to be expected.

"The Supreme Court of the state placed its decisions upon two grounds: First, that although the Evening Star claim included the original discovery shaft of the Wheeler claim, it did not thereby destroy that claim, in view of the fact that long prior to the location of the Evening Star the owners of the Wheeler had located a new shaft and developed the mine in that shaft. * * * The other ground was estoppel, by virtue of the lease under which two of the plaintiffs in error acquired possession. While the former ground is the one principally discussed in the opinion, the latter was adverted to in a few words at its close. The latter is sufficient to dispose of the case in this court."

In the case of Stewart et al. v. Westlake, 148 Fed. 349, 78 C. C. A. 341, it was held that the lessor of a mining claim, who was in possession and who had contracted to do work upon the claim that would be sufficient for the assessment work, and who relocated the claim in the name of third parties, obtained no right. The court said:

"The law of the case is well settled. The lessee of a mining claim who has contracted to do an amount of work thereon which would be a sufficient compliance with the legal requirements in respect of development, and also to notify the lessor of any intention to surrender or abandon the lease, cannot, upon failing to perform his obligations, secretly relocate the claim, and so secure and hold for himself the title. A patent obtained under such circumstances will be decreed to be held in trust for the lessor."

The testimony shows that the appellee recognized his duty to perform the assessment work. In his correspondence with Hayden he agreed to do this, if nothing more. If he had done the work contemplated by the terms of his contract, there would have been no question but what sufficient labor or improvements would have been performed or made upon the claim to have satisfied the law. It was just as much his duty to perform the assessment work during the six months in which he had possession of the claim as it was for the appellant to do it during the other six months. He failed in his

duty, if the work was not done, as much as the appellant, and now seeks to take advantage of his failure to perform the labor which he recognized was his duty to perform and to use the information he obtained under his contract with Hayden to further his own interests. His relation placed him in a position where he could injure Hayden and the appellant, just as though he had been their confidential agent, and persons placed in such a position are not permitted to take advantage of the information obtained thereby, even after the relation has ceased. 1 Mechem on Agency, §§ 1209, 1210, 1216, 1217, 1218; Ringo v. Binns, 10 Pet. 269, 9 L. Ed. 420; Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176.

The case of Trice v. Comstock, supra, reviews the authorities generally on this subject. In that case, Trice and Beemer, real estate men, had a tract of land listed with them, although they had no contract to purchase. They employed Rietmeyer and Comstock to secure purchasers for this and other lands. After obtaining information as to the value of this land during the time they were so employed, the agency was canceled. Thereafter Comstock bought the land himself. In a suit to hold them constructive trustees, the court said:

"Nor is it any defense to the suit to enforce this trust that the agency had terminated before the confidence was violated. The duty of an attorney to be true to his client, or of any agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its term. Eoff v. Irvine, 108 Mo. 378, 383, 18 S. W. 907, 32 Am. St. Rep. 609; Robb v. Green [1895] 2 Q. B. 315, 317-320; Louis v. Smellie [1895] 73 Law Times (N. S.) 226, 228. * * *

"Nor was discretion or authority to sell these 1,925 acres of land requisite to disable this agent from buying and holding them adversely to his principals. Every agency creates a fiduciary relation, and every agent, however limited his authority, is disabled from using any information or advantage he acquires through his agency, either to acquire property or to do any other act which defeats or hinders the

efforts of his principals to accomplish the purpose for which the agency was established. In Gardner v. Ogden, 22 N. Y. 327, 343, 350, 78 Am. Dec. 192, the clerk of the brokers of the plaintiffs, was held to be disabled from buying plaintiff's property, although he never had any discretion or authority relative to the sale of it. In Winn v. Dillon, 27 Miss. 494, 497, Dillon was declared to be disabled from purchasing the lands he acquired, although the only authority he ever had was to search out and report their descriptions. In Davis v. Hamlin, 108 Ill. 39, 49, 48 Am. Rep. 541, an agent of a lessee to procure amusements for his theater, who never had any authority to deal with the leasehold estate, was held to be disabled from taking a renewal of the lease himself, and was adjudged to hold the leasehold interest which he had secured for the exclusive use and benefit of his principal.

"The truth is that the principle of law which controls the determination of this case is not limited or conditioned by the interest, powers, or injuries of the parties to the fiduciary relations. It is as broad, general, and universal as the relations themselves, and it charges everything acquired by the use of knowledge secured by virtue of these trust relations and in violation of the duty of fidelity imposed thereby with a constructive trust for the benefit of the parties whose confidence is betrayed. It dominates and controls the relation of attorney and client, principal and agent, employer and trusted employee, as completely as the relation of trustee and cestui que trust. In Greenlaw v. King, 5 Jur. 19, Lord Chancellor Cottenham, speaking of this doctrine, says: 'The rule was one of universal application, affecting all persons who came within its principle, which was that no party can be permitted to purchase an interest when he had a duty to perform which was inconsistent with the character of a purchaser.' * * *

"The rule upon this subject was clearly and broadly stated in the American note to Keech v. Sanford, 1 White & T. Lead. Cas. in Eq. (4th Am. Ed.) p. 62, *page 58, in these words: 'Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.'

"The facts of the case in hand brought it squarely within this rule, charged the title which the agent Comstock acquired with a constructive trust for the benefit of his principals, and furnished substantial ground for their application to a court of equity for appropriate relief. * * *

"But the fiduciary relation through which agent C. W. Comstock procured his information and knowledge of the

location, character, and value of this tract of land, his acceptance of the agency, his leading of the probable purchaser to the property, his receipt from his principals of the expenses of this trip, forbade him from purchasing this land for himself, and thereby preventing his principals from affecting a sale of it, and charged it in his hands with a constructive trust in their favor."

In the case of Eoff v. Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609, the Supreme Court of Missouri held that an attorney who had been consulted with reference to the title to property, and having given advice in connection therewith, although his employment was repudiated by the owner of the land, yet he was precluded from purchasing an outstanding title, the information with reference thereto having been obtained from an abstract furnished him by the owner of the land, notwithstanding the relation had long terminated.

There are many cases decided by the courts holding that a person occupying fiduciary relations with the owner of a mining claim is precluded from relocating the same. Lockard v. Rollins, 2 Idaho (Hasb.) 540, 21 Pac. 414, Argentine Mining Co. v. Benedict, 18 Utah 183, 55 Pac. 559; O'Neill v. Otero, 15 N. M. 707, 113 Pac. 614; Largey v. Bartlett, 18 Mont. 265, 44 Pac. 965; Fisher v. Seymour, 23 Colo. 542, 49 Pac. 32, Lockhart v. Leeds, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. Ed. 263; Lowry v. Mining Co., 179 U. S. 196, 21 Sup. Ct. 104, 45 L. Ed. 151; Ball v. Dolan, 18 S. D. 558, 101 N. 719; Utah Mining & Mfg. Co. v. Dickert, etc., Co., 6 Utah 183, 21 Pac. 1002, 5 L. R. A. 259.

"With reference to what occurs after the agency is ended, it is not generally true that the duty and responsibility of the agent terminates with the agency. On the other hand, there is, as has been seen, a considerable class of cases in which it is held that an agent will not be permitted, after the termination of his agency, to take advantage of information which he acquired in a confidential capacity, during the agency, respecting the principal's business plans or purposes to obtain for himself rights or interests which he thus learns that the principal intended to acquire and the acquisition of

which by the agent would defeat the purposes of the principal" (citing Trice v. Comstock, 121 Fed. 620; Eoff v. Irvine, 108 Mo. 378, 32 A. S. R. 609; Dennison v. Aldrich, 114 Mo. App. 700). 1 Mechem on Agency, par. 1235.

The principle involved is not unlike that in the case of Lockhart v. Mining Co., 16 N. M. 237, 117 Pac. 837, in which Mr. Justice Parker, in summing up the case, said:

"We have thus a case pleaded, proved, and found by the court as follows: A prospector under contract posts a location notice and initiates a location; he is charged with the duty of performing the several acts of location; he enters into a fraudulent conspiracy to refrain from perfecting the location and to cause a forfeiture thereby; he does refrain from doing said acts and, upon forfeiture, delivers possession to the conspirators. This certainly makes out a case, and, irrespective of the other allegations in the complaint, entitles the plaintiff to the relief sought."

[3] The failure to do the annual assessment work required by the federal statute does not forfeit a mining claim, but it requires the intervention of a third party and a relocation of the ground. 2 Lindley on Mines, § 651; 1 Snyder on Mines, § 560; Morrison's Mining Rights, p. 128.

"Although the owner of a location has failed to do the necessary assessment work, so that the ground is subject to a relocation, yet if, before any such relocation by others, he perform the amount of assessment work required by the statute, then his rights are revived, and a subsequent relocation is invalid." Justice Mining Co. v. Barclay et al. (C. C.) 82 Fed. 554.

So that at the time the appellee attempted a relocation of the mine the appellant's interest therein had not forfeited, but was only subject to forfeiture. The proofs of assessment work made by appellant were filed on the 31st day of December, from which it might be inferred that, depending upon appellee to do this assessment work, the making of these proofs was delayed until it was impossible to do other work. This, however, would be immaterial as

the rights of the appellant would be intact except for the unlawful acts of the appellee.

Other questions are raised which we do not find it necessary to decide.

The motion for rehearing will be denied, and the judgment of the court will be reversed, and the cause remanded, with instructions to enter judgment for the appellant, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

ON SECOND MOTION FOR REHEARING.

BRICE, District Judge. Appellee contends that the Supreme Court had no jurisdiction to entertain or consider this appeal, because it was allowed more than one year after the rendition and entry of the final judgment. This question was heretofore raised in this case on the 19th day of September, 1918, by a motion to dismiss. This motion was overruled without an opinion on January 8, 1919, under the authority of Romero v. McIntosh, 19 N. M. 612, 145 Pac. 254, and no motion for rehearing of that question was filed. Thereafter the case was submitted on its merits, and reversed and rendered in favor of appellant on August 19, 1919, and a motion for rehearing was overruled February 14, 1921. This question was not raised in appellee's original brief on the merits, nor in his motion for rehearing, and now it is sought to have us review our original action in overruling the motion to dismiss this appeal by a second motion for rehearing on the merits. Under these circumstances, this court will not, at this time, review its former action.

[4] It is further contended that no issue appears in the pleadings that would authorize the Supreme Court to consider the question of whether or not there existed such fiduciary relations between appellant and appellee, as would preclude appellee from making a relocation. The trial court decided this question, and by agreement of appellee permitted appellant to file an amended reply raising this issue.

The district court having determined the question, and it having been presented to the Supreme Court in the briefs of both parties, the issue was properly before the Supreme Court. Canavan v. Canavan, 17 N. M. 503, 131 Pac. 493, Ann. Cas. 1915B, 1064.

The third point raised is to the effect that there is nothing in the testimony offered by plaintiff to sustain its claim of estoppel against defendant that would preclude the defendant from making relocations. This question has been heretofore thoroughly considered by the court and its decision based thereon. Our reasons are given at length in the opinion filed upon the first motion for rehearing, and we find no reason for changing the views expressed in that opinion, and adhere thereto.

The second motion for a rehearing is overruled, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2424. Jan. 14, 1921.]

STATE v. BAILEY.

[Rehearing Denied June 20, 1921.]

SYLLABUS BY THE COURT.

1. Appellant cannot predicate error upon the action of the trial court in improperly overruling his challenge to a juryman, when at the final impaneling of the jury he had not exhausted his peremptory challenges and the objectionable juryman was not forced upon him. P. 152

2. Evidence of threats is admissable in a case of homicide, although no one is definitely designated. P. 152

3. The reputation of the deceased as a man of peaceable character is competent evidence on behalf of the prosecution after such character has been attacked and put in evidence by the defense. P. 153

4. Proof of a witness' particular overt acts of wrongdoing is ordinarily relevant as impeaching evidence. The extent of such examination rests largely in the discretion of the trial court. P. 154

5. Where instructions given are correct and cover the same ground as those requested, or where those requested

incorrectly state the law as applicable to the case, the instructions requested are properly refused. P. 155

ON MOTION FOR REHEARING.

6. In a prosecution for murder, an instruction **held** fully to cover the defense of accidental discharge of the gun in defendant's hands thereby killing deceased. P. 158

7. In a prosecution for murder, where the defense of accidental killing was interposed, an instruction that if the jury believed that deceased was accidentally killed, or if they entertain a reasonable doubt thereon, they should acquit, **held** correctly refused, as not including all necessary elements. P. 158

8. In a prosecution for murder, where the defense of accidental killing was interposed, an instruction in the exact language of Code 1915, § 1472, **held** properly refused, as being inapplicable and as being abstract. P. 160

9. In a prosecution for murder, an instruction **held** not prejudicially erroneous, although confusing the doctrine of self-defense and the doctrine of defense of habitation. P. 161

10. An instruction not excepted to need not be considered on appeal. P. 163

Appeal from District Court, Grant County; R. R. Ryan, Judge.

Sylvester E. Bailey was convicted of murder in the first degree, and he appeals. Affirmed.

K. K. Scott, of Breckenridge, Tex., and Alvan N. White, of Silver City, for appellant.

"Threats, which are too general or too indefinite, not connecting the person slain or assaulted, therewith, are inadmissable. It seems that the threat must in some way designate or have reference to the person intended to be injured." Michie on Homicide, vol. 1, p. 757, and the authorities cited thereunder.

And speaking of a case very much like the case at bar the Supreme Court of Missouri said:

"Deceased statement that 'the first nigger that fools with me I'll put him to his end' was held inadmissible, although communicated to the defendant, because a mere conditional threat directed against no particular person, being a mere idle boast." State v. Guy, 69 Mo. 430. Also see 6 Enc. of Evid. 784.

Also see 6 Enc. of Evid. 784.

That the court erred in permitting the witness to testify over the objection of defendant that the deceased was not a quarrelsome man, before the deceased's reputation or character had been brought into question.

And evidence showing the character or reputation of the deceased as a quiet and peaceful man cannot be given by the state in a prosecution for homicide in the first instance and as a part of its case. Carr v. State, supra; State v. Potter, 13 Kan. 414; Dock v. Com., 21 Gratt. 909.

The good character of the deceased is not a subject of proof in a prosecution against another for killing him, where his character has not been attacked by the defense. Miers v. State, 34 Tex. Crim. Rep. 171, 53 Am. State Rep. 705, 29 S. W. 1074; Moore v. State, 46 Tex. Crim. Rep. 54, 79 S. W. 565; Melton v. State (Tex. Crim. App.) 83 S. W. 822; Jimmerson v. State, 133 Ala. 18, 32 So. 141; People v. Bezy, 69 Cal. 223, 7 Pac. 643; State v. Eddon, 8 Wash. 292, 36 Pac. 139.

The court erred during the progress of the trial, and while the defendant, Sylvester E. Bailey, a witness in his own behalf, was on the stand testifying, in permitting said witness to be cross-examined by the district attorney over the objection and exception of the defendant, to the great prejudice of defendant, that he had been guilty of other offenses against the law, and directly attacked his character as a defendant before his character had first been put in issue by him, to which the defendant then and there duly excepted. State v. Graves, 21 N. M. 556; Bishop's New Crim. Procedure vol. 1, sec. 1124; Thompson on Trial, vol. 1, sec. 653-655; State v. Lapage, 24 Am. Rep. 75; Wigmore on Evid., vol. 1, sec. 193; People v. Brown, 72 N. Y. 571, Am. Rep. 183; Clark v. State, 78 Ala. 474; Elliott v. State, 34 Neb. 48; People v. Crapo, 76 N. Y. 288, 32 Am.

Rep. 302; Ryan v. People, 79 N. Y. 593; State v. Huff, 11 Neb. 17; People v. Hamblin, 68 Cal. 101, 8 Pac. 687; Com. v. Barnard, 97 Mass. 587; People v. Cummins, 47 Mich. 334, 11 N. W. 184-186; State v. Kelsoe, 76 Mo. 505; State v. Lawhorn, 88 N. C. 634; State v. Efler, 85 N. C. 585; Gale v. People, 20 Mich. 159; People v. Gay, 7 N. Y. 378.

Where there is evidence tending to show misadventure in prosecution for homicide, failure to instruct the jury with reference thereto, is error, though no request was made for such instruction. French v. Com., 28 Ky. L. Rep. 64, 80 S. W. 1070; Roberts v. State, 112 Ga. 542, 37 S. E. 879; State v. Hartzell, 58 Iowa 520, 12 N. W. 557; Fitzgerald v. State, 112 Ala. 34, 20 So. 966; Casteel v. State, 73 Ark. 152, 83 S. W. 953; People v. Grill, 3 Cal. App. 514, 86 Pac. 613; Darby v. State, 9 Ga. App. 700, 72 S. E. 182; State v. Hartzell, 58 Iowa 520; 12 N. W. 557; Lewis v. Commonwealth, 140 Ky. 652, 131 S. W. 517; Messer v. Commonwealth, 27 Ky. L. R. 527, 85 S. W. 722; French v. Commonwealth, 28 Ky. L. Rep. 64; 88 S. W. 1070; Brock v. Commonwealth, 33 Ky. L. Rep. 630; 110 S. W. 878; People v. Thompson, 122 Mich. 411, 81 N. W. 344; Williamson v. State, 2 O. C. C. 292, 1 O. C. D. 492; Commonwealth v. Silcox, 161 Pa. 484, 29 Atl. 105; Commonwealth v. Long, 17 Pa. Super. Ct. 641; Mitchell v. State, 36 Tex. Cr. App. 278, 33 S. W. 367, 36 S. W. 450; Brittain v. State, 36 Tex. Cr. App. 406, 414, 37 S. W. 758; Paderes v. State (Tex. Cr. App.), 45 S. W. 914; Powell v. State (Tex. Cr. App.), 59 S. W. 1114; Miller v. State, 52 Tex. Cr. App. 72, 105 S. W. 502; State v. Legg, 59 W. Va. 315, 316, 53 S. E. 545, 3 L. R. A., N. S. 1152; Ryan v. State, 115 Wis. 488, 92 N. W. 271.

O. O. Askren, Attorney General, and H. S. Bowman, Assistant Attorney General, for the State.

From the foregoing it must appear that before a reversal, because of the excusing of a juror can be

relied upon, the appellant must show that he was prejudiced by reason of such action. State v. Du-Vall, 135 La. 710; 65 So. 904; L. R. A. 1916, E. 1264; Pittsburgh, etc., Railway Co. v. Montgomery, 152 Ind. 1, 71 Am. St. Rep. 301, 319; McGuire v. State of Mississippi, 37 Miss. 369, 376; People v. Durrant (Cal.), 48 Pac. 75, 78; Glasgow v. Metropolitan Street Ry. Co. 191 Mo. 347, 89 S. W. 915.

Where party has not exhausted his challenges to jury he cannot complain. Terr. v. Emilio, 14 N. M. 147; Terr. v. Lynch, 18 N. M. 15; State v. Rodriguez, 23 N. M. 156; 1 Thompson on Trials, pp. 45, 147.

Threat was properly admitted. Ford v. State, 71 Ala. 385; Jones v. State, 78 Ala. 8, 14; Roland v. State, 105 Ala. 41; Mathis v. State, 34 Tex. Cr. R. 39, 28 S. W. 817; De La Garze v. State, 61 S. W. 484; Armstrong v. State, 98 S. W. 844; Hixon v. State, 61 S. E. 14; Hardy v. Comm., 67 S. E. 522; Hodge v. State, 7 So. 593; Brown v. State, 5 N. E. 900; Taylor v. State, 72 S. W. 396.

Character and reputation of deceased was impliedly attacked and therefore evidence that deceased was of peaceble character was proper.

Overt acts of witness were relevant and admissible. 1 Michie on Hom. 680; People v. Webster, 34 N. E. 730.

Defendant's requested instruction ten was properly refused because it was merely an abstract proposition of law. 2 Thomp. on Trial, sec. 2321.

OPINION OF THE COURT.

RAYNOLDS, J. The appellant, Sylvester E. Bailey, was indicted at the March, 1919, term of the district court for Grant county, N. M., for the killing of one James N. Bedore, and a verdict of murder in the first degree was returned by the jury. Appellant filed a motion for a new trial, which was overruled and the appellant sentenced to be executed Friday, April 25, 1919. From the verdict and sentence appeal is taken to this court.

At the time of the homicide in question, the appellant was a prospector and miner living on his mining claim at a place called Vanadium, situated near Silver City in Grant county. On the mining claim were a store building, a small adobe residence, and an automobile garage. Appellant had rented his store to one L. E. Freeland. Freeland had rented the dwelling at the direction of appellant during his absence to the deceased, Bedore, for a period of three months ending September, 1918. Upon appellant's return to his claim he occupied a part of a box car which had been used by the railroad as a temporary depot. While appellant was waiting for the possession of his property, the deceased, Bedore, had turned over his dwelling to one Rose Freeland, who was then occupying it. Appellant notified the deceased and Rose Freeland that he desired possession of his dwelling on September 1, 1918. Deceased, Bedore, shortly after September 1st had tendered to the appellant another month's rent and appellant had refused to accept it. There was testimony to show that on the morning of the killing the deceased had stated that he was about to move from the premises of the appellant on that day, and that he had made arrangements with one of the witnesses to secure a team to move his belongings from said premises.

The appellant in his testimony, and by the testimony of other witnesses, attempted to show that the gun from which the fatal shot was fired was discharged by accident in a struggle between him and the deceased, after the appellant had taken the gun from under his pillow and used it as a club to drive off the deceased, who was about to attack him in his room. Upon examination of the body of the deceased, it was found he was shot in the abdomen, about two inches below the breastbone and a half inch to the right of the median line, and there was no point of exit. The shirt and underclothes had holes in them and were powder burned. There were

no eyewitnesses to the homicide, and the deceased made no statement, living only a few minutes after he fell.

Appellant assigns errors as follows:

The court erred in sustaining the two challenges made by the state to certain jurymen in overruling the challenges made by the appellant to two others in regard to their qualifications. Upon this assignment the law is well settled in this state.

"We are of the opinion that Mr. Thompson correctly states the general rule regarding the discretion of the court in respect to impaneling the jury as follows: 'In the superintendence of the process of impaneling the jury, a large discretion is necessarily confided to the judge, which discretion will not be revised on error or appeal, unless it appears to have been grossly abused or exercised contrary to law.' 1 Thompson, Trials, § 88." Territory v. Lynch, 18 N. M. 15, at page 28, 133 Pac. 405, at page 407.

"Assuming that the trial court excused this juror without cause, nevertheless we do not consider that appellant has ground for complaint. In 1 Thompson on Trials, § 43, the author, after pointing to the fact that the right of peremptory challenge is a right to reject, and not a right to select, says.

" 'Therefore, a party cannot, in general, complain that the court has excused jurors without cause, or sustained untenable challenges of the other party, thus driving the objecting party to exhaust his peremptory challenges upon other members of the panel, or upon special veniremen or talesmen.' See, also, Cyc. 315; 16 R. C. L. 291.

"Mr. Thompson, at section 120, more completely states the rule in the following language:

" 'No party can acquire a vested right to have a particular member of the panel sit upon the trial of his cause until he has been accepted and sworn. It is enough that it appear that his cause has been tried by an impartial jury. It is no ground of exception that, against his objection, a juror was rejected by the court upon insufficient grounds, unless through rejecting qualified persons, the necessity of accepting others not qualified has been purposely created.'

"We adopt this statement of the law, which is undoubtedly conclusive upon the assignment under consideration, in which, therefore, we find no merit."

State v. Rodriguez, 23 N. M. 156, at pages 164, 165, 167 Pac. 426, at page 428 (L. R. A. 1918A, 1016).

[1] In the present case it also appears that the defense had not exhausted its peremptory challenges when the jury was finally impaneled, and the action of the court is not error, for this as well as the foregoing reasons:

"The weight of authority is to the effect that, when a challenge for cause to a juror is improperly overruled, the error will be regarded as immaterial and without prejudice, if the objecting party did not challenge the juror peremptorily and his peremptory challenges were not exhausted; this upon the theory that a party must use all available means to exclude all objectionable jurors, and that a failure to do so constituted a waiver of his objection. 24 Cyc. 323, 324. We agree with the majority rule. This being true, it is our duty to assume that appellant was not harmed by the failure to sustain his challenge for cause." State v. Smith, 24 N. M. 405, at page 408, 174 Pac. 740, at page 741.

"It is our opinion that the better rule is that an erroneous overruling of a challenge for cause, even though the peremptory challenges are thereafter exhausted, will not warrant a reversal of the judgment unless it is further shown upon appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after such party had exhausted his peremptory challenges. [Citing cases.]" Colbert v. Journal Pub. Co., 19 N. M. 156, at page 160, 142 Pac. 146, at page 147.

"Finally it is a rule of paramount importance that errors committed in the overruling of challenges for cause are not grounds for reversal, unless it be shown an objectionable juror was forced upon the challenging party after he had exhausted his peremptory challenges. If his peremptory challenges remain unexhausted so that he might exclude the objectionable juror by that means, he has no ground for complaint." 1 Thompson on Trials, § 68, p. 147.

See, also, People v. Durrant, 116 Cal. 179, 48 Pac. 75, at page 78.

[2] The court erred in admitting evidence of the alleged statement not amounting to a threat, highly prejudicial to appellant. The statement or threat was as follows:

"He said he would protect his ground if he couldn't by law, he would with his gun. He had done it and he could do it again."

Standing alone such an indefinite statement might be objectionable as a threat, but with other evidence of the relationship between the parties and the circumstances of the case, it is clearly a threat and properly admitted.

"One of the errors assigned by the defendant is that evidence of a threat made by him to shoot a person whom he did not name, was admitted. There was, besides the language of the threat itself, evidence that the defendant had been warned against Camilo Martinez not long before he made the threat, and the undisputed fact that he, soon after he made it, began a controversy with Martinez on a matter in dispute between them, and did shoot him. It was for the jury to determine from the evidence whether he had reference to Martinez when he made the threat, if they believed he made it. State v. Cochran, 147 Mo. 517; Moore v. People (Colo.) 57 Pac. 858; State v. Vance (Wash.) 70 Pac. 34." Territory v. Alarid, 15 N. M. 165, at page 170, 106 Pac. 371, at page 372.

"It is a general rule that threats made by the defendant accused of murder, to kill some person not definitely designated, especially when made shortly before the commission of the crime to which they may be construed to refer, are admissible in evidence in connection with other explanatory circumstances on proof of the corpus delicti. See cases cited in note to the case of State v. Nelson, 89 Am. St. Rep. 691. Here the circumstances in evidence were sufficient to have warranted the jury in believing that the note was sent to the justice of the peace on the morning immediately preceding the homicide, and the weight to be given to the evidence was for the jury. See, also, 13 R. C. L. 924." State v. Martinez, 25 N. M. 328, at page 335, 182 Pac. 868, at page 870.

See, also, Territory v. Hall, 10 N. M. 545, at page 552, 62 Pac. 1083; Territory v. Pratt, 10 N. M. 138, at page 140, 61 Pac. 104; Miera v. Territory, 13 N. M. 192, at page 200, 81 Pac. 586.

[3] The court erred in permitting a witness to testify over appellant's objection that the deceased was not a quarrelsome man before deceased's reputation or character had been attacked. The general rule is that—

"Testimony as to the deceased's peaceable character is not competent on behalf of the prosecution until his character

has been put in issue by the defendant." 6 Ency. of Ev. p. 659.

This assignment is without merit. The character or reputation of the deceased had not been put in issue in the cross-examination, but the defendant had sought, unsuccessfully, to elicit facts which would show that the deceased was a quarrelsome and violent man. The evidence on redirect examination, the admission of which is assigned as error, simply followed the cross-examination and was properly admitted to explain and amplify the matters testified to on such cross-examination.

[4] The court erred in permitting the appellant while testifying to be cross-examined to the effect that he had been guilty of other offenses against the law. It is elementary and has been decided by this court many times that one offense may not be shown as evidence of the commission of another offense. In this case, however, the evidence objected to was not of other crimes, but of misconduct in the assertion of his rights, and was limited to the purpose of affecting the credibility of the witness; the court so instructing upon request as follows:

"Gentlemen, it has been permitted to inquire of certain questions of the defendant concerning with respect to alleged moral misconduct—these questions and answers have been solely for the purpose of inquiring into the credibility of the accused as a witness and as affecting his credibility. You will consider them as affecting the credibility of the accused as a witness, not in his capacity as an accused."

We find no error in this assignment. The general rule in matters of this kind is laid down in the case of State v. Perkins, 21 N. M. 135, at page 144, 153 Pac. 258, at page 261, where the following language is used:

"Complaint is also made of the refusal of the trial court to permit the appellants, on cross-examination of Mrs. Kubena, a very important witness for the state, to ask the witness as to specific acts of wrongdoing on her part. The same is true

of the prosecuting witness, Mrs. Knapp. The law in this jurisdiction was settled by the territorial Supreme Court in the cases of Territory v. Chavez, 8 N. M. 528, 45 Pac. 1107; Borrego v. Territory, 8 N. M. 446, 46 Pac. 349; and Territory v. De Gutman, 8 N. M. 92, 42 Pac. 48. There is a sharp conflict in the authorities upon this question, but, as the territorial Supreme Court has adopted the rule that proof of a witness' particular overt acts of wrongdoing are ordinarily relevant as impeaching evidence, but that such acts can never be shown by any evidence outside the examination of the assailed witness, and that the extent of such examination rests largely in the discretion of the trial court, we can see no good reason to depart from the rule of practice thus established."

[5] The alleged assignments of error, Nos. 5, 6, 8, 9, and 10, are upon the refusal of the court to give certain instructions asked by the appellant. The rule in this jurisdiction is that if the instruction given by the court properly presents the law of the case to the jury, it is not error to refuse a requested instruction, covering the same ground. Territory v. Baker, 4 N. M. (Gild.) 236, at page 237, 13 Pac. 30; Cunningham v. Springer, 13 N. M. 259, at page 287, 82 Pac. 232; Territory v. Pierce, 16 N. M. 10, at page 14, 113 Pac. 591.

Instruction No. 1 asked for by the appellant is also objectionable because it includes in it the element of heat of passion and the absence of a deadly weapon, when the question was not involved in this phase of the case and it is admitted that the killing was done with a deadly weapon. In a subsequent instruction the court treating the law of manslaughter set forth the effect of heat of passion in reducing the grade of the crime from murder to manslaughter. All the instructions asked for are covered by those given by the court and those given by the court sua sponte correctly state and apply the law.

Realizing the importance of a case of this nature, we have carefully read the transcript with the view of ascertaining whether or not the appellant's rights

were properly protected. We have come to the conclusion after such examination that the instructions requested were properly refused, as they were covered by instructions given by the court, and that those given by the court, to which objection was made, correctly and fully set forth the law applicable to the evidence adduced by the state and the appellant, and that a fair and impartial trial was had.

Finding no error in the record, the judgment of the lower court is therefore affirmed, and it is so ordered.

ROBERTS, C. J., and PARKER, J, concur.

ON MOTION FOR REHEARING.

RAYNOLDS, J. A motion for rehearing has been filed by the appellant, in which he calls attention to a condition in the instructions which it is alleged was presented in the original briefs, and was overlooked by the court. The defense in the case was accidental killing. Surrounding this general proposition there were questions as to the law of the defense of habitation, the law of self-defense, and the law of excusable homicide; but these questions were all collateral to the ultimate specific defense of accidental killing. In describing the occurrence, the defendant, the only witness on the subject, testified as follows:

"Q. Do you state now to the jury that in the struggle over this gun, when you hit him and he grabbed the gun, whether you pulled the gun off, or did he pull the gun off? A. He pulled the gun off, or it went off. I don't say how that was; it was in the struggle, in a mad moment. I didn't pull the trigger, and I didn't shoot the man, and I didn't take the gun with that intention, and I didn't shoot him.

"Q. How were you using it—as a club? A. Yes; to strike him.

"Q. For what purpose were you doing that? A. To keep him from attacking me, and perhaps killing me."

On cross-examination, appellant, when pressed for a more definite statement as to just how the killing occurred, testified as follows:

"Q. What did he do when you hit him? A. He grabbed the gun. As I said, the gun went off in the tussle.

"Q. That was accidental shooting? A. Yes.

"Q. Self-defense, but coupled with an accident, caused the deceased's death? A. That's the idea; he killed himself.

"Q. Committed suicide? A. That is what I want the jury to believe; he grabbed the gun, and in the tussle the gun went off without my putting my finger on the trigger.

"Q. Mr. Bailey, you were holding the gun by the handle, were you, when you hit him, and he grabbed the barrel? A. Grabbed right this way.

"Q. Got hold of the gun barrel? A. No; got hold with both hands, got hold of the whole thing.

"Q. The whole thing? A. Yes; the whole thing, and I believe that—that's the hammer, and at the time he grabbed that way and got in that position, he grabbed—his hand went over there and pulled the hammer back, and in the tussle it released and caused the gun to go off. * * *

"Q. You shot the man accidentally? A. The man shot himself.

"Q. The man shot himself? A. Yes.

"Q. You were acting in self-defense? A. And I hit him in self-defense, and acted all the time in self-defense.

"Q. You had no feeling against that man whatever? A. There was no intention to shoot him. I didn't shoot him. I didn't take up the gun to shoot him."

It will thus be seen that the appellant undertook to say and did say that the deceased caused the gun to be discharged by grabbing hold of it while it was in the appellant's hands being used as a club. At the time of the trial counsel for appellant evidently took the view that this was what the testimony showed, and in accordance therewith requested the court to give instruction No. 19, which was done. This instruction is as follows:

"19. You are instructed that, if you find from the evidence in this case that on the occasion of the killing of James M. Bedore, the deceased, immediately before the said killing,

entered the house or place of abode of defendant in a violent and angry manner, and either assaulted the defendant, or manifested an immediate intention to violently assault the defendant, and the defendant, believing it was necessary to protect himself from such violent assault of the deceased, seized a pistol and struck the deceased with it, and the deceased seized the pistol in the hands of the defendant, and in the struggle between the deceased and the defendant, which thereupon ensued, the deceased caused the pistol to be discharged in said struggle, and the deceased was thereby killed, then the defendant would not be guilty as charged, and you should acquit him; and if you have a reasonable doubt as to such facts, you should acquit defendant."

[6] This instruction, while it is not now objected to by counsel for appellant as being erroneous, is now said to be partial and insufficient to cover the whole ground, for the reason that it restricts the defense of accidental killing to a case where the gun was caused to be discharged by the deceased, and does not include the accidental discharge of the pistol by either the deceased or the defendant. It clearly appears, however, from the quotation of the testimony heretofore made, that the instruction exactly covers the situation as portrayed by the defendant in his testimony. He denies that he accidentally discharged the gun, and asserts that the deceased caused it to be discharged. Under such circumstances the instruction fully covers the facts as developed at the trial, and the appellant has no cause for complaint of the same.

[7] By way of further argument to the effect that the defense of accidental homicide was never fully presented to the jury, counsel for appellant complain of the refusal of the court to give their requested instruction No. 8, which is as follows:

"8. The court instructs the jury that if they believe from the evidence that James M. Bedore was accidentally killed, or entertain a reasonable doubt thereon, you should find the defendant not guilty."

It is apparent at a glance that the requested instruction was erroneous, and was correctly refused.

The instruction directs the jury that, if the deceased was accidentally killed under any circumstances whatever, the defendant should be acquitted. This instruction leaves out of consideration all of the circumstances showing whether the defendant was at fault, was the aggressor, or was entirely in the wrong in the use of the pistol, as outlined in the testimony. These circumstances must necessarily appear in the instruction before it would be competent for the court to direct the jury that the accidental killing of the deceased would entitle the defendant to an acquittal.

Much reliance is placed by appellant upon the case of State v. Legg, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152. In that case a wife was on trial for the murder of her husband. The defense was accidental killing, and the facts were that her husband instructed her to hand him his gun, and she undertook to get the gun down from the rack where it was kept to hand to him, and, according to the defendant, it was accidentally discharged and killed the husband. The defendant requested two instructions, which were refused as requested, but erroneously modified, and, as modified, given by the court; the first being in the exact language of appellant's instruction No. 8, supra, and the second applying the doctrine of accidental killing to the specific facts as above set out. Counsel overlook the distinction between the Legg Case and the case at bar. In the Legg Case, the defendant, in any view of the testimony, either for the prosecution or defense, was engaged in an entirely lawful act, unaccompanied by any circumstances which could deprive her of her defense of accidental killing. She could not be guilty unless the killing was intentional. In the case at bar, under the facts shown, the appellant may have been guilty, even if the firing of the gun was accidental, by reason of his attitude towards and in the controversy. Appended to the Legg Case is an

extensive note, collecting the cases on accidental killing as an excuse.

[8] Complaint is made of the refusal of the court to give appellant's requested instruction No. 1. This instruction is in the exact language of section 1472, Code 1915, which is as follows:

"Such homicide is excusable when committed by accident or misfortune [in lawfully correcting a child], or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent; or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation; or upon sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner."

The instruction omits only the words in brackets above indicated. The instruction as asked is clearly inapplicable. It is an abstract statement of the law, and no attempt is made to apply the provisions of the statute to the facts in the case. But, even assuming that the court might well have modified the instruction and applied the statute to the facts in the case, we think the court fully covered the ground in instruction No. 19, supra. It is to be observed that the statute covers three classes of cases: (1) Where the homicide is committed by accident or misfortune in doing any other lawful act by lawful means, with usual and ordinary caution and without any unlawful intent; (2) by accident or misfortune in the heat of passion upon a sudden and sufficient provocation; and (3) upon a sudden combat without any dangerous weapon being used, etc.

We assume that there is no magic in the word "excusable" as used in the section, and that, if every phase of appellant's defense was duly presented in the instructions, he will have no cause to complain at the refusal of the court to use the exact language of the statute. The question, then, is whether the instructions given did cover the whole field. It is to be observed that instruction No. 19, directed the

jury that under the circumstances detailed by the defendant and assumed in the instruction, he should be acquitted. The instruction, therefore, in effect directed the jury that, under the assumed circumstances, the act of striking deceased with a pistol was a lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent. This satisfied the first clause of the statute.

The second clause of the statute assumes the presence of heat of passion. An examination of defendant's testimony discloses that he disavows heat of passion and states that he acted at all times solely in self-defense. This clause of the statute is therefore inapplicable to the defense interposed.

The third clause of the statute contemplates a sudden combat, without any dangerous weapon being used. The defendant in his testimony says that he entered into no combat, but that he merely defended himself against the assault of the deceased. This does not constitute combat, as used in the statute. Sudden combat signifies a sudden fight in the nature of a duel, in which both participate in an aggressive way, rather than a one-sided affair, in which one party merely defends himself against the assault of another. It thus appears that section 1472, Code 1915, is in no way applicable to the facts in the case, except the first clause thereof, which as before seen, was substantially presented in instruction No. 19.

[9] Appellant complains of instruction No. 18 on the subject of the defense of one's person while in his own dwelling and the force which may be employed to expel the intruder. The instruction is as follows:

"18. You are instructed that a person may repel force by force in the defense of his person, being in his own habitation, against one who manifestly intends and endeavors violently to enter therein and to do him bodily harm, and if a conflict ensue under such circumstances, and life is taken,

the killing is justifiable. It must appear, however, that the assault was imminently perilous, and unless there be an apparent manifestation of an intent to take life, or to do great bodily harm, no assault will justify the killing of an assailant. A person repelling an attack in his own dwelling is not compelled to flee from his adversary, but he may use such force as is necessary to expel him therefrom, and he may stand his ground and defend his life, or defend himself from bodily harm, and he may even pursue his assailant until the danger to his life and danger of bodily harm to him is past."

There is evident confusion in this instruction of two doctrines, viz. the doctrine of self-defense and the doctrine of defense of habitation. The two doctrines bear such marked resemblance to each other, however, as to be almost identical; but by reason of the varying circumstances attending them there are points of divergence in the doctrines. There is, however, the common principle in both, viz. that it is the necessity of preventing the commission of a felony which justifies the killing of the assailant. Thus, in case of personal assault, the attempted infliction of death or great bodily harm is the felony which authorizes the killing of the assailant. In cases of assault upon the habitation it is the felony of burglary, robbery, or like crimes, which authorizes the inhabitant of the dwelling to resist the assault, even to killing the assailant if necessary. Or if the assault upon the habitation is for the purpose of reaching and committing a felony upon the dweller therein, or one of his family, this justifies resistance to the extent of killing, if necessary to prevent the felony. Where expulsion of an intruder from a dwelling is attempted, a slightly different situation arises. The owner may expel the intruder, using all the force necessary to accomplish that end. He may take an affirmative and aggressive attitude, and if a conflict ensues, and the intruder endangers his life, or places him in great bodily harm, he may slay the intruder. But it is not true that a man may kill another in his house when under the same circumstances of danger, or

apparent danger, to person or property, he would not be justified in killing outside his house. In personal encounters outside a dwelling, the appearances are usually plain and unmistakable, while in assaults upon or in dwellings the appearances are often not so plain, and apparently a greater latitude is, and should be, allowable, to a man in his own house in taking life. But the principle governing action is the same in both cases. Upon this subject see 21 Cyc. 828; 1 Bish. New Crim. Law, §§ 858, 859; 2 Bish. New Crim. Law, § 707; Carroll v. State, 23 Ala. 28, 58 Am. Dec. 282; State v. Patterson, 45 Vt. 308, 12 A. Rep. 200; Thompson v. State, 61 Neb. 210, 85 N. W. 62, 87 Am. St. Rep. 453; State v. Sumner, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, and note; 13 R. C. L. Homicide, §§ 144, 145; note to Newman v. State (Tex.) 21 Ann. Cas. 721.

In view of what has been said, we have no criticism of instruction No. 18, except in its confusion of the two situations above mentioned. But just why the court should have submitted any such proposition to the jury we do not understand, except that it was requested by the defendant. Why the right to kill in self-defense, or in defense of habitation, was a question to be submitted to the jury, does not appear. The defendant says that he never intended to kill deceased, did not attempt to kill him, and did not kill him. No question as to the right to kill was involved, and the defendant was not entitled to have the same presented to the jury.

[10] The giving of instruction No. 20 was not excepted to and need not necessarily be considered. The instruction, however, is unobjectionable. It was intended to inform the jury that, if the assault by the defendant upon the deceased with a pistol was not in fact in defense of defendant's person, or for the purpose of expelling deceased from the dwelling, but was in fact for the purpose of engaging him in a difficulty, and of then killing him, the ap-

pellant could rely neither upon the law of self-defense, defense of habitation, nor accidental killing. We can see no objection to this statement of the law.

In connection with the discussion of these instructions, we do not wish to be understood as departing from the well-established practice of refusing to consider questions on instructions where they have not been duly saved. We have been led in this case to depart somewhat from the strict letter of the rule on account of the enormous consequences to the appellant; he being under sentence of death. For this reason alone, we have been desirous of satisfying ourselves that by no possibility has the defendant been unjustly convicted.

It follows from the foregoing that the court committed no errors in the instructions to the jury, to which the motion for a rehearing is directed, and that the former opinion in the case should be adhered to; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2494. April 4, 1921.]

HAWKINS v. BERLIN.

[Rehearing Denied June 4, 1921.]

SYLLABUS BY THE COURT.

1. Where parties to a contract involving the sale of lands enter into a supplemental agreement whereby the seller obligates himself to obtain a release or satisfaction of a specified mortgage deed, he cannot, after failing to obtain such release, assert or plead in excuse or justification that such mortgage was void, and hence there existed no necessity for a release thereof. P. 167

2. **Held,** that this is a suit by which appellee seeks to recover damages resulting from appellant's breach of contract, and that the rule that a party to a contract cannot rescind and cancel without placing or offering to place the opposite party in statu quo is not applicable. P. 167

3. Assignments of error, not argued in the brief, will be regarded as abandoned or waived. P. 168

Appeal from District Court, Quay County; Leib, Judge.

Suit by J. H. Hawkins against G. Berlin. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

H. H. McElroy, of El Paso, Tex., and R. A. Prentice, of Tucumcari, for appellant.

H. A. Kiker, of Raton, and E. F. Saxon, of Tucumcari, for appellee.

OPINION OF THE COURT.

BRATTON, District Judge. Appellee instituted this suit to recover damages in the sum of $1,627 alleged to have been sustained by him as the result of appellant's breach of a certain contract entered into between them, together with a subsequent modification thereof, whereby appellant agreed to sell to appellee certain lots situated in Obar, N. M., with a certain building thereon, and a stock of merchandise. As a part of the purchase price therefor appellee executed 28 notes in the sum of $50 each, payable one each month, which were to be placed in escrow in the First National Bank of Tucumcari, with the provision that appellant's deed and abstract showing clear title should also be placed in said bank, and should be delivered to appellee when he had paid off all of such notes. Later, and while this contract was in process of being carried out, and after appellee had paid 10 of these notes, he made a contract with one Roy Johnson whereby he agreed to sell said premises to Johnson at a profit of $200. After this contract was made, appellee for the first time examined the abstract which appellant had furnished, and then objected to the title, by which objection he asserted there existed an unreleased mortgage deed covering said premises executed by New Mexico Land & Immigration Company to the Bank of Topeka, securing a note of $3,700. Immediately after this objection was made, appellant, appellee Johnson, and their respective at-

torneys had a conference at which this objection to the title was discussed, and it was there agreed that the appellant would obtain a release of such mortgage deed, and in consideration thereof appellee would pay to him $823 in cash in lieu of the 18 notes of $50 each which then remained unpaid, and in addition thereto Johnson agreed to pay him $25 in cash, whereupon appellee executed an order to the First National Bank of Tucumcari directing it to pay to appellant $823 when the abstract was approved by Johnson's attorney. This order was delivered to and kept by said attorney for about one month, and was then returned to appellee by mail. Up to the time this conference was held and this agreement had appellee had promptly paid the notes due appellant as they matured, but he paid none of the remaining notes.

About two months after the supplemental agreement was had with reference to the release of the mortgage deed, appellant took possession of the premises and placed some of his personal effects in the building, and when found there by appellee and asked why he was in such possession, he told and advised appellee that he had annulled the contract and taken possession of the building. The filing of this suit followed, by which appellee seeks to recover the damages which he claims to have suffered on account of appellant's breach of the contract. Appellant by cross-complaint sought to recover certain enumerated damages alleged to be due him. The trial court submitted to the jury only two elements of damages upon which appellee might recover, namely, the amount of money he had paid appellant on the purchase price of the property, and the loss of any profits he may have made by his sale to Johnson, which was never consummated on account of this mortgage. A verdict in favor of appellee for $729.75 was returned, judgment thereon rendered, from which this appeal was perfected.

[1] Appellant first contends that there was no defect in the title because the mortgage deed in question was void, and constituted no lien upon the premises nor defect in the title thereto, because it was executed by a corporation without the corporate seal being thereto attached; that the form of acknowledgment to such instrument did not comply in many respects with the statutes governing the same; that therefore it was not subject to record, nor should be considered even though placed on record. We think a determination of these questions of law is unnecessary to a decision of the case. It affirmatively appears from the pleadings and the evidence that, after appellee had examined the abstract and made objections to the title, appellant, for a valuable consideration, agreed and obligated himself to obtain a release of such mortgage, and after a breach of such agreement he will not be permitted nor heard to say that the mortgage was invalid, and hence no necessity for such release existed. This agreement to obtain such release constituted a special contract with respect to this particular phase of the title, and appellant was bound to perform its provisions without reference to the necessity for the same. Appellant pleaded that he had performed such agreement by obtaining and recording such release, but he offered no evidence whatever to sustain such issue.

[2] By proper assignment of error appellant urges that appellee cannot rescind and cancel the contract without restoring or offering to restore to appellant everything received from him under the same; that a restoration of or offer to restore status quo is indispensable to the right to maintain such a suit, and that his inability so to do will not excuse him from such obligation; that, if he is unable to so restore, his remedy is to sue for damages. Conceding, but not deciding, this to be a correct statement of law, it can avail appellant nothing because ap-

pellee did sue for damages alleged to have been sustained by him as the result of appellant's breach of the contract. This is not a suit to cancel and rescind the contract, but one to recover damages from a breach thereof. What we have here said fully disposes of the question last presented in appellant's brief, wherein he urges that, if appellant did threaten to rescind the contract and took possession of the premises under such circumstances as to constitute a trespass, such would not authorize appellee to rescind. A complete answer to this is that this is not a suit to cancel nor rescind.

The only remaining question presented by appellant is that neither the $500 item nor the $200 item for which the jury returned a verdict for appellee resulted from the failure of appellant to secure or obtain the release of the mortgage, because it does not appear from the evidence that Johnson refused to consummate his contract with appellee because of the existence of such mortgage. With this contention we do not agree. We think it satisfactorily appears that the appellant's failure to obtain such release was the cause of Johnson failing to perform his contract and accept the premises.

[3] Other questions are presented by the assignments of error, but they are not otherwise presented by appellant in his brief. This court has repeatedly held that matters presented by the assignments of error and not followed up and argued in the appellant's brief will be deemed to have been abandoned or waived by him. Riverside Sand & Cement Co. v. Hardwick, 16 N. M. 479, 120 Pac. 323; Brobst v. E. P. & S. W. Ry. Co., 19 N. M. 609, 145 Pac. 258; Clark v. Queen Insurance Co., 22 N. M. 368, 163 Pac. 371.

Failing to find any reversible error in the record, the judgment will be affirmed; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2530. June 13, 1921.]

STATE ex rel. WALKER et al. v. BRIDGES, Town Clerk.

SYLLABUS BY THE COURT.

1. Section 13, c. 89, Laws 1917, operates as an amendment pro tanto of section 3592, Code 1915, and authorizes the voting at municipal elections on affidavit. P. 170

2. An election held without the appointment of a board of registration and the registration of voters, while irregular, is not wholly void, where voters participating in the election present the affidavit required by law to the judges of election along with their ballots. P. 173

Appeal from District Court, Roosevelt County; Brice, Judge.

Application by the State, on the relation of R. S. Walker and others, for a writ of mandamus against Silas Bridges, as Town Clerk. From an award of a peremptory writ, respondent appeals. Affirmed.

Geo. L. Reese, of Portales, for appellant.

A. W. Hockenhull, of Clovis, for appellees.

OPINION OF THE COURT.

PARKER, J. This was an action in mandamus in the district court of Roosevelt county, brought by the state, on relation of R. S. Walker and A. E. Stevenson, against Silas Bridges, as town clerk of the town of Elida, to compel the respondent to canvass the returns and certify the result of an election held in said town of Elida on April 6, 1920, for the election of town officials. The respondent admitted the allegations of the petition, except as to the legality of the election, and alleged that no board of registration had been appointed for said election, and that the election was illegal because of the fact that none of the voters participating in the election had been registered as required by section 3592, Code 1915. The facts were stipulated. It was agreed that the election was legal in all respects, excepting that no registration board was appointed

and the voters were not registered. It was agreed that a number of voters were permitted to vote after making affidavit as to their qualifications.

The trial court held that section 3592, Code 1915, was impliedly repealed by chapter 89, Laws 1917, in so far as the absolute requirement in the former section of registration was concerned, and awarded a peremptory writ of mandamus against the respondent.

[1] It becomes necessary to construe section 3592, Code 1915, in connection with chapter 89, Laws 1917, to ascertain the present state of the law in regard to registration of the voters at municipal elections. Section 3592 is a part of chapter 63 of the Laws of 1893. The act was entitled "An act to provide a system of registration for voters of municipalities." The act was special in the sense that it applied solely to municipal elections. The section provides in detail the machinery for registering the qualified voters in municipalities, and contains the provision that "no person whose name is not so registered shall on any account be permitted to vote at such election." In this particular the requirements in regard to qualification of voters differed in municipal elections from that required at general elections. At general elections, while registration is required under sections 1963 and 1974, Code 1915, a qualified voter, whose name has been omitted from the registration list, may have the right to vote upon presenting to the judges of election an affidavit setting up certain specific facts, and corroborated by two qualified voters of the precinct in which he offers to vote. In Board of Education of City of Roswell v. Citizens' National Bank of Roswell, 23 N. M. 205, 222, 167 Pac. 715, we held that section 1963 had reference only to general state and county elections, and had no reference whatever to municipal or school district elections. This opinion was rendered upon the law as it stood prior to the passage

of chapter 89, Laws 1917. The act of 1917 is entitled, "An act relating to elections." It deals almost exclusively with the subject of the preparation and furnishing of ballots, and the method of voting, and brings into this jurisdiction the Australian ballot system.

Section 1 of the act provides that the expense of printing the ballots and cards of instructions for electors shall be borne, in cases of public elections, by the respective counties, and in cases of municipal elections by municipalities. Section 6 of the act provides for the printing of the ballots by the county clerk of each county, and that no ballots other than those so printed shall be cast, counted, or canvassed in any election. Section 7 provides that in municipal elections the duties which devolve upon the county clerk in general elections shall be performed by the municipal clerk. Section 9 provides for the number of ballots to be furnished by the county clerk in general elections and by the municipal clerk in municipal elections. Section 10 provides for the correction of errors in the tickets both by the county clerk or municipal clerk, as the case may be. Section 11 provides for the delivery of the ballots to the judges of election by the county clerk or the municipal clerk, as the case may be. Section 13 provides for the delivery at any election by one of the judges of election of the ballot to the qualified electors. The section further provides:

"Whenever any qualified elector, whose name has not been registered, shall offer to vote and shall produce evidence of his right so to do in the manner prescribed by law, the name of such elector shall be entered upon the registration list or poll books, and the number of the ballot cast by him shall be entered opposite his name in the same manner as herein provided for with reference to the ballots cast by registered voters."

Section 25 of the act provides penalties for illegal voting and registration at any election, and expressly applies to municipal voters, as well as voters

at general elections. Section 27 repeals 16 sections of the election laws, but does not specifically repeal section 3592, Code 1915.

The question then is, Did the Legislature intend by this act to modify section 3592, Code 1915, so that in cases of municipal elections qualified voters might vote upon furnishing the required affidavit, notwithstanding their names had not been registered? Theretofore they could not do so without registration, as we have seen. It is to be observed from the general view of this act that general elections and municipal elections are carried through the act upon the same basis, and are subject to the same requirements throughout. No provision is made in the act in regard to registration as an affirmative proposition, but the registration laws as existing are recognized as applicable to both kinds of election. It is irresistibly to be inferred from a general view of this act that it was the intention of the Legislature to put general elections and municipal elections upon the same basis, and that they should be conducted in the same manner, and that the same restrictions should apply to both, thus creating a homogeneous system. Viewed in this light the portion of section 13 of the act of 1917 above quoted would seem to indicate a legislative intent to apply the principle of the right of a qualified voter to vote, notwithstanding he was not registered, to all elections alike, and to do away with the former distinction contained in section 3592 to the effect that a voter could not vote unless he was registered. It is perhaps unfortunate that the Legislature was not more specific in its language, so that no interpretation would be required; but we believe that the legislative intent is sufficiently manifested to compel us to hold that section 13 operates as an amendment pro tanto of section 3592, Code 1915, and authorizes the voting at municipal elections on affidavit.

In reaching this conclusion we are not unmindful of the well-established rules of statutory construction. We take into consideration the rule that repeals or amendments by implication are not favored; that usually statutes of a special nature are not to be held to be repealed by acts of a general nature; that, where in the later act certain sections of former laws are specifically repealed, the presumption is that all other statutes are intended by the Legislature to remain in force and effect. Notwithstanding all these wise and salutary rules, there always remains the fundamental and controlling principle of construction, viz. that the intent of the Legislature is to be ascertained from the language used, and the connection in which it is employed, and when that intention is ascertained it is always to govern. And in this case, as we have heretofore stated, the language used in the several sections of the act of 1917 points unerringly, as we see it, to a legislative intent to render the election laws both general and municipal a homogeneous whole, and to prescribe the same rules in both instances as to qualifications of voters.

[2] Having arrived at the foregoing conclusion, we are confronted with a much more serious proposition as to whether the election was not entirely illegal. It is to be remembered that there was no attempt at registration, no registration officers were appointed, and no registration lists were prepared. It may be said generally that the registration laws are as much a part of the election laws as other regulations in regard to voting. The statute requires of the various officers throughout the state, including municipalities, that before the holding of the election officers be appointed to prepare registration lists of the legally qualified voters at such election. To ignore such laws, either through negligence, indifference, or fraud, is an open breach of duty on the part of the election officers, and is worthy of

unqualified condemnation. The registration laws are designed to settle beforehand the question as to who is eligible to vote at any given election. All such questions are primarily determined by the registration board, and thus the turmoil and inconvenience of controversies about the qualifications of voters at the polls on election day are eliminated. In many precincts in the state, without a registration list it would be impossible for all of the voters desiring to vote to do so within the time allotted for the holding of the election. As it is, in many precincts it is all that the judges of election can do, even with the exercise of the utmost diligence, to receive the ballots of all the people who desire to vote. It remains true, nevertheless, that the supreme right guaranteed by the Constitution of the state is the right of a citizen to vote at public elections. If through no fault of his, but through the fault of election officers, or those whose duty it is to appoint them, his right to participate in public elections is to be denied, great injustice is done the citizen. If, therefore, the regulations of elections may be reasonably construed to entitle the citizen to vote, it should be done.

The original law on the subject of registration of voters was contained in chapter 26, Laws 1868, and provided as follows:

> "Hereafter it shall not be lawful for any person to vote in the territory unless his name shall have been registered as a voter as hereinafter provided." Section 1.

By chapter 64, Laws 1903, this section was amended by adding thereto the following words:

> "Unless he shall tender to the judges of election an affidavit, signed and sworn to by himself, and by two qualified voters of the precinct in which he offers to vote, showing him to be a qualified voter of such precinct at such election."

The section as amended now appears as section 1963, Code 1915.

It thus appears that the Legislature in the first instance provided that no one except a registered voter could vote at any election. It afterwards departed from this principle, and allowed qualified voters to vote upon the presentation of the affidavit mentioned in the section. This indicates a clear departure from the former procedure, and the voter is not now to be deprived of the elective franchise by reason of the default of the election officers. This departure is significant, as indicating a legislative intent to free the voter from the restraint upon his franchise occasioned by the carelessness, inadvertence, or fraud of the election officers. Unless prohibited, therefore, by some positive provision of the statute the voter should be held to have the right to vote upon the presentation of the required affidavit, whether there has been any registration of the voters or not. In most of the states the requirement of registration is in much the same form as it was first adopted by the act of 1868 above quoted. Under such circumstances, where the statute provides that unless a voter is registered he cannot on any account vote at all, there must be a registration of the voters simply because of the requirements of the statute. Many cases have so decided. See Richardson v. Blackstone, 135 Md. 530, 109 Atl. 440; People ex rel. Ellsworth v. Laine, 33 Cal. 55; State v. Albin, 44 Mo. 346; Zeller v. Chapman, 54 Mo. 502; People v. Kopplekom, 16 Mich. 343; Nefzger v. Railway Co., 36 Iowa 642; Smith v. Bd of County Com'rs (C. C.), 46 Fed. 340; Pitkin v. McNair, 56 Barb. (N. Y.) 75; Gardina v. Board of Registrars, 160 Ala. 155, 48 South. 788; People v. Earl, 42 Colo. 238, 94 Pac. 294; Bryer v. Sevigney, 42 R. I. 187, 106 Atl. 155; Fish v. Kugel, 63 Colo. 101, 165 Pac. 249; Doerflinger v. Hilmantel, 21 Wis. 574. See, also, Clayton v. Prince et al., 129 Minn. 118, 151 N. W. 911, Ann. Cas. 1916E, 407, and note.

Other cases might be cited, but it would seem to be unnecessary. These cases all turn upon the prop-

osition that, where the statute provides that no unregistered voter may vote, an election held where there has been no registration is void by force of the terms of the statute. This holding is undoubtedly correct. On the other hand, in Power v. Hamilton, 22 N. D. 177, 132 N. W. 664, under a statute similar to ours, and which provided for a non-registered voter to vote by furnishing a certain affidavit, the court held, although there was no registration list made and no attempt was had to comply with the registration laws, that the election was legal in so far as it was participated in by persons who furnished the necessary affidavit as to their qualifications. The court went further in that case than it is necessary for us to go in the case at bar, because in that jurisdiction the statute required the affidavit of the voter to be corroborated by a householder and registered voter of the precinct, which, of ocurse, was impossible literally to have been furnished, there having been no registration list. But in the case at bar the requirement is that the corroboration shall be by two qualified voters of the precinct, whether they are registered or not. See, also, Swain v. McRae, 80 N. C. 111.

In the case at bar, as before seen, a number of the voters voting at the election in question furnished affidavits as to their qualifications in accordance with the requirements of the statute. In the absence of any showing in the record to the contrary, it will be assumed that a majority of the votes cast were thus fortified by the required affidavit, and hence that the successful parties at the election were elected by duly qualified electors. We therefore hold that the election in this case, while exceedingly irregular on account of the absence of registration, was not illegal as a whole on that account.

We appreciate that it is taking a long step to say that a legal election may be held in this state and

the election officers may absolutely ignore the requirements in regard to registration of voters, which requirements, of course, are as much a part of the election law as any other part of it. If an election can be held in a municipality without registration, then a state election may be held without registration, and the requirements of the law absolutely ignored. On the other hand, however, it is always to be remembered that public officials will presumably perform all of their public duties with honesty and fidelity. It is only an occasional case which will ever arise in which election officers will be so negligent or corrupt as to fail to register the voters in any given precinct or voting place. In such case we believe that the interests of the people will be best served by the interpretation of the election laws which we have announced. It follows from all of the foregoing that the judgment of the district court was correct, and should be affirmed; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2512. June 20, 1921.]

RIVERS BROS. CO. v. PUTNEY.

SYLLABUS BY THE COURT.

In the absence of contrary contractual provisions, where goods are ordered of a specific quality, the seller undertaking to deliver them to a carrier to be forwarded to the buyer at a distant point, the right of inspection at destination continues for a reasonable time, and in such cases the carrier is not the agent of the buyer for inspection purposes, but only for the receipt and carriage of the goods.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by the Rivers Bros. Company against R. E. Putney, trading under the name and style of L. B. Putney. From a judgment of dismissal, plaintiff appeals. Affirmed.

Heacock & Grigsby, of Albuquerque, for appellant.

Reid, Hervey & Iden, of Roswell, for appellee.

OPINION OF THE COURT.

PARKER, J. This is an appeal by Rivers Bros. Company, a corporation, from a judgment rendered in favor of R. E. Putney, trading as L. B. Putney, appellee, dismissing the complaint.

The action was to recover a sum of money on account of the sale and delivery of certain fruit. The facts disclose that the appellee is a wholesale grocer at Albuquerque, and that the appellant is a fruit dealer in Los Angeles, having a broker at Albuquerque. The broker telephoned the appellee asking if he wanted anything on that day's refrigerator dispatch from the appellant from Los Angeles. In response thereto appellee ordered certain fresh fruit. The appellant delivered to the carrier at Los Angeles certain fruit purporting to be in accordance with the appellee's order. The shipment included crates of apricots, apples, and bing cherries, and arrived in a refrigerator car at Albuquerque in slightly shorter than the usual time. No claim was made that the shipment was not properly handled but it was shown by appellee, but denied by appellant, that the apricots were delivered to the carrier in Los Angeles in an overripe and rotten and unsalable condition. On account of the condition of the apricots, the shipment was refused by the appellee on its arrival in Albuquerque, after an inspection thereof by him.

The appellant contends, in effect, that the contract was executed for a shipment f. o. b. Los Angeles, and consequently title passed upon delivery there to the carrier, and that the appellee had no right to inspect the shipment at Albuquerque, its agent, the carrier, having received the shipment at Los Angeles, or any right to refuse to accept the shipment upon its arrival at destination.

The court found that the contract called for fruit fit and in condition to ship to Albuquerque; that the appellee had the right to inspect the shipment at Albuquerque; and that the carrier was appellee's agent only in so far as the actual transportation of the goods was concerned.

Appellant's broker testified that he had done business for a number of years with the appellee and that it was always understood that goods purchased from the appellant were sold f. o. b. Los Angeles. On cross-examination the witness testified that what he meant by f. o. b. Los Angeles was that the purchaser should pay the freight from Los Angeles, and that his understanding of his agency was that the carrier was the agent of the purchaser in so far as acceptance of the goods to the standard and quality of those ordered were concerned. He also testified on cross-examination.

"Q. Let us make the illustration not quite so plain; let us suppose that Mr. Putney ordered apricots, which I believe he did in this order. You understand that that order was meant to be apricots to be shipped by refrigerator freight, and to be merchantable when arriving in Albuquerque, you understand that? A. Yes, sir."

From other testimony of the witness, however, it would appear that all his brokerage business theretofore had been done upon the theory that the buyer took the goods at his own risk, through the agency of the carrier, at point of departure. The trial court, however, found, in substance, that the contract contemplated the delivery at Los Angeles of merchantable fruit, and that the apricots were not of merchantable quality; hence the appellant breached its contract, and the appellee was not required to accept the shipment at destination. It also found, in effect, that the carrier was the agent of the appellee only for the purpose of transportation of the goods, and could not bind the appellee with respect to the quality of the goods ordered and shipped.

The contract, in express terms, was silent as to quality of fruit ordered, but it is evident that the parties contemplated that the sale and purchase was of merchantable fruit—not overripe, decayed, unsalable fruit. It is immaterial whether this be characterized as an express or implied warranty; the fact remains that the contract was for merchantable goods, and that the court was justified, under the doctrine of substantial evidence, to conclude that the apricots, when delivered to the carrier in Los Angeles, did not fulfill the conditions of quality contemplated by the contract made between the parties.

We then have for consideration only this question: Where goods of a fixed quality are ordered from a foreign seller, to be transported through a carrier, f. o. b. the seller's residence, does the acceptance of the shipment by the carrier waive the right of the purchaser to inspect the goods at destination for quality? The appellant's statement of the proposition for which it contends injects facts which make the doctrine inapplicable here. It states the proposition as follows:

"Where the contract between the purchaser and the seller is that goods purchased are to be delivered to a common carrier, and the carrier is to act as the agent of the buyer in the shipment and delivery of the goods to him, and the delivery is completed by the seller f. o. b. to the carrier, and where under the contract the carrier is the agent of the purchaser in accepting the goods as to the standard and quality, then the purchaser has no right to refuse the acceptance of the goods purchased, at the point of destination, on account of the inferior quality of the goods purchased or because the goods failed to come up to the standard and quality."

Cases of this character depend for solution upon the terms of the contracts made between the parties. Where the shipment is agreed to be made f. o. b. place of departure, title to pass there and right of inspection as to quality, etc., to be made there, of course the purchaser cannot refuse acceptance at

point of destination. But we have no such case here. Here the court found, in effect from the facts, constituting the contract, that, while the delivery was f. o. b. Los Angeles, it was not complete until tne state of the shipment at Los Angeles had been ascertained at Albuquerque, because the contract contemplated fruit delivered in Los Angeles to the carrier in fit and salable condition to ship to Albuquerque. In other words the contract fixed a standard of quality. In Eaton v. Blackburn, 52 Or. 300, 96 Pac. 870, 97 Pac. 539, 20 L. R. A. (N. S.) 53, 132 Am. St. Rep. 705, 16 Ann. Cas. 1198, the court said:

"Under an executory contract for the future sale and delivery of goods of a specific quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of inferior quality, the vendee is not bound to accept them; and, unless he does so, he is not liable therefor. This necessarily gives to the vendee the right, and imposes upon him the duty of inspection, and he must therefore be given an opportunity to make such inspection before becoming liable for the purchase price, unless the contract otherwise provides; and where articles are to be delivered to a common carrier by the vendor, to be forwarded to the vendee at a distant point, and no provision is made for inspection and acceptance before or at the time of shipment, the vendee is entitled, under the law, to a reasonable time, after the goods arrive at their destination, in which to exercise the right of inspection, and to accept or reject them, if they do not comply with the contract."

In 23 R. C. L. p. 1426, it is said:

"The implied agency of the carrier designated by the buyer to accept delivery by him only extends to an acceptance of such goods as comply with the requirements of the contract of sale. The carrier has no authority to pass upon whether the goods in fact comply with the contract, and if they do not so comply the seller cannot base a claim of constructive delivery to the buyer on his delivery to the carrier. Ordinarily the buyer, after the arrival of the goods at their destination, has the right to inspect the same to see if they comply with the contract, and may reject them if they do not do so, and this is held true though the contract provides for delivery to carrier f. o. b. point of shipment, without a requirement

that the goods be inspected and accepted by the buyer at such point."

In the same work and volume, page 1433, it is said:

"It is the general rule that where goods are ordered of a s specific quality, which the seller undertakes to deliver to a carrier to be forwarded to the buyer at a distant place, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination; in such a case the carrier is not the agent of the buyer to accept the goods as corresponding with the contract, although he may be his agent to receive and transport them."

Numerous cases will be found supporting the text. Some of them, cited by appellee, are: Schiller v. Blyth & Fargo Co., 15 Wyo. 304, 88 Pac. 648, 8 L. R. A. (N. S.) 1167; Alden v. Hart, 161 Mass. 576, 37 N. E. 742; Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; Salomon v. King, 63 N. J. Law 39, 42 Atl. 745. In the last-cited case the court, among other things, said:

"With respect to common carriers, the inspection of goods for the purpose of ascertaining whether they conform to a particular contract is ordinarily so foreign to their business that the employment of an express company by a vendee, nothing more appearing, will not constitute it the vendee's agent to accept goods sold and delivered."

In Pierson v. Crooks, supra, the court said:

"The ordering of goods of a specific quality by a distant purchaser of a manufacturer or dealer, with directions to ship them by carrier, is one of the most frequent commercial transactions. It would be a most embarrassing and inconvenient rule, more injurious even to the dealer or manufacturer than to the purchaser, if delivery to the carrier was held to preclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered."

For further authorities, see Strauss v. National Parlor Furniture Co., 76 Miss. 343, 24 South. 703; Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12

Am. St. Rep. 831; Holt v. Pie, 120 Pa. 425, 14 Atl. 389; Fogel v. Brubaker, 122 Pa. 7, 15 Atl. 692.

The contract being silent as to inspection, but the court below finding that it contemplated the shipment at Los Angeles of goods of a certain quality, the rule announced herein is controlling. For the reasons stated, the judgment of the trial court will be affirmed; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2599. June 20, 1921.]

LAKE ARTHUR DRAINAGE DIST. v. FIELD, State Com'r of Public Lands.

SYLLABUS BY THE COURT.

1. Specific assessment on property for improvements, based upon benefits, the cost of which is assessed against the property, is not a tax within the constitutional sense.

P. 186

2. Chapter 69, Laws 1917, as amended by chapter 87, Laws 1919, which made the provisions of the drainage act (sections 1877 to 1958, Code 1915) specifically applicable to lands owned by the state of New Mexico, and directed the commissioner of public lands to issue proper vouchers, payable out of the income fund derived from lands of the class benefited, for the payment of the assessment made, is unconstitutional, because under the terms of the Enabling Act, as accepted and confirmed by the Constitution of the state, the state has no power to improve the granted lands and charge the expense of the improvements against said lands, or funds derived from lands belonging to the class benefited.

P. 188

Appeal from District Court, Santa Fe County; Holloman, Judge.

Petition by the Lake Arthur Drainage District for a writ of mandamus against Nelson A. Field, Commissioner of Public Lands, to compel the issuance of vouchers for drainage assessments. Judgment for petitioner on demurrer, and defendant appeals. Reversed, with directions.

H. S. Bowman, Attorney General, and A. M. Edwards, Assistant Attorney General, for appellant.

Reid, Hervey & Iden, of Roswell, for appellee.

OPINION OF THE COURT.

ROBERTS, C. J. The Lake Arthur drainage district of Chaves county, on August 20, 1920, filed a petition in the district court of Santa Fe county for a writ of mandamus, directing the commissioner of public lands of New Mexico to issue vouchers for the payment of certain drainage assessments against certain lands granted to the state of New Mexico by the United States, by Act June 21, 1898 (30 Stat. 484), for common school purposes, and confirmed by the Enabling Act, and certain lands for the benefit of the Agricultural College. Attached to the writ as Exhibit B was the order of the district court confirming the preliminary report of the commissioner, and among the findings made by the court was the following:

"That the proposed work is necessary and of utility in carrying out the purposes of the petition, and the same would promote agricultural interests, and the benefits will exceed the cost in each and every instance upon each and every lot, tract, parcel, or easement of land to be included in said drainage district."

And contained in the final order, which was attached as Exhibit C, were the following findings:

"That the commissioners have caused to be prepared by the said engineer a detailed list of lands to be benefited by the proposed work, and after due and proper consideration, and after a thorough personal examination of each and every 40-acre tract or subdivision within said drainage district, they have assessed against each tract, lot, and easement of land in said district, by whomsoever held, the amount of benefits which they have determined will be caused by the same by the construction of the said drainage system.

"The court further finds that the commissioners have apportioned and assessed the part of the costs of construction above mentioned, over and above the amount assessed against such corporations receiving special benefits as afore-

said, against the several benefited tracts, lots, and easement of land in said drainage district in proportion to the benefits they will derive therefrom. * * * And the court finds that said assessments as reported by the commissioners for costs of construction, as well as for benefits, are just, fair, and equitable assessments, and have been arrived at after a thorough investigation and examination by the commissioners on the ground.

"That all of the lands within said proposed drainage districts are in need of drainage, and that the drainage thereof as proposed will result in great benefit to and improvement of the said lands; that the system of drainage as proposed by the commissioners, as mentioned and described in their report and as herein referred to, is feasible and proper in all respects and the benefits therefrom on each and every 40-acre tract or subdivision thereof will be in excess of the assessments made against the said lands."

The application for the writ of mandamus was bottomed on the provisions of chapter 69, Laws 1917, as amended by chapter 87, Laws 1919, which made the provisions of the drainage act (sections 1877 to 1958, except section 1932, Code 1915), specifically applicable to lands owned by the state of New Mexico, and directed the commissioner of public lands to issue proper vouchers, payable out of the income fund derived from lands, of the class benefited, for the payment of assessments made; that is to say, if the lands benefited by the drainage were lands granted to the state of New Mexico for the use of the common schools, then the cost of the improvements must be paid out of the income fund of the common school land. The commissioner was required under the act to issue his voucher to the state auditor, certifying that the assessment had been legally made and describing the land therein, stating the institutions to which the same pertains, and the auditor was thereupon required to draw his warrant against the income fund of such institution for the amount of such assessment or the installment thereof due. The excepted section of the Code (1932), which made the drainage assessment a lien on the land, was not made applicable to the granted

lands. As to these lands, no lien was provided for, but payment was to be made as indicated. By section 4, chapter 69, Laws 1917, it is further provided that where state lands were sold under contract upon the deferred payment plan, assessments might thereafter be made against the interest of the purchaser, and any unpaid assessments were made a lien on the equity of such purchaser, and such equity might be sold as other lands. Section 3 provides that any state lands within a drainage district, the value of which has been enhanced by the creation and operation of the system, should not be sold at a price less than their actual value, and provision is made for appraisement. To the alternative writ which was issued the commissioner made return in the form of a demurrer, both to the petition and to the writ.

The demurrer was based on two grounds, briefly stated as follows: (1) That said lands cannot be taxed; (2) that the drainage act, in so far as state lands are concerned, is in contravention of section 10 of the Enabling Act as ratified and accepted by the Constitution of the state (section 9, art. 21). The demurrer was overruled, and the commissioner stood on the demurrer, and judgment was entered against the official, directing him to issue the vouchers for the payment of the assessment alleged to be due in the application for the writ. From the judgment, the present appeal is prosecuted. There are two points involved in the appeal.

[1] We will consider first the question as to whether this is a tax upon state lands in the constitutional sense. Section 3 of article 8 of the Constitution of the state exempts from taxation property of the state. Under this provision it would be beyond the power of the state Legislature to provide for a tax upon state property, but is the levying of assessment in proportion to benefits, in other words an assessment tax, a tax within the constitutional

inhibition? Does section 3 of article 8 of the Constitution relieve the state and the other political subdivisions and institutions therein mentioned from liability for special assessment for direct improvements? This court, in the case of Dexter-Greenfield Drainage District, 21 N. M. 286, 154 Pac. 382, considered at length the drainage act of this state, and to some extent the nature of drainage assessments. We there drew the distinction, generally approved by the authorities, between a tax and an assessment for benefits for improvement. In that case the drainage act was attacked because it conferred upon the court the power of taxation contrary to the Constitution. We there stated:

"The cases referred to in the appellant's brief upon this point are cases involving the collection of taxes, as distinguished from assessments for benefits, as provided in this act. There is a distinction in the authorities between a tax and a special assessment, when involved in the question of the constitutional power to levy and collect the same."

The position was sustained by quotations from Cooley on Taxation and the case of Bryant v. Robbins, 70 Wis. 258, 35 N. W. 545, and many other authorities. It is true there is a conflict of authority upon the proposition, but we believe the better rule is that a specific assessment of property for improvements, the cost of which is assessed against the property, is not a tax within the constitutional sense. The cases are very numerous, and we will cite only the following: City of Clinton v. Henry County, 115 Mo. 557, 22 S. W. 494, 37 Am. St. Rep. 415; Lockwood v. St. Louis, 24 Mo. 20; Sheehan v. Good Samaritan Hospital, 50 Mo. 155, 11 Am. Rep. 412; Edwards Construction Co. v. Jaspar County et al., 117 Iowa 365, 90 N. W. 1006, 94 Am. St. Rep. 301; Commissioners v. Ottawa, 49 Kan. 747, 31 Pac. 788, 33 Am. St. Rep. 396; Mt. Sterling v. Montgomery County, 152 Ky. 637, 153 S. W. 952, 44 L. R. A. (N. S.) 57; New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96.

In the case of Lockwood v. St. Louis it was held that church property was liable for special sewer assessments; and in the case of Clinton v. Henry County, that the county was liable for special assessments for street paving; and in Sheehan v. Good Samaritan Hospital, that while the charter of the Hospital Company exempted its property from taxation, its real property was held liable for special street improving assessments. It might be that it would be beyond the power of local authorities to make such improvements and assess the cost thereof against the state property without specific statutory authority, but this point is not in this case and need not be determined because here there is specific statutory authority for the assessment and collection of the same. From the foregoing it will be seen that an assessment for benefits is not within the constitutional inhibition.

[2] The main point in this case, however, is whether the restrictions of the Enabling Act as accepted and confirmed by the constitutional convention, and which thereby became part of our fundamental law, impress such a condition upon the land granted to the state for common school purposes, and institutional purposes, that specific assessments cannot be imposed upon such lands. It would require no argument to demonstrate the fact that no lien could be created upon state lands by a specific assessment, or in any other manner, because by section 10 of the Enabling Act it is provided:

> "No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever."

But the act of the Legislature creates no lien upon the lands, but provides for the payment of the assessment only by vouchers issued by the commissioner of public lands, payable out of a specific fund, to wit, the income fund. It is apparent that the so-

lution of this question depends upon the act of Congress granting the lands, and the acceptance of such provision in our state Constitution. The pertinent provisions of section 10 of the Enabling Act are as follows:

"That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said territory, are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in the manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust. * * *

"A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any money shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys were by this act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed."

And by section 9, article 21, of the Constitution, the trust was accepted by the state in the following language:

"This state and its people consent to all and singular the provisions of the said act of Congress, approved June twentieth, nineteen hundred and ten, concerning the lands by said act granted or confirmed to this state, the terms and conditions upon which said grants and confirmations were made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in said act provided."

The question then for determination is whether the state Legislature can, under the terms of the granting act, so incorporated in our Constitution, improve the granted property and charge the expense of improvement against the income fund of such land.

Appellee argues that the lands involved in this case were granted to the state originally by section 10 of the Act of June 21, 1898, 30 Stat. at Large, p. 484, which, so far as pertinent to this discussion, is as follows:

"That the lands reserved for university purposes, including all saline lands, and sections 16 and 36 reserved for public schools, may be leased under such laws and regulations as may be hereafter prescribed by the legislative assembly of said territory; * * * and all necessary expenses and costs incurred in the leasing, management, and protection of said lands and leases may be paid out of the proceeds derived from such leases. * * * The remainder of the lands granted by this act, except those lands which may be leased only as above provided, may be sold under such laws and regulations as may be hereafter prescribed by the legislative assembly of said territory; and all such necessary costs and expenses as may be incurred in the management, protection, and sale of said lands may be paid out of the proceeds derived from such sales."

But Enabling Act, § 10, provided:

"That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said territory, are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in the manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions. * * *"

And as this provision was accepted by the constitutional convention, it thereby became a part of our fundamental law to the same extent as if it had been directly incorporated into the Constitution. But even if it be assumed that the original granting act was not affected in any manner by the Enabling Act and the constitutional provision further than

the acceptance of the grant and an agreement in the Constitution to comply with the original granting act, appellee would be in no better position, for it requires no argument to demonstrate that the state would have the power to protect the grant of lands and to charge the expense of such protection to the trust fund. But the charges sought to be imposed upon the trust estate in this case, so far as the reccord discloses at least, were not incurred for the protection of the land. The drainage law, the act which authorizes the state to pay its proportionate cost of drainage, proceeds upon the theory of benefits or rather improvement of the property and a promotion of agricultural interests.

The decree of the court in this case permitting the assessment finds, not that the assessment was necessary for the protection of the property, but that it was beneficial to the property and that agricultural interests would be promoted thereby. Neither the language of the Enabling Act, nor the granting act of 1898, authorizes the state to improve the granted property. By carefully chosen language the rights and duties of the state are defined and strict limitations are imposed upon the exercise of the power. The money in this case, it is true, was not payable out of the permanent fund, but was to be paid out of the income fund; but this cannot alter the rights of the parties, because the income from the lands was impressed with the same trust as the land itself. That is to say, it could only be used for the support and maintenance of the common schools or the institutions to which it was granted.

The Enabling Act was considered by this court very exhaustively in the case of State v. Llewellyn, 23 N. M. 43, 167 Pac. 414. Of course, what was said there has no direct bearing upon this case. There are no cases in point on the question presented in the instant case. In the case of Edgerton v. Huntington School Township, 126 Ind. 261, 26 N.

E. 156, it was held that congressional township lands in that state were not subject to assessments. In that case the assessments were attempted to be made a lien on the land; the court saying:

"The state has no power to tax such lands, for if it were permitted to do so, it would tax them out of existence, and divert them to the use of the state in the payment of ordinary expenses. So, if they could be assessed for local improvements and exposed to sale at public auction, and sold to the highest bidder, they might be totally absorbed and diverted from the common school fund to a purpose never contemplated when they were reserved. The argument that the lands are benefited to an amount equal to the assessments does not meet the question, for while it is true in theory, and is, perhaps, true in fact, in many cases, that such lands are benefited by public improvements, it does not follow that when exposed to sale for the payment of such assessments, some person will bid enough to cover the enhanced value of the land."

Another case is that of People v. Trustees of Schools, 118 Ill. 52, 7 N. E. 262. The court, speaking of a similar grant of land, said:

"It should not be exposed to the danger of being improved away, by being made to pay for supposed benefits conferred upon it by improvements."

Another case similar to the cases last cited is that of Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841. The court said:

"Neither does the fact that school section No. 16, Wiser township, which lies adjacent to the drain in question, and concededly is benefited by it, was not assessed, furnish any legal ground for complaint. Being school land, it was not assessable, under sections 153, 158, and 163 of the state Constitution. This tract is a portion of the lands granted by the United States to the state in trust for school purposes. The provisions of the grant and its acceptance forbid the imposition of assessments."

The distinguishing feature, of course, between these cases and the one at bar, is that there the assessment was attempted to be made a lien on the land, while here no such lien is authorized, but direct

provision is made for the payment of the assessment out of the income fund, which, under the granting act, could be used only for certain specified purposes; and the improvements of land not being one of the permitted uses of this fund, it would seem to necessarily follow that an act authorizing its use for such purpose would be invalid.

Appellee argues, however, that the drainage of these lands was only incidentally an improvement; that it was absolutely essential for the protection of the land; that without drainage they would become water-logged and so impregnated with alkali that the result would be practically a destruction of the land for any beneficial use. The error in this argument is that there is nothing in the pleadings upon which to base it. The drainage act and the supplemental act providing for the improvement of such lands, payment of the assessment by the commissioner, all the court proceedings in the case leading up to the confirmation of the assessment,, and the petition for the writ of mandamus, show plainly that the proceeding was based upon the theory of improving the lands to be drained, and that agricultural interests would be promoted thereby. If the present act were upheld, it would logically follow that the state could engage in the construction of irrigation enterprises for the improvement of granted lands, and charge the cost of constructing the same against the income fund derived from such lands. Appellee does not argue that this could be done. Many other examples might be suggested, such as fencing land, putting down wells, and other similar examples. The language of the Enabling Act clearly shows that it was not the intention of Congress that the state was to have the power to improve the lands at the expense of the lands or income derived therefrom. We think the present act clearly violates the letter and spirit of the Enabling Act as accepted by the state, and that the court below should have sustained the demurrer.

In this case it is unnecessary to consider the terms of the Enabling Act granting the lands separate and apart from our constitutional provision agreeing on the part of the state to comply with the terms and provisions of the granting act, because it is clear that the Legislature is bound by the constitutional provision independent of the power of Congress to impose restrictions upon the grant which the state is legally bound to observe.

For the reasons stated, the judgment will be reversed, with directions to the trial court to sustain the demurrer; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2495. June 22, 1921.]

BEEBE v. FOUSE.

SYLLABUS BY THE COURT.

1. A novation does not take place where the seller under a conditional sale contract consents that the purchaser may transfer the goods covered by the conditional sale contract to a third party, and that such seller will accept payments made on the contract from such transferee, where, under the terms of such subsequent agreement, the original purchaser is not released from liability, and the transferee does not become personally obligated for the payment of the balance of the purchase price. P. 196

2. The statute (chapter 74, Laws 1917), which requires conditional sale contracts to be recorded, does not provide for the recordation of an assignment of such a contract. P. 197

3. A conditional sale contract is not invalidated when not recorded as against a landlord's lien under the statute referred to, which invalidates such a contract when not recorded as to subsequent mortgages in good faith, purchasers for value without notice, and subsequent judgment or attaching creditors without notice and as against subsequent "general creditors" without notice, as a landlord's lien claimant is neither a mortgagee, judgment or attaching creditor, or "general creditor." P. 198

4. Under a conditional sale contract which gives the seller a right to enter upon the premises and retake possession of the property upon default, the statute of limitations does not

begin to run against the right to replevin such property upon default until the seller elects to exercise the right to retake such property. P. 199

5. Under section 4146, Code 1915, which provides that when an instrument in writing is the foundation of the action a copy must be attached to the complaint, no contract or other instrument need or should be filed or annexed which is not the foundation of the action or defense. P. 201

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by L. V. Beebe against Albert Fouse. Judgment for plaintiff, and defendant appeals. Affirmed.

H. B. Jamison, of Albuquerque, for appellant.

Simms & Botts, of Albuquerque, for appellee.

OPINION OF THE COURT.

ROBERTS, C. J. Appellee brought this suit against appellant to recover certain articles of personal property which appellee claimed to own, and which were in the possession of appellant. Appellant based his claim to chattels upon the fact that he had purchased the same at a sale made to satisfy a landlord's lien. The case was tried to the court without a jury, and the court found that the appellee had sold the chattels in question to one Miller some time in the months of January and February, 1917, under a title retention contract; that Miller had made certain payments upon the property; and that he subsequently, with the consent of appellee, transferred the property to one Owens. The property in question was used in a dry-cleaning establishment, and the business was carried on in a building owned by the Kent estate, of which W. P. Metcalf was agent. Owens defaulted in the payment of the rent and left the state. He had not made any payment to appellee on the contract between appellee and Miller after January 2, 1918, and this action was not filed until the 20th day of February, 1919. But no demand was made upon Owens by appellee, and

appellee testified that Owens retained possession of the property with his consent thereafter. In other words, he did not elect to forfeit the contract.

The court found that there was no new contract entered into between Owens and appellee when appellee took the goods over from Miller, and that appellee did not release Miller from his obligation, but did agree to accept payments from Owens on the Miller contract. The court found the facts and stated conclusions of law in favor of appellee, and entered judgment accordingly, from which this appeal is prosecuted.

The first point made by appellant is that the agreement between appellee, Miller, and Owens in the summer of 1917, whereby Owens went into sole possession of all the chattels, was invalid as against a landlord's lien unless acknowledged and recorded. This contention is based upon the assumption that there was a novation; otherwise it is without merit.

"A novation, then, as understood in modern law, is a mutual agreement, between all parties concerned, for the discharge of a valid existing obligation by the substitution of a new valid obligation on the part of the debtor or another, or a like agreement for the discharge of a debtor to his creditor by the substitution of a new creditor." 20 R. C. L. p. 360.

[1] In view of the finding of the court that Miller was not released, there could be no novation. It goes without saying that if there was a conditional sale contract between Owens and appellee such a contract would, under the terms of chapter 74, Laws 1917, be required to be recorded in order to afford protection to the seller against the parties named in the statute. There is a question, which will be discussed later, as to whether a landlord's lien would be within the protection of the statute, but as between Owens and appellee there was clearly no conditional sale, but merely an agreement or understanding between the parties that appellee

would and did consent that he would accept the installments due under the Miller contract from Owens. The sale or contract existed between Miller and Owens, not between appellee and Owens. Appellee did not accept Owens as his debtor, and would have had no cause of action against Owens for the debt. We quote the statute:

"Section 1. That section 2 of chapter 71 of the Session Laws of 1915, relating to chattel mortgages, be and the same is hereby amended so as to read as follows:

" 'Sec. 2. That hereafter all chattel mortgages, conditional sales, leases, purchase leases, sale leases, or other instruments of writing having the effect of a mortgage or lien upon personal property, or that are intended to hold the title in the former owner, possessor or grantor until the value or purchase price is fully paid, shall be acknowledged by the owner or mortgagor in the same manner as conveyances affecting real estate, and the same shall be filed or recorded as hereinafter required. The failure to so file or record any such instrument in writing shall render the same void as to subsequent mortgages in good faith, purchasers for value without notice and subsequent judgment or attaching creditors without notice; and as against subsequent general creditors without notice such unrecorded instrument shall not be valid until the same shall be duly filed or recorded as hereinafter provided.' "

[2] It will be seen that under the terms of this statute it was only the conditional sale contract that had to be acknowledged and recorded. Appellant argues that this construction of the statute and the facts in this case leave the parties dealing with the apparent owner of the chattels, which are in his possession, where he holds them under an agreement with the original purchaser under the conditional sale contract, by which such apparent owner is to pay out the original contract, without any protection and subject to imposition and fraud. The answer as to this is that the legislature has not seen fit to provide against such a contingency, and that, however meritorious such a provision might be, it is not the province of the court to extend the terms of

the statute beyond its plain language. This contract between appellee and Miller was entered into before chapter 74, supra, went into effect; consequently appellee's rights were protected under the conditional sale contract, although it had not been recorded.

Our statute (section 3334, Code 1915) gives to landlords a lien on the property of their tenants which remains in the house rented. Property which is held by the tenant under a conditional sale contract, where title has not passed, is not the property of the tenant within the meaning of the statute, and the landlord's lien would not extend to any such goods (Bingham v. Vandegrift, 93 Ala. 283, 9 South. 280).

[3] But there is another sufficient reason why appellant was not entitled to recover or retain the goods purchased by him in this case, and that is that, even though it be assumed there was an oral conditional sale contract between appellee and Owens, of course not acknowledged or recorded, the appellant claiming under a sale to satisfy a landlord's lien, would not come within the protection of the statute. A conditional sale contract is invalidated when not recorded as to "subsequent mortgages in good faith, purchasers for value without notice, and subsequent judgment or attaching crediors without notice, and as against subsequent general creditors without notice." Of course, if appellant held "in privity" with the landlord, and such landlord was within the protection of the statute, appellant would be protected; but the landlord proceeding to enforce his lien was neither a subsequent mortgagee, judgment or attaching creditor, nor a general creditor.

"General creditors are persons who have given credit and who have no lien or security for the payment of a debt so created." Words and Phrases, First Series, vol. 4, p. 3058.

It cannot be said that appellant was a purchaser for value without notice. The facts about the sale

were as follows: Metcalf, the agent, without giving any notice, as required by the landlord's lien statute, took possession of the property and sold it to appellant. Afterwards appellee instituted this action in replevin, and thereafter, and after appellant had been served with notice in the replevin action and knew that appellee claimed title to the property, Metcalf, the agent, gave the statutory notice, and resold the property, at which time appellant repurchased it. At the time of such purchase appellant had notice of the claim of appellee, so that it cannot be said that he was a purchaser for value without notice.

[4] It is next argued that the action was brought more than one year from the time when the cause of action accrued, and was therefore barred by our statute (section 4344, Code 1915), which requires that the action shall be brought within one year after the right of action accrued. This argument is based upon the provision in the contract in question which reads as follows:

"It is further understood and agreed that the time is the essence of this contract, and if any payments remain unpaid after the same shall become due and payable, or if any of the above conditions be violated, the said party of the first part, his agent or assigns, amy enter upon the premises, where said property is stored, or may be found, and retake possession thereof without previous demand or notice either of amounts due, or of possession, or any other demand, and retain all money paid thereon as liquidated damages thereon, agreed upon for violation of this contract by the said party of the second part, and thereupon this contract shall be forever relieved from any claim on behalf of said party of the second part arising therefrom."

Appellant contends that, as appellee's right to forfeit the contract by reason of the non-payment of the January, 1918, installment then accrued, the statute then began to run, and cites in support of his contention Buss v. Kemp Lumber Co., 23 N. M. 567, 170 Pac. 54, L. R. A. 1918C, 1015. It will be

observed that the provisions in the contract in question gave appellee the right to enter upon the premises and take possession of the goods upon default in the payment of any installment, but this right was optional with the appellee. In the case above cited it was held that the statute of limitations commenced to run against a cause of action on a note upon default of the payment of interest, where the note provided that, "in case of a default in any interest payment, then the whole principal sum shall become due and collectible." But in this case it will be observed that by the terms of the contract itself, upon default in the payment of the interest, the whole sum became immediately due and payable, and no option was left with the payee as to whether such was to be the effect of the nonpayment. Under the contract in the case at bar the appellee had the right, if he so elected, to enter upon the premises where the property was found and to retake possession thereof, without previous demand or notice. But this right was in abeyance until appellee elected to exercise it. Consequently, the statute did not begin to run until such election was made.

It is argued that under the evidence Miller was released from liability to Beebe under the Beebe-Miller contract. This argument is based upon the assumption that the court was in error in finding that there was no release. We have read the evidence and it justifies the finding.

It is next contended that there is no evidence in the case to show that Beebe was ever the owner of the goods taken under the writ of replevin from Fouse. By comparison between the final judgment, the testimony of Fouse, and Exhibit A, which contained a list of the goods, it will be seen that the court gave in his final judgment an award to the appellee for just such articles as Fouse did not exclude, and which he admitted in his testimony to have gotten. This would seem to dispose of the

question as to the identity of the articles in the complaint.

[5] It is lastly claimed that it was error for the court to admit plaintiff's Exhibit A, the conditional sale contract between Miller and appellee, in evidence, over the objection of the defendant, when no copy of it had been set out in the complaint or filed therewith. Section 4146, Code 1915, provides that when an instrument in writing is the foundation of the action a copy must be attached to the complaint, and in the absence of such copy such instrument cannot be received in evidence. The right of action of the plaintiff against Fouse to recover the goods mentioned in the complaint was in no sense founded upon the written contract between Beebe and Miller. In so far as appellee was concerned, Fouse was a trespasser who bought these goods first at a void sale made by the landlord without notice and without right and, second, after the writ of replevin had been served upon Fouse and second sale was made. Appellee was not in any way attempting to enforce the conditional sale contract against Fouse, who was not a party to it, but the conditional sale contract between Beebe and Miller was introduced in evidence to show Beebe's ownership of the property, to which he testified orally. Appellee's right of action was not founded upon the conditional sale contract, but upon the fact that he was the owner of the goods and that the same were unlawfully held by the appellant. The conditional sale contract was simply an item of evidence going to show such ownership.

"No contract or other instrument need or should be filed or annexed which is not the foundation of the action of defense." 31 Cyc. 356.

Finding no error in the record, the judgment will be affirmed; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2533. June 22, 1921.]

ABO LAND CO. v. DUNLAVY et al.

SYLLABUS BY THE COURT.

1. Where a party takes a cost bond required to perfect an appeal to this court to the county clerk and hands the bond to him, and afterwards takes the bond back for the purpose of procuring a signature on such bond, and before it is marked "filed," there is no filing of the bond. P. 203

2. Under section 33, c. 43, Laws 1917, where a motion for certiorari for diminution of the record is not made within 30 days after appellant, or plaintiff in error, has filed his brief, the same will not be granted unless cause is shown excusing the failure of the appellant to apply for such certiorari within such 30 days. P. 203

Appeal from District Court, Torrance County; Ed Mechem, Judge.

Action by the Abo Land Company against James P. Dunlavy and others. Judgment for defendants, and plaintiff appealed. The appeal was dismissed, and plaintiff moves to set aside the order and for a reinstatement of the cause. Denied.

Rodey & Rodey, of Albuquerque, for appellant.

H. S. Bowman, of Santa Fe, for appellees.

OPINION OF THE COURT.

ROBERTS, C. J. The transcript of record in this cause was filed in the office of the clerk of this court on August 23, 1920, and thereafter, on September 7, 1920, appellant filed its brief on the merits. Thereafter appellee filed a motion to dismiss the appeal because no cost bond was filed within 30 days, as required by section 15, c. 43, Laws 1917. This section provides that, where a cost bond is not filed within 30 days after the allowance of the appeal, the appeal shall fail, and this court held in the case of Hernandez v. Roberts, 24 N. M. 253, 173 Pac. 1034, that the failure to file the cost bond within the time required was an incurable defect, which could not be waived by the appellee.

Thereafter, on October 20, 1920, appellant filed a petition for a writ of certiorari for the correction of the record for the purpose of showing that a cost bond was filed within the 30 days, but the same was not supported by any showing attempting to excuse appellant's failure to apply for the writ of certiorari within 30 days after having filed its brief, as required by section 33, c, 43, Laws 1917. The court without a written opinion entered an order sustaining the motion to dismiss the appeal.

After the 20 days had expired within which to file a motion for rehearing, appellant filed a motion to set aside the order of dismissal and to reinstate the cause and for a hearing on the merits. This motion was supported by affidavit in which appellant undertook to show that it had filed a good and sufficient cost bond within the 30 days required by the statute, and that its petition for writ of certiorari should have been granted. Oral argument was permitted upon the motion.

[1, 2] After carefully considering the questions presented, we are satisfied that the order dismissing the appeal was correct for two reasons. The record as filed in this court shows a cost bond which was filed and approved some time after the 30 days had expired. Appellant by affidavits filed undertakes to show that there was another cost bond tendered and filed within the 30-day period which it desires to bring into the record by the writ of certiorari applied for, but the affidavits in support of the writ fail to show that the cost bond was filed. Marshal Orme, the son of the president of the appellant corporation, in his affidavit shows that such a cost bond was executed, not signed by his father as president, however, because at that time he was ill in a hospital; that he took the cost bond to Julian Salas, the county clerk of Torrance county, and placed it in his hands at his residence in Estancia during office hours, and the affidavit is silent as to what occurred

thereafter. The county clerk in his affidavit shows that an extension of time to file the cost bond had been granted by the district judge, which of course was ineffectual under the statute, and that Marshal Orme brought the cost bond to him at his residence; that he took it in his hands, and in a letter to the clerk of this court, which the county clerk says was correct, he says that Mr. W. R. Orme was ill in a hospital, "and he being the principal, both himself and Mr. Orme (Marshal) concluded that it would be better to have W. R. Orme to sign said bond," which clearly shows that the younger Orme took the bond away for the purpose of having his father sign it. Under these circumstances, of course, there was no filing of the bond. But aside from this question, the application for the writ of certiorari was properly denied, and the motion to dismiss sustained, because appellant in applying for the writ of certiorari failed to make showing to the court accounting for its delay in not applying for the writ within 30 days after it had filed its brief. The statute (section 33, supra) provides:

> "All motions for such certiorari [for diminution of the record] shall be made within thirty days after appellant or plaintiff in error shall have filed his brief, otherwise the same shall not be granted unless upon such special cause shown to the court accounting satisfactorily for the delay."

Appellant did not undertake to in any manner account for the delay, and to have sustained the application for the writ under such circumstances would have been a clear violation of this section of the statute.

For the reasons stated, the application to set aside order of dismissal will be refused; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2537. June 24, 1921.]

STATE v. CURRY et al.

SYLLABUS BY THE COURT.

1. Appellants were prosecuted for the unlawful purchase of four head of sheep from one not the owner of the sheep. The indictment charged the purchase to have been made on the 13th day of January, 1920. The state put in evidence the fact that some time in December prior thereto one of the appellants had exacted one head of sheep from the party from whom the later purchase was made as damage for trespass; that such appellant stated at the time that he would not exact the sheep, but for the fact that the sheep belonged to Bond & Weist, the parties alleged in the indictment to be the owners. Appellants contend that by putting in evidence of the prior transaction there was an election by the state, and that transaction is the one upon which it should seek a conviction. This evidence was introduced for the purpose of proving knowledge on the part of appellant of lack of ownership of the sheep in the party from whom they later purchased, and by so doing there was no election. P. 208

2. Where evidence of ownership depends solely upon the brand upon an animal, ownership may be established only by the introduction of the record brand, or a certified copy of the same; but ownership of an animal may be established by flesh marks, or other proper evidence of ownership, as if no brand law existed. P. 209

3. It is within the discretion of the court as to whether or not it will exclude witnesses from the courtroom during the trial, and the court has the right to permit such witness or witnesses as it deems necessary to sit with either side during the trial for consultation and advice. P. 210

4. It is the duty of the trial court to see that counsel and witnesses are required to sit at such distance from members of the jury that the jurors cannot overhear remarks between counsel or counsel and others; but where an appellant complains that counsel for the state was permitted to sit so near the jury that such remarks could be overheard, but upon objection the court states he knows that the jurors have not overheard such remarks, the statement of the court is controlling, and must be accepted as true. P. 210

5. Where a trial court, during the conduct of the trial, makes an objectionable statement in the presence of the jury, but later instructs the jury that they are not to be influenced in making up their verdict by any remark made by the court

but are to decide the case solely upon the evidence adduced upon the trial, if there is error in the remark it is cured by the admonition. P. 211

6. The admission or exclusion of evidence not strictly in rebuttal is a matter resting within the discretion of the trial court, the exercise of which discretion is not subject to review except in cases of gross abuse. P. 211

7. Where the trial court directs a view by the jury, a party to the trial not objecting to the view will not be heard to raise the objection in the appellate court that the view should not have been permitted. P. 212

Appeal from District Court, Guadalupe County; H. J. Leahy, Judge.

Jack Curry and Doc Curry were convicted of unlawfully purchasing sheep from one known to have no right to sell, and they appeal. Affirmed.

C. G. Hedgcock, of Las Vegas, and Martin R. Baker, of Santa Rosa, for appellants.

H. S. Bowman, Attorney General, and A. M. Edwards, Assistant Attorney General, for the State.

OPINION OF THE COURT.

ROBERTS, C. J. Appellants, Jack Curry and Doc Curry, were indicted in the district court of Guadalupe county at its April, 1920, term, under an indictment charging them jointly with larceny in the first count, and in the second with the unlawful purchase of four head of sheep, the property of Bond & Weist, a corporation, from one Prudencio Maestas, on the 13th day of January, 1920, they knowing that said Maestas had no right to sell the same. The defense moved at the opening of the case for an election by the state as to which count it would proceed under. The motion was overruled but at the close of the state's case in chief, on motion of defendants, the state elected to proceed on the second count. From a conviction on this count, and judgment and sentence of the court thereon, defendants prosecute this appeal.

On the 27th day of December, 1919, Maestas, with a herd of about 600 sheep, the ownership of which

was divided between Bond & Weist and Joseph Holbrook, passed through Jack Curry's place with such herd on the way to Bull Canyon, a new pasture to which they were driving the sheep. Curry demanded of Maestas that he give him 1 head of sheep for the trespass occasioned by the sheep in crossing his pasture. The sheep was delivered to Curry by Manuel Garcia, the foreman of the herd. Jack Curry stated to Garcia at the time, so Garcia testified, that if the sheep had belonged to any one other tnan Bond & Weist he would not have demanded pay for the trespass. There was evidence that the herder had notified the owner of this transaction, and it was ratified. On January 9, 1920, Maestas claimed to have had another conversation with Jack Curry, in which Curry stated that he wanted to buy some sheep, offering to trade a cow for 10 head. This was denied by the defendants. Maestas testified that he agreed to sell Jack Curry 5 head of sheep at $25 and these 5 head were delivered to Jack Curry on the 10th day of January, 1920. Maestas further testified that he sold Jack Curry 3 head of sheep for $3, which were delivered on the 13th of January. The defendant, Doc Curry, had no conversation with Maestas about buying the sheep, and did not appear in evidence until the 13th of January. On that date the two appellants came to Prudencio Maestas, at which time Jack Curry paid him $28, including a check for $5, which Doc Curry signed, and Jack Curry took a bill of sale from Maestas for 8 head of sheep, witnessed by A. N. Merrel and C. E. Merrel. The Merrels testified to the giving of the bill of sale. Maestas denied the giving of the bill of sale, and claimed that he said he had no right to sell the sheep. Later Maestas confessed to Holbrook, owner of some of the sheep, and he delivered the money to him, or offered to deliver it. The sheep were found in the possession of Jack Curry. Doc Curry admitted that he placed the earmark of Jack Curry on 5 of the 8 head, and also their paint mark

on the 8 sheep, but denied clipping the wool or removing the old paint mark. The additional facts will be stated as occasion requires in discussing the errors relied upon.

[1] The first point made by the appellants is that the state, having introduced evidence as to the transaction on the 27th of December, 1919, thereby elected that transaction as the one upon which it would seek a conviction. There might be some merit in this contention if such evidence had been put in solely for the purpose of showing a crime committed on that date, but this evidence was competent for the purpose of showing that appellants knew that the sheep in question did not belong to Maestas, for it was testified on that occasion Jack Curry stated that he would not have exacted the 1 head of sheep for the trespass except for the fact that the sheep belonged to Bond & Weist. This was an important item of evidence for the purpose of showing knowledge of lack of ownership in Maestas at the time of the subsequent purchase of the 8 head of sheep, and by putting in such evidence for that purpose, there was no election; besides, the evidence showed that that transaction was ratified by the owner, and the facts did not make out a crime. The transactions from January 10th to 13th were but a continuous negotiation, and constituted but one crime. Consequently, it follows that there was no merit in this contention.

It is argued that Maestas was an accomplice, and that his testimony was not corroborated as to the guilty knowledge of defendants' lack of authority to dispose of the sheep. The state argues that Maestas was not an accomplice, but this question becomes wholly immaterial, because there was ample corroborating evidence to sustain a conviction. Manuel Garcia, as stated, testified that appellant, Jack Curry, said that he would not exact the 1 head of sheep in payment of the trespass committed by

the herd if the sheep did not belong to Bond & Weist, thereby clearly showing that Jack Curry had knowledge of the lack of ownership in Maestas of the sheep in question; and there was ample corroboration of the larceny or purchase of the sheep, as they were found in the possession of the appellant, Jack Curry, and in addition there was the check given, which was used in part payment. All this afforded substantial corroboration, and the contention urged by appellant is without merit.

[2] It is contended that the ownership of the sheep, charged in the indictment as the property of Bond & Weist, was not proven. Maestas testified that the sheep he was herding, and which he sold to Jack Curry, were sheep belonging to Bond & Weist. Joe Holbrook, another witness for the state, testified that the sheep in the herd belonged to Bond & Weist, together with some sheep owned by him; that he assisted in recovering the eight head from Jack Curry and identified four of the sheep as the property of Bond & Weist. There was no attempt to prove ownership by recorded brand, and the indentification was made by the witnesses without reference to the brand. Proof of ownership was amply sufficient to sustain a conviction. No objection was interposed as to the method of proving ownership, nor attempt on the part of the appellants by cross-examination to establish upon what method of identification the state's witnesses relied in making up their judgment as to identity. The testimony was positive, and presumably from personal knowledge. Where evidence of ownership depends solely upon the brand upon an animal, ownership may be established only by introducing the recorded brand, or a certified copy of the same; but the brand law does not require that ownership must be proved by the brand alone, but it may be established by flesh marks, or other proper evidence of ownership, as if no brand law existed. State v. Crosby, 23 N. M. 461, 169 Pac. 303, and cases cited.

Next, counsel for appellants urge that by the trial court's conduct and remarks before the jury appellants were prejudiced. The chief objection to the conduct of the court seems to be based upon three circumstances occurring upon the trial as follows: (1) Permitting the witness Holbrook, for the state, to be present at the trial; (2) permitting the same witness to sit in close proximity to the jury; and (3) permitting certain conversations between counsel for the state and this witness to take place in such close proximity of the jury that the same might have been overheard by members of the panel.

[3] As to the first objection, it is sufficient to say that it is within the discretion of the court as to whether or not it will exclude witnesses from the courtroom during the trial and the court has the right to permit such witness or witnesses as it deems necessary to sit with either side during the trial for consultation and advice. Jones on Evidence, vol. 5, § 807; 16 C. J. 841 and 842. There was no abuse of the court's discretion in this case.

[4] As to the remaining points made under this head, the record discloses the following facts: Counsel for appellants objected to Joe Holbrook, a witness for the state, sitting so close to the jury, stating his objection to be that the witness was sitting within a foot and a half of one of the jurors, and he had certain papers on the table in front of him which could be seen by the jury, and had certain conversations with counsel for the state which could be heard by the jurors. The court said that he knew no conversation had occurred which any of the jurors could hear, and that the papers on the table in front of the witness were exhibits which had been introduced in the case. The statement by the court is, of course, controlling, and must be accepted as true. Consequently, there was no prejudicial error in this regard. It is, of course, the duty of the court to see that counsel and witnesses are required to sit at

such distance from members of the jury that the jurors cannot overhear remarks between counsel, or counsel and others.

[5] Objection is made to a remark made by the court to counsel for appellants at the trial, that such remarks "are uncalled for, and are not becoming to any attorney of record in this court." The court, however, instructed the jury that they were not to be influenced by any remark made by the court, and were to decide the case solely upon the evidence adduced upon the trial; and if there was error in the remark it was cured by the admonition.

In rebuttal the court permitted the state to put in evidence as exhibits the 4 head of sheep belonging to Bond & Weist recovered from appellant, Jack Curry. The sheep were brought to the rear door of the courthouse in an automobile, and upon request of the state, and without objection on the part of appellants, save upon the ground that it was not proper rebuttal testimony, the jury was permitted to view the sheep, in the presence of the judge, counsel on each side, the court reporter, and the clerk. Two objections are made to this proceeding here:

(1) That such evidence was not proper rebuttal. This question was thoroughly considered by this court in the case of State v. Carabajal, 26 N. M. 384, 193 Pac. 406, and it was held that—

> The "trial judge has the power in his sound judicial discretion to vary the order of proof, and his action is not reviewable, except for gross abuse of discretion."

[6] And in the case of State v. Riddle, 23 N. M. 600, 170 Pac. 62, this court quoted with approval from 1 Thompson on Trials, 354, as follows:

> "The admission or exclusion of evidence not strictly in rebuttal is a matter resting in the discretion of the trial court; the exercise of which discretion is not subject to review except in cases of gross abuse."

[7] The second contention advanced is that the trial court committed error in permitting the jury to retire to the back door of the courthouse, under the circumstances stated, and view the sheep, and in permitting a witness to be questioned there as to said sheep. This objection is not available to appellants, however, because not made in the trial court; and, besides, counsel for appellants participated in the examination of such witnesses. This case is not unlike that of Sandoval v. Chavez, 27 N. M. 70, 196 Pac. 322, in which the trial court viewed the premises at the request of one party, and without objection by the other. We there held that the nonobjecting party had acquiesced in the view of the premises, and could not here raise the question as to the court's power to do so. It has been so frequently decided by this court that objections not made in the trial court will not be considered on appeal that the citation of authority on the proposition is unnecessary.

Finding no error in the record, the judgment will be affirmed; and it is so ordered.

PARKER and RAYNOLDS, JJ., concur.

[No. 2551. June 24, 1921.]

STATE v. MARES et al.

SYLLABUS BY THE COURT.

1. Venue, like any other fact in a case, may be proven by circumstantial evidence. P. 213

2. The plea of former jeopardy must be interposed at the earliest opportunity, and, if not, it is waived, and cannot be raised for the first time after verdict. P. 215

Appeal from District Court, Valencia County; M. C. Mechem, Judge.

Nicolas Mares and Manuel Cheyes were convicted of larceny of cattle, and they appeal. Affirmed.

A. A. Sedillo, of Albuquerque, for appellants.

H. S. Bowman, Attorney General, and A. M. Edwards, Assistant Attorney General, for the State.

OPINION OF THE COURT.

ROBERTS, C. J. Appellants were tried and convicted of the larceny of five head of neat cattle and appealed. The venue was laid in the indictment in Valencia county, and it is contended that the district court of that county was without jurisdiction, because the venue was not proven as laid in the indictment. The facts out of which this contention arises are as follows:

[1] The cattle were alleged to have been the property of Leopoldo Garcia. The evidence showed that Garcia lived in Valencia county, near the boundary line between that county and Bernalillo county, but not immediately adjoining the line. His ranges were shown to all be in Valencia county, and the evidence further established that the cattle were missed from such ranges and were found in the corral of a butcher named Trinidad Herrera near Albuquerque, in Bernalillo county. There was evidence to the effect that on the 10th day of December, 1918, appellant Cheyes drove five head of cattle from the home of the appellant Nicolas Mares, located in Bernalillo county, to the corral of Herrera, delivering the cattle to Herrera. The evidence is conflicting as to the brand upon the cattle. The evidence offered on behalf of the state was to the effect that the next morning after the cattle were delivered two or three witnesses saw them and identified the cattle as the property of the prosecuting witness, Garcia, and as having the brand of Garcia upon them. On behalf of the appellants it was testified that the cattle did not have Garcia's brand upon them, but the brand of the appellant Mares; that Mares had purchased the cattle unbranded from some Indians. And it is argued that because no witness saw the cattle taken from Valencia county, or in the possession of either of the appellants in

Valencia county, there was a failure on the part of the state to prove the venue as laid in the indictment. This contention, however, we think is without merit, because there was ample evidence to show that the cattle were the property of Garcia; that they were pastured upon his ranges in Valencia county and were driven therefrom by someone. Venue, like any other fact in a case, may be proven by circumstantial evidence, and the circumstances in this case shown by the evidence were amply sufficient to warrant the inference that the cattle had been stolen by the appellants in Valencia county.

The second contention advanced is that the state failed to prove that the appellants, or either of them, had any connection with the particular cattle involved in this cause, or that they had ever had the cattle in their possession. The basis for this argument rests upon the fact that Herrera, the man to whom the cattle were sold, testified that the cattle did not have Garcia's brand upon them, but only the brand of the appellant Mares; that they were delivered to him one evening at his corral. But there was evidence that the next morning two or three witnesses saw five head of cattle in Herrera's corral which had upon them Garcia's brand. The proof was to the effect that the cattle in the corral the next morning were the same cattle that were delivered by appellant Cheyes. This evidence justified the jury in concluding that Herrera and Cheyes had not told the truth about the cattle if they elected to believe the witnesses who testified as to seeing the cattle the next morning. It is true no witnesses testified to having identified these cattle as the property of Garcia while they were in the possession of either of the appellants, but there was evidence showing that these were the same cattle, or at least circumstances in evidence from which such fact could be inferred. This contention is therefore without merit.

[2] It is lastly urged that appellant's plea of former jeopardy should have been sustained. It appears prior to the returning of the indictment in Valencia county appellants had been indicted in Bernalillo county, and after a portion of the evidence was introduced the court instructed the jury to return a verdict of not guilty, evidently based upon the assumption that the state had failed to prove venue in Bernalillo county. But the plea in this case was not interposed until after the verdict of the jury had been returned. The authorities hold that such a plea must be interposed at the earliest opportunity, and, if not, it is waived, and cannot be raised for the first time after verdict. 16 C. J. 418. In the case of Territory v. Lobato, 17 N. M. 666, 134 Pac. 222, L. R. A. 1917A, 1226, defendant raised the question of former jeopardy in a motion for an instructed verdict at the conclusion of the state's case, and also later in a motion in arrest of judgment. We said:

"In the view we take of this question, it is not necessary for us to determine the question as to whether or not the defendant was placed in jeopardy by the swearing of the first jury, for the reason that the matter was not properly raised or presented to the court. * * *

"When, as in this case, there is an opportunity to plead former judgment or jeopardy, and it is not pleaded, the case is as if there were no former judgment or jeopardy."

There being no error in the case, the judgment will be affirmed; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2435. June 25, 1921.]

KEYES v. KEYES.

SYLLABUS BY THE COURT.

1. A party to a suit in a civil action will not be allowed to introduce general evidence as to his reputation as to moral character, unless the same is an issue in the case from the nature of the action, like a case of libel or slander. P. 217

2. Good moral character cannot be established by the introduction of an ex parte certificate or statement. P. 218

3. In a suit for criminal conversation and seduction of plaintiff's wife, a certificate of good moral character of plaintiff, signed by Gen. Goethals, Governor of the Panama Canal Zone, was inadmissible, and was prejudicial. P. 218

Appeal from District Court, Chaves County; Bratton, Judge.

Action by Harry Keyes against Charles D. Keyes. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Reid, Hervey & Iden, of Roswell, for appellant.

Hiram M. Dow, of Roswell, for appellee.

OPINION OF THE COURT.

ROBERTS, C. J. Appellee sued appellant for criminal conversation and seduction of his wife. Appellant answered, admitting that he had had intercourse with appellee's wife, and alleged that it was with the consent of the wife and with the knowledge and consent of the husband. A trial was had to a jury, and resulted in a verdict for appellee for $10,000 damages. The case is here by appeal from the judgment entered on the verdict, and several different grounds of error are relied upon for reversal. Two errors were committed, which require a reversal. We have examined the other errors assigned, and find no merit therein, and will not enter into a discussion of the same, directing our attention to the errors committed.

First. Appellee testified as a witness in his own behalf. He gave a rather detailed history of his life, showing that he married the wife, for whose defilement he sought a recovery in the case, in the Panama Canal Zone in 1910; that he had been employed in the Canal Zone by the United States government in various capacities as a cook, and in charge of the commissary, etc.; that he later left the Canal Zone, and after visiting Alaska and other

places with his wife, left her in Los Angeles, Cal., and he went to a small mining town, called Oatman, in Arizona, and engaged in the restaurant business; that while he was in Oatman appellant had visited his wife in Los Angeles and it was there the acts complained of took place. His evidence, together with letters written by appellant to appellee's wife, and appellant's admissions in his answer, made out appellee's case.

Appellee was a stranger in Roswell, where the case was tried. He put in evidence, over objection, a service letter given him by G. W. Goethals, Governor of the Panama Canal Zone, which, after showing the time of employment and work done by appellee, and the salary received, concluded as follows:

"Voluntarily resigned. Effective March 10, 1915. During this period of employment his general workmanship was excellent and general conduct very good.

"[Signed] G. W. Goethals, Governor."

[1] Appellee in this court does not undertake to defend the action of the court in admitting the letter in evidence, but contends that the case should not be reversed, because the letter was put in, because (1) it was harmless error, and could not have affected the verdict; and (2) that the objection directed to the admission of the letter in evidence did not sufficiently point out the error to the court. The rule is well established that a party to a suit in a civil action will not be allowed to introduce general evidence as to his reputation or moral character, unless the same is an issue in the case from the nature of the action, like a case of libel or slander. Jones, Commentaries on Evidence, vol. 1, §§ 148, 158; Thompson v. Bowie, 71 U. S. (4 Wall.) 463, 18 L. Ed. 423; Greenleaf on Evidence, vol. 1, § 54; Givens v. Bradley, 3 Bibb (Ky.) 192, 6 Am. Dec. 646; Fahey v. Crotty, 63 Mich. 383, 29 N. W. 876, 6 Am. St. Rep. 305.

[2] But, even if testimony as to appellee's good moral character was an issue in the case, he could not prove it by the introduction of an ex parte certificate. This question has come before the courts in cases where soldiers have offered to introduce certificates of discharge, and in every instance they have been held ex parte declarations and inadmissible. People v. Eckman, 72 Cal. 582, 14 Pac. 359; Taylor v. State, 120 Ga. 857, 48 S. E. 361.

[3] It would not seem to require much argument to demonstrate the probable prejudice resulting to appellant by the introduction of the certificate of character in question. General Goethals, who gave it, was a man of national reputation, and enjoyed to an exceptional degree the confidence and respect of the American people. In this case the amount of damage which the jury would award the complaining party necessarily would be influenced by the opinion which the members of the jury formed as to the character and standing of the plaintiff. Certainly a much larger recovery would be awarded to a man of high standing and unblemished character than to a man of bad character and morals. It would also have a very decided tendency to destroy the effect of the evidence as to connivance and consent of appellee. The verdict in the present case was for $10,000 damages, and it is impossible for us to say what influence this letter had upon the size of the verdict. That it would tend to enhance it we think is clear, especially under the circumstances in this case, where the plaintiff was a stranger in the jurisdiction where the case was tried.

As to the point that the objection to the introduction of the evidence was not broad enough to include the ground urged here, we quote the objection stated:

"To which the defendant objects for the reason it is irrelevant, immaterial, and incompetent, being an ex parte state-

ment by a party not before the court for the purpose of cross-examination, and tending to prove or disprove no issue in this case, and being in a sense hear-say, in addition to being an ex parte statement of a party not before the court."

We think this objection was sufficient to direct the court's attention to the vice in the proffered evidence. It was hearsay, and clearly inadmissible, and the prejudice was manifest in the contents of the letter or statement.

As to the second error, the court allowed the appellee, while testifying as a witness in his own behalf, to relate certain conversations which he had had with the postmaster at Oatman, Ariz., when he inquired for his wife's mail, in which the postmaster told him that his wife had given orders not to deliver her mail to any one but herself, and also to give testimony as to his wife's conversation when he confronted her with the defendant's purported letters. It is not alleged that appellant was present at either of these conversations. This testimony was clearly inadmissible, because it violated the rule as to hearsay evidence. The testimony of the conversations with the postmaster tended to induce the jury to believe that, because his wife was guarding her mail strictly from her husband, therefore she was concealing illicit relations with the appellant.

For these errors, the cause must be reversed and remanded to the court below for a new trial; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2541. June 25, 1921.]

TIMM et al. v. WHITE et al.
WHITE v. TIMM et al.

SYLLABUS BY THE COURT.

Where the record fails to show notice to settle and sign the bill of exceptions, it will be stricken.

Appeal from District Court, De Baca County; Brice, Judge.

Suit by H. F. Timm and another against John F. White and other. From the judgment, plaintiff and the defendant named appeal. Transcript by stipulation to be used in both appeals. On motion to strike bill of exceptions of appellee. Bill stricken.

See, also, 27 N. M. 103, 196 Pac. 173.

F. Faircloth, of Santa Rosa, and H. N. Nuzum and C. F. Fishback, both of Ft. Sumner, for appellants.

R. E. Rowells and Patton & Hatch, all of Clovis, for appellees.

OPINION OF THE COURT.

ROBERTS, C. J. Timm and wife made an oil lease to John F. White. White transferred the lease to Earickson, Awalt, and Glenn, or to one of them, and it was subsequently transferred to the others by such assignee. Timm and wife brought suit against White to set aside the lease on the ground that it was procured by fraud, and the subsequent assignees were made parties defendant. Upon issue joined the court held that the lease was procured by fraud, and gave judgment against White for $500 damages, but refused to set aside the lease as to the subsequent assignees, Earickson, Awalt, and Glenn, because they were found to be innocent purchasers for value. From the judgment against White he appealed, making Timm and wife appellees. Timm and wife appealed from the judgment, refusing to cancel the lease as to Eariskson, Awalt, and Glenn. Transcript has been filed in this court which, by stipulation, is to be used in both appeals. Appellees Earickson, Awalt, and Glenn have filed a motion to strike out the bill of exceptions in the transcript as to them, because they had no notice of the settling and signing of the same.

Section 27, c. 43, Laws 1917, requires five days' notice to the opposite party of the intended application to the judge of the court in which said cause was tried, to sign and settle the bill of exceptions. In the case of Palmer v. Allen, 18 N. M. 237, 135 Pac. 1173, this court held that a bill of exceptions will be stricken from the transcript on appeal upon motion therefor when no notice has been given the adverse party of the time and place of its proposed settlement and signing, as required by section 26, c. 57, Laws 1907, which is in the same language as the present statute on the subject. In that case it was stated that, in addition to the fact that the record failed to show notice, appellee had filed an affidavit showing that no notice was in fact given. But this affidavit was wholly immaterial, as it is incumbent upon the appellant or plaintiff in error to show by the transcript the giving of such notice. It would lead to needless controversy in this court if affidavits were to be received or other proof offered to establish the fact as to whether notice was or was not given. The record should affirmatively show notice or waiver of notice, or the appearance of the appellee at the settlement and signing of the bill of exceptions. In the case of State v. Smith, 24 N. M. 405, 174 Pac. 740, we held that appeals are heard upon the record and by the record determined, and that the appellate court would not receive evidence to supply omissions therein, and that the court would not receive affidavits to show that a defendant in the court below had exhausted his challenges to jurors. The same principle should apply as to the giving of notice to settle and sign the bill of exceptions.

The record failing to show notice, the bill of exceptions as to appellees Earickson, Awalt, and Glenn will be stricken; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2596. June 25, 1921.]

COLLINS v. UNKNOWN HEIRS et al.

SYLLABUS BY THE COURT.

1. A motion to dismiss a writ of error or appeal for failure to file a transcript of record or assignments of error within the time required by statute, not made until after the appellant or plaintiff in error has cured the default, will be denied. P. 223

2. Where an appellant files a motion for extension of time within which to file assignments of error before appellee has taken advantage of the default, such motion has the effect of curing the default if granted by this court. P. 223

3. An extension of time granted by the trial court for settling and signing the bill of exceptions automatically extends the return day for the appeal or writ of error to 10 days beyond such extended time. P. 224

4. The trial court may grant a second extension of time within which to settle and sign the bill of exceptions, where a præcipe for the record has been filed within the time limited by the statute. P. 225

Appeal from District Court, Sandoval County; Hickey, Judge.

Action by A. E. Collins against Unknown Heirs and others. Judgment for plaintiff, and defendants appeal. Motion to dismiss appeal and affirm judgment denied.

Simms & Botts, of Albuquerque, and M. C. De Baca, of Bernalillo, for appellants.

H. B. Jamison, of Albuquerque, for appellee.

OPINION OF THE COURT.

ROBERTS, C. J. Appellee has filed a motion to dismiss the appeal and affirm the judgment in this cause. A statement of the facts first upon which the motion is based will lead to a better understanding of the motion.

The appeal was taken July 15, 1920; cost bond was filed and approved, and præcipe for the record was filed, all within the statutory time. On September 17, 1920, a motion was filed for additional

time to have bill of exceptions settled, signed, and filed. This motion was granted on September 25, and the time was extended for 90 days. The effect of this order was to extend the time for settling and signing the bill of exceptions to January 11, 1921. On December 31, 1920, a motion for further additional time to have bill of exceptions settled, signed, and filed was filed, but the motion was not acted upon until January 26, at which time an order was entered, granting the additional time requested and extending the return day until March 12. The transcript of record was filed in this court within the extended time, and on March 14 appellant filed a motion, requesting the court to grant them two weeks additional time within which to file assignments of error. On March 16 appellee filed this motion to dismiss the appeal and affirm the judgment because (1) assignments of error had not been filed within the time required by the statute; and (2) because the original return day of the appeal had never been extended by the trial court; and (3) because the court was without power to grant the second extension.

[1] It has been frequently decided by this court that a motion to dismiss a writ of error or appeal for failure to file a transcript or assignments of error within the time required by statute, not made until after the appellant or plaintiff in error has cured the default, will be denied. Armijo v. Abeytia, 5 N. M. 533, 25 Pac. 777; Sacramento Valley Irrigation Co. v. Lee, 15 N. M. 567, 113 Pac. 834; Eagle M. Co. v. Lund, 15 N. M. 696, 113 Pac. 840; Gauss-Langenberg Hat Co. v. Raton National Bank, 17 N. M. 233, 124 Pac. 794.

[2] When appellant filed its motion for extension of time within which to file assignments of error before appellee had taken advantage of its default, such motion had the effect of curing the default, if granted by this court. It has been the uniform

practice to grant such a request for extension of time where any reasonable showing is made of necessity therefor. The showing here is that the transcript is very voluminous, and because of such fact appellants had not been able to prepare and file proper assignments of error. This showing was sufficient to warrant the granting of the extension asked. As appellants' motion to dismiss was not filed until after the default was cured, it was not well taken on this ground.

[3] Passing to the second question: (1) Does the extension of time for settling and signing the bill of exceptions automatically extend the return day, or is a separate order of the court required to effectuate such extension of the return day? While we have been unable to find any case decided by this court on this question, it has been the uniform practice to regard an extension of time to settle and sign the bill of exceptions as extending the return day 10 days beyond such extended time. Section 36, chapter 43, Laws 1917, authorizes the granting of an extension of time within which to have the bill of exceptions settled and signed, and provides for the filing by the clerk of the district with the clerk of the Supreme Court of a certified copy of such order. The purpose of this, of course, is to prevent the appellee from docketing the cause and securing the affirmance of the judgment for failure to file the transcript in time. Where the trial judge extends the time for settling and signing the bill of exceptions, the return day of the cause is automatically entended by such order, and no separate order of extension of the return is required. Section 22, which provides for extending the return day, contemplates that for some reason the clerk of the district court is not able to make up the transcript within the time required after the bill of exceptions has been settled, signed, and filed; and it is designed to take care of the appellant in such a case, and to give him further time to file the transcript in this

court. So far as we know, in no case where the time for settling and signing the bill of exceptions has been extended has a separate order been entered, extending the return day of the appeal or writ of error.

[4] The third proposition relied upon is that the trial judge had no power to grant the second extension of time within which to settle and sign the bill of exceptions. This contention does not accord with the uniform practice. In many cases two or more extensions of time have been granted by the trial judge, and no question has heretofore been raised as to the power to do so. The only limitation upon the power of the court to grant an extension of time for such purpose is that contained in section 36, which prohibits such order unless the appellant or plaintiff in error has filed, or caused to be filed, in the office of the clerk of the district court, in 30 days after an appeal is taken or writ of error sued out, his præcipe for the record on appeal or writ of error as the case may be, and has ordered the transcribing of the testimony to be included in his bill of exceptions. This statute, as stated, was complied with by appellants, and where such statute is complied with, the trial court has authority to grant such additional time as in its judgment may be necessary to enable the appellant to prepare the bill of exceptions, and is not limited to one extension, but may grant as many as in its judgment are necessary to secure the accomplishment of such purpose.

It follows that the motion to dismiss the appeal and affirm the judgment must be denied; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2497. July 1, 1921.]

STATE v. CRUMBLEY et al.

SYLLABUS BY THE COURT.

1. Diagram or sketch made by witness to illustrate his testimony was properly admitted in evidence, although not accurate in some particulars. P. 226

2. A printed map, showing sections, townships, and ranges, was properly admitted in evidence, where the sole purpose of the same was to show the distance from one established point to another established point. P. 227

3. Witness who had been in butchering business for many years held competent to testify as to color and breed of hogs, after same had been dressed. P. 227

4. Objection to question tending to show ill feeling between a witness for the state and witness for the appellant was properly sustained, where the court was not informed by counsel for appellant that the purpose was to show ill feeling between the witness for the state and the appellant. P. 227

Appeal from District Court, Grant County; Ryan, Judge.

Delia Crumbley and another were convicted of larceny, and defendant named appeals. Affirmed.

G. Volney Howard and Harry C. Miller, both of El Paso, Tex., for appellant.

H. S. Bowman, Attorney General, and A. M. Edwards, Assistant Attorney General, for the State.

OPINION OF THE COURT.

MECHEM, District Judge. Appellant, together with Samuel C. Pruitt and Terrell Hightower, was tried for the larceny of 19 head of swine. Pruitt was acquitted, and the appellant and Terrell Hightower were convicted, and Hightower did not appeal.

[1] Counsel for appellant urges that it was error to permit the introduction in evidence of a plat drawn by the witness Homer Reece; the objection being that the plat was not first shown to be an accurate map or plat, and that the witness admitted that it was not accurate. The plat was a rough sketch made by the witness in the presence of the

jury while testifying, and was made for the purpose of illustrating his testimony, and the admission of the same in evidence was not error. Territory v. Price, 14 N. M. 262, 91 Pac. 733.

[2] Counsel for appellant next urges that it was error to admit in testimony a printed map, purporting to have been issued by the Forest Department, on the ground that it was not shown to be accurate. This map had on it the ranges, townships, and sections, and it was introduced solely for the purpose of showing the distance from the place of Homer Reece, the owner of the hogs, and the place of the appellant. The appellant having previously testified as to the numbers of the section, township, and range where he lived, and the witness Homer Reece having testified as to the number of the section, township, and range where he lived, the distance was therefore a mere matter of computation. For this purpose the map was properly admitted.

[3] Counsel for appellant urges that it was error to permit the witness Frank Brakefield to testify as to the color and breed of the hogs sold to him by one of the defendants, Pruitt; the witness never having seen the hogs until after the same had been scraped and dressed. It is urged that the witness was not qualified as an expert. The witness testified that he had had a great deal of experience in butchering and cleaning hogs, and that at the time he saw the hogs in question he was able to determine the color and breed. In our opinion the witness was shown to be qualified.

[4] The last ground urged by the counsel for appellant is that it was error for the court to sustain an objection to a question, propounded to appellant's mother, as to whether or not she had had trouble with Pat Akins, a witness for the state, about the hogs. Counsel contends that he could have shown that there was ill feeling between the witness Pat Akins and the Crumbleys. There was nothing in the

question which apprised the court of this purpose, and it was the duty of counsel to have stated to the court what he expected to prove. He did not do this, but contented himself with saving an exception to the ruling of the court, and he cannot complain.

Finding no error in the record, the judgment will be affirmed; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2529. July 1, 1921.]

STATE ex rel. SISNEY v. BOARD OF COM'RS OF QUAY COUNTY.

SYLLABUS BY THE COURT.

1. **Held,** that boards of county commissioners are without authority to alter award made by viewers in proceeding to lay out a road, except where the property owner is dissatisfied with the award. P. 230

2. **Held,** that there is no appeal provided from action of a board of county commissioners in altering an award made by viewers in proceeding to lay out a road. P. 231

3. **Held,** that, where no appeal is provided, the proper remedy to review quasi judicial action of board of county commissioners is by certiorari. P. 231

Appeal from District Court, Quay County; Lieb, Judge.

Petition by the State, on the relation of P. H. Sisney, against the Board of County Commissioners, Quay County, and another, for a writ of certiorari to quash proceedings in fixing damages in laying out road. Judgment for defendants, and petitioner appeals. Reversed and remanded, with instructions.

R. A. Prentice, of Tucumcari, for appellant.

OPINION OF THE COURT.

MECHEM, ED, District Judge. This is an appeal from the action of the district court of Quay county, dismissing appellant's petition for a writ of certiorari to the board of county commissioners and

county clerk of Quay county to quash the proceedings of the board of county commissioners in fixing damages due appellant in laying out and establishing a road through his land.

The petition for the road was presented to the board April 1, 1918, and on the same day the board appointed viewers to assess the damages and benefits to the landowners affected. The viewers filed their report fixing appellant's damages at $1,145.

On April 8, 1919, the board received the reports of the viewers and approved the same with the exception of the amount of damages awarded, and to the appellant they awarded the sum of $200. The board then ordered the notices to be posted declaring said road to be opened.

On May 17, 1919, the appellant filed his petition in the district court for writ of certiorari to the board and county clerk, setting out the fact regarding the proceedings and alleging that the action of the board in reducing the amount of the award was without notice to the appellant and was without warrant of law; that he never had been tendered the amount of damages awarded him by the viewers and that the board was attemping to open said highway over his protest; that he was without other speedy and adequate remedy at law; and praying that the resolution laying out said highway be reversed and held for naught, and for such other relief as to the court might seem meet and proper.

The cause came on for hearing. No evidence was introduced save the records of the proceeding before the board. The court gave judgment for the appellees and dismissed the petition at appellant's costs, from which action the appellant appealed.

The statutes fixing the authority of the board of county commissioners with reference to the awards made by viewers are as follows:

"Sec. 2665. The board of county commissioners at their next regular meeting, after the filing of such report, shall

proceed to consider the same and all objections that there may be made thereto, and they shall determine whether or not such road shall be established and open for travel. And they may refer the matter of viewing to the same or other viewers with instructions to report in like manner, as herein required, or specially upon some particular matter."

"Sec. 2667. The board of county commissioners having considered the report of any road review, and the compensation to which any person or persons damaged having been ascertained and paid to the owner or owners or into court for him or them, may order the road to be opened for public travel and declared a public highway."

"Sec. 2669. If any person or persons be of the opinion that the damages awarded him or them by the viewers are inadequate and insufficient, the board of county commissioners may agree with such person or persons upon the measure of the same, and should they fail to so agree such person or persons may appeal from the decision of the viewers to the district court of the county and evidence shall be taken before the court or referee as in other cases and the court shall determine the amount of damages and render judgment accordingly."

[1] It will be seen from a reading of these sections that the board of county commissioners was without jurisdiction to change the award of the viewers unless a property owner was aggrieved by the action of the viewers, in which event they might agree with him upon his measure of damages; but the board is without authority to lower the award made to any person. The only authority the board has in the event it is dissatisfied with the award of the viewers is to reject the report, or order the same viewers to make another report or discharge the viewers and appoint other viewers to report, either fully or upon some particular matter. The action of the board in this case in declaring said highway established without paying to the appellant the amount of damages awarded him by the viewers, or paying the same into court for him, was without authority and void.

Having decided that the action of the board was without authority, the next question is: Does the statute provide for an appeal?

[2] The only provision of the statutes with reference to laying out and establishing a road, providing for an appeal, is to be found in section 2669, which is to the effect that if any person, or persons, are of the opinion that the damages awarded to him, or them, are inadequate and insufficient, and the board is unable to agree with them as to the measure of the damages, then such person, or persons, may appeal from the decision of the viewers to the district court. There is no appeal provided from the action of the board in lowering such an award; the reason for this is probably due to the fact that no such an authority was vested in the board.

[3] There being no appeal provided, the remedy is by certiorari.

"Certiorari is the appropriate process to review the proceedings of bodies and officers acting in a judicial or quasi judicial character, and it may be stated that this writ will lie for none other than acts partaking of a judicial nature." 11 C. J. 120.

"It is clear, however, that the nature of the act to be performed rather than the office, board or body which performs it, that determines whether or not it is the discharge of a judicial or quasi judicial character." 11 C. J. 121.

In laying out and establishing highways, boards of county commissioners are exercising the right of eminent domain, and it can hardly be questioned that it is an exercise of a quasi judicial function.

This case is reversed and remanded to the district court, with instructions to reinstate the case and proceed in accordance with this opinion; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2611. July 1, 1921.]

NOHL v. BOARD OF EDUCATION OF CITY OF ALBUQUERQUE.

SYLLABUS BY THE COURT.

1. A court of equity will not sit in review of the proceedings of subordinate, political, or municipal tribunals; and, where matters are left to the discretion of such bodies, the exercise of that discretion, in good faith, is conclusive, and will not, in the absence of fraud, be disturbed. P. 235

2. Boards of education of municipal school districts (section 8, c. 105, Laws 1917) are given authority to defray "all other expenses connected with the proper conduct of the public schools in their respective districts." **Held,** in a suit to enjoin the expenditure of school funds for the purpose of carrying group insurance for teachers and employees, where the pleadings admit that by carrying such group insurance the school board is enabled to procure better teachers and to retain such teachers in its employ by so doing at a much less expense than would be necessary except upon the payment of much larger salaries, such an expenditure is connected with the proper conduct of the public schools, and within the discretion intrusted to the board of education. P. 236

Appeal from District Court, Bernalillo County; Hickey, Judge.

Suit by Fred Nohl against the Board of Education of the City of Albuquerque for a injunction. Decree for defendant, and plaintiff appeals. Affirmed.

F. O. Westerfield, of Albuquerque, for appellant.

Simms & Botts, of Albuquerque, for appellee.

OPINION OF THE COURT.

ROBERTS, C. J. Appellant, a taxpayer of the city of Albuquerque, brought this action to enjoin the board of education of the city of Albuquerque from paying further installments of premium on a policy of group insurance upon the lives of the latter's teachers and other employees. From the judgment and decree for the defendant, plaintiff appealed.

The cause was decided upon the pleadings, and there was no dispute as to the facts. The board of education of the city of Albuquerque had contracted with the Equitable Life Insurance Society to furnish group life insurance for the teachers and employees of the board of education under the terms of which the insurance continued in force during the year contracted for, if such employees remained in the employ of the board for such period, and was to be renewed annually, and upon the death of any of such employees the beneficiary named by such employee received from $500 to $2,000, depending upon the length of service of such employee with the board. Such insurance was payable to the employee in case of total and permanent disability. The monthly premiums paid for such insurance by the board varied in amounts from $70 to $90, depending upon the age and length of service of its employees for the time being. The funds were paid out of the public school funds of the municipal school district, and it was alleged in the complaint that the school district, unless enjoined, would continue the payment of such monthly premiums out of the public school funds aforesaid. The complaint alleged that such payment of the funds for such use constituted a misapplication and a misappropriation of the same to the irreparable damage of plaintiff and those similarly situated. The answer admitted the facts set forth in the complaint, but denied that the payment of the money constituted a misapplication of the funds or a misappropriation of the same, and further alleged:

"That defendant employs 110 teachers and 10 other employees in the conduct of the public schools in its district, and that the average monthly cost and expense of said insurance for each such teacher and employee does not exceed eighty-five cents for each such employee.

"That each of defendant's said teachers and other employees desires insurance upon his life, and that they cannot, by clubbing together, voluntary association, or otherwise

than through defendant as their employer and at defendant's expense, obtain insurance of the kind and character described in plaintiff's complaint, or insurance of equal value in proportion to cost; and many employees on account of family history, physical condition, and other obstacles could not obtain individual insurance, or any insurance other than in the form described in plaintiff's complaint.

"That the efficiency and usefulness to the public and to the schools of the teaching force is greatly increased by permanency and length of time of service of teachers, and that by incurring the small expense necessary to pay said insurance defendant has been able to secure and retain, and has secured and retained, the services of more efficient and loyal teachers and other employees, and has increased the efficiency and usefulness of its said employees to a much greater extent than would have been possible otherwise without expending much larger sums for higher salaries, and that thereby defendant has increased the efficiency, welfare and usefulness of the public schools under its jurisdiction and control at a minimum of expense to the taxpayers.

"That defendant, by its proper officers and directors, has decided and determined under all the facts and circumstances that the procuring and carrying of said insurance and the incurring of the expense thereof will increase, and has increased, the permanency, ability, efficiency, and loyalty of its teachers and other employees commensurate with the amount of expense, and that such expense is connected with the proper conduct of the public schools in its district.

"That the payment of further monthly premiums on said insurance policy by defendant will be defraying expenses connected with the proper conduct of the public schools in its district, and is such an expense as defendant is required and given power by law to defray, and that defendant's decision and determination thereof, in the exercise of the judgment and discretion of its officers and directors, should not be disturbed or interfered with by this court."

A stipulation was filed, as follows:

"(1) That each and all of the allegations of plaintiff's complaint are true, except that defendant denies the correctness and soundness of the legal conclusions contained in paragraph 6 of said complaint, admitting, however, in event only that it should be finally determined that defendant is without authority of law to pay the insurance premiums complained of, that plaintiff is irreparably damaged and has no adequate remedy at law.

"(2) That each and all of the allegations of defendant's answer are true, except that plaintiff denies the correctness and soundness of the legal conclusions contained in paragraph 6 of said answer.

"(3) That the court may render judgment on the pleading and this stipulation for such party as in the court's opinion may be entitled thereto, and the parties hereto move the court to so do."

The single question for determination is whether the payment of money for the purpose stated was a misapplication or misappropriation of the school funds, and the solution of the question depends upon the statute. Section 8 of chapter 105, Laws 1917, which controls, reads as follows:

"County boards of education and boards of education of municipal districts shall have power and be required to provide, by building, purchasing, or leasing, suitable schoolhouses; to keep same in repair, to provide the necessary furniture therefor, to provide for fuel and light, for the payment of the teachers' wages as well as other employees, excepting only the county school superintendent; to provide for the payment of interest on school bonds and the redemption thereof, and to defray all other expenses connected with the proper conduct of the public schools in their respective district."

[1] Was the expenditure "connected with the proper conduct of the public schools?" It will be observed that the expenditure of the funds under this statute is left entirely in the discretion and judgment of the school board, so long as such expenditure can be reasonably said to be conducive to the proper conduct of the schools. In High on Injunctions, vol. 2, § 1240, the author says:

"A municipal corporation, being a political body clothed with certain legislative and discretionary powers, equity is ordinarily adverse to interfering by injunction with the exercise of those powers at the suit of a private citizen. And no principle of equity jurisprudence is better established than that courts of equity will not sit in review of the proceedings of subordinate political or municipal tribunals, and that where matters are left to the discretion of such bodies

the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed."

The text is abundantly supported by authority, and there are no cases to the contrary. The expenditure of public funds raised by taxation or other methods for public purposes must necessarily be intrusted by the Legislature to the public agencies, and these agencies are required to exercise discretion and judgment in determining the purpose for which such money will be spent, within the limits of the authority granted, and courts will not interfere unless there is a clear departure from the legislative authority. In the management and conduct of public schools of the state the school authorities are called upon to determine the objects and purposes for which the school funds shall be expended, within the limits of the authority granted, which will prove beneficial to and promote the interests of education, and to expend money daily for such purposes.

[2] It is admitted that the securing of group insurance for the teachers enables the board of education to procure a better class of teachers, and prevents frequent changes in the teaching force. This is certainly desirable and conducive to the "proper conduct of the public schools." School funds are now being spent in all the school districts of the state, and in many, if not all of the other states, for purposes and objects unquestionably proper, gauged by our advancing civilization, which a quarter of a century ago would have been considered highly improper. In many of the schools we have mechanical instruction in many of the trades and professions which not so many years ago would not have been tolerated. The teaching of music, arts, and science has become a recognized necessity. Many things are provided now for the comfort and convenience of both teachers and pupils which heretofore would have been prohibited by injunction as an improper expenditure of public

funds. In some of the schools of the state gymnasiums, swimming pools, playgrounds, and other forms of recreation, amusement, and diversion are provided, because it is recognized by advanced public sentiment that such instrumentalities are calculated to and do promote the cause of education, and tend to better the schools and keep the pupils and teachers satisfied and contented. Many corporations employing large numbers of laborers throughout the country carry group insurance on such employees with the same object in view as that which evidently was in the minds of the members of the board of education of the city of Albuquerque when the insurance in question was purchased. In many parts of the state we have consolidated schools, where conveyances are hired, or means of transportation provided, by which pupils living at long distances from the school are transported to and from the consolidated school. The power of boards of education to do so has never been questioned, because it is recognized that better schools are thus provided, and the cause of education is promoted.

It is clear that the courts should not interfere with the discretion intrusted to boards of education under the statute, unless it plainly appears that there has been a gross abuse of such discretion, and that the funds are being spent for purposes and objects which have no relation to the public schools. This cannot be said in this case. Some cases are cited by both parties, but, as they all depend upon the interpretation of statutes, they do not afford much assistance. Appellant cites the cases of Whittaker v. City of Salem, 216 Mass. 483, 104 N. E. 359, Ann. Cas. 1915B, 794; Shanklin v. Boyd, 146 Ky. 460, 142 S. W. 1041, 38 L. R. A. (N. S.) 710; Jennison v. Rogers, 87 Minn. 130, 91 N. W. 430, 58 L. R. A. 663; Smith v. Halvotchiner, 101 Neb. 248, 162 N. W. 630, L. R. A. 1917E, 331. And appellee cites the cases of District of Columbia v. Dean,

38 App. D. C. 182, 38 L. R. A. (N. S.) 513. But, as stated, these cases were all decided under local statutes, and are influenced more or less by the same.

For the reasons stated, we conclude that the expenditure was proper, and the judgment of the trial court will be affirmed; and it is so ordered.

RAYNOLDS, J., concurs.

PARKER, J., being absent, did not participate.

[No. 2522. July 12, 1921.]

STRICKLAND v. ELLIOTT et al.

SYLLABUS BY THE COURT.

1. Chapter 31, Code 1915, as amended by Laws 1919, c. 156, furnishes a comprehensive and complete system of judicial procedure relative to drainage, adequate to the protection of every right and interest attaching to the ownership of land situated in a drainage district organized pursuant to the act, and all owners of such lands subject to the control of the drainage district, as organized, are parties to such proceedings and concluded by final decrees entered by the court having jurisdiction. Such decrees not being subject to collateral attack, the only remedy permitted to an owner aggrieved by such decree is by appeal seasonably taken to the Supreme Court. P. 239

2. Where the owner of land situated in and affected by a drainage district brings an action to exonerate the land from the assessment for benefits, and the lien attaching therefor, upon the allegations that the drain as designated in the survey or report filed, which formed the basis of such assessment, was not actually constructed, and that no drain was actually constructed that in any way benefited his land, such allegations do not state a cause of action, because such survey or report is not final upon filing, but is subject to modification until confirmed by the court. P. 241

Appeal from District Court, Chaves County; Bratton, Judge.

Acion by A. A. Strickland against A. R. Elliott and others. From a judgment entered on plaintiff's refusal to plead further after the sustaining of a

demurrer to his amended complaint, he appeals. Affirmed.

C. O. Thompson, of Roswell, for appellant.

R. D. Bowers, of Roswell, for appellees.

OPINION OF THE COURT.

RYAN, District Judge. This is an appeal from a final judgment entered in the district court of Chaves county upon plaintiff's refusal to plead further after an order made sustaining a demurrer to his third amended complaint; the demurrer being upon three grounds: (1) That the complaint failed to state a cause of action; (2) that there was a defect of parties defendant, in that the bondholders of the drainage district were not named as defendants; and (3) that two distinct causes of action were improperly joined and not separately stated and numbered.

[1] The allegations of plaintiff's complaint pertinent to the present inquiry are that the plaintiff is the owner of 140 acres of land situated in Chaves county; that the defendant the East Grand Plains Drainage District is a corporation organized in pursuance of the New Mexico Drainage Act (chapter 31, Code 1915); that the defendants Ellett, Miller, and Whitney are the commissioners of said drainage district; the defendant Davis is the treasurer of Chaves county; that the defendant drainage district was organized in conformity with and for the purpose designated in the statute controlling; that the drainage commissioners, after the organization of the district, made the survey for the assessment of benefits; that by such survey one of the drains to be constructed as shown upon the survey "was located through, across, and along plaintiff's lands and in such way, when, if installed as shown by the location of such survey, as would drain said lands and carry off the subwaters therefrom and thereby benefit plaintiff's said lands"; that upon the basis of

this survey, and the assessment sheets made therefrom and filed in court, the commissioners caused plaintiff's lands to be assessed for benefits; "that the only drain which would be beneficial to the lands of the plaintiff was the drain shown by such survey running through, across, and along the lands of the plaintiff as aforesaid, and on which the benefits to said lands were estimated as aforesaid;" that the commissioners completed all the work of constructing drains and outlets, but failed and refused to construct the drain designated in the survey above referred to, and that such drain as was actually constructed in no way yielded any benefit whatsoever to the plaintiff's lands.

Upon these allegation plaintiff prays that his land be exonerated from the lien of assessment; that the collection of the assessment be enjoined; and, in the alternative, prays that if such relief be not granted then the commissioners be ordered by the court to construct the drain across his land as designated in the survey or report filed.

Plaintiff, in substance, properly alleges, and the demurrer admits the truth of such allegation, that the drains and outlets actually constructed did not run across or upon his lands or affect the same, and yielded no benefit whatsoever to them. It is elementary that the foundation of the right to levy assessments is the particular benefit received by the land assessed; hence no assessment at all could be made where there is no benefit, 9 R. C. L. 653, and cases cited. But the question in this case involves, not the correctness of the principle invoked by the plaintiff, but his right to be heard urging it. This court has held in the case of In re Dexter-Greenfield Drainage District, 21 N. M. 286, 154 Pac. 382, analyzing and construing this same statute, as follows:

"The drainage law of New Mexico provides for a judicial proceeding from start to finish. It provides generally for

filing in the district court a petition, and sets forth what the petition shall contain, the requisite number of signers, and the number of acres which must be represented. It provides for a judicial hearing after due and proper notice, upon the question of the sufficiency of the petition, the constitutionality of the law, and the jurisdiction of the court, and if the petition is found sufficient the court appoints three commissioners to make a preliminary investigation and report, and upon this report the court declares the district established, and orders the commissioners to cause a survey to be made to establish assessments to meet the cost of construction and make a report thereon, and upon the filing of this report, and the giving of notice as provided by the statute, the court considers the report of the commissioners as provided by the act, and particularly the question as to whether the benefits exceed the cost, and, after disposing of any remonstrances that may be filed, makes its order in the form of an ordinary decree, confirming or rejecting the report."

Whether, therefore, the lands of the plaintiff would receive any benefit adequate to a legal assessment from the construction of the drainage system proposed by the original survey (section 1877, Code 1915), or as proposed in the preliminary report of the commissioners (section 1903, Code 1915, as amended by chapter 156, Laws 1919), or as designated in the final survey (section 1915, Code 1915), upon which assessment for benefits was made, is a matter upon which full opportunity was afforded him to be heard. The decree confirming the final survey is a final decree by which he is concluded and is not subject to collateral attack; his remedy, if aggrieved thereby, being by an appeal to the Supreme Court. Section 1923, Code 1915; 21 N. M. 286, 154 Pac. 382.

[2] It is noted that the complaint of plaintiff finds no fault with the survey for the assessment of benefits, damages, and costs of construction made pursuant to section 1915, Code 1915, as such report or survey was filed. In fact, it is alleged by him that such survey, as filed, designated a drain to be constructed across his lands in such a way as to benefit them. Is this showing sufficient to entitle

him to any relief; it being taken as true that the drains actually constructed do not run across his land or in any way benefit it? The utmost alleged by the plaintiff construing the allegations of his complaint favorably to him is that the survey or report was filed and as filed designated the beneficial drain. The report is not final or conclusive on filing, but a hearing upon such filing of the report is ordered by the court on proper notice, at which hearing those interested or desiring to remonstrate may be heard.

"Upon the filing of said report, the court shall make and enter an order fixing the time and place when and where all persons interested may appear and remonstrate against the confirmations thereof, and the clerk of said court shall cause notice of the time and place of such hearing to be given to all parties interested, which notice shall contain a brief description of the lands benefited and damaged, together with the net damage awarded to the several tracts, parcels, easements and corporations to which damages are awarded, and the sum in each case assessed for construction against said several benefited parcels, tracts, easements and corporations." Section 1918, Code 1915.

And such report may thereafter be modified by the court.

"If the court finds that the report requires modification the same may by order of the court be referred back to the commissioners, who may be required to modify it in any respect." Section 1922, Code 1915.

At any time before confirmation of the report the commissioners may file a supplemental report.

"At any time prior to making the order confirming said report or thereafter the court may permit the commissioners to present and file a supplemental report, or amend their report as to any matter which, pursuant to the provisions hereof, was or might have been included in the original report presented by them, and after reasonable notice given to all parties interested, in such manner as the court shall direct, the court may, upon the hearing in said matter, make such order as the case may require." Section 1925, Code 1915.

The report is final only upon confirmation.

"If there be no remonstrance, or if the finding be in favor of the validity of the proceedings, or after the report shall have been modified to conform to the findings, the court shall confirm the report and order of confirmation shall be final and conclusive, the proposed work shall be established and authorized and the proposed assessments approved and confirmed, which approval and confirmation shall be final, unless within thirty days an appeal be taken to the Supreme Court." Section 1923, Code 1915.

And even after confirmation the court does not lose jurisdiction to modify the report of the commissioners upon notice.

"Said order of confirmation may, at the same or at any subsequent term of said court, be revised, modified, or changed, in whole or in part, on petition of the commissioners, after such notice as the court may require, to parties adversely interested." Section 1924, Code 1915.

This court so held in Stanley v. Wixon, 24 N. M. 499, 174 Pac. 200.

Upon the allegation, therefore, that the survey or report as filed designated a drain beneficial to the land, and that the drainage system as constructed did not benefit the land, it does not result that the plaintiff was deprived of any legal right. The report, as filed, may have been modified at the hearing (section 1922), or after supplemental report filed by the commissioners (section 1925), or after confirmation on the petition of the commissioners (section 1924). Nowhere does the complaint allege that the report designating a drain to be constructed across plaintiff's land was confirmed by the court. Were such the case, he had a very simple remedy by an application to the court to compel the commissioners to obey its decree.

In the absence of an allegation in plaintiff's complaint that the report finally confirmed by the court was disobeyed by the commissioners, it is presumed that the system of drainage actually constructed

and which formed the basis of plaintiff's complaint, in that such system carried no benefit to his land, was so constructed in conformity to a report or survey filed and confirmed by the court, and, this being true, a complete and exclusive remedy was available to plaintiff under section 1938, which is as follows:

"Any owner of land, or any interest in land, within a drainage district, who claims that his land in said district is exempt from liability for, or lien of any assessment for cost of construction or repairs, or any additional assessment by said commissioners levied against the same whether said assessments be the first or any subsequent assessment or questions the legality of such assessment, may at any time within thirty days after such assessment shall have been made and on ten days' notice to such drainage commissioners appear before the court having jurisdiction and show cause why said land should not be bound by all drainage assessments in any report or reports of the commissioners of said district assessed against the same. The presumption shall be in favor of the regularity of such assessments, and they shall stand as valid assessments unless the owner of such land, or some interest therein shall show that said assessment is inequitable, or is void because the lands were not subject to assessment in the first instance."

Plaintiff's complaint therefore reveals that he failed to pursue the procedure specified in the drainage statute and permitted himself without proper objection to be concluded by the final decree entered therein. He cannot thereafter assail such decree by a collateral suit, and it follows that the complaint fails to state a cause of action, and the action of the trial court in so holding was correct.

The complaint failing to state any cause of action, it is unnecessary to decide whether the bondholders should have been joined as parties defendant, or whether two distinct causes of action were improperly joined and not separately stated and numbered.

The judgment of the trial court will be affirmed; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2459. July 20, 1921.]

MARTINEZ v. FLOERSHEIM MERCANTILE CO. et al.

SYLLABUS BY THE COURT.

1. Where it is shown to the satisfaction of the trial court that an application has been made for an extension of time to perfect an appeal, and that through the failure of the clerk to file the papers the time has expired before the papers are filed, they may be filed by order of the court, and the time extended nunc pro tunc. P. 247

2. The findings of the trial court that conveyances were made without consideration, made to cheat and defraud a particular creditor and to hinder and delay him in the collection of his judgment, which had been previously obtained, if supported by substantial evidence, will not be disturbed on appeal. P. 247

Appeal from District Court, Colfax County; Leib, Judge.

Action by Cleofas R. Martinez against the Floersheim Mercantile Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Bickley, Kiker & Voorhees, of Raton, for appellant.

W. R. Holly, of Springer, for appellees.

OPINION OF THE COURT.

RAYNOLDS, J. On October 5, 1912, Jesus M. Martinez sold to the Floersheim Mercantile Company certain sheep, which were infected with a contagious disease known as scabies, and the controversy which resulted from the loss occasioned to the Floersheim Company was settled by a note being given by Martinez to the said company on November 19, 1912, for the sum of $1,321, to be paid in six months. This note was not paid at maturity, and suit was brought upon it; the defendant, Martinez, in his answer setting up that the note was obtained by fraud and duress. The case was tried by the court without a jury, and judgment given for the plaintiff, the Floersheim Mercantile Company, on

August 25, 1914, for the sum of $1,762. On October 28, 1914, the sheriff of Colfax county levied upon the property of J. M. Martinez to satisfy the judgment, and on November 14, 1914, this suit was begun by Cleofas R. Martinez, the wife of J. M. Martinez, seeking an injunction against the sheriff and the Floersheim Mercantile Company. Judgment below was given for the sheriff and the mercantile company, and Cleofas Martinez, the wife of J. M. Martinez, appealed from that judgment to this court.

The appellant, Cleofas Martinez, claims to be the owner of the property in question; it having been deeded to her by her husband, J. M. Martinez, on July 30, 1912. On said date a bill of sale was also made to her by him for certain personal property. The deed above mentioned, together with a power of attorney from Cleofas Martinez, the appellant, to J. M. Martinez, her husband, were made at the same time. The deed and power of attorney were recorded May 24, 1913. The bill of sale was recorded September 19, 1914. Both the bill of sale and the deed were acknowledged April 11, 1913. Appellant claims that the conveyances to her were in repayment of the property which she had brought into the marriage community over 30 years before the date of these conveyances. The trial judge found that the conveyance was a voluntary one, without consideration, made to cheat and defraud the Floersheim Company; that the appellant had, together with her husband in collusion, withheld the conveyance from record for the purpose of obtaining credit; that the whole transaction was one to cheat and defraud; and that, even if she were the owner of the property and her husband, as attorney under the power of attorney, had conveyed or sold it, she was estopped as against the Floersheim Company, because the sheep which were sold to the company were her sheep, and she was in fact an undisclosed principal in the transaction.

[1] At the outset of the case we are met with a motion to dismiss by the appellee on the ground that said appeal was not filed in the Supreme Court on or before the return day thereof, in that more than 90 days had elapsed from the time the appeal was taken and the same was filed in the Supreme Court; and, further, on the ground that there was no extension of time for taking such appeal. This motion has been apparently abandoned by the appellee, as is shown by his brief on the merits. The record discloses, however, that there is nothing in his contention, as the leave to extend time was granted nunc pro tunc by the lower court upon a showing made by the appellant that she had complied with the law, and the clerk had failed to properly file the papers. This showing satisfied the lower court and in the interest of justice the entries were made below nunc pro tunc.

[2] Appellant assigns 64 errors, but groups these errors into three propositions: First, that the creditors in the case are subsequent creditors, and not existing or prior creditors, and that actual fraudulent intent must be proven in order that they may set aside this conveyance; second, that the conveyance was made for an adequate consideration, the repayment of the dotal property brought into the marriage community by the appellant. The third subdivision consists in the various errors made by the trial court, which are based upon the two former propositions, and the view which the lower court took of the law in regard to the case.

As will be seen from the above statement of facts, the trial court tried both the suit upon the promissory note, in which judgment was rendered, and the injunction suit to prevent levy of the judgment obtained upon the promissory note; the injunction suit being the one which is appealed to this court, and which we are now considering. The testimony taken in the suit upon the note was incorporated in the

present suit, and is made a part of the record. As before stated, the trial court in the present suit made specific findings that the conveyance was voluntary; that it was made for the purpose of cheating and defrauding the Floersheim Mercantile Company; that there was collusion between the appellant and her husband in withholding the conveyance from record; and that the appellant was estopped, even if she were the true owner, because she had allowed her husband to act as her attorney, and she was in fact an undisclosed principal in all the conveyances out of which the controversy arose. The appellant requested the court to make 29 findings in her favor, to the effect that the consideration was adequate, and that the conveyance was not voluntary, but was made in good faith. The court, however, refused all findings of the appellant and in fact its findings, either by inference or specifically, were diametrically opposed to those requested. Although the record is a lengthy one, much testimony having been taken on both sides in the two suits, and the assignments of error are numerous and the findings and requested findings are elaborate and specific, the real question involved in the case is a simple one, and is determined entirely by the presence or absence of substantial evidence to support the findings of the trial court. The distinction between prior creditors, subsequent creditors, and the effect of the recording act, etc., so elaborately argued by appellant, have no bearing because the court as a matter of fact found that there was actual fraud and collusion, and that the whole scheme or plan was one to cheat and defraud this particular creditor. If the evidence supports this finding of the court that, this attempted conveyance being withheld from record, the power of attorney that was given and the entire transaction was a scheme to cheat and defraud the Floersheim Mercantile Company and to hinder and delay them from obtaining judgment against J. M. Martinez,

then the judgment should be affirmed, as this court cannot pass upon the weight of the evidence, and the trial court has correctly applied the law to the facts as found. We have carefully read the record, and find that, although there is no evidence to contradict specifically the testimony of the appellant and her witnesses that the transaction was as she testified, nevertheless the court was at liberty to disregard her testimony and that of her witnesses, and to believe that the whole transaction, because of the suspicious circumstances attending it, was fraudulent.

In Gebby v. Carrillo, 25 N. M. 120, at page 128, 177 Pac. 894, at page 897, the whole subject is reviewed, and the rule applicable to this case is laid down in the following quotation:

> "The testimony given by the appellant is possible of contradiction in the circumstances and its truthfulness and accuracy were open to a reasonable doubt upon the facts in the case."

In the present case there were suspicious circumstances and inherent probabilities which justified the court in his view of the case and furnished the substantial evidence which is the basis of his judgment. This is especially true in view of the fact that the court was asked to make specific findings of good faith on the part of the appellant and of adequate consideration, and to find specifically that the deeds in question were made upon certain dates, which he refused to do. All of this shows that the court did not believe the instruments introduced were made and acknowledged, on the dates they were purported to have been made and acknowledged, and the whole transaction, as it found, was a scheme to defraud. This court has held in many cases that, where there is substantial evidence to support the verdict of the lower court, the decision will not be disturbed. After careful consideration of the entire record, we see no reason for departing from these precedents.

The decision of the lower court is affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J. concur.

[No. 2500. July 20, 1921.]

TADLOCK v. SCHOOL DIST. NO. 29 OF GUADALUPE COUNTY et al.

SYLLABUS BY THE COURT.

1. That part of section 4956, Code 1915, concerning the payment of teachers by the order of school directors, signed by the county school superintendent, is inconsistent with chapter 105, section 5, Laws 1917, and the system outlined therein, and consequently was repealed. P. 251

2. The power to hire a school-teacher presupposes the right to dismiss her. P. 255

3. The control of rural schools is vested in the county board of education, and not in the board of school directors. P. 255

4. In the absence of statutory provisions, there exists in the employing agency an implied right to dismiss a teacher for adequate cause. In rural schools this implied right vests in the board of school directors and county board of education jointly. P. 256

Appeal from District Court, Guadalupe County, Leahy, Judge.

Action by Jewel Tadlock, a minor, by next friend, S. B. Tadlock, against School District No. 29 of Guadalupe County, N. Mex., and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

F. Faircloth, of Santa Rosa, for appellants.

W. T. Brothers, of Santa Rosa, for appellee.

OPINION OF THE COURT.

PARKER, J. Jewel Tadlock, appellee, by her next friend, brought this action in the district court for Guadalupe county, against school district No. 29 of Guadalupe county and Placido Baca y Baca,

county school superintendent, to recover $130, alleged to be due as salary as a school-teacher, plus $1,000, exemplary damages. The cause was referred to a referee, and submitted to the court for final judgment. From a judgment for $130 and costs in favor of appellee, the appellants have prosecuted this appeal.

On August 10, 1918, the school district and the appellee entered into a written contract, by the terms of which the appellee was employed to teach school in said district for a term of seven months, beginning September 2, 1918, at the rate of $65 per month. The contract was approved by the county board of education of Guadalupe county, and the appellee performed service under the contract until January 24, 1919, when, according to the allegations of the complaint, she was dismissed without cause by the board of directors of the school district.

While the evidence is conflicting as to whether the school district or the appellee breached the contract of employment, and while this court is as advantageously circumstanced to determine the truth of that matter by weighing the evidence as was the trial court—the trial court not having seen the witnesses, but having rendered judgment upon the transcript of evidence taken before the referee—yet it will be unnecessary to consider the weight of the evidence.

The complaint omits the Guadalupe county board of education as a party defendant, and it is contended by the appellants, among other things, that the trial court erred in refusing to hold that such board was a necessary party.

[1] This case requires a statement of the statutory law on the subject of rural schools and some general legal principles concerning schools and teachers generally. Prior to 1917 the local school district administration system was in force in this

state. Under that system each local school district was an independent unit for administrative purposes, governed by a board of three members called the board of school directors. Certain supervisory powers over such boards and schools was vested in the state board of education, the state superintendent of public instruction, and county school superintendents. By chapter 105, Laws 1917, the so-called "county unit" plan of rural school control and administration was adopted. Under that system the Legislature centralized the administration of rural school affairs in a board of five members called the county board of education. The bulk of powers theretofore vested in boards of school directors was reposed by that act in such county boards, leaving to boards of school directors such minor powers as the employment of teachers, "with the approval of the county board of education," the "care and keeping" of school houses and property therein, subject to such uses thereof as the county board might ordain, the taking of the school census, school director elections, local school bond elections, display of the flag, etc. County boards were created "for the purpose of centralizing control over rural schools and more economically administering the funds thereof." Section 1, c. 105, Laws 1917.

Section 5 of the act provided:

"The said board shall have full power and control over all rural schools and districts and the funds thereof, including high schools in rural districts and the funds thereof, except as such power is now conferred upon the state board of education and the state superintendent of public instruction. Said boards shall, also, have power to contract for and purchase all sites, buildings, equipment or other property for schools. All rural school moneys in the respective county treasuries and all such money credited * * * to such schools shall be expended and disbursed upon warrant of the county board of education only, signed by the president thereof and countersigned by the secretary thereof, and no contract or expenditure of said funds or any part thereof hereafter made, except in the manner herein specified, shall be valid. * * * Teachers shall be employed by the board of

school directors with the approval of the county board of education."

Section 6 vests the title of all rural school property in the county board of education. Section 8 provides:

"County boards of education * * * shall have power and be required to provide, by building, purchasing, or leasing, suitable schoolhouses; to keep same in repair, to provide for fuel and light, for the payment of teachers' wages as well as other employees, * * *; to provide for the payment of interest on school bonds and the redemption thereof, and to defray all other expenses connected with the proper conduct of the public schools in their respective districts."

Section 9 authorizes county boards to constitute the local boards of school directors their agents in executing the ministerial powers conferred upon the county boards, such agency to be in writing and revocable at the pleasure of the county boards.

Section 11 vests in the county school superintendent jurisdiction over rural schools; requires him to make visits to such schools and supervise the methods of instruction employed and consult with the school directors "concerning the improvement of their schools."

Section 14 makes the local boards of school directors bodies corporate, with power to sue and be sued and contract and be contracted with. Section 16 places the "care and keeping" of the rural schoolhouses and property therein in the hands of the school directors, subject to the limitation heretofore expressed.

Section 4956, Code 1915, enacted in 1891, and not specifically repealed by the act of 1917, provides:

"Every person employed to teach a school shall keep a proper record, and at the end of each term, make a report to the county superintendent, showing the whole number of pupils that have attended * * * and for failure to make such report, he may be fined. * * * No person shall be paid any money for teaching any school outside of incorpor-

ated cities, towns and villages, until an order is presented, signed by two of the school directors or the proper district and indorsed by the county superintendent."

The last clause of this section is relied upon by the appellee as authority for the proposition that it was unnecessary to make the county board of education a party defendant; the contract of employment having been made by the school directors, and the payment of the salary sued for being permitted by the last clause of the last-mentioned section.

Section 5 of the act of 1917 which requires that rural school money shall be paid "only" upon the warrants of the county board of education, signed by the president and countersigned by the secretary, is wholly inconsistent with the plan theretofore existing by which school moneys in rural districts was expended by the school directors. Under section 5 teachers' salaries can be paid only upon the warrants of the county board of education, and consequently the last clause of section 4956, Code 1915, was repealed. That the Legislature determined to carry forward the new system of school expenditures in all its parts is indicated also by the fact that it repealed specifically section 4851, Code 1915, which provided for matters concerning the vouchers and warrants for the payment of rural school moneys by local school directors. The judgment in the case at bar would cause the payment of the appellee's salary as school-teacher to be made contrary to the act of 1917, and in a manner wholly antagonistic to that specified in that law. As rural school money, and particularly teachers' salaries, can be disbursed under the law only by the county board of education, and as this action was an attempt to compel payment of a teacher's salary, though the action was grounded on a contract, the board of education of the county was an indispensable party defendant, for the district court would obtain no jurisdiction to compel the payment of the salary from the school

funds in the hands of such board, except where such board was made a party defendant. From the statement of general principles hereinafter mentioned, it will also be seen that the county board was an indispensable party defendant for other reasons.

[2] Under our law, as we have shown above, the teachers in rural schools are employed by the local board of school directors, with the approval of the county board of education. It is settled that the power to hire a teacher presupposes the right to dismiss her. 24 R. C. L. "Schools," § 75. "Where one agency is given power to employ, with the approval of another agency; the right of dismissal is joint, and can be accomplished legally only by the concurrent act of both agencies." People ex rel. Gilmore v. Hyde, 89 N. Y. 11. The conferring of general power over rural schools in the county board and the county school superintendent did not authorize either to dismiss a teacher, because that power flows from the right to employ, and employment is effected by the school directors, with the approval of the county board. Consequently the right to discharge or dismiss a teacher in a rural school of this state is vested in the local school directors and the county board of education jointly. The evidence in this case indicates that the local school directors usurped the power of dismissal of the appellee. In fact the evidence indicates a general misconception by the local directors of their powers.

[3] The control of rural schools is vested in the county board of education, not in the local board of school directors. School directors have no power to close a school. That power vests in the county board of education. The complaint alleges a breach of contract on the part of the school directors, but makes no mention whatever of any action on the part of the county board, which could be held to constitute a breach of the contract of employment.

[4] To avoid any misunderstanding it should be stated that the statutes of this state are silent as to the right generally to dismiss teachers of rural schools. The law provides for qualifications of school-teachers, but makes no provision for dismissal after employment, except in the single instance where complaint is made after the teacher is afflicted with tuberculosis. Section 4953, Code 1915. Many states have statutes providing that teachers may be dismissed for adequate cause. The general rule, however, in the absence of a statute on the subject, is that there exists in the employing agency an implied power to dismiss the teacher for adequate cause. Freeman v. Town of Bourne, 170 Mass. 289, 49 N. E. 435, 39 L. R. A. 510. In this state such implied power exists jointly in the school directors and the county board of education so far as rural school-teachers are concerned.

Because the complaint fails to state a cause of action and for the error of the court in refusing to require the county board of education to be made a party defendant, the judgment of the trial court will be reversed, and the cause remanded for such further proceedings as are not inconsistent with this opinion; and, it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2509. July 20, 1921.]

CASSAN v. CASSAN.

SYLLABUS BY THE COURT.

1. Section 2778, Code 1915, authorizes district courts to award to the wife, in divorce actions, reasonable alimony, in installments or lump sums, independent of which spouse may have been the guilty party, and the action of the court thereunder can be reviewed for abuse of discretion only. P. 257

2. Findings supported by substantial evidence will not be disturbed on appeal. P. 258

Appeal from District Court, Colfax County; Leib, Judge.

Action for divorce by Dominick Cassan against Jessie Cassan. From a judgment for plaintiff but allowing defendant alimony, he appeals, and defendant cross-appeals. Affirmed.

Morrow, Merriau & Sadler, of Raton, for appellant.

J. Leahy, of Raton, for appellee.

OPINION OF THE COURT.

PARKER, J. This is an appeal from the district court for Colfax county. The action was brought by Dominick Cassan, the appellant and cross-appellee, against Jessie Cassan for divorce. The complaint alleged that the appellee abandoned and deserted the appellant, that she is addicted to the use of intoxicating liquors to excess, and that she has refused to maintain the relations of wife to the appellant. The answer denied the material allegations of the complaint and by way of cross-complaint alleged that appellant failed to properly clothe and support appellee; that he compelled her to perform manual labor on the ranch of the parties hereto; that he ordered her to leave their home; and that he was constantly filthy and unclean in his person. It was also alleged that the appellee was without property or funds for her support. Issue was made upon the allegations of the cross-complaint, and decree was entered in favor of appellant, dissolving the bonds of matrimony and ordering the appellant to pay $1,350 to appellee "as permanent or lump sum alimony."

[1] The only proposition advanced by appellant on this appeal concerns the right of the trial court to find the issues of fact in favor of the appellant and at the same time compel him to pay "permanent or lump sum alimony," the appellant contending that alimony cannot be granted to the guilty spouse.

Regardless of precedent in other jurisdictions, the solution of the proposition depends solely upon a construction of section 2778, Code 1915, which provides:

"In any suit for the dissolution of the bonds of matrimony, division of property, disposition of the children, or for alimony, the court * * * may make and enforce * * * such order to restrain the use or disposition of the property of either party, or for the control of the children, or to provide for the support of the wife during the pendency of the suit, as in its or his discretion may seem just and proper; and to make such order, relative to the expenses of the suit, as will insure the wife an efficient preparation and presentation of her case; **and, on final hearing, may allow the wife such a reasonable portion of the husband's separate property, or such a reasonable sum of money to be paid by the husband, either in a single sum, or in installments, as alimony, as under the circumstances of the case may seem just and proper.** * * *"

This section, and particularly that part in bold type, constitutes a clear and unequivocal grant of power to district courts to award to the wife, in divorce actions, reasonable alimony, in installments or lump sums, independent of which spouse may have been the guilty party. The power is limited only to the grant of a "reasonable sum" as that factor is influenced by the circumstances of the particular case. It is obvious that on appeal the only matter for review is whether the trial court abused its discretion in fixing the amount of the award under the circumstances of the case. To find in the affirmative it would be necessary to hold that the amount fixed by the trial court, under the circumstances was contrary to reason, or exceeds the bounds of reason. Independent Steel & Wire Co. v. N. M. Central R. Co., 25 N. M. 160, 178 Pac. 842. The circumstances of the case at bar disclose no basis for so holding.

[2] Appellee and cross-appellant assigns seven errors, of which six constitute an attack on the findings made by the trial court. The findings are

supported by substantial evidence, and consequently will not be disturbed on appeal, a proposition so often laid down in this court that citation of authority therefor is unnecessary. One assignment urges that the trial court erred in refusing to consider appellee's proffered findings of fact and conclusions of law. It appears that the proposed findings and conclusions were tendered to the court before rendition of its final decree; that the trial court took the cause under advisement and rendered a judgment containing findings inconsistent with those tendered by the appellee. It is immaterial that the trial court refused to consider the requested findings of appellee, those findings being inconsistent with the facts as found by the trial court. The entry of the decree containing findings contrary to those requested by appellee constituted an overruling of the proposed findings tendered by appellee.

For the reasons cited, the judgment of the trial court will be affirmed as to the appeal and cross-appeal; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2516. July 20, 1921.]

GRAYSON v. MEANS & EVANS et al.

SYLLABUS BY THE COURT.

Where in a suit for a commission the court below, upon conflicting evidence, found that the plaintiff was the procuring cause of the sale, and gave judgment in his favor for an amount which this court cannot say, as a matter of law, is excessive, the judgment of the lower court will be affirmed.

Appeal from District Court, Grant County; Edwin Mechem, Judge.

Action by Ray Grayson against Means & Evans and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Percy Wilson, of Silver City, for appellants.

C. C. Royall, of Silver City, and Vaught & Watson, of Deming, for appellee.

OPINION OF THE COURT.

RAYNOLDS, J. The plaintiff below, appellee here, brought suit in Grant county for recovery of a commission or compensation in a purchase which the defendants made of certain ranch property and cattle formerly belonging to the Red River Cattle Company of Socorro county. The plaintiff recovered judgment below for the sum of $6,500, being 5 per cent. of the purchase price of $100,000 paid for the ranches and 50 cents per head for the 3,000 cattle bought at the same time. From this judgment the defendants appeal to this court. Appellant assigns 38 errors, but in his brief asked for reversal upon three propositions: First, that there was no custom shown as to the amount of compensation due in a transaction of this kind; second, that the 5 per cent. commission allowed upon the real estate sale was not justified by the evidence; and, third, that the compensation allowed by the court was excessive, even if the plaintiff was the procuring cause of the sale. The case was tried by the court without a jury, and the evidence was conflicting on all the material points in controversy.

In regard to the first proposition that there is no custom shown by which the plaintiff was entitled to a commission, it is only necessary to state that the court in finding No. 10 did not base his conclusion upon a custom, but upon a reasonable compensation for the services rendered.

In regard to the second and third propositions that the 5 per cent. commission on the real estate was not justified by the evidence, and the compensation was excessive even if the plaintiff was the procuring cause, we have carefully read the transcript of testimony, and these objections to the judgment

cannot be sustained. There is ample evidence to sustain and justify the finding of the court for the 5 per cent. commission on the sale of the real estate, and this court cannot say that the compensation allowed for the entire transaction in a matter of this magnitude was excessive, in view of the evidence introduced as to similar transactions.

We find no error in the judgment of the lower court, and it is therefore affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2520. July 20, 1921.]

MACY v. MIELENZ (DEXTER STATE BANK, Intervener).

SYLLABUS BY THE COURT.

1. Where the court finds as a fact that a deed was to be held as security for money borrowed from a bank for the purchase price of the property, an equitable lien for the repayment of such money was properly impressed upon such property. P. 263

2. Where a deed is delivered to be held in escrow by a bank as security for the indebtedness of one of its officers to the bank, the fact that it is a complete instrument does not prevent the delivery being in escrow, and does not pass title to the grantee by such delivery in escrow. P. 264

3. An escrow agreement may be established by parol. P. 264

Appeal from District Court, Chaves County; Brice, Judge.

Suit by C. M. Macy against Fred Mielenz for partition, in which the Dexter State Bank intervened. From a judgment in favor of the intervener, plaintiff appeals. Affirmed.

Ed S. Gibbany and I. S. Epstein, both of Roswell, for appellant.

H. C. Maynard, of Roswell, for appellees.

OPINION OF THE COURT.

RAYNOLDS, J. This suit was brought by C. M. Macy against Fred Mielenz and Thomas Wheaton to partition 40 acres of land, the northeast quarter of the northwest quarter, section 17, township 13 north, range 26 east, N. M. P. M. The Dexter State Bank intervened in the case, claiming to have advanced the money for the purchase of land under an agreement to secure the purchase money by delivery of the deed in blank to the bank, the deed to be held until the purchase money was paid. The purchasers, Fred Mielenz and A. E. Macy, were respectively cashier and president of the intervener bank at the time of the purchase. The name of the grantee in the deed was left blank, and the deed was retained by the bank for some time. Later Mielenz's name was inserted therein so that he could borrow money on the land. He borrowed $3,000 from the Pacific Mutual Life Insurance Company with which he paid to the bank his portion of the notes. About this time Macy desired something to show his interest in the land, and it was agreed, as found by the trial judge, between the bank and Macy and Mielenz that Mielenz should deed an undivided one-half interest in the land to Macy, the deed to be held by the intervener bank until Macy had paid his portion of the notes due on the purchase price. This deed was left in the bank unrecorded for a number of years. During this time A. E. Macy, the president of the bank, gave a mortgage to C. M. Macy, his brother, who was the plaintiff below, which C. M. Macy sought to foreclose, but dismissed the foreclosure proceedings when the bank was preparing to intervene in the suit. The trial judge found that there was collusion between A. E. Macy and C. M. Macy to obtain title to the property without paying the note in question, as A. E. Macy had in the meantime become a bankrupt and was unable to pay the note. The court further found that the mortgage made to C. M. Macy, the suit brought thereon and

subsequently dismissed, and the deed given by A. E. Macy to C. M. Macy when the suit was dismissed in satisfaction of the mortgage were all a part of a scheme to secure possession of and title to the property without paying the indebtedness at the bank. The court further found that it was never the intention of the parties that delivery of the deed should be made to A. E. Macy, but, on the other hand, it was their intention to deliver it to the bank to be held in escrow for A. E. Macy until his notes secured by it were paid. Upon the trial of the case below, judgment was rendered in favor of the bank, and an equitable lien impressed upon the property and ordered foreclosed. From this judgment C. M. Macy appeals to this court.

An assignment of seven errors which appellant in his brief summarizes in the general proposition:

> "That the entire structure of the findings and judgment of the court below are based upon the conclusion of law that the deed from Mielenz to A. E. Macy was not delivered: (1) Because at the time the money was furnished by the bank for the purchase of the land both A. E. Macy and Mielenz intended the land should be held for the payment of the money borrowed; (2) that when a year after the purchase Meilenz made a mortgage on the land and a deed to Macy, that Macy, acting in a dual capacity as bank officer and grantee in the deed, should hold his own deed in escrow until he paid his note to the bank."

[1] Appellant contends that there is no evidence whatever of the intention to hold the first deed in which the grantee's name was in blank as security for the money advanced by the bank, and further argues that there is no evidence to support the finding of the court that such was the intention. In this, however, he is mistaken, as the evidence of Mielenz clearly shows that such was the agreement and intention of the parties, and that the name of the grantee was left in blank and the deed unrecorded for the very purpose of securing the bank for the money advanced. There is a conflict of testimony on

this point; A. E. Macy testifying that there was no such agreement. But we think the court was justified, under the circumstances of the case, in the finding made as to the agreement.

[3] As to the second proposition, appellant argues that the deed made by Mielenz to Macy was a complete deed and was delivered to Macy. On this point there is also a conflict of evidence, and the court, as before stated, found that there was collusion between A. E. Macy and C. M. Macy in withdrawing the deed which had been made to A. E. Macy and placing it of record, thereby seeking to acquire title to the property in question without payment of the money due the bank.

The appellant argued that the deed was a complete deed, and, delivery having been made, no conditions could be attached to it, but the court finds that no delivery was made to A. E. Macy, and that he held the deed in escrow for the benefit of the bank.

Appellant further argued that A. E. Macy could not act in a dual capacity, both as an officer of the bank and in his individual capacity, and that he could not hold his own deed in escrow. It is undoubtedly the law that the grantee in a deed cannot hold the same in escrow. Dev. on Deeds, vol. 1, pp. 553, 555, 561. But in this case the corporation may hold the deed in escrow for an officer just as an officer may hold a deed in escrow for a corporation. The corporation and the officers composing it are not identical, and they may act as escrow agents for each other. Dev. on Deeds, vol. 1, p. 558, and note 2; Blair v. Security Bank of Richmond, 103 Va. 762, 50 S. E. 262; Southern Life Insurance Co. v. Cole, 4 Fla. 359.

[2] The appellant further contends that such a trust or lien as is here involved is contrary to the statute of frauds, and that, if there was such an agreement to hold the property in trust for the bank,

it should have been in writing or it is void. This contention is without merit, as an escrow agreement may be established by parol, and the court found as a fact that the deeds in both cases were never delivered, but were held in escrow to secure the bank. Dev. on Deeds, vol. 1, p. 551, § 312a.

We find no error in the decision of the court below, and it is therefore affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2572. July 20, 1921.]

STATE v. CARPIO.

SYLLABUS BY THE COURT.

1. A charge that murder was done willfully, deliberately, and premeditatedly and of malice aforethought is sustained by proof that it was committed with a mind imbued with these qualities, though they were directed against a person other than the one killed. P. 270

2. In a homicide case where A. shoots at B. and the bullet strikes C. and kills him, the malice or intent follows the bullet. P. 272

3. Instructions given by the court to the jury, not objected to in the court below, will not be reviewed upon appeal. P. 272

Appeal from District Court, Grant County; Edwin Mechem, Judge.

Antonio Carpio was convicted of murder in the first degree, and he appeals. Affirmed.

David E. Grant, of Santa Fe, for appellant.

The court should have granted appellant's motion to instruct the jury to acquit him, because of variance between indictment and proof. Smith v. State, 7 Tex. App. 382; People v. Knapp, 71 Cal. 1, 11 Pac. 793 (1886); State v. Walker, 9 Houst. (Dela.) 464, 33 Atl. 227 (1887); State v. Greenleaf, 71 N. H. 606, 54 Atl. 38 (1902); State v. Johnson, 40 Conn. 136 (1873); State v. Reddington, 7 S. D. 368, 64

N. W. 170 (1895), 21 Cyc. 726 and authorities there cited; McFarland v. State, 154 Ind. 442, 56 N. E. 910 (1900); Wolfe v. State (Tex.) 85 S. W. 8 (1905); Haygood v. State, 51 Tex. Cr. App. 618, 103 S. W. 890 (1907); Southern Express Company v. The State (Georgia), 97 S. E. 550 (1918); People v. Anderson, 267 Ill. 75, 107 N. E. 840 (1915); Mitchell v. State, 63 Ind. 276 (1878); State v. Williams, 68 Ark. 241, 57 S. W. 792 (1900); Jacobs v. State, 46 Fla. 157, 35 So. 65 (1903); Hankins v. The State, 57 Tex. Cr. App. 152, 122 S. W. 21 (1909); State v. Crogan, 8 Ia. 523 (1859); Cronin v. The State, 30 Tex. App. 278, 17 S. W. 410 (1891); Stone v. The State, 115 Ala. 121, 22 So. 275 (1897); State v. McWhirter, 141 N. C. 809, 53 S. E. 734 (1906); State v. Ray, 92 N. C. 810 (1885).

In the case last cited, the learned court, at page 811, states:

"The probata fails to prove the allegata. The well-settled rule is that the proof, in order to convict, must, in all material respect, support and go to prove the allegation in the indictment."

Although at common law malice directed against one human being will be transferred and imputed against another killed by mistake or accident, yet that is a rule or conclusion of law, and an indictment in its allegations cannot avail itself of such a conclusion, but must state the actual facts and not conclusions of law, intendments or implications.

In Territory v. Hubbell, 13 N. M. 579, 86 Pac. 747, (1906), at page 583, this honorable court states:

"Facts are to be stated" (in an indictment) "not conclusions of law alone."

In State v. Graham, 38 Ark. 519 (1882), at page 521, the court says:

"An indictment should set forth the special matter of the whole fact, with such certainty that the offense may judici-

ally appear to the court; and it is not enough to charge a conclusion of law."

In Rank v. The People, 80 Ill. App. 40 (1899), at page 43, the court thus expresses itself:

"* * * and it is a fundamental rule, both of civil and criminal pleading, that facts and not conclusions of law must be averred which, in the eye of the law, constitute the crime charged."

In Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542 (1892), at page 202, says the learned court:

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be."

The indictment should contain such a specification of acts and descriptive circumstances as would on its face fix and determine the identity of the offense. Territory v. Hubbell, 13 N. M. 579, 86 Pac. 747 (1906); United States v. Medina, 15 N. M. 204, 103 Pac. 976 (1909); Wingard v. The State, 13 Ga. 396 (1853); State v. Dougherty, 4 Ore. 200 (1871); United States v. Burns, 54 Fed. 351 (1893).

They should be stated with such particularity as to enable the defendant to know exactly what he has to meet. Territory v. Hubbell (supra); United States v. Medina (supra); Wingard v. State (supra); United States v. Cruikshank, 92 U. S. 542 (1875); Harne v. State, 39 Md. 552 (1873); Commonwealth v. Terry, 114 Mass. 263 (1873); State v. McGinnis, 126 Mo. 564, 29 S. W. 842 (1895), 22 Cyc. 295 and authorities there cited.

The indictment should be so drawn as to enable the defendant to avail himself of an acquittal or conviction as a bar to a further prosecution arising out of the same facts. New Mexico authorities supra; United States v. Burns (supra); State v. Shirer, 20 S. C. 392 (1883), 22 Cyc. 295 and authorities there cited.

In the light of the proof submitted on which the state sought to convict the defendant, the indictment does not fix and determine the identity of the offense. It charges a wilful, malicious, deliberate and premeditated killing of one Efren Rios, arising out of a deliberate and premeditated design unlawfully and maliciously to effect his death. The proof develops a design, if any, not to effect the death of Rios, but of another, one Lucero. The latter offense is obviously not identical with the first, and the indictment thus fails to fix and determine the identity of the offense for which the proof is offered, with the precision and particularity required by law.

Furthermore, the defendant could not, under the indictment, know exactly what he had to meeet, when the case made by the proof in the hands of the state established an offense totally different from the one charged.

He prepared and made a perfect defense to the charge against him as stated by the indictment. At the trial he was met not by the charge on which he had relied and prepared, but by another charge, totally distinct and apart from the first.

Malice and deliberation are absolutely essential elements of the crime of murder in the first degree, of which defendant was found guilty in the case at bar. Sections 1456 to 1459, New Mexico Code 1915. State v. Smith (Sup. Ct. New Mex., 1921), 194 Pac. 869.

The prejudice and injury to the defendant resulting from the error in said instruction 26, was not cured by any other instruction, nor by the charge taken as a whole. State v. Crosby (Sup. Ct. New Mex., 1920), 191 Pac. 1079.

"Where, as here, the court first correctly states the rule in general terms, and then directly states the contrary rule in language pointed specifically to the instant case, it is not appropriate to hold that the error is cured by a general view of the instructions as a whole." Howard v. Worthington (Cal. 1920), 195 Pac. 709, at page 710.

Harry S. Bowman, Attorney General, for the State.

If a person, while maliciously attempting to kill another, unintentionally kills a third person, towards whom he entertains no malice, it is murder. State v. Brown, 4 Penniwell (Ill.) 120, 53 Atl. 354; Wheatley v. Commonwealth, 26 Ky. Law Rep. 436, 81 S. W. 687.

And where a defendant deliberately intended to kill one person, and, in attempting to do so, took the life of another, whom he mistook for the intended victim, he is none the less guilty of murder in the first degree. People v. Suesser, 142 Col. 354, 75 Pac. 1093.

And where deceased placed herself between defendant and a third person, or for any reason got in range, and defendant fired, intending to strike the third person, not then intending nor expecting to strike deceased, but killed deceased, defendant was guilty of murder in the first degree. People v. Trebilcox, 149 Cal. 307, 86 Pac. 684.

To like effect, see, State v. Bell, 5 Penniwell (Del.) 192, 62 A. 147; Brown v. State, 47 Ind. 28, 46 N. E. 34; State v. Williams, 122 Ia. 115, 97 N. W. 992; Tompkins v. Commonwealth, 28 Ky. Law Rep. 648, 90 S. W. 221; State v. Payton, 90 Mo. 220, 2 S. W. 394; State v. Bectra, 7 N. J. L. 322, 58 Atl. 933; State v. Cole, 132 N. C. 1069, 44 S. E. 391; Thornton v. State, (Tex.) 65 S. W. 1105; State v. Briggs, 58 W. Va. 291, 52 S. E. 218; Wharton on Hom., Sec. 359, (3d Ed.); Ryan v. People, 114 Pac. 306; Brooks v. People, 216 S. W. 705; State v. Clark, 47 S. W. 886; Forshee v. State, 108 Pac. 554; State v. Foster, 38 S. W. 721; People v. Patim, 101 N. E. 694.

OPINION OF THE COURT.

ROBERTS, C. J. Appellant was tried and convicted of the crime of murder in the first degree and appeals. On August 4, 1919, appellant attended

a dance at the town of Central, Grant county, N. M. Appellant had asked a young lady, one Julia Olguin, to dance with him, and she had refused. Thereupon he told her that if she would not dance with him she could not dance with any other person. Later she was dancing with one Casamero Lucero, whereupon appellant caught hold of Lucero and told him that he could not dance with Miss Olguin. Lucero slapped or pushed appellant, and some other men pushed him outside the door and closed the door. Later Efren Rios entered the ballroom and told Lucero that Carpio, the appellant, wanted to see him outside. Lucero went out followed by Rios and approached appellant, and when he got to within 14 or 15 paces of appellant, appellant told him to stop; whereupon appellant fired at Lucero, and the bullet struck Rios and killed him. A second shot was fired at Lucero, wounding him but not fatally.

[1] The first point made upon which appellant relies for a reversal is that there was a variance between the allegation of the indictment and the proof adduced upon the part of the state, in that the indictment alleged that the defendant feloniously, willfully, deliberately, premeditatedly, of his malice aforethought, and from a deliberate and premeditated design, then and there unlawfully and maliciously to effect the death of Efren Rios, did assault and shoot the said Efren Rios, from the effects of which assault and shot said Rios died; whereas, the proof showed that the malice and deliberation were directed against Lucero and not Rios. There is no merit in this argument, however, because under the law the malice and deliberation were transferred from Lucero to Rios. In other words, the malice followed the bullet. In Wharton on Homicide (3d Ed.) § 359, the author says:

"The rule is nearly, if not quite, universal that one who kills another, mistaking him for a third person whom he in-

tended to kill, is guilty or innocent of the offense charged the same as if the fatal act had killed the person intended to be killed. * * * And a charge that murder was done willfully, deliberately, and premeditatedly, and with malice aforethought, is sustained by proof that it was committed with a mind imbued with these qualities, though they were directed against a person other than the one killed."

In the case of Brooks v. State, 141 Ark. 57, 216 S. W. 705, a very late case, having been decided December 1, 1919 (reversed on other grounds), the defendant had been indicted for the murder of a girl named Irene Crawford, although the shot was directed at one John Law. It was insisted by the appellant that the indictment was defective because it charged the defendant with killing Irene Crawford with "the willful, malicious, premeditated and deliberate intent then and there to kill and murder her, the said Irene Crawford."

The court held that there was no error in the indictment, stating:

"An indictment for homicide in a case like this must allege the assault as made on the person killed. Where the accused shoots at one man and kills another, malice will be implied as to the latter; and a felonious intent is transferred, on the same ground, as where poison is laid to destroy one person and is taken by another. Hence the felonious intent is thus transferred, and the indictment must be drawn accordingly. That is to say, it must allege that the assault was made on the party murdered, etc., in all respects just as if the party killed had been the party shot at."

In the case of State v. Clark, 147 Mo. 20, 47 S. W. 886, a question similar to that raised in the case of Brooks v. State, supra, was before the supreme court of Missouri; one count of the indictment charging that the design to kill was directed against one Lizzie Williamson, alias Lizzie Clark, while the person killed was Lizzie Hatch. The court held that count in the indictment was bad, upon the ground that the malice was transferred, and therefore that the indictment should have alleged the design to kill

to have been directed against the deceased. This court said:

"'Where the party shoots at one man and kills another, malice will be implied as to the latter; and the felonious intent is transferred, on the same ground, where poison is laid to destroy one person and is taken by another.' * * * And where the felonious intent is thus transferred, the indictment must be drawn accordingly, to wit, it must allege that the assault was made on the party murdered, and so on, in all respects, just as if the party killed had been the party shot at. So are all the precedents in this state and elsewhere."

We know of no cases to the contrary. It follows that there is no merit in this contention.

[2] The court gave to the jury instructions as to murder in the first and second degrees which followed the allegations of the indictment, that is to say, as to first degree; charged the jury that if appellant deliberately and with malice aforethought shot at Rios intending to kill him, he would be guilty of murder in the first degree, and if the shooting was done without deliberation, but with malice aforethought, it would be murder in the second degree. The instructions were proper, as the malice was transferred or followed the bullet. It would have been proper for the court to have explained in his instructions this principle to the jury.

The third point urged is that the indictment was defective in that it charged that the deliberation and malice aforethought were directed at Efren Rios instead of Lucero whom the appellant intended to kill. What we have said under the first proposition disposes of this point.

[3] It is lastly urged that the court was in error in giving instruction No. 26 to the jury. This instruction in effect told the jury that if appellant shot at Lucero unlawfully, willfully and feloniously, not in the first degree. No objection was made to this and killed Rios, he would then be guilty of murder in his necessary or apparent necessary self-defense,

instruction in the court below; consequently it is not open to review here. This has been the uniform holding of this court. State v. Eaker, 17 N. M. 479, 131 Pac. 489; State v. Lucero, 17 N. M. 484, 131 Pac. 491; State v. Klasner, 19 N. M. 479, 145 Pac. 679, Ann. Cas. 1917D 824; State v. Johnson, 21 N. M. 432, 155 Pac. 721; State v. Orfanakis, 22 N. M. 107, 159 Pac. 674; State v. Starr, 24 N. M. 180, 173 Pac. 674; State v. Whitener, 25 N. M. 20, 175 Pac. 870; State v. Parks, 25 N. M. 395, 183 Pac. 433.

David E. Grant, Esq., who so ably briefed and presented the case in this court, did so at the request of this court, and had no connection with the case in the court below.

The judgment will be affirmed; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2605. July 20, 1921.]

MONTOYA v. HUBBELL et al.

SYLLABUS BY THE COURT.

1. The obligation of the appellant to perform the judgment rendered on appeal results from the judgment itself, and an appeal bond is accordingly valid without his signature, unless the statute expressly requires execution by the appellant. P. 274

2. A cost bond on appeal is valid and effective, even though it was executed by the sureties and approved by the clerk before the appeal was allowed by the court. P. 274

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by Nestor Montoya against Frank A. Hubbell and others. From a judgment for plaintiff, defendants appeal. On motion to dismiss. Motion denied.

Marron & Wood, of Albuquerque, for appellants.

Thomas K. D. Maddison and H. B. Jamison, both of Albuquerque, for appellee.

OPINION OF THE COURT.

ROBERTS, C. J. Appellee has filed a motion to dismiss the appeal because no cost bond had been filed in compliance with the statute (section 15, chapter 43, Laws 1917). A cost bond was filed, but its validity is attacked on two grounds: First, because there was more than one appellant, and the bond was signed only by one appellant, who executed the same on his own behalf and other appellants. The sureties on the bond, however, undertook that the appellants would pay all costs that might be adjudged against them on said appeal, and equally assured the payment of the costs by the appellants not signing the bond as by the appellant who did sign it.

[1] The statute does not require an appellant to join in the bond. It requires only that he file a bond with sufficient sureties conditioned to pay the costs.

"The obligation of the appellant to perform the judgment rendered on appeal results from the judgment itself, and an appeal bond is accordingly valid without his signature, unless the statute expressly requires 'execution by' the appellant." 1 Ency. Pl. & Pr. 973.

[2] The second ground of attack upon the bond is that the record shows it was executed by the sureties two days before the taking of the appeal, and that it was approved by the clerk one day before the appeal was allowed by the court. The transcript shows that the appeal was allowed on the 21st day of January, 1921, and that thereafter on, "to wit, the 21st day of January, 1921, there was filed in the office of the clerk, etc., a cost bond," which is then set out.

There is no merit in this objection. It is the filing of the bond with the clerk of the district court that puts it into effect, not the date of its execution, or

approval by the clerk. It must be approved by this official in order to become effective as a cost bond, and while the better practice would be that the clerk should approve it before it is filed, the essential thing is its approval. The bond in the present case having been executed, approved by the clerk, and filed, it is effective and valid, even though its execution and approval may have antedated the order allowing the appeal. 1 Ency. Pl. & Pr. 989; State v. Alta S. M. Co., 24 Nev. 230, 51 Pac. 982; Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176; Debenture v. Warren, 9 Wash. 312, 37 Pac. 451.

The motion to dismiss the appeal will be denied; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2617. July 20, 1921.]

BACA v. COURY.

SYLLABUS BY THE COURT.

1. Where an appellant or plaintiff in error fails to make all interested parties in the court below parties to the appeal or writ of error, he may, upon leave granted by this court, compel such interested parties to become parties to the appeal or writ of error. P. 276

2. If a transcript of record as filed by an appellant or plaintiff in error is not correct, or fails to contain all of the proceedings of record in the court below, the additional matter should be brought into the record by certiorari. P. 277

Error to District Court, Guadalupe County; Leahy, Judge.

Action by G. J. Coury against Mauricio Chavez, in which Hilario Baca intervened. There was an order denying his motion to quash and intervener brings error. On motion to dismiss. Motion denied.

F. Faircloth, of Santa Rosa, for plaintiff in error.

W. T. Brothers, of Santa Rosa, for defendant in error.

OPINION OF THE COURT.

ROBERTS, C. J. G. J. Coury, on the 4th day of February, 1918, filed suit in the district court of Guadalupe county against Mauricio Chavez in assumpsit, and sued out a writ of attachment, and also filed a lis pendens notice on certain real estate. The real estate covered by the attachment and lis pendens was lots 21 and 22 in block 127 of the town of Santa Rosa. Chavez did not appear, and judgment by default went against him on the account. After the attachment was served and the lis pendens filed, Chavez sold the real estate in question to Braulio Rivera and wife, who subsequently transferred it to Hilario Baca. It does not appear whether the real estate was ever sold under the writ of attachment from the record before the court. An order of sale was made, however, on the 31st day of November, 1919. On the 20th day of April, 1921, Hilario Baca, plaintiff in error, filed a motion asking that he be permitted to enter a special appearance in the cause, which was apparently granted, and he moved to quash the writ of attachment because the attachment bond had not been approved by the clerk of the district court and because the clerk had not indorsed his approval upon the bond. The court denied the motion to quash, to review which order Baca sued out a writ of error from this court.

The petition for the writ of error was entitled "Hilario Baca, Plaintiff in Error, v. G. J. Coury, Defendant in Error." Chavez was not made a party defendant. Defendant in error has filed a motion to dismiss the writ of error on two grounds:

First, that the cause was [illegible] properly entitled, in that Baca was not a party [illegible] the court below. There is no merit in this, because the record before the court now shows that he was allowed to intervene.

[1] The second ground is that Mauricio Chavez should have been made a party to the writ of error, either joining with the plaintiff in error or joined

as a defendant. We think he should have been made a party, but permission will be granted by this court, upon proper application, to the plaintiff in error to bring in the omitted party, and this upon the authority of State ex rel. Baca v. Board of County Commissioners, 21 N. M. 713, 158 Pac. 642.

[2] The defendant in error has filed what he terms a reply brief in which he suggests that after the order entered, to review which the writ of error was sued out, the court upon application corrected the order showing that leave had not been granted Hilario Baca to intervene in the lower court. Attached to the brief is a purported certified transcript of the proceedings leading up to said amended order. If the transcript, as filed by the plaintiff in error, is not correct or does not contain all the proceedings of record in the court below, the additional matter should have been brought into the record by certiorari. The matter attached to the reply brief of defendant in error is no part of the record and cannot be considered by this court. The statute (chapter 43, Laws 1917) provides how the transcript of record is made up and omissions therein supplied.

For the reasons stated, the motion to dismiss the writ of error will be denied; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2538. July 23, 1921.]

ROBERTS v. HUMPHREYS et al.

SYLLABUS BY THE COURT.

Where a lease is put in escrow to be recorded upon the happening of certain events or the fulfillment of certain conditions, and such events do not happen and the conditions are not fulfilled, the recording of such lease without the consent of the lessor entitles him to have the lease declared null and void and the record thereof canceled.

Appeal from District Court, Eddy County; Bratton, Judge.

Action by Elizabeth Roberts against S. G. Humphreys and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. H. Jackson, of Artesia, and Clark J. Millron, of Los Angeles, Cal., for appellants.

J. B. Atkeson, of Artesia, for appellee.

OPINION OF THE COURT.

RAYNOLDS, J. This case arose out of the following facts: Some of the owners of land in the vicinity of Dayton, N. M., desiring to have tests made to find out whether or not oil or gas existed in paying quantities in that locality, agreed to execute oil and gas leases to S. G. Humphreys. The appellee, Elizabeth Roberts, owned land in this vicinity, and on August 15, 1916, made an oil and gas lease on her property to said Humphreys. As shown by the testimony and found as facts by the court, she was at that time a nonresident of New Mexico. The negotiations which were preliminary to her signing the lease were carried on by correspondence between her and E. S. Wallace, who was the agent of S. G. Humphreys and who was also secretary of the committee having charge of the negotiations to secure the leases and let the contract for drilling. The correspondence shows that her lease was to be put in escrow in the First State Bank & Trust Company of Artesia and was not to be placed of record until certain development work was done. It was made a condition that if the development work was not done, the lease was to be returned. The committee made several attempts to have wells drilled and oil developed, but those with whom they contracted failed to carry out their contracts. Subsequently in order to induce other operators to develop oil and gas upon said property, and as a condition precedent without which the

operators would not start work, the leases, including that of the appellee, Roberts, were assigned to appellant Faris and placed of record. Appellee was not consulted as to this change in the agreement and and did not consent to the placing of her lease upon record. The appellee, plaintiff below, sought to have the lease declared null and void and canceled on the records of Eddy county. The trial court gave her judgment as prayed for, and the defendant Faris appeals to this court.

Appellant assigns nine errors, relying principally upon the following: That the court found the lease was not delivered, and that the court went outside of the pleadings to make said finding. It is only necessary to state at this time that the record amply sustains the finding that the lease was delivered in escrow, and that the conditions of the escrow, upon the fulfillment of which it was to be recorded, were not complied with. The allegations in the complaint were sufficient, together with the evidence received in support of them, to sustain the finding of the court in this respect.

The other assignments of error relate to the sufficiency of the evidence to support the findings, but a reading of the transcript of record shows that such assignments are without merit and need not be considered.

The case is therefore affirmd; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2543. July 23, 1921.]

RAABE & MAUGER v. STATE TAX COMMISSION.

SYLLABUS BY THE COURT.

The district court cannot, under Code 1915, §5475, abate the taxes of a taxpayer and reduce his assessment, where the only question involved is discrimination on account of

excessive valuation alleged by the petitioner to have been placed upon his property by the taxing authorities. Bond-Dillon Co. v. Matson, 27 N. M. 85, 196 Pac. 323, and First State Bank of Bernalillo v. State, 27 N. M. 78, 196 Pac. 743, followed.

Appeal from District Court, Bernalillo County; Hickey, Judge.

In the matter of the taxes of Raabe & Mauger for the year 1919. On petition of the taxpayer, the taxes were abated, and the State Tax Commission appeals. Reversed and remanded, with directions to dismiss petition.

John Venable, of Albuquerque, for appellant.

Simms & Botts, of Albuquerque, for appellee.

OPINION OF THE COURT.

RAYNOLDS, J. This is an appeal by the State Tax Commission from a judgment of the district court of Bernalillo county abating the taxes of appellee for the year 1919 in the amount of $551.47 and reducing the value fixed upon their stock of merchandise by the State Tax Commission in the sum of $14,000.

Appellant filed a petition June 19, 1920, in the district court of Bernalillo county, alleging:

"That their property as it appeared upon the tax rolls of said county for the year 1919, was merchandise $30,000, fixtures $15,000, raised by the State Tax Commission $14,000; and that the raise by the State Tax Commission of $14,000 is unjust and without warrant of law, in view of the facts is excessive, and if allowed to stand will force petitioner to pay and bear an unjust portion of the burden of taxation for said year, and will unjustly discriminate against petitioner."

Petitioner further alleges that—

"Petitioner has exhausted all remedies provided by law for relief by appealing to the State Tax Commission which refused relief to the petitioner after it had ordered the additional raise shown."

This suit was brought under Code 1915, § 5475, the district attorney indorsing the petition and allowing the matter to be submitted to the court. No pleadings were filed by the state nor the State Tax Commission. The matter was presented to the district court and after hearing the evidence submitted on behalf of the petitioner and the state, the court abated the taxes as aforesaid. To this judgment the State Tax Commission excepted and appealed.

Appellant assigns four errors, only one of which we think necessary to consider, as it controls the case, namely, that the court was without jurisdiction of the subject-matter of the action.

This case is controlled by two cases heretofore decided by this court, namely, Bond-Dillon Co. v. Matson, 27 N. M. 85, 196 Pac. 323, and First State Bank of Bernalillo v. State, 27 N. M. 78, 196 Pac. 743. In the former case the following language is pertinent and applies to the present suit:

"The injustice for which the taxpayer is entitled to relief is not an injustice caused by errors of judgment of the taxing authorities in fixing an alleged overvaluation of his property when, as here, he has had notice and a hearing on the question and the determination of the value of said property. The taxpayer is entitled to relief in equity on a proper showing, but the injustice for which the statute [Code 1915, section 5475] is intended to give relief is, by its terms, such injustice, as is caused by any errors of other kinds (other than obvious clerical ones) discovered by the treasurer or taxpayer in said assessment book and does not contemplate such overvaluation as is alleged as a ground for relief in this case. * * * But the power of the treasurer and the courts under this statute does not extend to overturning, correcting, or modifying every action or step taken by the taxing authorities in the assessment and collection of taxes and substituting the judgment of the courts for that of the taxing authorities in all questions of fact, law, and policy in regard to taxation."

"In our opinion the court could not set aside the findings of the assessor and the State Tax Commission and independently determine that their decisions in matters of fact were wrong

and fix the value of a taxpayer's property after that matter, upon hearing, had been determined by the taxing authorities. In other words, the district court does not make assessments and fix values as was done in this case." Bond-Dillon Co. v. Matson, supra.

See, also, First State Bank of Bernalillo v. State, 26 N. M. 401, 196 Pac. 743 at page 744, where the meaning of said section is explained and the limitations thereof determined.

The case is therefore reversed and remanded, with instructions to dismiss the petition; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2528. July 25, 1921.]

STATE v. LAZAROVICH.

SYLLABUS BY THE COURT.

1, 2. In a preliminary hearing of a person charged with the commission of a felony, the justice of the peace constitutes a "court," and the preliminary hearing a "cause," within the meaning of section 1663, Code 1915. P. 283

3. An indictment under section 1663, Code 1915, in the words of the statute, **held** sufficient. P. 286

4. The indictment having alleged the unlawful purpose of the attempted persuasion or intimidation, it was not necessary to allege that the persuasion or intimidation was done "knowingly." P. 286

5. Under the circumstances, evidence as to larceny of property **held** admissible. P. 286

6. Under the facts of the case, **held,** that it was immaterial that the record of the justice of the peace showed that certain persons were found guilty of larceny of whiskey. P. 286

7. It is discretionary with the trial court whether it will sustain an objection or grant a motion to strike out evidence theretofore admitted without objection. P. 288

8. Evidence establishing a crime for which the accused is not on trial, but relevant to the intent with which the act charged in the indictment in the instant case was done, **held** admissible. State v. Starr, 24 N. M. 180, 173 Pac. 674, followed. P. 288

Appeal from District Court, Colfax County; Lieb, Judge.

Goetosar Lazarovich, alias Estavan Stanley, was convicted of intimidating a witness, and he appeals. Affirmed.

John J. Kenney, of Santa Fe (E. R. Wright, of Santa Fe, of counsel), for appellant.

Harry S. Bowman, Attorney General, and A. M. Edwards, Assistant Attorney General, for the State.

OPINION OF THE COURT.

ROBERTS, C. J. The appellant, Goetosar Lazarovich, was convicted in the district court for Colfax county of the statutory crime of intimidating a witness, and has perfected this appeal.

The indictment alleged in substance that on the 24th day of March, 1920, the appellant unlawfully and feloniously attempted to persuade and intimidate one Joe Servo, a witness, in a cause then pending in the court of a justice of the peace, wherein Martin and Nick Pavelich were charged with the larceny of a horse and wagon of the value of $100, of the property of George Pabor; the intimidation being effected for the purpose of preventing the witness from testifying to certain facts within his knowledge and material to the cause.

[1, 2] The first contention made by appellant is that the indictment is defective, because a justice of the peace, sitting as a committing magistrate in a preliminary hearing, is not a court, nor is the matter which he is investigating a "cause," within the meaning of the statute. The statute (Code 1915, § 1663) provides:

"Any person who * * * attempts to persuade or intimidate any witness in any cause pending in any of the courts of this state for the purpose of preventing such witness from testifying to any fact, or to abstain from testifying to any fact which is not true," etc.

Section 3180, Code 1915, confers on justices of the peace jurisdiction of criminal cases throughout the county, and authorizes and requires them, on complaint, to cause persons charged with the commission of crime or breach of the law to be brought before them, investigate the complaint, and either commit to jail, discharge, or recognize such persons to appear before the district court, as the case may be.

The statute first quoted is unambiguous. The essentials under the statute are a court, a pending cause, a witness, and persuasion or intimidation for the purposes mentioned. If these concur, the offense is complete. If a justice of the peace, a public judicial officer, vested with judicial power, is not a "court," within the meaning of the act, when transacting judicial business over which he has jurisdiction by law, we are at a loss to know what he is. If he is not presiding in a "cause," when he hears and determines matters coming before him under the law in preliminary investigations of the commission of felonies, we know not by what name to characterize such proceedings. As to what constitutes a court, see State v. Atherton, 19 Nev. 332, 10 Pac. 901; Rupert v. Alturas County Commissioners, 2 Idaho 19, 2 Pac. 718; Dixon v. People, 53 Colo. 527, 127 Pac. 930; Marsden v. Horlocker, 48 Or. 90, 85 Pac. 328, 120 Am. St. Rep. 786; In re Steele (D. C.) 156 Fed. 853; Tissier v. Rhein, 130 Ill. 110, 22 N. E. 848; McVeigh v. Ripley, 77 Conn. 136, 58 Atl. 701. From these authorities it appears that a court is a judicial tribunal established to administer justice, and composed of one or more persons assembled under authority of law for hearing and trying causes and the transaction of judicial business. A justice of the peace is a court, when publicly administering justice delegated to him by law. Waldo v. Wallace, 12 Ind. 569; Tissier v. Rhein, supra. It will be sufficient to say that in this jurisdiction judicial power is conferred upon justices

of the peace, somewhat limited, it is true, and that when regularly engaged in the exercise of that power such justices of the peace are as much "courts" as are the district and Supreme Courts of this state. Authorities contrary to this conclusion are based upon interpretations of statutes not to be followed here. Thus in Todd v. U. S., 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982, appellant's strongest authority on this proposition, the holding was clearly influenced by the fact that the statutes of the United States made a distinction between "examining magistrates" and "examining courts." The power to determine the probable commission of a felony is vested in this state in the justice of the peace as such, and is a component part of the general powers conferred on such courts. The power is, of course, judicial in its nature, and the justice of the peace, when acting in that capacity in such matters, constitutes a court in the full sense of the word, equally as well as when he presides in a case regularly brought before him involving the commission of a misdemeanor. The Constitution itself vests judicial power in such courts. Section 1, art. 6, State Constitution.

The statute intends to reach all judicial proceedings before justices of the peace, where there are adversary parties. It used the word "cause" to express its meaning. Cause has been defined to be a suit, litigation, or action of any kind, civil or criminal, contested before a court of justice. Gibson v. Sidney, 50 Neb. 12, 69 N. W. 314. It also means a proceeding in court. Blyew v. United States, 13 Wall. 581, 20 L. Ed. 638. The judicial investigation by a justice of the peace to determine the probable commission of a felony by the accused is a "cause," within the meaning of the statute, and therefore we hold that the statute covers, in both aspects, the circumstances outlined in the indictment in the case at bar.

[3] Was it imperative that the indictment allege the means by which the persuasion and intimidation was accomplished by the appellant, or, being in the words of the statute, was it sufficient? In State v. Probert, 19 N. M. 13, 140 Pac. 1108, we said:

"It is only where the terms of the statute are so general as to require specification of detail, in order to identify a given transaction with which it is sought to charge a defendant, that the allegations of an indictment must be expanded beyond its statutory terms."

In 14 R. C. L. 174, it is said the purpose of requiring the words of the indictment to be expanded beyond the statutory terms is to identify or define the offense, so that the accused may plead autrefois acquit or convict. No necessity existed for expanding the words of the indictment in the case at bar beyond the words of the statute.

[4] The indictment was not defective for failing to charge that the accused "knowingly" committed the act, or that he did it with corrupt intent. So long as the persuasion or intimidation was done for the purpose specified in the statute—and the indictment charged such purpose—it is sufficient. As to the necessity of alleging knowledge, see 22 Cyc. 327, 29 Cyc. 1335, and 14 R. C. L. 177.

[5, 6] At the outset of the hearing in this case the district attorney advised the court that because of the absence of a witness he would be obliged to proceed out of the regular order. He then introduced the principal witness for the state, who testified that on the day in question he and Mike Pabor had driven to a prairie, and were engaged in taking contraband whisky from the place where it had been concealed, when the Pavelich brothers arrived upon the scene in a car and after firing several shots appropriated the horse, wagon, and whisky to their own uses and drove away. Thereupon counsel for appellant objected, on the ground that the evidence was incompetent, and that the method pursued was

improper to arrive at the facts in the case. The witness then testified that the horse was subsequently found on the ranch of Martin Pavelich; that the witness had been notified by the sheriff to be at the trial of the Pavelich brothers in the court of the justice of the peace; and that on the day of the trial the witness met the appellant at the home of George Pabor, and threatened the witness with punishment in jail for a couple of years for stealing the whisky from its concealed place on the prairie. The appellant then advised the witness to settle with Martin Pavelich, agreeing to give the witness a case or two of whiskey and to pay all expenses, if he would consent to so settle matters. The witness declined the offer, saying that the matter was in court, whereupon the appellant sought to persuade the witness to testify that the horse ran away from the witness on the prairie, saying nothing about Martin Pavelich being present when the horse and wagon were stolen.

Counsel for appellant contends that the trial court erred in permitting the witness to testify as to the larceny by the Pavelich brothers, saying that such proof was immaterial and harmful. The objection came too late, having been interposed after the testimony had been adduced, and no motion to strike was made. Crawford v. Gurley, 23 N. M. 659, 170 Pac. 736. But we fail to appreciate the position of appellant in the matter on the merits. The state was not engaged in proving the Pavelich brothers guilty of the offense of larceny, but was endeavoring to show that the witness saw those brothers take the horse and wagon and drive away with the whisky, and that the appellant sought to prevail upon the witness to testify to facts contrary to the truth of the transaction, as the witness knew it from observation. No reason is urged or authority cited why this testimony was not material. It was the premise of the charge that the appellant intimi-

dated the witness for the purpose of preventing him from disclosing material facts.

The objection raised here by appellant as to the introduction of the record of the justice of the peace is without merit; the contention being that, because the record showed that the Pavelich brothers were bound over to await the action of the grand jury for "stealing of the wagon and horse and whisky," there was a variance, in that the indictment alleged that the cause in the court of the justice of the peace was one wherein the Pavelich brothers were "charged with the larceny of one horse and wagon." The whiskey was stolen by the Pavelich brothers at the same time the horse and wagon were stolen, and was a concomitant part of the whole transaction. The fact that the order binding over the Pavelich brothers to await the action of the grand jury included a finding that they stole the whiskey was entirely immaterial.

[7] It is contended by counsel for appellant that it was error to admit the testimony of the sheriff that he served a subpœna upon Mike Pabor. But the proposition is not properly before the court, because the testimony was adduced without objection having been made in apt time. After its introduction, counsel for appellant moved that it be stricken. Under such circumstances, it was a matter for the exercise of the discretion of the trial court as to whether the testimony should be stricken. In Crawford v. Gurley, 23 N. M. 659, 170 Pac. 736, we held that it is a matter of discretion with the trial court whether it will sustain an objection, or grant a motion to strike out evidence which has been admitted theretofore without objection.

[8] The appellant testified that he was in the house of George Pabor on the day in question. He was asked how he happened to be there, and the question was excluded upon the objection of the state. The appellant contends that the action of

the court was erroneous, in that he had the right to state why he visited Pabor's house, where the state contended the unlawful act charged in the indictment occurred. There is no basis for the contention, however, because later the witness was asked the same question and fully answered it.

Over the objection of appellant, Mike Pabor testified that the appellant came to his home one day and told him that, if he said that he (Mike Pabor) and Joe Servo had found whisky, Mike Pabor and Hixenbaugh, the sheriff, would both go to the penitentiary. The testimony was admitted on the theory that it was material to the proposition of intent on the part of the appellant in the main transaction. The law as to the admission of evidence of crimes other than that upon which the accused is being tried has been treated of a number of times in this jurisdiction. Thus, in Territory v. McGinnis, 10 N. M. 271, 61 Pac. 208, evidence of another crime was sustained, on the ground that it tended to show motive. Territory v. Livingston, 13 N. M. 318, 84 Pac. 1021, where it was held that the evidence of the theft of a mule, committed at the same time as the theft of a horse for which appellant was being tried, was proper, because the two acts were a part of the same transaction. Territory v. Coldwell, 14 N. M. 535, 98 Pac. 167, where it was held that proof of the possession of other animals by appellants, at or near the time the appellants were arrested, was admissible, because the "evidence was admitted to show the intent of the parties charged." Territory v. West, 14 N. M. 546, 99 Pac. 343, where evidence of numerous acts of appellant in stealing and selling horses was held admissible, because it tended to prove that crime was committed in a systematic manner, and evinced intent or motive of the accused in the instant case. In State v. Graves, 21 N. M. 556, 157 Pac. 160, it was said that evidence of other crimes is generally not ad-

missible, but that where such other crimes form an inseparable part of the whole transaction the same is admissible. State v. Pino, 21 N. M. 660, 158 Pac. 131, followed the Graves Case, supra.

State v. Starr, 24 N. M. 180, 173 Pac. 674, is decisive of the proposition raised by appellant here. In that case it was said that, generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish: (1) Motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan, embracing the commission of two or more crimes, so related to each other that proof of one tends to establish the other; and (5) identity of person charged with the commission of the crime on trial. In that case evidence of an escape from jail while armed was held admissible, as tending to prove intent in the commission of the act of homicide which subsequently followed. The decision was also placed upon the ground that the evidence of the other crime in combination with the evidence of the crime for which the appellant was being prosecuted constituted a scheme or plan, and was therefore admissible upon that theory.

In the case at bar it was incumbent upon the state to prove that persuasion was attemped, and that it had for its purpose the stifling of the truth, or in other words that the persuasion or intimidation was done for the purpose of stifling the truth. Without proof of that purpose the state did not make out its case. Proof that appellant attempted to persuade Mike Pabor, the other main witness of the facts out of which the prosecution grew, to stifle the truth on the hearing before the justice of the peace, was material, as showing guilty knowledge or intent in the case at bar, and was, under the authority of the Starr Case, supra, admissible.

The rejection by the trial court of evidence that the appellant believed in the innocence of Martin

Pavelich and that George Pabor, the owner of the horse and wagon, made no complaint against the Pavelich brothers, was not error, because both items of evidence were irrelevant and immaterial.

For the reasons stated, the judgment of the trial court will be affirmed; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2633. Aug. 6, 1921.]

BOWERS v. CITY OF ALBUQUERQUE

SYLLABUS BY THE COURT.

Section 3598, Code 1915, which prohibits the increase or decrease of salary of a city officer during his term of office, has no application to a city officer having no fixed tenure of office, but who serves during the pleasure of the appointing power.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by Henry M. Bowers against the City of Albuquerque. From a judgment for defendant, plaintiff appeals. Affirmed.

Henry G. Coors, Jr., of Albuquerque, for appellant.

W. A. Keleher, of Albuquerque, for appellee.

OPINION OF THE COURT.

ROBERTS, C. J. This case involves the right of the city of Albuquerque to carry group insurance on the lives of the employees of said city. The right of the city to do so must be answered in the affirmative under the recent decision of this court in the case of Nohl v. Board of Education of the City of Albuquerque, 27 N. M. 232, 199 Pac. 373, as the admissions contained in the pleadings are similar to those in the pleadings in that case.

There is one additional point presented by this case which was not in the case referred to. It is

argued by the appellant that the payment of premiums on the policy by the city, which inured to the benefit of the employees and officers of the city, constituted an increase in the salary of the officer during the term for which he was appointed, in violation of section 3598, Code 1915. This statute provides that the emoluments of no officer of any city or town shall be increased or diminished during the term for which he shall be elected or appointed. Section 3590, Code 1915, provides for the appointment of a city marshal and certain other officers of cities. The city of Albuquerque, however, is governed by a commission under a charter adopted pursuant to the provisions of chapter 121, Laws 1919. Under section 1, article 5, of this act a city manager is employed for an indefinite term, subject to removal by the commissioners of the city at any time without cause. Under section 4 of article 5, the manager employs all other officers and employees of the city, and has the right to discharge them at any time. The group insurance policy covered all officers and employees of the city except the city commissioners; that is to say it insured the city manager and the officers and employees appointed by him. It will thus be seen that the statute referred to can have no application to the officers and employees of the city of Albuquerque covered by the policy in question, as such officers have no terms of office.

In the case of State ex rel. Kane v. Johnson (Mo.) 25 S. W. 855, the question arose as to the right of the council to increase the salary of the chief engineer in the fire department of the city of St. Joseph. Section 1244, R. S. 1889, was somewhat similar to section 3598 of our Code. It prohibited the increase or decrease of the salary of an officer of the city during his term of office. The court held that the chief engineer was an officer of the city, but that as he had no term of office the statute did

not apply. The same conclusion was reached by the Supreme Court of South Dakota in the case of Somers v. State, 5 S. D. 321, which was reconsidered by the court, without change however; 5 S. D. 584, 59 N. W. 962. See, also, Gibbs v. Morgan, 39 N. J. Eq. 126. We know of no authority to the contrary.

The judgment of the lower court, sustaining the right of the city to carry group insurance under the pleadings in the case, must be upheld, and its judgment will be affirmed; and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

[No. 2524. July 20, 1921.]

VAUGHAN v. JACKSON.

[Rehearing Denied Sept. 9, 1921.]

SYLLABUS BY THE COURT.

1. A finding supported by substantial evidence will not be disturbed on appeal. P. 295

2. Where a written contract is modified by parol, and reliance is placed on the modified terms of the contract by one of the parties, to his damage, the opposite party is estopped to take advantage of the statute of frauds. P. 295

Appeal from District Court, De Baca County; Bratton, Judge.

Action by G. R. Vaughan against J. W. Jackson, who counterclaimed. From a judgment for defendant, plaintiff appeals. Affirmed.

STATEMENT OF FACTS.

On April 18, 1918, appellee entered into a written contract with appellant, whereby it was agreed that the appellee was to deed to appellant 480 acres of patented land, and assign to him certain leases and contracts for state land, and sell 100 head of cattle, to be selected by the appellant out of appellee's herd. The trade was to be closed May 18, 1918. Appellant paid to appellee at the time of making the

contract $500 in cash. Within a day of two after the execution of the contract appellee learned that he did not have title to 160 acres, known as the "Cartright tract," which was included in the 480 acres he had agreed to convey by warranty deed. The only title he had to the Cartright tract was a tax sale certificate, and the period of redemption had not expired, and would not expire until in the fall of 1918.

Appellee immediately informed appellant of the condition of the title to the Cartright tract, and they agreed verbally that as to the Cartright tract the appellee was to have until January 1, 1919, or later, if necessary, to make the deed, and that the appellant was to execute his note to the appellee for $800, which was the agreed value of the Cartright tract; that the note was to be payable in two years, and was not to bear interest until appellee conveyed title to appellant to said tract; that, in the event appellee could not give title to the Cartright tract, then the note was to be returned to appellant; that between April 18, 1918, and May 18, 1918, there was a severe drought existing in the country where the land in question was located, and where the cattle mentioned in the contract were being held; that appellee, relying upon the appellant's agreement to carry out the contract, as modified, held the cattle, in order to be able to deliver the same in accordance with the contract, and suffered loss thereby; that on the 17th day of May, 1918, appellee notified appellant that he was ready to perform according to the terms of the contract as modified, and appellant refused to carry out the contract.

Thereafter appellant brought suit on the original contract, seeking to recover the $500 paid by him. Appellee answered, setting out the modification of the contract and the failure of the appellant to carry out the contract as modified, and asked for damages. The case was tried to the court without a jury and

the court found for the appellee; also found that by reason of the appellant's failure to carry out the contract, as modified, the appellee was damaged in the sum of $750, and gave appellee judgment for $250. Appellant brings this appeal.

H. R. Parsons, of Ft. Sumner, for appellant.

J. E. Pardue, of Ft. Sumner, and T. E. Mears, of Portales, for appellee.

OPINION OF THE COURT.

EDWIN MECHEM, District Judge (after stating the facts as above). Appellant made numerous assignments of error, but has only argued two propositions: First, that the modification of the contract was within the statute of frauds, and, being oral, was void; second, admitting that the modification did not come within the statute of frauds, there was no evidence on which the court could have given the appellee more than nominal damages.

[1, 2] As to the first proposition, we do not deem it necessary to go into the question as to whether or not the oral modification, as agreed to by the parties, was within the statute of frauds for the court found that the appellee relied on the same, and held his cattle in order to be able to carry out the contract, and suffered loss, and for this reason the appellant was estopped from pleading the statute of frauds as a bar. The evidence sustains the finding, and the trial court was correct in his conclusion of law.

The appellant admits that the appellee notified him, within a day or two after the signing of the contract, of the condition of the title to the Cartright tract. He also admits that he did not notify appellee that he would not go ahead with the contract until May 17, 1918. It was the appellant's duty, if he intended to insist on a strict compliance with the contract, to have so told the appellee. He could not agree with the appellee that the contract should be modified, and after the appellee had relied on

such agreement, to his damage, then take refuge behind the statute of frauds. In Kingston v. Walters, 16 N. M. 59, 113 Pac. 594, this court said:

"Where a representation as to the future relates to an intended abandonment of an existing right, and is made to influence others, and they have been influenced by it to act, it operates as an estoppel."

The evidence in this case shows that the appellee had opportunities to sell the cattle in question during the 30 days; that he refused to sell the same, because he was relying on appellant's agreement to carry out the contract as modified.

As to the question of damages raised by appellant, we have read the evidence, and it is sufficient to sustain the judgment.

For the reasons stated, the judgment is affirmed; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2542. July 13, 1921.]

WEST TEXAS LOAN CO. v. MONTGOMERY.

[Rehearing Denied Sept. 14, 1921.]

SYLLABUS BY THE COURT.

1. **Held,** that an agreement to extend notes "until frost" is an agreement to extend to a definite time. P. 298

2. **Held,** that the evidence showed that there was a consideration for the extension, and the question was properly submitted to the jury. P. 298

3. **Held,** that this court cannot consider a question, where the transcript is incomplete and does not disclose what was done in the court below. P. 299

4. Where maker of note was by promise of extension of note induced to spend labor and money which he otherwise would not have spent, the same was consideration for the extension; it not being necessary that he pay money to the note holder, if induced to part with something of value. P. 299

ON MOTION FOR REHEARING.

5. An objection that a pleading amendment was allowed, substantially changing the defense, is not reviewable, where the only objection urged below was that the evidence adduced did not justify amendment. P. 300

6. It is within the court's discretion to allow or refuse amendments after the evidence is heard, or the arguments of counsel closed. P. 300

Appeal from District Court, Curry County; Brice. Judge.

Action by the West Texas Loan Company against J. H. Montgomery. Judgment for defendant, and plaintiff appeals. Affirmed.

Patton & Hatch, of Clovis, for appellant.

Rowells & Reese, of Clovis, for appellee.

OPINION OF THE COURT.

ED. MECHEM, District Judge. Appellant began suit in the court below by filing an action in replevin in usual form against the appellee for the possession of certain livestock. Suit was filed September 24, 1918. Appellee answered, denying allegations of the complaint, and alleging that the appellant was claiming possession under a certain chattle mortgage given to secure the payment of some notes, the principal one being for $6,877.94, due June 10, 1918; that on August 12, 1918, the appellant had agreed with the appellee that, if appellee would gather and move the live stock onto better grass, the notes would be extended until frost that fall, which occurred October 28, 1918; that appellee gathered and moved said live stock at great labor and expense, in accordance with said agreement, but that on September 24, 1918, the appellant, in violation of said agreement, sued out said writ of replevin, and wrongfully took possession of said live stock, and converted same to its own use and benefit, to appellee's damage in the sum of $16,000. Appellant replied, admitting the note and mortgage, but denying the other allegations of the answer. The case

was tried to the court with a jury, and verdict and judgment for appellee in the sum of $2,187.07 was returned, from which appellant brings this appeal. The appellant raises two objections: First, that the extension was not to a definite date; and, second, that the extension was without consideration.

[1] The appellant first urges that the testimony on behalf of the appellee as to the extension was not sufficiently definite. There was sufficient evidence introduced on this question to require the same to be submitted to the jury and it was properly submitted. The appellant next urges that until frost in the fall of 1918 is not an extension to a definite date. Inasmuch as this note was past due, and the question of the release of a surety is not involved, the rigid rule as to definiteness of time would not apply; but we do not deem it necessary to go into that phase of the question, as we are satisfied that an extension of time "until frost" is an extension for a definite time, the rule being that an agreement to extend the time for payment, in order to be valid, must be for a definite time, although no precise date need be fixed, it being sufficient if the time can be readily ascertained. 8 C. J. 428. It is sufficient if the promise is to pay at a time which must certainly come at all events. Cota v. Buck, 7 Metc. (Mass.) 588, 41 Am. Dec. 464. In this latitude frost must come, and the coming of frost is certain; and not contingent.

[2] The next proposition urged by appellant is that there was no consideration for the extension, and that it was therefore void. The appellee testified that the president of the appellant corporation agreed with him that, if he would gather the live stock and move it onto better grass, the notes would be extended and that he (appellee) in pursuance to such agreement gathered said live stock and moved the same; and he and his wife worked, and that he paid out money in employing others to help. The

court instructed the jury that, if they believed the testimony of the appellee, it would constitute a consideration for the extension. The court was correct in this.

[4] It cannot seriously be contended that, where the appellee was induced to spend labor and money which he otherwise would not have spent, the same was not a consideration for the extension. It was not necessary that he pay money to the appellant, but if he was induced to part with something of value it was sufficient.

[3] The appellant has argued that some of the instructions given by the court were erroneous, but as the objections raise the same question as to time and consideration it is not necessary to discuss them. Appellant says that the court erred in permitting the appellee to amend his answer at the close of the case. Inasmuch as the appellant has failed to incorporate the original answer in the transcript, we are unable to discover what the amendment was, and for that reason cannot consider the question.

Finding no error in the record, the case is affirmed; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

ON MOTION FOR REHEARING.

ED. MECHEM, District Judge. In a motion for rehearing filed, appellant contends that the court was in error in the original opinion in refusing to consider the action of the court in permitting the appellee to amend his answer at the close of the case. The refusal to consider was based upon the fact that appellant had failed to incorporate the original answer into the transcript. Appellant admits that it failed to incorporate such original answer into the transcript, but insists that this was impossible, because the court permitted the amendment to be made by interlineation. Consequently, the only pleading appearing in the files of the court below was the original answer, as amended.

[5] Assuming, however, that the point is properly here for consideration, there is no merit in the argument advanced by appellant that there was any error in permitting the amendment. In considering the propriety of the action of the court, we would be limited to the objection interposed to the allowance of the amendment in the court below, and this was that there was nothing in the evidence adduced to justify any such amendment. It is argued here that by the allowance of the amendment defendant was permitted to change substantially his defence. This objection was not urged in the court below, and, of course, will not be considered.

[6] Reverting to the objection there interposed, that the evidence did not justify the amendment, it is sufficient to say that this has been disposed of by what was said in the original opinion. We there held that the evidence was sufficiently definite as to the extension, and that there was sufficient evidence on this point to require its submission to the jury. This being true, the court did not abuse its discretion in permitting the trial amendment.

"It is generally held to be within the discretion of the court to allow or refuse amendments after the evidence is heard or the arguments of counsel closed." 31 Cyc. 401.

For the reasons stated, the motion for rehearing will be denied; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2671. Sept. 24, 1921.]

LOPEZ v. STATE HIGHWAY COMMISSION et al.

SYLLABUS BY THE COURT.

Where an act of the Legislature, authorizing the issuance and sale of debentures, is validated by the adoption of a proposed amendment to the Constitution, an appeal which raises the question of the constitutionality of the statute, which might be meritorious but for the amendment to the Consti-

tution so adopted, will not be considered after the curative amendment has been adopted by vote of the people.

Appeal from District Court, Santa Fe County; Holloman, Judge.

Action by Celso Lopez against the State Highway Commission of the State of New Mexico and others as members thereof and C. U. Strong as State Treasurer. Demurrer to complaint sustained, and plaintiff appeals. Appeal dismissed.

J. O. Seth, of Santa Fe, for appellant.

H. S. Bowman, Attorney General, and A. M. Edwards, Assistant Attorney General, for appellees.

OPINION OF THE COURT.

ROBERTS, C. J. By chapter 153, Laws 1921, the Fifth State Legislature passed an act authorizing and directing boards of county commissioners to levy taxes for each of the years 1921, 1922, and 1923 for the construction and improvement of public highways, and to meet dollar for dollar allotments to the state of federal funds under the Federal Aid Road Act (U. S. Comp. St. §§ 7477a-7477i), which tax, when collected, was to be paid into the state treasury and credited to the state road fund. The act in question authorizes the State Highway Commission to anticipate the tax so directed to be levied and collected by the issuance and sale of debentures, which should be payable out of the proceeds of the tax realized under the act in question. The State Highway Commission was proceeding to issue debentures under said act to the amount of $800,000, when on August 11, 1921, appellant filed suit in the district court of Santa Fe county to enjoin such commission from issuing and selling such debentures. Appellant was a taxpayer and brought the suit on behalf of himself and all other taxpayers similarly situated, alleging that the act under which said debentures were about to be issued was unconstitutional and void, and that the tax levied

would be a lien and incumbrance upon the property of the taxpayers in the state. The act was alleged to be unconstitutional because: (1) It violated sections 7 and 8 of article 9 of the State Constitution. Section 7 authorized the state to borrow $200,000 in the aggregate to meet casual deficits or failures in revenue, or for necessary expenses, etc. Section 8 prohibited the contracting of any other debt save as authorized by section 7 without a vote of the electors of the state, which it was alleged had not been complied with. (2) That the act was void because the same attempted to extend the taxing power beyond the biennial term of the Legislature. (3) That the tax levies provided for by said chapter were levies for state revenues, and void because in excess of the four-mill limit prescribed by section 2 of article 8 of the Constitution. (4) That the act was void because the debentures by it authorized were not mentioned in the title of the act. A demurrer to the complaint was filed and sustained by the court below. Appellant stood on the complaint and appealed. The case was argued and submitted to this court on September 7, 1921.

The same Legislature which enacted the law in question submitted to the people for adoption or rejection constitutional amendment No. 11, proposing an amendment to the Constitution by adding as follows, viz.:

"Laws enacted by the fifth Legislature authorized the issue and sale of state highway bonds for the purpose of providing funds for the construction and improvement of state highways and to enable the state to meet and secure allotments of federal funds to aid in construction and improvement of roads, and laws so enacted authorizing the issue and sale of state highway debentures to anticipate the collection of revenues from motor vehicle licenses and other revenues provided by law for the state road fund, shall take effect without submitting them to the electors of the state, and notwithstanding that the total indebtedness of the state may thereby temporarily exceed one per centum of the assessed valuation of all property subject to taxation in the state. Provided,

that the total amount of such state highway bonds payable from proceeds of taxes levied on property outstanding at any one time shall not exceed two million dollars. The Legislature shall not enact any law which will decrease the amount of the annual revenues pledged for the payment of state highway debentures or which will divert any of such revenues to any other purpose so long as any of the said debentures issued to anticipate the collection thereof remain unpaid." See Laws 1921, p. 478.

By an act of the same Legislature it was provided that this proposed constitutional amendment, together with others, should be submitted to a vote of the people at a special election to be held September 20, 1921. The attorney for appellant and appellee herein have this day filed a stipulation in the case, under which it is stipulated and agreed that the election provided for was held upon the date named, and that at such election a majority of the electors voted in favor of the adoption of proposed constitutional amendment No. 11. The official count of the votes has not yet taken place, but it is a matter of common knowledge that the amendment was overwhelmingly adopted, and in view of the stipulation it will be accepted as a fact by the court. Such being the case, and these debentures having been by such amendment validated and ratified, their constitutionality is not open to debate. The debentures thus being unquestionably valid under this amendment to the Constitution, it will serve no useful purpose to discuss the questions raised in appellant's brief. For this reason the appeal will be dismissed; and it is so ordered.

PARKER, J., and LIEB, District Judge, concur.

[No. 2474. June 20, 1921.]

NEW MEXICO MOTOR CORPORATION v. BLISS.

[Rehearing Denied Oct. 19, 1921.]

SYLLABUS BY THE COURT.

1. A court of equity, even in the absence of special circumstances of fraud, accident, or mistake, may relieve against a forfeiture incurred by the breach of a covenant to pay rent, on the payment or tender of all arrears of rent and interest by a defaulting lessee. P. 306

2. While a court of equity has power to relieve against a forfeiture for nonpayment of rent, even though the contract or lease provides for such forfeiture, it has no power to relieve against forfeiture imposed by statutes. P. 307

3. The effect of Code 1915, § 2384, which gives a right of action in forcible entry and unlawful detainer "when the tenant fails to pay the rent at the time stipulated for payment," and section 2386, which provides for 3 days' notice to quit before suit can be brought, is to work a statutory forfeiture, but the forfeiture does not become effective until the expiration of the 3 days after the notice, during which time the tenant can pay the rent and avoid the forfeiture. P. 307

4. The 3 days' notice to quit where the rent is not paid was designed to take the place of the common-law demand, and to provide a short time within which the tenant might pay the rent, and thus save the forfeiture. P. 308

5. Where the statute provides for the forfeiture of the lease by giving 3 days' notice to quit for nonpayment of the rent, and the landlord, instead of giving the statutory 3 days' notice, gives a 10-day notice to quit, the tenant has the 10 days in which to tender the rent and avoid forfeiture. P. 310

6. Whenever the judgment, if left unreversed, will preclude the party against whom it stands as to a fact vital to his rights, though the judgment, if affirmed, may not be directly enforceable by reason of lapse of time or change of circumstances pending appeal, a writ of error will not be dismissed as involving only a moot question. P. 310

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by the New Mexico Motor Corporation against E. E. Bliss. Defendant's motion for judgment on pleadings was granted, and the complaint

dismissed, and, pending appeal by plaintiff, temporary injunction was allowed to remain in force. Motion to dismiss appeal denied, judgment of trial court reversed, and cause remanded, with instructions to proceed according to the opinion.

Simms & Botts, of Albuquerque, for appellant.

Forcible entry and detainer statute does not of itself forfeit lease. Romero v. Gonzales, 3 N. M. 5; Patten v. Balch, 15 N. M. 276; 16 R. L. C. "Landlord & Tenant" Par. 666; Kann v. King, 204 U. S. 43, 69 L. R. A. 866; Abrams v. Watson, 59 Ala. 524; Garner v. Hannah, 6 Duer (N. Y.) 262; Wylie v. Kirby, Ann. Ca. 1913A.

H. B. Jamison, of Albuquerque, for appellee.

A court of equity is without jurisdiction to relieve against a forfeiture in face of the statute. 16 R. C. L. p. 1151; 69 L. R. A. 835; Warne v. Wagenor, 15 Atl. (N. J. E.) 307; Sec. 2384, Code 1915; 69 L. R. A. 866; Woodson v. Skinner, 22 Mo. 13; Taylor v. Carondelet, 22 Mo. 105; Hutch v. Crondelet, 26 Mo. 466; Brink v. Studman, 70 Ill. 241.

OPINION OF THE COURT.

RAYNOLDS, J. The New Mexico Motor Corporation, appellant herein, brought suit in Bernalillo county against E. E. Bliss, appellee, seeking to be relieved from forfeiture in the payment of rent under certain lease of a store building in the city of Albuquerque, owned by Bliss, and praying a temporary injunction to restrain Bliss from molesting it in the possession of the real estate pending the litigation, and for a perpetual injunction on final hearing. A temporary injunction was granted, and, upon trial of the case, the defendant, Bliss, moved the court to deny the plaintiff the right to introduce testimony, which motion was sustained. Motions for judgment on the pleadings were made by both plaintiff and defendant, and defendant's motion was granted. Thereafter the complaint was dismissed,

and pending the appeal to this court the temporary injunction was allowed to remain in force.

Appellant assigns four errors which may be considered as one assignment, namely, that the court erred in granting defendant's motion for judgment on the pleadings, and dismissing plaintiff's complaint.

Appellant held under a lease from one Mrs. Sallie Garcia, who was the former owner of the property in question. Appellee, Bliss, had purchased the property and had received rent from the appellant. The lease provided, among other things:

"And it was expressly understood and agreed by and between the parties that if the rent above reserved or any part thereof shall be behind or unpaid on the date of payment whereon the same ought to be paid as aforesaid * * * it shall and may be lawful for the party of the first part, his heirs, etc., at his election, to declare said term ended, and enter into the premises or any part thereof, either with or without due process of law, re-enter, and the said party of the second part, or any other person or persons occupying in or upon the same to expel, remove, or put out, using such force as may be necessary in so doing."

It is admitted that the rent for the month of October, 1919, due on the 1st day of October of that year, was not paid, and that on the 28th day of October, 1919, the defendant, Bliss, served on the appellant a written notice of forfeiture, and demanded that plaintiff vacate within 10 days. Before the expiration of the 10 days appellant alleges that it tendered to the appellee all the rent then due and owing, and offered to pay the expenses and charges for water. The tender was refused.

[1] This action was begun to prevent the enforcement of the notice of forfeiture and expulsion of the appellant from the premises. There is some dispute as to whether the tender made by the appellant was a sufficient tender, but we need not consider that point, because not decided below. The proposition involved in this appeal is as to whether

equity in this jurisdiction can relieve against a forfeiture for nonpayment of rent.

It is argued by the appellant that the general power of the equity court to relieve against forfeiture for nonpayment of rent is in full force in this jurisdiction. The general principles in regard to jurisdiction of equity to relieve against forfeiture for nonpayment of rent are well established. As is said in Kann v. King, 204 U. S. 43, 54, 27 Sup. Ct. 213, 216 (51 L. Ed. 360):

"That a court of equity, even in the absence of special circumstances of fraud, accident, or mistake, may relieve against a forfeiture incurred by the breach of a covenant to pay rent, on the payment or tender of all arrears of rent and interest by a defaulting lessee, is elementary. Sheets v. Selden, 7 Wall. 416."

See, also, R. C. L. vol. 16, par. 606, Landlord and Tenant; notes 86 Am. St. Rep. 844; 69 L. R. A. 866.

[2, 3] On the other hand the appellee argues that, where a staute exists such as does in this jurisdiction on the subject of forcible entry and detainer (Code 1915, § 2384), by which a right of action is given "when the tenant fails to pay the rent at the time stipulated for payment," that such statutory enactment prevents equity from taking jurisdiction and relieving against the forfeiture. The appellee's position is stated by the following quotation:

"There is a marked difference between a forfeiture imposed by statute and one arising under the contract of the parties. The Legislature can impose it as a punishment, whilst individuals can only make it a matter of contract. In the one case it cannot be relieved against, in the other it may." Woodson v. Skinner, 22 Mo. 13.

If section 2384 stood alone, appellee's position would be correct, but it must be read in connection with section 2386, which provides:

"Before suit can be brought in any except the first of the above classes, 3 days' notice to quit must be given in writing to the defendant."

Consequently it requires two things to work the statutory forfeiture, viz. nonpayment of rent and a 3 days' notice to quit for such default. Appellant argues that the action of forcible entry and detainer above mentioned is an action for possession of the property in question, and is only intended to prevent a breach of the peace, and not to give possession to the landlord for nonpayment of rent, and, further, that the statute does not work a forfeiture against which courts of equity cannot give relief; in other words, that it is not by its terms a statutory forfeiture. But in this appellant is in error, because the statute expressly by its terms works a forfeiture, and after the forfeiture is complete a court of equity would have no power to grant relief. But, as stated, the forfeiture is not effective nor complete until the expiration of the 3 days' notice required by section 2386. During this time the lessee can pay the rent and avoid the forfeiture. This section, as stated by the Supreme Court of Illinois in the case of Chadwick v. Parker, 44 Ill. 326—

"was obviously designed to dispense with the necessity of making the common-law demand of the rent on the very day it fell due, and to give a remedy where the lease contains no clause for a re-entry."

[4] Under the common law, before the landlord could declare a forfeiture, where the lease provided for the termination of the same upon the nonpayment of the rent, it was always incumbent upon the landlord to make a demand upon tenant for the payment of the rent on the very day when it became due, and at the place of payment provided for in the lease. This 3 days' notice to quit where the rent is not paid was evidently designed to take the place of the common-law demand, and to provide a short time within which the tenant might pay the rent, and thus save the forfeiture. It is inconceivable that the Legislature would provide for a forfeiture

for nonpayment of the rent without even a demand being made upon the tenant for the payment of the same. Many leases run for a long term of years, and frequently valuable improvements are placed upon the leased premises by the tenant, which might all be swept away by an inadvertent failure to pay the rent at the precise time stipulated in the lease, and this without his intention having been called to the forfeiture, or the fact that the landlord intended to insist upon the strict terms of the lease. No case has been cited to us under a similar statute holding that the tenant may not pay the rent before the expiration of the notice, and thus save his default.

In Tiffany on Landlord and Tenant, vol. 2, p. 1769, the author says:

"The statute, in providing for a notice to quit, occasionally provides that the rent may be paid within the period named for the notice, or requires the notice to be in the alternative, for the payment of rent or delivery of possession. But it has been decided that, even when the statute does not in terms provide for the payment of overdue rent within the period during which the notice is to run, the purpose of the provision, for a certain length of notice before the tenant is liable to suit for dispossession, must have been to enable the tenant to pay, and that he has until the expiration of the notice in which to pay or tender the rent, and so prevent his expulsion.

"After the period of the notice has expired, it has been held, the tenant has no longer this right, and a like view has been taken as regards a tender after the commencement of the proceeding."

The case of Chadwick v. Parker, supra, contains an extended discussion of the history of the common law and the statutory changes in regard to the whole subject. See, also, So. Penn. Oil Co. v. Edgell, 48 W. Va. 348, 37 S. E. 596, 86 Am. St. Rep. 43, and note at page 48.

"No court, so far as our researches have extended, has held that, without a demand of rent from the tenant in some form, a forfeiture could be predicated upon a failure to pay the

same. Such a law would be so manifestly unjust, and would lead to such serious consequences, that we cannot give to our statute such a construction, unless required to do so by language clearer and more pointed than that used in the law we are now considering. Large interests and valuable improvements are frequently involved in leases, and to hold that a tenant without notice or demand absolutely forfeits his lease by a failure to pay or tender his rent within three days after the same may become due, though prevented by sickness or accident or the absence of his landlord from making the payment, and without notice that the landlord will insist upon such a forfeiture, might often result in the grossest injustice and wrong. A construction, however, that makes the service of notice to quit a demand, thereby relieving the landlord from the necessity of making the common-law demand, and which gives the tenant the three days in which to pay his rent after such demand, it seems to us, carries into effect the clear intent of the law making power." Dakota Hot Springs Co. v. Young, 9 S. D. 577, at 581, 70 N. W. 842, 843.

[5] Under the authorities above cited, we conclude that the notice to quit is a demand, and that by the terms of the statute payment within three days after notice would defeat the forfeiture for nonpayment of rent. In this case, however, the landlord, instead of giving the 3 days' statutory notice to quit, gave the tenant a 10-day notice. Within that time, as admitted by the pleadings, the tenant tendered the rent in arrears and interest thereon. Where the statute provides for a forfeiture of the lease by giving a 3 days' notice to quit for nonpayment of the rent, and the landlord, instead of giving the statutory 3 days' notice, gives a 10-day notice to quit, the tenant has the 10 days within which to tender the rent due and avoid the forfeiture. Whether the tender in this case was sufficient or not, we do not decide, as that proposition was not passed upon in the lower court.

[6] Since the submission of this cause on the merits appellee has filed a motion to dismiss the appeal upon the ground that appellant, on September 1, 1920, vacated the premises, the lease to which was

the subject of this controversy. In said motion it was asserted that the questions involved in this appeal are now moot, and that the courts would have no power to grant relief. This contention is, however, untenable, because, if the appeal be dismissed, the judgment of the trial court would remain in full force and effect under which it was adjudicated that appellant had forfeited all his rights under the lease. If he had no rights under such lease he would be a trespasser, and appellee would be entitled to recover full damages for his occupancy of the premises; whereas, if he had a right to hold under the lease, his liability would be measured by the rental stipulated thereby. Further, the appellant would be liable on the injunction bond which it gave for attorney's fees, and any damage which appellee might have sustained by reason of the injunction. The rule in such cases is well stated by the syllabus in the case of Kaufman v. Mastin, 66 W. Va. 99, 66 S. E. 92, 25 L. R. A. (N. S.) 855, as follows:

> "Whenever the judgment, if left unreversed, will preclude the party against whom it stands as to a fact vital to his rights, though the judgment, if affirmed, may not be directly enforceable by reason of lapse of time or change of circumstances pending appeal, a writ of error will not be dismissed as involving only a moot case."

It follows that the motion to dismiss the appeal should be denied, and the judgment of the trial court reversed and the cause remanded, with instructions to proceed in conformity with this opinion, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2603. July 21, 1921.]

ELLIS et al. v. NEW MEXICO CONST. CO. et al.

[On Motion for Rehearing, Oct. 25, 1921.]

SYLLABUS BY THE COURT.

1. Section 3662, Code 1915, being chapter 39 of the Laws of 1884, was repealed by implication by chapter 42 of the Laws of 1903. P. 315.

2. There are in New Mexico two distinct and independent laws upon the subject of paving in municipalities, and procedure followed by a municipality under either of them is valid; these laws being the Provisional Order Law of 1903 (sections 3665 to 3671, inclusive, Code 1915), and the Petition Law, being sections 3672 to 3683, inclusive, Code 1915. P. 315.

3. Where a muncipality adopts a charter pursuant to chapter 86 of the Session Laws of 1917, and such charter is silent on the subject of paving city streets and levying special assessment therefor, the state law on municipalities governs. P. 321.

4. The purpose of the notice required under the provisional order law (chapter 152, Laws 1919) is to afford the property owner opportunity to urge objection as to paving or the extent or character of paving, and the cost thereof; but this is a right merely to be heard, and the doing of the work, the character and the extent thereof, rest entirely in the discretion of the governing body of the municipality. P. 322

5. In the absence of a charge of fraud or collusion between the city and the successful bidder, or of a showing of injury to the abutting property owner because of the acceptance of the bid, complaint as to the terms set forth in the advertisement for bids, in that they operate to exclude all but the successful bidder, will not be considered by the court; it being presumed that the city performed its duty and accepted the lowest bid; the manner of performing such duty not being subject to inquiry by the court. P. 323.

6. A municipal corporation's authority to pave streets does not imply power to burden owners of abutting property with the expense thereof by special assessment, but such power is derived from express statutory enactment, which must be carefully followed. P. 314.

7. Burdening owners of property abutting street with a special paving assessment, as a matter of constitutional right assertable by such owners, need not be preceded by a peti-

tion of a majority or any number of them, nor by opportunity for effectual objection; conformity to the statute being sufficient. P. 314.

8. Laws 1919, c. 152, § 3, permits assessment for street paving to be made upon the front-foot rule, and where so done in conformity to statute, it is valid and not subject to the objection that it is assessed in excess of benefits. P. 322.

9. A statute is repealed by implication where the legislative intent is manifest that the later statute should supersede the former, as where the Legislature enacts a new and comprehensive body of law which is so inconsistent with and repugnant to the former law on the same subject as to be irreconcilable with it, and especially where the later act expressly notices the former in such a way as to indicate an intention to abrogate. P. 318.

Appeal from District Court, Bernalillo County; Bratton, Judge.

Suit by George E. Ellis and others against the New Mexico Construction Company and City of Albuquerque to enjoin road construction work and to remove cloud on title arising from special assessment lien. Judgment dismissing the complaint, and plaintiffs appeal: Affirmed.

George C. Taylor, of Albuquerque, for appellants.

W. A. Keleher and Reid, Hervey & Iden, all of Albuquerque, for appellees.

OPINION OF THE COURT.

RYAN, District Judge. The city of Albuquerque, a municipal corporation, reorganized pursuant to chapter 86, Laws 1917, entered into a contract on the 2d of October, 1920, with the defendant herein, the New Mexico Construction Company, for the construction of about 12 blocks of bitulithic pavement on Tijeras road in said city. Thereafter the defendant construction company proceeding with such work, the plaintiffs, owners of property abutting on Tijeras road, filed suit in equity to enjoin the work and to remove the cloud on title arising from the special assessment lien.

The invalidity of the proceedings on the part of the city effectuating in the contract as made out in the complaint of the plaintiffs, lies in this: (1) The owners of property abutting the street to be paved, against whom the expense of paving by way of special assessment was assessed, did not, nor did a majority or any number of them, petition the municipal government for such improvement, such petition being a necessary prerequisite and jurisdictional to the validity of subsequent proceedings; (2) the city of Albuquerque having adopted a charter as provided by chapter 86, Laws 1917, and the charter being silent as to paving streets and levying assessments therefor against the owners of abutting property, there is absent any authority under and pursuant to which such work could be done and cost assessed; (3) that no legal notice was given the abutting property owners, and such hearing provided for upon the notice actually given furnished merely opportunity for objection, the objection being ineffectual against the contrary decision of the municipal government; (4) that the contract was let to the defendant construction company without an opportunity for the submission of bids, and upon such terms that none but the successful bidder, the New Mexico Construction Company, could have proposed and performed.

There are other grounds urged in the complaint going to the invalidity of the proceedings, but such grounds are not impressive enough to deserve consideration here.

To the plaintiff's complaint both defendants joined in interposing a demurrer which the trial court sustained, and, the plaintiffs refusing to plead further, final judgment was entered dismissing the complaint.

[6, 7] The first point raised, that is the absence of a petition on the part of abutting property owners of the street to be paved, is exhibited more

clearly by stating and deciding two preliminary propositions with which it is involved: First. A municipal corporation, though empowered, as under our laws, with authority to pave streets, has not by reason thereof implied power to burden the owners of property abutting the street to be paved, with the expense of such improvement by special assessment, but the power so to do is derived from express statutory enactment which must be carefully followed. Town of Albuquerque v. Charles Zeiger, 5 N. M. 674, 27 Pac. 315; Town of Roswell v. Dominice, 9 N. M. 624, 58 Pac. 342. Second. The burdening of the owners of property abutting the street to be paved with a special assessment to defray the cost, as a matter of constitutional right assertable by such owners, need not be preceded by a petition of a majority or any number of such owners, nor by opportunity for effectual objection, but conformity to the statute on the subject is sufficient. 2 Page and Jones, Taxation by Assessment, 1347; City of Perry v. Davis & Younger, 18 Okl. 427, 90 Pac. 865; Spalding v. City and County of Denver, 33 Colo. 172, 80 Pac. 126; Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943.

[1, 2] We proceed to ascertain, therefore, whether the allegations in the complaint of the plaintiffs, admitted to be true by the demurrer, that the contract for construction of pavement was entered into without being preceded by the petition referred to, was fatal to the validity of the special assessment, in that the statute controlling required such petition. Plaintiffs' complaint assails the proceedings taken as offending against this essential by three allegations, each of which goes to the failure on the part of the city to follow the requirement of specific statutes on the subject; that is: First. That the proceedings omitted to conform to section 3662, Code 1915:

"No street or highway shall be opened, straightened, or widened, nor shall any other improvements be made which

will require proceedings to condemn private property, without the concurrence in the ordinance or resolution directing the same, of two-thirds of the whole number of the members elected to the council or board of trustees, and the concurrence of a like majority shall be required to direct any improvement or repair of a street or highway, the cost of which is to be assessed upon the owners, unless two-thirds of the owners to be charged therefor shall petition in writing for the same."

Second. That the proceedings omitted to conform to the provisions of chapter 157, Laws 1919:

"Whenever the owners of more than one-half of the front feet of property abutting upon any highway, or portion thereof, proposed to be improved in any city, exclusive of any property owned by the United States, or by the state, shall petition in writing, the governing body thereof, to order the improvement of such highway, or part thereof, within a district described in such petition or petitions, the governing body of such city shall have the power to order such improvement and select the material and methods therefor, and contract for the construction of such improvements in the name of the city, and to provide for the payment of the cost thereof out of any available funds of the city, or as otherwise provided by law; provided, that whenever any proposed improvement herein contemplated shall be on a highway or portion thereof, upon which abuts property belonging to any county, school district or city, the respective boards or bodies having control of such county, school district or city property, may cause a petition to be signed for such improvement."

Third. That the proceedings omitted to conform to the provisions of section 3672, Code 1915:

"Every incorporated city shall have power, upon presentation of a petition or petitions in writing, and subject to the limitations hereinafter provided in the following eleven sections, to improve any street, avenue, alley, highway, public place or square, or any portion thereof within its limits, by filling, grading, raising, paving or repaving the same in a permanent manner, or by the construction or reconstruction of sidewalks, curbs and gutters, or by widening, narrowing or straightening the same, and to construct the necessary appurtenances thereto, including sewers and drains."

Section 3662, Code 1915, is the statutory enactment of the territorial Legislature of 1884. As a

statutory provision it exhausted the law in force in the territory on the authority vested in municipalities to pave streets and defray the cost by special assessment. This law is entirely inhibitive and negative in character, laying down a prerequisite jurisdictional to subsequent acts, but affording no positive detailed procedure to be followed in the event the conditions demanded were met. It, in effect, by omitting to charter the manner by which paving might be legally done, prevents paving in municipalities by special assessment. In 1891 (chapter 43, Laws 1891) the territorial Legislature, apparently mindful of the frailty of the 1884 law, enacted new legislation competent, at least, to the object in view. Section 3 of this act reiterates the inhibition contained in the Law of 1884 referred to by specifically pointing out that the procedure in paving streets must conform to such act.

"That the levying of assessments provided for by the two preceding sections shall be under a general ordinance prescribing the manner thereof and upon petition of owners of at least one-half of the property frontage of the block fronting on the improvements to be made, and be subject to the provisions of section 1635 of the Compiled Laws of New Mexico 1884; and said assessments when levied shall create a lien upon such adjoining property, to be collected under the provisions of subsection 75 of section 1622 and section 1660 of said Compiled Laws." Section 3, chapter 43, Laws 1891.

This was the law in force until 1903 when chapter 42, Laws 1903, was enacted. This latter act specifically repeals section 3 of the Laws of 1891, and furnishes a thorough, adequate, and complete method of procedure in the matter of paving streets in municipal corporations and by its completeness robbed of efficacy the other provisions of the Law of 1891, section 3 being repealed specifically, and by express provision repealed all acts and parts of acts in conflict therewith. This law, it is noted, was carried into the Code of 1915 as sections 3665 to 3671, inclusive. The law of 1903, above, contains no

provision similar to that of the 1884 Law (section 3662, Code 1915) and makes no mention whatsoever of a petition on the part of abutting property owners. On the contrary this act and the inhibitive law of 1884 are repugnant and irreconcilable as is evident from a comparison of both acts.

"That whenever the city council of any city, whether incorporated under general or special laws, or the board of trustees of any town or village in the state of New Mexico shall be of the opinion that the interests of said city require that any street or alley, or any part thereof, within the limits of said city, be graded, graveled, paved, macadamized or in any manner improved, such city council or board of trustees shall make a provisional order to the effect that such street or alley or part thereof shall be so graded, graveled, paved, macadamized or improved, and shall order the city engineer, or some other competent engineer, to cross-section said street or alley or part thereof and to make an estimate of the total cost thereof, and an estimate of the number of cubic yards of material necessary to be used in the grading thereof, or to be excavated therefrom." Section 3665, Code 1915.

Sections 3666 and 3667, following, provide that upon the filing of the report of the engineer a hearing shall be had after notice, at which hearing any one interested may be heard as to the propriety of the improvement contemplated, the cost and manner of payment. Section 3668 provides:

"After such hearing, said city council or board of trustees shall determine as to the advisability of so grading, graveling, macadamizing or otherwise improving such streets or alleys or parts thereof and shall determine the kind and character of such improvements so to be made, and shall proceed to advertise for bids for the doing of the work therefor, and shall enter into a contract for the doing of such work and the furnishing of all necessary materials to the lowest bidder."

[9] The act of 1903 by reason of the fact that it occupies completely all the matter on the topic of paving in municipalities and the levying of special assessments to pay the expenses thereof, dealt with

in prior legislation, that it expressly repeals section 3 of chapter 43, Laws 1891, in which was incorporated the law of 1884, that it is repugnant to and irreconcilable with the law of 1884, manifests a clear intent on the part of the Legislature to supersede and therefore to repeal that law. A statute is repealed by implication, though such repeal is not favored, where the legislative intent is manifest that the latter statute should supersede the former, and such intent is manifest where the Legislature enacts a new and comprehensive body of law which is so inconsistent with and repugnant to the former law on the same subject as to be irreconcilable with it, and especially does this result follow where the latter act expressly notices the former in such a way as to indicate an intention to abrogate. 6 Am. & Eng. Ency. of Law, 720; Baca v. County Commissioners, 10 N. M. 438, 62 Pac. 979; U. S. v. Claflin, 97 U. S. 546, 24 L. Ed. 1082; Howard v. Hulbert, 63 Kan. 793, 66 Pac. 1041, 88 Am. St. Rep. 267; Gymnastic Assoc. of South Side Milwaukee v. City of Milwaukee, 129 Wis. 429, 109 N. W. 109. The latter act (chapter 42, Laws 1903, sections 3665 to 3671, Code 1915) covering the entire subject, embracing all the law pertinent thereto and furnishing a new and comprehensive system of procedure, makes it clear that the Legislature intended to supersede prior acts relating to the same subject, and this result is to be derived even in the absence of repugnancy and inconsistency. Harold v. State, 16 Tex. App. 157; State ex rel. v. B. P. O. E., 69 Miss. 895, 13 South. 255; In re Hawes, 22 R. I. 312, 47 Atl. 705.

We have then to consider as determinative of the validity of the proceedings complained of the law of 1903 (sections 3665 to 3671, Code 1915) and the law of 1913 (chapter 22, Laws 1913), which comprises sections 3672 to 3683, inclusive, Code 1915, and as each act was amended in certain particulars by the law of 1919, the former by chapter 152, and

the latter by chapter 157 of such laws. An examination and analysis of these two laws, the first generally termed the provisional order law, the latter the petition law, display that each is complete in itself, and sets forth each step in the procedure to be followed by the municipality. But the former places in the discretion and judgment of the municipal government the decision as to paving streets, such decision being final; the latter imposes as a condition jurisdictional to valid proceedings the petition of at least 51 per cent. of the owners of the front feet of property abutting upon the street to be paved.

The contention of appellant that section 3662 is to be read into the former law as a prerequisite affecting the provisional order law of 1903 failing, in that such section is repealed by the latter act, it is yet urged that the petition law, that of 1913, as the last expression of the legislative will, is controlling, and, being repugnant to the former, supersedes it. That this contention is untenable is forced upon us by the fact of the inclusion in the 1913 act of this saving clause:

> "No other existing law with reference to the construction or maintenance of the improvements contemplated in the sections numbered in the preceding section, shall be repealed, but the said laws shall remain in force to be applied by the governing body of any city, in its discretion, according to the provisions of said laws and without reference to said sections." Section 3683, Code 1915.

There can be no repeal by implication where the act expressly provides that prior acts shall continue in force. 25 R. C. L. 931; 36 Cyc. 1077. It being clear, therefore, that it was the legislative intent that the 1913 act was not designed as a substitute for or to supersede the 1903 act, and that each act is complete in itself, but radically different to the extent that one leaves the decision as to paving and assessing the expense thereof by special assessment

entirely with the governing body of the municipality, but the other permits nothing effective to be done without the petition of more than one-half of the abutting property owners, it follows that the acts are cumulative. 25 R. C. L. 174. We hold that the city of Albuquerque having, as the record before us shows, followed the procedure relative to paving under the provisional order law (sections 3665 to 3671, Code 1915) thus proceeding in conformity with law, the allegations of plaintiffs' complaint attacking the proceedings actually taken by the city on the ground that they are violative of one or more of the provisions of the petition law (sections 3672 to 3683) were demurrable.

[3] The demurrer admits further the allegations of the complaint that the special charter adopted by the city of Albuquerque under the provisions of chapter 86, Laws 1917, omits authorization to the city commissioners to pave city streets and meet the cost by special assessment and to enforce the liens created therefor by foreclosure. We have examined the cases cited in appellant's brief. The principle announced by all of them is established by mere statement. Where the Constitution of the state grants to municipalities power of self-government under a charter which is adopted, the charter is the measure of authority, and the municipality possesses the power to enact ordinances affecting persons and property within its corporate limits only to the extent that the charter expressly confers it, or necessarily implies such power from what is expressed or essential to the exercise of the power granted; but this rule does not apply to the instant case, for the reason that Albuquerque has not adopted its charter under a grant of power conferred by the fundamental law. The Legislature only has acted. The state law on municipal corporations controls.

"Any municipal corporation now existing and by election accepting the provisions of this act shall retain its present

boundaries, excepting as they may be altered under the provisions of the laws of New Mexico, and shall retain and possess all powers granted under the Municipal Corporations Act and such other powers as are not inconsistent with the statutes and Constitution of the state of New Mexico." Section 4, art. 1, chapter 121, Laws 1919.

[8] The next specific attack made by appellants in their complaint against the procedure followed by appellees is that the assessments made against them were in excess of benefits. Section 3, chapter 152, Laws 1919, amending the 1903 paving law (section 5, chapter 42) carried forward into the Code as section 3669, permits the assessment to be made upon the front-foot rule, and it is such method of assessment that appellants complain of, as stated above. The method followed by the city conforms to the statute, and is therefore valid. That it is a constitutional method of assessment this court has already decided. Roswell v. Bateman, 20 N. M. 77, 146 Pac. 950, L. R. A. 1917D, 365, Ann. Cas. 1918D, 426.

[4] The objection urged that no notice was given as required by section 3, chapter 40, Laws 1915, which amended section 3679 of the Code (part of the petition law) we have already disposed of; lack of adherence to the terms of the petition law is immaterial. The purpose of the notice in the provisional order law is to afford opportunity to discuss as already pointed out, and any objection at the hearing by one interested against the advisability of paving, or the extent or character of paving is unavailing against the decision of the city to the contrary. Notice and hearing within constitutional demands are had upon the filing of suit to foreclose the lien. Roswell v. Bateman, supra. Hence, by statutory provision, the extent or character of paving, as proposed in the provisional order, which forms the basis of the notice required, may be deviated from. In fact, were the order not clearly tentative, discussion upon it would be futile. It is after such provisional order is made and after hear-

ing and discussion thereon that final decision is made by the city, which decision forecloses objection. Section 3668, Code 1915, supra.

[5] We see no merit in the remaining point as alleged in the complaint and argued in appellants' brief, to the effect that the advertisement for bids contained such terms that only the defendant construction company could have proposed to do the work and could have performed. There is no allegation of fraud or collusion, or of injury to the plaintiffs or any property owner interested, or of other substantive facts which would go to negative the presumption that the city performed the duty imposed upon it by statute by letting "the contract for the doing of such work and the furnishing of all necessary materials to the lowest bidder." The allegations of the complaint admitted to be true are not necessarily inconsistent with the actual performance of the duty imposed. The action of the trial court in dismissing the complaint was proper, and its judgment will be affirmed; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

ON MOTION FOR REHEARING.

RYAN, District Judge. In their motion for rehearing, plaintiffs urge that the court, in the original opinion filed herein, omitted to take into consideration the contention made by them that the provisional order law of the act of 1903 (sections 3665-3671, inclusive, Code of 1915) was repealed by implication by the act of the territorial Legislature of 1909, chapter 31, Laws of 1909. This position is so clearly untenable that it was not deemed deserving of comment in the opinion. The act of 1903 above referred to has to do with the authorization to a city council to order local improvements and assess the cost thereof upon abutting property. Chapter 31, Laws of 1909, has to do with the creation of improvement districts by incorporated cities; the

organization of boards of improvements for the districts so created, and the direction and control of such improvements by such boards; the creation of boards for the assessment of benefits in each district; and the collection of the assessments. The opinion filed herein states upon what conditions subsequent legislation will be held to repeal prior legislation by implication. None of the tests therein set forth are here present to imply the repeal of the act of 1903 by the 1909 act.

The remaining contentions upon which a rehearing is urged were treated in the opinion proper.

For these reasons, the motion for rehearing will be denied; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2562. Oct. 6, 1921.]

TRYONE KNITTING MILLS v. RUBIN.

SYLLABUS BY THE COURT.

1. The plea of payment is an affirmative defense, and the burden of proof is upon the party interposing this plea.

P. 325.

2. Where in a suit for a balance due for goods sold and delivered, the defendant acknowledges the receipt of the goods and their value as alleged, pleads payment, but fails to introduce evidence in support of his plea, judgment for the amount sued upon is properly given for the plaintiff.

P. 326.

Appeal from District Court, Chaves County; Brice, Judge.

Action by the Tryone Knitting Mills against Barney Rubin in the justice court, where judgment was rendered against the defendant, and on appeal to the district court and trial de novo judgment was again rendered for the plaintiff, and the defendant appeals. Affirmed.

J. C. Gilbert, of Roswell, for appellant.

Alexander J. Nisbet, of Long Beach, Cal., for appellee.

OPINION OF THE COURT.

RAYNOLDS, J. This case originated in the justice of the peace court, precinct No. 1 of Chaves county, N. M., where judgment was rendered against the appellant in the sum of $150, balance due for goods sold and delivered. Plaintiff alleged the original bill was for $264, on which $114 had been paid. An appeal was taken to the district court, where upon trial de novo, judgment was again rendered for the appellee, and appellant therefore appealed to this court.

Appellant assigns four errors which may be considered as two propositions: First, that the court below erred in not sustaining his demurrer to the evidence at the close of the appellant's case: and, second, that the court erred in refusing to make findings of fact and conclusions of law as requested by the appellant, the defendant below.

No written pleadings were filed in the justice or the district court, the defense of the defendant being, as stated on page 21 of the transcript, that the defendant did not owe the account.

In our opinion this case turns upon one proposition. At page 39 of the transcript after the close of the evidence for the plaintiff, the defendant by his counsel made the following statement:

"Mr. Gilbert: The contention of the defendant is this: That these were certain goods, amounting to $264 and some cents, shipped to him by the plaintiff in October and November; that these goods were paid for, each and every one that was shipped; that we do not owe them anything for these goods. We do not deny receiving these goods to that amount."

[1] The defendant introduces no evidence to support his plea of payment. The plea of payment is an affirmative defense and the burden of proof

is upon the party interposing this plea. 21 R. C. L. par. 131, and cases cited.

[2] After this admission was made by the defendant, a motion for judgment by the plaitiff for the amount sued for, if made, could have been properly sustained. The court did not therefore err in giving judgment for the plaintiff, when the defendant refused to introduce any evidence of payment after having admitted receiving the goods, and also having admitted that they were of the value alleged by the plaintiff.

As this point is decisive of the whole case the other assignments of error need not be considered.

The judgment is therefore affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2386. Oct. 11, 1921.]

KERSHNER v. TRINIDAD MILL. & MIN. CO. et al.

SYLLABUS BY THE COURT.

1. A mortgagee of a mill site and mill, upon the payment of taxes upon, or redemption from tax sale of, the mortgaged property, acquires nothing more than an additional lien on the property for the amount paid, with interest, enforceable along with the mortgage debt, and does not acquire a title to the property which he can assert against that of the mortgagor. P. 330.

2. A location of a mill site over the ground covered by a subsisting location is void, and cannot ripen into a valid location, even if the senior location becomes forfeited or abandoned P. 331

3. The right to a mill site may be transferred by delivery of possession and retention thereof by the transferee. P. 334.

4. The erection and maintenance of a quartz mill upon the nonmineral public lands of the United States is a location of the land upon which the mill stands and that surrounding the same for a sufficient space as is necessary for the con-

venient use and occupation of the mill. In such case the owner of the mill has connected himself with the government, under the terms of Rev. St. U. S. § 2337 (U. S. Comp. St. § 4645), and may resist encroachment of others claiming under the mining laws of the United States. P. 335.

Appeal from District Court, Taos County; Lieb, Judge.

Suit by William D. Kershner against the Trinidad Milling & Mining Company and others. Decree for defendants, and plaintiff appeals. Affirmed.

F. T. Cheetham, of Taos, for appellant.

Bickley, Kiker & Voorhees and H. M. Rodrick, all of Raton, for appellees.

OPINION OF THE COURT.

PARKER, J. This is an appeal by the plaintiff below from a decree rendered by the district court for Taos county quieting the title to a certain mill site in favor of the appellee, one of the defendants below, the Trinidad Milling & Mining Company. The action was instituted by appellant by a complaint in the usual form to quiet title to real estate. The appellee company answered, denying the allegations of the complaint and setting up title to the premises adverse to the appellant.. It appears that in March, 1909, a so-called location of the Black Jack mill site was made by appellee's predecessors in title, and a location notice was filed for record in the office of the county recorder of Taos county on April 8, 1909. The location notice describes by metes and bounds a piece of land 500 feet in length by 435.6 feet in width, and recites that there is situated upon the ground a quartz mill and reduction works owned by the locators. It is to be observed that this is a location of a mill site not connected with any lode mining claim, and that the location is based upon the fact of the existence on the land of a quartz mill and reduction works. No question is made as to the nonmineral character of the land, or of the actual ex-

istence on the ground of the mill and reduction works.

Thereafter the said locators of said mill site on April 12, 1912, executed and delivered in escrow, until a balance of the purchase price should be paid, an instrument conveying to one C. F. Wilson the mill and reduction works heretofore mentioned, and used the following language therein, viz.:

"Have bargained, sold, transferred and delivered and by these presents do bargain, sell, transfer, convey, and deliver to the said C. F. Wilson the following described property, to wit, that certain concentrating mill, known as the 'June Bug mill,' together with all machinery, tools and water rights thereunto belonging, such mill being located in Red River Canyon, about 1½ miles below the town of Red River in the Red River mining distirct, in the county of Taos, state of New Mexico."

It is to be observed that the document above referred to is nothing more nor less than a conveyance of the quartz mill and reduction works, and has no reference whatever in terms to any rights in the land covered by the location of the mill site. Thereafter said Wilson assigned his rights under the said conveyance to the appellee, the Trinidad Milling & Mining Company, which company afterwards fulfilled the terms of the escrow agreement by paying the balance of the purchase price due for the property, and thereupon became the owner of the quartz mill and reduction works.

After the appellee took possession in 1912 of the milling machinery and mill site, it re-established the corners of the said mill site and re-ran the lines of the claim, blazing trees on the corners and writing notices thereon to the effect that the Red River Mining & Milling Company claimed the site. The mill was upon the site at the time, and the process of reduction was changed from that of concentration to the cyanide system, and new machinery was installed and buildings erected. In 1914 the company installed a concentrating table, made some test runs,

and treated a small amount of ore. There is no question but that up to this time the appellee company was in the exclusive possession of the property. In 1915 the company made some slight repairs to a flume, cut some brush on the mill site, and cut out some mud at the headgate. Reed, a representative of the company, was at that time working a claim of his own near the mill site, but aside from such supervision as he gave the mill site, nothing was done by way of operating the mill that year. No caretaker or watchman was on the premises.

The discrepancy in name between that of the appellee and that of the Red River Mining & Milling Company, as appeared in the notices posted as above referred to, is explained by the fact that at the time of the posting of said notices the appellee corporation had not been organized, and the name of the same had to be changed from Red River Mining & Milling Company to some other name on account of the requirements of the state corporation commission, and the name of the Trinidad Milling & Mining Company was finally adopted. But everything which was done in and about the premises was done for the use and benefit of the corporation which was finally organized under the name of the Trinidad Milling & Mining Company.

In June, 1914, the appellee, the Trinidad Milling & Mining Company, executed to appellant, and two others, a mortgage to secure the payment of $1,583.39, covering the property in question and describing the same as follows:

> "The 'June Bug mill site' together with all flumes, ditches, easements, rights of ways, and privileges used with an in connection with said mill and mill site, together with all water and water rights used with and in connection with said 'June Bug mill,' or used in connection with said mill and mill site being located in Red River Canyon," etc.

—which said mortgage was accepted and acted upon by the appellant.

On July 27, 1915, the treasurer and collector of Taos county sold at tax sale to the appellant the property involved for delinquent taxes of 1914 and described the property as "cyanide mill and crusher." No attempt was made to sell in said tax sale any right or interest in and to the land involved, and the certificate of sale omits the provision in regard to the right of the former owner to redeem from said sale. It was evidently the opinion of the parties concerned that the mill and machinery constituted personal property and that there was no right of redemption from the sale. On the same date the said treasurer and collector sold to the appellant the same property, describing it as personal property and as the "June Bug mill," for the taxes delinquent for the year 1913.

Under these circumstances, the appellant on September 1, 1915, made an attempted location of the ground embraced within this mill site, with slightly different boundaries, and filed a location notice of the same for record on September 4th following.

[1] We are met at the threshold with the question as to the effect of the tax sale. At the time of the purchase by appellant at tax sale, he was the mortgagee of appellee of the property involved. It was taxed as improvements on a mining claim under the provisions of section 5427, Code 1915, which provides for the taxation of all property in the state, with certain exceptions, and section 5433, Code 1915, which specifically provides that improvements on mining claims shall not be exempt. A mortgagee is authorized to pay taxes on the mortgaged property, or to redeem from tax sale, and the amount paid becomes an additional lien on the property to be enforced with the mortgage. Section 5504, Code 1915. Under such circumstances, can the mortgagee acquire a tax title to the property and thus defeat the title of the mortgagor? There is some diversity of opinion on the subject, but the

great weight of authority is that the mortgagee, when he pays taxes or redeems from tax sales, merely acquires an additional lien on the property and may recover the amount paid from the mortgagor along with the mortgage debt, and cannot in that way acquire a title which will defeat that of the mortgagor. See 19 R. C. L. Mortgages, § 174. See, also, Jones v. Black, 18 Okl. 344, 88 Pac. 1052, 90 Pac. 422, 11 Ann. Cas. 753, and note, where many cases are collected. See, also, Cooley, Taxation (3d Ed.) p. 970; Burchard v. Roberts, 70 Wis. 111, 35 N. W. 286, 5 Am. St. Rep. 148; Shepard v. Vincent, 38 Wash. 493, 80 Pac. 777; Jones, Mortgages (7th Ed.) § 1134. The appellant, therefore, when he purchased at the tax sale, acquired nothing more than an additional lien on the property for the amount paid, and interest, and acquired no title to the property, which he could assert against his mortgagor. When he went upon the property and made his so-called location, he was in no better position than that of the ordinary locator.

[2] We have then a case where a party has upon the unappropriated, nonmineral land of the United States a reduction works or mill for the reduction of ore, not associated or connected with any mining claim, and another, deeming himself so entitled, enters upon the premises, takes possession of the same, and the machinery and improvements thereon, and attempts to appropriate the same to his own use by means of a so-called location of a mill site.

The statute governing the matter of mill sites is section 2337, R. S. U. S. (U. S. Comp. St. § 4645), which is as follows:

"Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but

no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section."

It is to be observed that this section uses the word "location" in connection with mill sites. No method of location is pointed out, as in the case of location of lode claims; but it is fair to assume that the same formalities so far as applicable should be observed as in the case of lode claim locations. Those formalities are prescribed by section 2324, R. S. U. S. (U. S. Comp. St. § 4620), as follows:

"The location must be distinctly marked on the ground, so that its boundaries can be readily traced."

No other requirements of the section are applicable to mill sites.

No requirement of record of any location notice is to be found in this section, but it is provided that when record is made the same shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. This section has been many times considered by the courts, and it has been often held not to require the posting of any location notice in order to effect a valid location. See 5 Fed. Stat. Ann. 19 et seq., where many cases are collected. Additional requirements are to be found in statutes of several of the states. See 2 Lindley on Mines (3d Ed.) § 521. But in this jurisdiction we have no statute on the subject of the location of mill sites. Here, all that is required to effect a valid mill site location is that it "be distinctly marked on the ground so that its boundaries can be readily traced." The posting of the location notice, containing the name of the locator, or claimant, and giving the location of the

mill site with reference to natural objects or permanent monuments, are not required. It seems strange that such an important matter should have been so long left in such an unsatisfactory condition, but such is the fact.

It appears therefore that the locators of the Black Jack mill site made an appropriation of the ground by marking its boundaries, and such was the condition when they contracted for the sale of the machinery to Wilson, assignor of the appellee, Trinidad Milling & Mining Company. Thereafter on April 30, 1912, articles of incorporation were executed, and on May 17, 1912, the same were filed with the corporation commission, incorporating the appellee. In the meantime, the date not being fixed, but being stated to be about the last of April, 1912, the persons interested in the organization of the appellee corporation re-established the corners and lines of the mill site, marking the corners as being claimed by the Red River Mining & Milling Company. The corners, as established, were not identical with the old corners, but were practically so; the only change being at the northeast corner, which was moved about 20 feet.

The court found that appellee corporation was entitled to the Red River Mining & Milling Company location and treated the same as a valid location of the ground.

Counsel for appellant invokes the doctrine promulgated by the leading case of Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735, to the effect that a location covering ground already located is void ab initio and can never ripen into a valid location, notwithstanding the senior location is afterwards forfeited or abandoned. He argues that at the time of the location of the Red River Mining & Milling Company mill site, the ground was covered by a valid and subsisting mill site location under the name of the Black Jack mill site, owned by appellee's

grantors, and which they had not conveyed to appellee, the conveyance being in escrow, and not delivered until long after the location.

The doctrine is perhaps controlling on this point. While it was true there was a conveyance of the mill and machinery delivered in escrow at the time of the location, it was not finally delivered until long afterward and could not take effect until it was so delivered. A location, under the doctrine, must be valid when made; otherwise it fails absolutely. The court was technically in error, therefore, in holding that the Red River Mining & Milling Company mill site location was valid.

[3] It appears, however, that possession of the Black Jack mill site located by appellee's grantors was delivered by them to appellee and retained by it. All of the circumstances show that appellee's grantors intended to surrender their possession to it and appellee took and maintained the same. Was not this a sufficient transfer of the locator's rights in the Black Jack mill site?

In this connection we are not unmindful of the prevailing doctrine throughout the mining states that a mining location operates as a grant by the government of an interest in land, and, consequently, no transfer thereof can be effectuated except by deed. This is perhaps correct on principle in regard to lode or other claims, where, under the federal and local laws, no possession, use, or occupation of the grant is required in order to maintain the locator's rights. Even in case of lode claims in early days it was quite generally held that a mining claim might be transferred by delivery of possession and a retention thereof by the transferee. Union Con. Silver Min. Co. v. Taylor, 100 U. S. 37, 25 L. Ed. 541; Table Mt. Tunnel Co. v. Stranahan, 20 Cal. 198; Doe v. Waterloo Min. Co., 70 F. 459, 17 C. C. A. 190; Omar v. Soper, 11 Colo. 389, 18 Pac. 448, 7 Am. St. Rep. 246; Lockhart v. Rollins, 2 Idaho, 540,

21 Pac. 414; Kinney v. Con. Virginia M. Co., 4 Sawy. 383, Fed. Cas. No. 7,827. Later, California departed from this doctrine by reason of a statute of that state which required a deed to convey mines. Garthe v. Hart, 73 Cal. 541, 15 Pac. 93. Montana by reason of a statute never adopted the doctrine. Hopkins v. Noyes, 4 Mont. 550, 2 Pac. 280. Mr. Lindley criticizes the doctrine that a mining claim may be transferred by delivery of possession, but no distinctions are pointed out between mining claims and mill sites. See 2 Lindley on Mines (3d Ed.) § 642. In this connection we may well recur to section 2337, R. S. U. S. It will be seen that in asserting a claim to a mill site in connection with a lode claim, it must be used and occupied for mining or milling purposes. And in the case of an owner of a mill not connected with a mine, the presence on the ground of the mill satisfies the requirement of the statute as to use and occupation. The statute does not seem to contemplate the right to locate a mill site without actually using and occupying the ground. This is the position of the land department of the government. See 2 Lindley on Mines (3d Ed.) § 521. This is not so with regard to mining locations. After a mining location has been perfected, no further possession need be maintained, except to make the required annual expenditure. The nature of the right is inherently different in the two cases. We are not aware that this distinction has been pointed out in other cases, but we conclude that the right to a mill site may be transferred by delivery and acceptance of possession and no deed is required.

[4] There is another consideration which prevents appellant from recovery in this case. Assuming for the time being that the original Black Jack location became abandoned by the locators and never passed by delivery to appellee, and assuming that the Red River Mining & Milling Company's location is void by reason of being premature, the fact still

remains that at the time of the intrusion of the appellant upon the premises, appellee was in the lawful possession of a portion of the public domain with a mill and reduction works thereon, which it was maintaining and using for the purposes contemplated by the federal statute. That statute is a grant of a right to take possession of the non-mineral lands of the United States for such purposes and to maintain same against all intruders. It follows when appellant intruded and took possession of appellee's mill and made his pretended location, he was a naked trespasser upon the possession of the appellee of the mill and the land upon which the mill stood, and the land surrounding the said mill for such sufficient space as was necessary for the convenient use and occupation of the mill, whether appellee had any location of the mill site at all or not. The only object of the location in such a case is to give notice to others of the claim to five acres and thus prevent encroachment upon the lateral boundaries of the land needed for the operation of the plant. The mill, itself, is notice of the claim to the land upon which it stands and that immediately surrounding it. Its erection and maintenance operates as a location of the land. The owner of such a mill so situated has connected himself with the government and is in a position to resist any subsequent appropriator claiming under the mining law.

As before pointed out, the appellant claims under his location. He does not and cannot claim under his tax title. If his case was founded upon his alleged ownership of the mill under the tax sale, a different question might be presented. In that case the question would arise as to whether the appellee had not lost its right to the possession of the land by reason of its loss of the title to the mill; but no such question is here.

Some other questions are in the case, but in view of our position upon the fundamental rights of the parties, they are of no interest to the appellant.

There being no substantial error in the record of which appellant can complain, and for the reasons stated, the judgment of the court below should be affirmed, and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2486. Oct. 13, 1921.]

BUJAC et al. v. WILSON.

In re CARDONER'S ESTATE.

SYLLABUS BY THE COURT.

1. Sections 2222, 2223, 2242, 2243, and 2244, Code 1915, interpreted, and held, that the residence required of a person to entitle him to qualify as an executor is nothing more than actual residence. P. 341

2. Aside from the common-law doctrine which excludes idiots and lunatics, the desire of the testator is a controlling factor in determining the right to administer an estate, and it is only statutory disqualifications which may operate to defeat such desire. P. 343

Appeal from District Court, Bernalillo County; Hickey, Judge.

Proceedings for the appointment of Joseph R. Wilson, as executor of the will of A. M. J. Cardoner, deceased, opposed by E. P. Bujac and others. A judgment of the probate court finding Joseph R. Wilson qualified to act was affirmed on appeal to the district court, and objectors appeal. Affirmed.

Marron & Wood, of Albuquerque, for appellant.

A. B. McMillen, of Albuquerque, for appellee.

OPINION OF THE COURT.

PARKER, J. Upon a motion to dismiss the appeal we handed down an opinion concerning which, upon motion for rehearing, we have some doubts. In view, however, of the opinion we have of the case, we do not deem it necessary to further discuss this

motion, and will withdraw the opinion and dispose of the case upon the merits.

The facts in the case are that a Madame Cardoner died at her residence in Albuquerque, N. M., on the 1st of October, 1918, leaving a last will, in and by which she appointed Joseph R. Wilson as executor to serve without bond, and named her daughter, Bertha Pauchet, of Barcelona, Spain, her sole legatee. The will was produced and filed by the executor in the probate court, together with a petition for the approval of the will and the issuance to him of letters testamentary on October 12, 1918. There was no contest as to the validity of the will, but the appellants, on November 30, 1918, together with said Bertha Pauchet, the said legatee, filed amended and supplemental objections to the appointment of Wilson as executor and prayed as follows:

"Wherefore your petitioners pray that the will of the said Mathilde Cardoner be admitted to probate as prayed for in the petition, but that the application of the said Joseph R. Wilson to be appointed executor thereof without bond be denied and refused by the court, and that Etienne P. Bujac, creditor, be appointed as administrator with the will annexed and manage her said estate upon giving ample security as required by law."

A hearing was had on November 30, 1918, in the probate court, and Joseph R. Wilson was held by said court to be a qualified executor under said will, and letters testamentary were thereupon issued to him. From this judgment of the probate court the objecting parties appealed to the district court of Bernalillo county. Pending appeal from the probate court to the district court Bertha Pauchet, the legatee, dismissed her appeal, and asked that the said Joseph R. Wilson be allowed to continue to administer the estate, and opposed the appointment of the said Bujac as administrator with the will annexed. The district court on November 26, 1919, found that said Joseph R. Wilson was qualified to

act as executor, and that letters testamentary had been duly issued to him by the probate court, and that the said E. P. Bujac was not entitled to appointment as administrator of the said estate.

The principal ground of opposition to the appointment of Wilson is his alleged nonresidence. It appears from the evidence that at the time of the death of the deceased Wilson was a resident of the city of Philadelphia, state of Pennsylvania. Upon the death of the deceased he went to Albuquerque, N. M., and soon thereafter, and prior to the issuance to him of letters testamentary, he had acquired a place of residence and had removed to Albuquerque and was living there with his family. These facts are undisputed. It is urged, however, by appellants that Wilson's residence was so established in Albuquerque for the purpose of enabling him to serve as executor of the estate, and was not established for the purpose of becoming an actual, bona fide, permanent resident of the state, and that therefore he did not become qualified as an executor. Evidence was introduced by appellants to establish the fact that Wilson's residence was established here, not for the purpose or with the intention of making his residence permanent, but for the purpose of enabling him to qualify as executor in this matter, and some evidence along this line was offered which was excluded by the court upon technical grounds. In the view we take of the matter, however, it may be assumed that the evidence offered and tendered would show that Wilson established his residence in Albuquerque and maintained the same during the pendency of the administration of the estate for the purpose merely of qualifying himself to serve as executor, although there is evidence in his behalf to the contrary, which the court might well have been justified in believing.

The question turns upon the proper interpretation

of our statutes in this regard, the pertinent provisions whereof are as follows:

"Sec. 2222. Persons capable of making a will may be appointed as executors or administrators, and after having accepted said appointment, they shall impartially and punctually discharge the duties thereof.

"Sec. 2223. The following persons are not qualified to act as executors or administrators: Nonresidents of this state; minors; judicial officers; persons of unsound mind, or who have been convicted of any felony, or of a misdemeanor involving moral turpitude."

"Sec. 2242. If an executor or administrator become a nonresident of this state, he may be removed and his letters revoked in the manner prescribed in the preceding section, except that the notice may be given by publication for such time as the court or judge thereof may direct.

"Sec. 2243. If a person be named in a will as executor who is a nonresident of the state or a minor, upon the removal of such disability he is entitled to qualify as such executor, if he apply therefor within thirty days from the removal of such disability if otherwise competent. If in the meantime, an administrator with the will annexed has been appointed, his powers and duties cease with the qualification of such executor; but if another executor is qualified and is acting as such, they thereby become joint executors.

"Sec. 2244. Whenever it appears probable to the court or judge that any of the causes for removal of an executor or administrator exist or have transpired, as specified in section 2241, it shall be the duty of such court or judge to cite such executor or administrator to appear and show cause why he shoud not be removed, and if he fail to appear or show sufficient cause, an order shall be made removing him and revoking his letters; and it is the duty of the court or judge thereof to exercise a supervisory control over an executor or administrator, to the end that he faithfully and diligently perform the duties of his trust according to law." Code 1915.

It will be noticed that, speaking broadly, all persons capable of making a will may be appointed executor, as is provided by section 2222. The genernal provisions of this section are restricted somewhat by the provisions of section 2223, to the effect that nonresidents of the state, together with others

specified in the section, shall not be qualified to act. By section 2243, it is provided that, if the executor named in the will is a nonresident of the state, he may, upon the removal of such disability, become qualified to act if he applies for letters within thirty days after the disability has been removed. By section 2242, if the executor, after he has qualified, becomes a nonresident, he may be removed and his letters revoked in accordance with certain procedure laid down in the statutes.

[1] Taking these sections of the statute together, we are of the opinion that it is clear that the residence contemplated as a basis for the qualification of an executor means nothing more than actual residence. The statute seems to contemplate and to provide for cases exactly like the case at bar. It contemplates that wills may be presented to probate courts in this state which name executors who are for the time being nonresidents of the state, and further contemplates that, upon the removal of such disability by establishing an actual residence in this jurisdiction, the right to administer becomes perfect. Under such circumstances it cannot be said that the quality or character of the residence necessary to qualify an executor is anything more than an actual residence and presence within the state. So that, in accordance with the provisions of section 2244 above quoted, the probate court or judge may exercise a supervisory control over him to the end that he faithfully and diligently performs the duties of his trust according to law.

Counsel have cited a few cases which have attempted to define the meaning of residence but none of the same seem to us to be applicable in this jurisdiction. Most of the cases cited define the nonresidence necessary in order to confer jurisdiction upon the federal courts under the diverse citizenship requirements. One case cited is based upon the dis-

tinction between legal and actual residence, and holds that legal residence is required to avoid the necessity of giving a cost bond. Appellants cite two cases which bear directly upon the question. In Re Petition of Marion Mulford, 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986, the court held under a statute which provided that "no nonresident shall be appointed or act as executor" that a resident of Ohio who still maintained his homestead in that state and who came to Illinois and testified that he intended to remain in Illinois so long as it might be necessary to perform his duties as executor of the estate, was a nonresident of Illinois, and was not entitled to complain of the action of the court in refusing to issue to him letters testamentary. It is to be observed, however, at least so far as appears from the report of this case, that Illinois has no such provisions of law as we have. There is in Illinois no provision that a nonresident who has been named an executor may remove the disqualification and obtain letters testamentary within 30 days after the removal of said disqualification.

The other case cited is In re Donovan's Estate, 104 Cal. 623, 38 Pac. 456. In that case a brother of the deceased, who died intestate in California, resided in the state of Massachusetts at the time of the death of his brother. He, and others entitled to share in the estate, signed and forwarded to the appellant a request for his appointment as administrator and appellant, in pursuance of such request, later filed his petition praying that letters of administration be issued to him. Three days before the hearing the brother arrived in California. He was put upon the stand and testified in such a manner as to show that it was not his intention to remain in the state. The statute of California requires that a person requesting appointment as administrator, or requesting the appointment of

another person, must be a "bona fide" resident of the state. The court very correctly held in that case and under that statute that the residence required was more than a mere actual residence. The case therefore has no controlling influence upon the determination of this matter.

We are confirmed in this conclusion by the further consideration that the wishes of a testator as expressed in his last will and testament are to be regarded as of controlling force, and are to be overturned only where some positive provision of law prevents the same being carried out. This is a well-known fundamental principle, universally recognized.

[2] Counsel for appellants presented in their objections to the qualifications of Wilson to act as executor certain matters tending to show unfair or dishonest conduct toward the deceased in her lifetime, and here urge the same in a somewhat perfunctory manner. We do not understand them to seriously contend that upon principle or authority, such objections can be successfully maintained. On the other hand counsel for appellee have cited Kidd v. Bates, 120 Ala. 79, 23 South. 735, 41 L. R. A. 154, 74 Am. St. Rep. 17; In re Bergdorf's Will, 206 N. Y. 309, 99 N. E. 714; Clark v. Patterson, 214 Ill. 533, 73 N. E. 806, 105 Am. St. Rep. 127; Berry v. Hamilton, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515—all of which are well-considered cases, and point out that the desire of the testator is a controlling factor in determining the right to administer an estate, and that it is only statutory disqualifications which may operate to defeat the will of the testator, aside from the common-law doctrine which excludes idiots and lunatics.

It follows from all of the foregoing that the

judgment of the district court was correct, and should be affirmed; and it is so ordered.

RAYNOLDS, J., concurs.

ROBERTS, C. J. (concurring.) While agreeing that the judgment in this case on the merits should be affirmed, I am unable to give assent to the view of the law as expressed in the majority opinion. As I understand this opinion, it is to the effect that the residence necessary to qualify an executor is simply actual residence or presence within the state at the time application for appointment is made. If by actual residence it is meant to hold that the person must at the time of applying for letters be a bona fide resident of the state, I would give ready assent to that. But the majority opinion, as I read it, does not require actual, bona fide residence within the state, but simply physical presence of the applicant for letters at the time the application is made. I am forced to this conclusion, because the opinion states "actual residence and presence within the state" is all that is required, and an attempt is made to distinguish this case from the case of In re Petition Marion Mulford, 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986. I think all who read this opinion will come to the conclusion that it is meant to hold that residence as generally understood is not required of the applicant for letters testamentary under our statute. I do not believe there is any basis for the attempted distinction, for the statute of Illinois (section 66, Ill. Stat. Ann. 1913) provides "that no nonresident of this state shall be appointed or act as administrator or executor," which means substantially the same thing as our section 2223 in this regard. It is true they have no provision similar to our section 2243, to the effect that a person may become a resident of the state after the probate of a will in which he is named as executor, whereupon he is eligible for

appointment. But I cannot see how this provision can have the effect upon the other provision ascribed to it in the majority opinion. In the case of In re Mulford, 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986, Marion Mulford has been named as executor of the will of Harriet M. Richards. The testator was a resident of the county of Will in the state of Illinois. Mulford was a resident of Ohio. He testified that he was 71 years old, and had a wife and two daughters with whom he resided in Dayton, Ohio, when the said Harriet M. Richards died. That he lived with his family on homestead property owned by himself, and which he had not abandoned; that he had come to Illinois with the fixed purpose and intention of accepting the executorship of this estate and of remaining within the jurisdiction of the court until the estate could be administered upon in accordance with the will, and that he still retained that fixed purpose, whatever time might be required therefor. After reciting the above facts, the court said:

"Nevertheless, the appellant is a resident of the state of Ohio. Residence is lost by leaving the place where one has acquired a permanent home and removing to another place without a present intention of returning. 24 Am. & Eng. Ency. of Law (2d Ed.) 697. 'A temporary sojourn within a state for pleasure or business, accompanied by an intention to return to the state of one's former inhabitance, does not constitute residence.' Pells v. Snell, 130 Ill. 379.

"The court did not err in refusing to issue letters testamentary to the appellant."

In an earlier case (Child v. Gratiot, 41 Ill. 357), and before the enactment of the provision that no nonresident should be appointed or act as administrator or executor, the court held that a nonresident could not legally be appointed because of the provision of the statute which authorized the

removal of an executor who became a nonresident of the state.

Other states have statutes prohibiting the appointment of a nonresident. The majority opinion seems to attach importanc to the use of the word "bona fide" resident in the California statute. I attach no importance to this as I assume that when the word "resident" is used in a statute it necessarily means a bona fide resident.

Arkansas has a statute (section 14, Kirby & Cassell's Digest of the Statutes of Arkansas 1916) which, as our statute, uses the term "nonresident," and provides that a nonresident is not eligible for appointment. Likewise Missouri, section 10, R. S., 1919. Under this statute, in the case of Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113, the court held that a nonresident coming into the state and being appointed must come with a bona fide intention of becoming a resident of Missouri. Georgia has a similar statute, section 3941, Code 1914; likewise Montana, section 7436, Code 1907. The courts of all these states hold, so far as I am advised, that actual, bona fide residence within the state at the time of appointment is essential.

I cite these for the purpose of showing that the importance attached to the use of the term "bona fide" in the California statute is not justified. Decisions under these statutes will be found collected in the note to the case of In re Mulford, 1 L. R. A. (N. S.) 341. See In re Bailey, 31 Nev. 377, 103 Pac. 232, Ann. Cas. 1912A, 743.

In our statute relative to venue in civil actions it is provided that transitory actions shall be brought in the county where the plaintiff or defendant, or some one of them, in case there be more than one of either, resides. If this does not require bona fide

residence in the county by the plaintiff where he sues in such county, then it will be possible for the plaintiff to temporarily go to some other county in the state and there file the suit. To constitute residence, as I understand the term, there must be an actual home where the person intends to reside permanently, or for a definite or indefinite length of time, and residence depends upon fact and intention.

But, entertaining these views as I do, I am still of the opinion that the judgment in this case should be affirmed. For the court found upon conflicting evidence that Joseph R. Wilson, on the 12th day of October, 1918, which preceded his appointment, and ever since that date, has been an actual and bona fide resident of the city of Albuquerque, county of Bernalillo, and under this finding his appointment as executor was justified. The fact that he came to New Mexico for the purpose of qualifying as executor under the will in question is not material, if in fact he came here with the intention of making Albuquerque his home to the exclusion of all other places. As said by the court in the case of Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113:

> "The rule is well established in every jurisdiction that the motive or purpose of a change of domicile or residence is not material. The only question is whether the change of residence is made by the party with the bona fide intention of becoming a resident of another state."

Here Wilson testified that he had given up his home in Philadelphia and had come to Albuquerque with his wife and daughters with the intention of making Albuquerque his permanent home, that he had either sold or removed his furniture and effects to Albuquerque, and had permanently abandoned his home in Philadelphia. The court had the right to believe this evidence offered by Wilson. It is true that witnesses testified to conversations with Wilson prior to this time which indicated that at that time

Wilson contemplated making the change temporarily only, but it may be that thereafter he formed the fixed purpose and intention of permanently residing in Albuquerque. The evidence justified the finding. I do not attach any importance to the point made by appellants to the effect that the enumeration of certain disqualifications of persons from becoming executors of wills by section 2223, Code 1915, does not conclude the court from refusing letters testamentary upon grounds other than those named in the statute, such as bad character, insolvency, and antagonistic interest, as the court did not refuse the letters. A different question might be here if letters had been refused on some other than statutory grounds.

The only other point requiring consideration is the refusal of the court to admit in evidence a letter written by Wilson to the legatee under a will, but the statement as to the contents of the letter in the offer of evidence, I think, shows that no prejudice resulted by reason of the refusal. The offer was to show that the letter in question written by Wilson to Mrs. Pauchet since the commencement of the proceedings to be appointed executor, and during Wilson's sojourn in New Mexico, stated in substance that he was coming here—obliged to come here—solely for the purpose of protecting the interests of Mrs. Pauchet in this estate, and in connection with the properties of the estate. As I have attempted to show heretofore, the motive prompting his taking up his residence in New Mexico was wholly immaterial.

It is urged that the evidence in this case is of such a nature that it ought not to be held that there was substantial evidence offered to establish the bona fide residence in New Mexico of Joseph R. Wilson. I do not agree with this statement. The court had the

right to believe Wilson if it so elected.

I agree that the opinion heretofore filed on the motion was erroneous, and for that reason consent to its withdrawal.

For the reasons stated, I concur in the affirmance.

[No. 2502. Oct. 22, 1921.]

MOREHEAD v. ATCHISON, T. & S. F. RY. CO.

SYLLABUS BY THE COURT.

Where one approaching a railroad crossing in an automobile according to his own testimony stopped, looked, and listened at a distance of 57 feet from the track, and did not thereafter again stop, look, and listen, but drove upon the track, he is guilty of contributory negligence, and cannot recover for injury to himself or to his car occasioned by the collision between the train and his car upon the crossing.

Appeal from District Court, Chaves County; Brice, Judge.

Action by Jesse Morehead against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and the defendant appeals. Reversed, with instructions to enter judgment for the defendant.

G. S. Downer, W. C. Reid, and E. C. Iden, all of Albuquerque, for appellant.

Appellee was, as a matter of law, guilty of such contributory negligence as to bar his recovery in any amount. Toledo S. & W. R. Co. v. Gallagher, 109 Ill. App. 67; Mercer v. Walker, 58 Pac. 27, 9 Kan. App. 882, 60 Pac. 735, 61 Kan. 736; M. K. & T. Ry. Co. v. Duffey, 71 Pac. 261, 66 Kan. 735; St. Louis & S. Ry. Co. v. Simms, 92 S. W. 909, 116 Mo. App. 572; McAuliffe v. New York Central & H. R. R. Co., 73 N. E. 1126, 181 N. Y. 537; Penn Co. v. Alburn, 23 Ohio Circuit Court 130; Hess v. Williamsport &

M. B. R. Co., 37 Atl. 568, 181 Penn. St. 492; Haupp v. New York Central & H. R. R. Co., 42 N. Y. S. 477, 18 Miscel. Rep. 594, 45 N. Y. S. 666, 20 Miscel. Rep. 291; Chicago Great Western Ry. Co. v. Smith, 141 Fed. 930, 73 Circuit Court of Appeals 164; Burns v. Louisville & N. R. Co., 33 So. 891, 136 Ala. 522; St. Louis I. M. & S. Ry. Co. v. Johnson, 86 S. W. 282, 74 Ark. 372; Choctaw O. & G. R. Co. v. Baskins, 93 S. W. 757, 78 Ark. 355; Thornton v. Cleveland C. C. & St. L. Ry. Co., 31 N. E. 185, 131 Ind. 492; Malott v. Hawkins, 63 N. E. 308, 159 Ind. 127; Day v. Boston & M. R. R. Co., 52 Atl. 771, 96 Me. 207, 90 Am. St. Rep. 335; Houghton v. Chicago & G. T. Ry. Co., 58 N. W. 314, 99 Mich. 308; Sandberg v. St. Paul & D. R. Co., 83 N. W. 411, 80 Minn. 442; Winter v. N. Y. & L. R. R. Co., 50 Atl. 339, 66 N. J. L. 677; Candelaria v. A. T. & S. F. Ry. Co., 6 N. M. 274; R. R. Co. v. Houston, 95 U. S. 697.

W. E. Rogers, of El Paso, Tex., for appellee.

We have no complaint to make of the authorities cited by appellant, but we do complain of counsel's attempted application of the same.

OPINION OF THE COURT.

RAYNOLDS, J. This is an appeal from an action instituted by Jesse Morehead against the Atchison, Topeka & Santa Fe Railway Company to recover for personal injuries and damages to property which occurred in a collision between a train and an automobile on the public road crossing in the city of Roswell, N. M. In the lower court appellee, Morehead, recovered judgment for the sum of $466.50, from which judgment appellant appeals to this court.

As stated by appellant in his brief:

"There is but one assignment of error in this case, which is, in effect, that the evidence showed contributory negligence as a matter of law." "The question is simply whether or not

the Supreme Court, after reading the testimony contained in the transcript, considers the evidence upon which appellee must rely as sufficient under the rule often announced by this court that it will not disturb the findings of the lower court or the verdict of the jury when supported by substantial evidence, and, if the court then considers there is sufficient substantial evidence under its former rulings to support the verdict, whether granting that the appellee's story is true, the facts disclosed thereby do not constitute, as a matter of law contributory negligence barring recovery."

The appellee's story of the collision upon which he must recover, although contradicted in some particular by other witnesses, was substantially as follows: Appellee, with others, had attended an entertainment which broke up about midnight, when, with the others, he got into a Ford car owned by the appellee and went in search of a place in which to get a lunch. After going to several places which were closed, they went to the Santa Fe Restaurant, located on the south side of Fifth street and about 57 feet west of the railroad's main line of track where it crossed Fifth street. The railroad company's depot is on the opposite side of this street and in the neighborhood of 200 feet from the north edge thereof. When the parties in the automobile saw that the restaurant was closed, they started up again and started across the track to turn around. They were, according to appellee's testimony, at the restaurant probably half a minute. The appellee was driving. He stopped the car entirely and looked to see if the restaurant was closed, saw it was, and started on. He looked and listened for trains at the time he stopped, looked, and listened to see if there were any trains or any light. After starting up about 10 feet from the track, he changed from low to high gear. The first time he noticed the train he was upon the track and the train was about 5 feet from him. He did not look around from the time he first stopped, looked, and listened 57 feet away until he was hit by the train. When he stopped,

looked, and listened, he did not hear or see any train. There was no headlight according to his testimony, nor was any bell rung nor whistle blown. At the time he stopped in front of the restaurant and looked and listened, he looked and listened carefully, and thought he was safe. In reply to a question as to whether he looked up between the time he started from the restaurant and the time he approached the track, he said:

> "Well, I usually look right straight ahead you know when I am driving; after looking both ways and listening, I don't remember anything. I was looking straight ahead."

This is, in substance, the appellee's story, and, although it is contradicted on several points, and the evidence is conflicting, it must be assumed for the purposes of this case that the jury believed it and based their verdict in his favor upon this evidence.

If we make this assumption, in our opinion a case of contributory negligence is made out, and the appellant's motion for a directed verdict in its favor should have been granted by the trial court.

As shown by the above statement, according to appellee's own story, he stopped, looked, and listened, 57 feet away from the track which he was about to cross; he did not look again, but went upon the track where the collision occurred. The cases on similar facts are not numerous, but are uniform in holding that one must look from a point which will enable him to see, and that he must continue to look and listen until the point of danger is passed.

We do not find it necessary in this case to decide that, when the witness says he did look and did not see an object which in the nature of things he must have seen if he did look, on this question his testimony must be disregarded and cannot be credited; but we decide upon the proposition that, assuming

his story to be true and that he stopped, looked, and listened as he said he did, nevertheless he performed these acts at such a time and in such a position that his going upon the track immediately thereafter without further exercising his faculties of sight and hearing makes out a case of contributory negligence and prevents his recovery.

We quote from a few of the numerous authorities upon the principle herein involved.

"The law requires of one going into so dangerous a place the vigilant exercise of his faculties of sight and hearing at such short distance therefrom as will be effectual for his protection, and if this duty is neglected, and injury results, there can be no recovery, although the injury would not have occurred but for the negligence of others. Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403; Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542; Schofield v. Chicago, M. & St. P. R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Northern Pacific R. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; Chicago, etc., Ry. Co. v. Andrews, 64 C. C. A. 399, 130 Fed. 65; Shatto v. Erie R. R. Co., 59 C. C. A. 1, 121 Fed. 678; Ames v. Waterloo, etc., Co., 120 Iowa 640, 95 N. W. 161." Chicago Great Western Ry. Co. v. Smith, 141 Fed. 930, at page 931, 73 C. C. A. 164.

"The duty to look and listen requires the traveler to exercise care to select a position from which an effective observation can be made. The mere fact of looking and listening is not always a performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective." —and cases cited. Elliott on Railroads, vol. 3, par. 1166.

"The doctrine has been repeatedly stated by this court that a traveler approaching a railroad crossing must take notice of the fact that it is a place of danger, and must not only look and listen for the approach of trains before he goes upon the track, but must continue to look and listen until he has passed the point of danger. He must continue his vigilance until the danger is passed, and must look both ways up and down the track." Choctaw, O. & G. R. Co. v. Baskins, 78 Ark. 355, 358, 93 S. W. 757, 758, and cases cited.

"One need not be vigilant at extravagantly long range. This would be futile, and precaution might exhaust itself

before peril came. Nor does the law expect incessant observation, or exact the performance of the impossible feat of looking both ways at once. But it is plain that care, in order to be effective, must cover the whole field of danger. If risk is inherent in a continuing state of things, the duty to exercise reasonable care is to the same extent a continuing obligation." Winter v. New York, & L. B. R. Co., 66 N. J. Law 677, 50 Atl. 339.

See, also, Malott v. Hawkins, 159 Ind. 127, 63 N. E. 308.

As to what is contributory negligence see Candelaria v. A. T. & S. F. Ry. Co., 6 N. M. 266, at p. 274, 27 Pac. 497.

For the reason above stated, the motion of the appellant for a directed verdict in its favor should have been granted. As there is no error complained of in the admission or exclusion of evidence, and a new trial would present the same legal proposition upon the testimony, the case is reversed, with an order to the trial court to enter judgment for the appellant; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2518. Oct. 22, 1921.]

MORROW v. MARTINEZ.

SYLLABUS BY THE COURT.

It is the duty of the trial court, in a case tried to it, to make specific findings of fact and conclusions of law sufficiently specific to enable the appellate court to review the decision upon the grounds upon which it was made below.

Roberts, C. J., dissenting.

Appeal from District Court, Colfax County; Lieb, Judge.

Action by John Morrow against Severino Martinez. Judgment for plaintiff, and the defendant

appeals. Reversed and remanded, with instructions to set aside the judgment and upon due notice to make findings of fact and conclusions of law in accordance with Code 1915, § 4197, and to enter judgment thereon.

Bickley & Kiker and A. C. Voorhees, all of Raton, for appellant.

Morrow, Merriau & Sadler, of Raton, for appellee.

OPINION OF THE COURT.

PARKER, J. This is an appeal from the district court of Colfax county from a judgment quieting the title of the appellee to a portion of the Mora Grant. The appellee, plaintiff below, alleged that he was the owner in fee simple of the premises in question, and pleaded and relied upon three distinct sources of title, viz.: (1) Tax proceedings; (2) court proceedings consummated in a special master's deed; and (3) adverse possession under color of title. The appellant, defendant below, put in issue the allegations of the complaint by his answer. He also filed a cross-complaint, but, as it was afterwards voluntarily dismissed, it need not be considered. At the close of appellee's case the appellant demurred to the evidence and moved to dismiss the compaint. The demurrer to the evidence and motion to dismiss were overruled by the court, and, the appellant electing to stand upon his demurrer and motion, judgment was entered for the appellee.

Prior to entry of judgment appellant requested the court to make findings of fact and conclusions of law as a basis for the proposed judgment. This was refused by the court, and no findings of any character were made, except the general one that the appellee was the owner of the premises in fee simple.

The appellant complains of the refusal of the trial court to make findings of fact and conclusions of law

as requested. Appellee seeks to justify the refusal of the court to make such findings and conclusions upon two considerations, viz.: (1) That in cases where a demurrer to the evidence is interposed, the demurrer admits the truth of the facts shown by the evidence for the opposing party, and that therefore there is no issue of fact before the court; and (2) that, where no prejudice results to the party requesting findings, no complaint can be made of the refusal. Authorities are cited in the brief from some of the other jurisdictions in support of these propositions. We do not deem these authorities controlling, however, either upon principle or as authority. We have in this jurisdiction a statute governing this proposition, which is section 4197, Code 1915, and which among other things provides:

"Upon the trial of any question of fact by the court, its decision must be given in writing and filed with the clerk in the cause, and in such decision the court shall find the facts and give its conclusions of law pertinent to the case, which must be stated separately, but the findings of facts and the giving of conclusions of law may be waived by the several parties to the issue, by suffering default or by failing to appear at the trial, or by consent in writing, or by oral consent in open court, entered in the record."

It is apparent that this statute imposes a duty upon the court without request to make findings of fact and conclusions of law in every case tried by the court involving questions of fact. It is a right which the successful party has to have the court make such a record as will support the judgment, and it is a right the unsuccessful party has to have the court make such a record as will enable him to review the action if he so elects. This section of the statute was carefully considered in Luna v. Cerrillos Coal Railroad Company, 16 N. M. 71, 113 Pac. 831, and it was there held that this section required the court to make findings of the essential or determining facts on which its conclusion in the case was reached specific enough to enable this court to re-

view its decision on the same grounds as those on which it was made. The history of the section and the reasons for its adoption are therein pointed out. It is true that in that case there was no demurrer to the evidence and motion to dismiss the declaration, and there were issues of fact before the court supported by proof on both sides, but we fail to appreciate any distinction between that case and the case under consideration affecting this proposition. Although the demurrer to the evidence may for some purposes be held to amount to an admission of the facts which it tends to establish, that admission goes only to the extent of furnishing a rule for determining what the facts in the case are. The court under such circumstances may well assume that the facts shown are true. But this principle does not reach the question at hand. The question is, What are the facts, and what legal conclusions should be drawn from them? To have the court show by the record these matters is a statutory right in all cases tried to the court, and the district court must, when properly requested, comply with the provisions of the law.

For the reasons stated the judgment of the court will be reversed, and the cause remanded, with instructions to set aside the judgment, and upon due notice to the parties to make findings of fact and conclusions of law in accordance with section 4197, Code 1915, and to enter judgment thereon; and it is so ordered.

RAYNOLDS, J., concurs.

ROBERTS, C. J. (dissenting). The only point decided by the court is upon the question of practice, and the conclusion is that the case should be reversed and remanded to the district court in order that findings of fact may be made. No attempt is made by the court to pass upon the many other ques-

tions presented by appellant's brief, and I presume that, in the natural sequence of events when the findings are made by the court and judgment entered upon such findings, the case will then come again to this court for a review of the other questions already briefed and presented.

The effect of the opinion in this case is to establish the practice in this jurisdiction that in every case in which evidence is introduced the court must make findings of fact, although under the evidence in the case no question of fact is presented for determination. The statute provides (section 4197, Code 1915):

"Upon the trial of any question of fact by the court, its decision must be given in writing and filed with the clerk in the cause, and in such decision the court shall find the facts and conclusions of law pertinent to the case. * *"

The error in my judgment in the majority opinion is in the assumption that, when the court passes upon a demurrer to the evidence, it thereby is trying a question of fact. For if such be the effect of the action of the court on the demurrer, such action in a law case would be a clear invasion of the province of the jury, because by both the Constitution and statute the jury is made the exclusive trier of questions of fact. The only authority cited for the conclusion is the case of Luna v. Cerrillos R. R. Co., 16 N. M. 71, 113 Pac. 831, but that case is clearly not in point, for there no demurrer to the evidence was interposed, and in deciding the case the court was passing upon a question of fact, where under the statute his mandatory duty was to make findings of fact if so requested. There is a wide distinction indeed between the duty and province of the court in passing upon a demurrer to the evidence and in deciding a disputed question of fact upon a conflict in the evidence. In passing upon a demurrer the court does not weigh the evidence. A demurrer to

the evidence admits all facts which the evidence tends to prove, or of which there is any evidence, however slight, and all inferences which can be logically and reasonably drawn from the evidence, and no regard is to be paid by the court to the evidence in favor of the demurrant. That is to say, if there is conflict in the evidence, the conflict is to be resolved in favor of the party against whom the demurrer is interposed, and no heed is to be given by the court to any evidence favorable to the party interposing the demurrer. By interposing a demurrer the party so doing withdraws from the consideration of the court all evidence offered by him, and admits as true whatever facts the evidence adduced by the opposite party tends to prove, and all reasonable inferences which may be drawn therefrom, and asks for a decision of the law upon such admitted facts. This statement of the effect of a demurrer to the evidence is amply sustained by the authorities, and I know of no authority to the contrary. I cite in support of it Lake Shore & Michigan Southern Railway Co. v. Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319, and authorities there collected; Pawling v. U. S., 4 Cranch. (U. S.) 219, 2 L. Ed. 601, 2 Tidd's Prac. 865; Copeland v. New England Ins. Co., 22 Pick. (Mass.) 135. See, further, Century Digest, vol. 46, under the subject of Trial, Key-Nos. 355, 356, where many authorities will be cited, all to the effect that in passing upon the demurrer the court does not weigh the facts, but simply decides as a matter of law whether the evidence, assuming it to be true, warrants a judgment or verdict for the plaintiff, or the party against whom the demurrer is interposed. This being true, in passing upon the demurrer the court is not passing upon a question of fact, but of law. It is like the court, for example, passing upon a demurrer to the complaint. All the facts alleged in the complaint are to be taken as true, and so doing, the court de-

termines as a matter of law whether the facts stated would entitle the plaintiff to recover. The majority opinion says that—

"Although the demurrer to the evidence may for some purposes be held to amount to an admission of the facts which it tends to establish, that admission goes only to the extent of furnishing a rule for determining what the facts in the case are. The court under such circumstances may well assume that the facts shown are true, but this principle does not reach the question at hand. The question is, what are the facts, and what legal conclusion should be drawn from them? To have the court show by the record these matters is a statutory right in all cases tried to the court, and the district court must, when properly requested, comply with the provisions of the law."

I think the majority opinion by this quoted statement contemplates that, after ruling on the demurrer and deciding it either for or against the demurrant, the court would thereupon be required to determine as an original question the weight to be attached to the evidence in the case. In other words, assuming that there was some conflict in the evidence and the defendant demurs thereto, which demurrer is overruled upon the assumption by the court, and the necessary admission by the defendant, that the evidence favorable to the plaintiff was true, as well as all reasonable inferences to be drawn therefrom, that the court must then weigh the evidence and give judgment for or against the plaintiff, not upon the demurrer, but upon the weight he gives to the evidence for and against the plaintiff. This appeals to me as a novel proposition indeed. If such be the rule, then the interposition of a demurrer to the evidence is a useless formality, and settles and determines nothing. For after ruling upon it, the court and the parties are in exactly the same situation as though the case was submitted to the court upon the evidence for determination. In the case of Lake Shore & Michigan So. Ry. Co. v.

Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319, the court said:

"In passing upon a demurrer to evidence, the court is called upon to rule upon a question of law, and hence there must be no conflict as to the evidence. If a party seeks to make available a conflict in the evidence as to any fact, he must go to the jury or to the court sitting as a trier of the facts. If he resorts to a demurrer to the evidence, he thereby withdraws all evidence in conflict with the evidence which tends to establish a fact in favor of the other party."

I concede that under the modern practice a demurrant may demur to the evidence and invoke the ruling of the court, and, upon such ruling being adverse to him, waive the demurrer and introduce evidence. But such is not the case here, as the parties elected to stand upon the demurrer, the effect of which was to invoke the judgment of the court on the admitted facts, and thus secure the right to a review in this court upon the propriety of the action of the court in overruling the demurrer. If it would be incumbent upon the court to find the facts in writing after overruling the demurrer, the same rule would necessarily require a finding of facts where the demurrer was sustained and what, I ask, would be the result if the facts found should disagree with the evidence, the truth of which was necessarily admitted by the defendant? In case a stipulation of facts is filed in a case and a finding is made, which all the authorities hold not required, and the finding conflicts with the stipulated facts, the rule is that the stipulation controls. Seward v. Rheiner, 2 Kan. App. 95, 43 Pac. 423.

It appears to me that we would have an anomalous situation presented, in an action at law by a jury, where upon the conclusion of the plaintiff's case the defendant should interpose a demurrer to the plaintiff's evidence. The court for example sustains the demurrer. Could it be contended that nevertheless there would be an issue of fact in the case for the

jury to pass upon? If not, would there be an issue of fact in the case for the jury to determine if the court should overrule the demurrer and the defendant should elect to stand upon the ruling? Would it then become essential for the court to submit the case to the jury to pass upon the facts, and what would be the result if the jury should disagree with the court, and hold that the evidence, if true, did not warrant a recovery for the plaintiff? Many cases might be cited to the effect that findings are unnecessary upon a judgment of dismissal or nonsuit, or where the parties stipulate as to the facts in the case, or where a case is submitted upon an agreed statement of facts. The cases may be found in notes to 8 Standard Ency. of Proc. pp. 998, 999, and these cases were decided under statutes in substance and effect like our section 4197. As in my judgment the court in passing upon the demurrer and later entering judgment on its ruling thereon was not trying a question of fact, but one of law, for which reason it was not required by the statute in question to make findings of fact, I dissent from the majority opinion.

[No. 2505. Oct. 31, 1921.]

FAIRCHILD v. CLOUDCROFT LUMBER & LAND CO. et al.

SYLLABUS BY THE COURT.

In the absence of the evidence, the findings of the trial court will be assumed to be correct. First National Bank of Albuquerque v. Staley, 26 N. M. 650, 195 Pac. 514, followed.

Appeal from District Court, Otero County; Ed Mechem, Judge.

Suit by S. W. Fairchild against the Cloudcroft Lumber & Land Company and others. Judgment

for the defendants, and the plaintiff appeals. Affirmed.

E. L. Medler, of El Paso, Tex., for appellant.

Winter, McBroom & Scott, of El Paso, Tex., and E. R. Wright, of Santa Fe, for appellees.

OPINION OF THE COURT.

RAYNOLDS, J. This is a suit brought for an injunction and damages by the appellant, plaintiff below, against the appellees, defendants below, praying for a temporary injunction restraining the defendants from operating and conducting a sawmill on plaintiff's lands, and for maintaining nuisances about the same, blocking the roads, destroying the fences, etc. The complaint prayed for an accounting as to plaintiff's damages and a permanent injunction.

An order to show cause why the temporary injunction should not issue as prayed for was entered, and upon the rule to show cause the defendants filed a verified answer. To certain parts of this answer the plaintiff interposed a demurrer, which was submitted to the court at the same time a hearing was had upon the order to show cause why temporary injunction should not issue. Upon this hearing the plaintiff submitted in support of his application for temporary injunction affidavits, and the defendants submitted documentary evidence and oral proof, which was not reduced to writing and was not made a part of the record below, nor on appeal.

The court after submission of the matter to him took it under advisement, and subsequently entered a judgment denying the plaintiff's right to relief. In this judgment the court found, first, that the defendants had under the contract involved in the controversy the right to erect and maintain sawmills and to use the mill sites for milling purposes; second, to log lumber from adjacent lands, now owned by

the defendants, but not owned by them, or either of them, on February 4, 1918. From these findings the court concluded as follows:

"And it is further ordered and adjudged that said motion and application of the plaintiff for a temporary injunction be, and the same hereby, is denied; and under the conclusion of the court upon the findings so made, the plaintiff as a matter of law upon final hearing hereof would not be entitled to an injunction, the court upon the pleadings adjudges that the plaintiff's complaint is without equity, and defendants should have final judgment upon the pleadings."

From this judgment an appeal is prosecuted to this court.

The controversy arose out of the construction of a warranty deed made by the defendant Cloudcroft Lumber & Land Company to the plaintiff Fairchild, in which the grantor reserved all oil and mineral rights and all merchantable timber upon said lands, together with the rights of ingress and egress to and from the lands, for the purpose of harvesting said timber * * * and exclusive rights of way for tramroads, log slides, skidder sets, mill sites, camp privileges, etc. It was to restrain the defendants from operating a sawmill upon part of the land so granted that this suit was brought. The appellant assigns as error the action of the court in denying the equitable relief sought by him, and holding, as in the judgment heretofore set out, that his complaint was without equity. This is the principal assignment upon which appellant relies.

At the outset we are confronted with the proposition as shown by the above statement of facts that this is not a case in which judgment is granted to the defendant upon the pleadings, although the language of the trial court above quoted would seem to justify this view. The case as presented here is one which has been tried upon the merits, and after the submission of affidavits and oral testimony, the

court has made findings of fact and conclusions of law. We are asked to review the conclusions of the court based on the findings of fact, but we have not before us the evidence submitted to the court on which these findings were made. It has been often held that in the absence of the evidence the findings of the trial court will be assumed to be correct (First National Bank v. Staley, 26 N. M. 650, 195 Pac. 514), and that findings are conclusive if the record does not contain a transcript of the evidence. Gradi v. Bachechi, 24 N. M. 100, 172 Pac. 188; Jahren v. Butler, 20 N. M. 119, at 127, 147 Pac. 280; U. S. v. Lesnet, 9 N. M. 271, at 281, 50 Pac. 321; Montoya v. Unknown Heirs, 16 N. M. 349, at 376, 120 Pac. 676.

It may be that the complaint did state a cause of action, and, standing alone, contained grounds for equitable relief, but that is not the proposition before us. On trial upon the merits upon evidence submitted, as is shown by the record, the trial judge decided against appellant's contention, and under the decisions above cited and the general presumption in favor of judgments of the courts below, we are bound to assume that the decision was correct, in the absence of evidence in the record before us to the contrary.

For the reasons above stated, the judgment below will be affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2580. Nov. 31, 1921.]

SEIS v. CORN.

SYLLABUS BY THE COURT.

1. Instrument providing for sale of "what ewe lambs I decide to sell from 6,800 ewes" constitutes a valid contract, and sale of such ewes to person other than purchaser named

in contract constitutes a breach for which damages may be recovered. P. 366

2. Findings supported by substantial evidence will not be disturbed on appeal. P. 367

Appeal from District Court, Bernalillo County; Holloman, Judge.

Action by A. G. Seis against E. S. Corn. Judgment for plaintiff, and defendant appeals. Affirmed.

George B. Barber, of Carrizozo, for appellant.

Thos. K. D. Maddison, of Albuquerque, for appellee.

OPINION OF THE COURT.

DAVIS, J. This is an action upon a contract by which E. S. Corn, appellant, agreed to sell to Culp Bros. Sheep Company certain lambs. The company assigned the contract to A. G. Seis, plaintiff below, and appellee here. The portion of the contract in question is as follows:

"This is to certify that I have this day sold to Culp Bros. Sheep Company, of Denver, Colo., not less than———head of unshorn lambs out of my flocks, all the wether lambs, and what ewe lambs I decide to sell from 6,800 ewes."

The wether lambs were delivered as called for in the contract. Corn sold about 700 ewe lambs to another party and refused to deliver any under the contract quoted above. This action was thereupon commenced for this breach of the contract. The district court gave judgment for plaintiff. No question is raised as to the amount of the damages; appellant taking the position that the contract was not enforceable and no damages collectible.

[1] The first question on this appeal is as to the meaning and effect of the agreement. Counsel for appellant contends that there was no binding contract covering the ewe lambs, but that, as expressed

in his brief, if the defendant decided to sell his ewe lambs to the Culp Bros. Sheep Company, he was at liberty to do so, and, if he decided not to sell to them, then there was no liability on his part. But this is not the language of the contract. Appellant agreed to sell to the company all the ewe lanbs that he decided to dispose of. He was at liberty to keep all or any part of these lambs, following the custom among sheepmen of retaining such lambs for the maintenance of their flocks by the replacement of old ewes. But, if he did dispose of them, he was obliged to sell to Culp Bros., or their assignee.

This is the only reasonable construction of the agreement. To say that he was at liberty to sell to whomsoever he pleased is to say that no contractual relation existed, and that the language regarding these lambs was useless.

The fact that the number of lambs was not fixed by the contract, or that the sale in this respect was conditional upon the decision to be made by the defendant as to whether he would sell or keep the ewe lambs, makes no difference. Contracts the performance of which may be determined by the happening of a future event are nevertheless enforceable, and certainty of amount at the time the contract is made is not necessary. Similar contracts have come before the courts and have been declared valid, as in the following cases: Parker v. Pettit, 43 N. J. Law, 512; Bergess Sulphite Fiber Co. v. Broomfield, 180 Mass. 283, 62 N. E. 367; McCall Co. v. Icks, 107 Wis. 232, 83 N. W. 300; Robert E. Lee Co. v. Omaha, etc., Co., 16 Colo. 179, 26 Pac. 320.

[2] Appellant also contends that the contract in question was obtained by fraud, and that the wether lambs were received in full satisfaction of the contract, and the right to the ewe lambs was then waived. Several other propositions are raised by

the appellant, but all these questions are dependent upon the facts, and, the trial court having resolved these facts against the appellant's contentions, and there being substantial evidence to support the findings, the same will not be disturbed on appeal, a doctrine so frequently decided here that citation of authority therefor is unnecessary.

For the reasons stated, the judgment of the trial court is affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

[No. 2545. Nov. 4, 1921.]

PRENTICE et al. v. CAIN et al.

SYLLABUS BY THE COURT.

A valid written contract merges all prior and contemporaneous oral negotiations concerning the subject-matter embraced within the terms of the writing, and parol evidence cannot be received to contradict, vary, add to, or subtract from the terms thereof.

Appeal from District Court, Quay County; Leahy, Judge.

Action by R. A. Prentice and another against C. W. Cain and another. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

Ed. F. Saxon, of Tucumcari, and Veale & Lumpkin, of Amarillo, Tex., for appellants.

R. A. Prentice, of Tucumcari, for appellees.

OPINION OF THE COURT.

DAVIS, J. Plaintiffs, appellees here, brought this action to recover for breach of a contract relative to the sale of automobiles. Various grounds for damages were alleged, but as recovery was upon only one, it is unnecessary to state the others. The the-

ory upon which recovery was had was that the contract gave appellees an exclusive right to sell Oakland automobiles within a stated district; that three of these automobiles had been sold within that district by other parties, and that therefore plaintiffs were entitled to damages. The district court gave judgment accordingly. The controlling question is whether the rights of plaintiffs were exclusive.

There was a written contract between appellees and the Vester Automobile Company, one of the appellants here. The company agreed to sell the automobiles at stated prices and to deliver them at agreed times. Various other details are set out. The contract provided that there were no verbal agreements affecting it, and that no alterations or variations in its terms should be binding upon the company unless made in writing and signed by one of its officers. Nowhere in it was there a suggestion that appellees should have exclusive right to sell the automobiles within any locality, and in fact there was no territorial limitation upon their right to sell cars purchased. To the contrary, the written contract expressly stated that no exclusive sale was given on cars or parts.

Appellees did not claim in the court below, nor do they here, that they had any exclusive rights under this contract. They base their claim upon an oral understanding with the appellant C. W. Cain, who was acting vice president of the company, by which they say it was agreed that they should have the exclusive right to sell within specified territory.

The trial court found that the written contract was entered into, but that "at the time and place of the making of said contract" a further and additional agreement was made by which certain territory "should be by defendants assigned and set over

unto plaintiffs for the exclusive right to sell Oakland automobiles therein for and during the life of said contract." It found that three Oakland automobiles were sold within the territory by parties other than plaintiffs, fixed the damages, and gave judgment.

The additional agreement referred to was a verbal one, but in support of its findings the trial court referred to certain correspondence between the parties.

On November 13, 1917, after the cancellation of the contract, Prentice wrote the company a letter in which he said:

"Am also informed that the subagent at Las Vegas sold to W. E. Lang, of Cuervo, an Oakland car last week. This is in our territory, and we should have the commission on this car.

"Would be pleased to have you take the matter up with the Albuquerque house and arrange for a settlement of this commission."

To this the company replied on November 17 as follows:

"In regard to sale at Las Vegas sold in your territory, wish to say that Las Vegas is under the Denver distributors and if you will give us the motor car number of the machine we will take it up with them immediately, and try to secure a commission for you. Although we will not obligate ourselves to see that such commission is paid, unless the Denver distributors pay us."

We do not think this correspondence proves the contention of appellees or sustains the finding of the trial court.

The facts, therefore, are that plaintiffs made a written contract, containing no provision as to exclusive rights, and, indeed, expressly stating that the rights were not exclusive. They attempt to prove that this contract does not express the true agreement, since it was verbally agreed and understood that their rights should be exclusive in cer-

tain territory. This they may not do, whether the parol understanding was prior to or contemporaneous with the written instrument. Such parol matters are merged in the writing. Locke v. Murdoch, 20 N. M. 522 151 Pac. 298, L. R. A. 1917B, 267; Baca v. Fleming, 25 N. M. 643, 187 Pac. 277.

So far as concerns appellant C. W. Cain, the judgment is clearly erroneous on other grounds. The negotiations with him were entirely in his capacity as vice president of the company, and were so understood by every one. He did not sign the written contract, and was not a party to it.

The case is reversed and remanded for further proceedings in accordance with this opinion; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

[No. 2568. Nov. 9, 1921.]

OPTIC PUB. CO. v. BOARD OF COM'RS OF SAN MIGUEL COUNTY.

SYLLABUS BY THE COURT.

1. Chapter 108, Laws 1909, does not permit the rendition of a judgment against a county for current expenses, where, as here, the complaint shows on its face that the claim on which the judgment is sought has been allowed by the county commissioners, and payment denied or refused because there are no funds for the payment of such claim. P. 373

2. Chapter 108, Laws 1909, does not repeal the Bateman Act (Code 1915, §§ 1227 to 1233, inclusive). James v. County Commissioners, 24 N. M. 509, 174 Pac. 1001, followed. P. 373

Appeal from District Court, San Miguel County; Leahy, Judge.

Action by the Optic Publishing Company against the Board of County Commissioners of the County

of San Miguel. Judgment for plaintiff, and defendant appeals. Reversed, with instructions to set aside the judgment.

C. W. G. Ward, of Las Vegas, for appellant.

W. J. Lucas, of East Las Vegas, for appellee.

OPINION OF THE COURT.

RAYNOLDS, C. J. This is an appeal by the county of San Miguel and board of county commissioners of said county from a judgment against them in favor of the Optic Publishing Company for the sum of $2,343.35, which judgment was rendered by the consent of the assistant district attorney and which, upon motion by the district attorney representing the appellant, the court refused to set aside. The judgment was founded upon a claim for work done and supplies furnished by the appellee for the appellant. A verified account of the claim was presented to the board of county commissioners and allowed by it on the 8th day of November, 1920, but the account was not paid for the reason that there were no funds out of which it could be paid. Subsequently suit was brought upon this claim. No process was served, and there is no record that the board of county commissioners consented to the waiver of such process, nor the action of the assistant district attorney in entering his appearance and consent to judgment for the full amount of the claim. The judgment was rendered on the 17th of November, 1920. On November 26, 1920, a motion to set it aside was filed by the district attorney on the ground that the assistant district attorney was without power to consent to such judgment and to the relief granted therein under a recent decision of the supreme court, and further that said assistant district attorney acted under a mistake. This motion was denied.

The appellant seeks a reversal of the ac-

tion of the lower court on the ground that the judgment should have been set aside as it was null and void, and assigns ten errors which may be grouped in the following propositions: (1) That the assistant district attorney was without power or authority to consent to a judgment being given, or to waive the service of process, and that the court was without jurisdiction to render judgment upon such pretended waiver; (2) because the complaint did not state facts sufficient to constitute a cause of action, in that the indebtedness sued on was illegal and void in that the claim was presented during the year 1920, and no cause of action arose until December 31st of that year, because only at that time and subsequent thereto could the current bills for 1920 be paid by the funds of that year; in other words, that the claim upon which judgment was sought was prematurely presented, and no cause of action arose until December 31, 1920; (3) that the court erred in refusing to set aside the judgment for the foregoing reasons.

The motion to set aside the judgment was in the nature of a petition, and was not supported by affidavits, nor verified by the district attorney. It is contended by the appellee it was properly denied for this reason.

[1-2] This case involves the construction of the Bateman Act, found in Code 1915, §§ 1227 to 1233, inclusive, which law is to the general effect that the expenses of a county cannot exceed the current funds of the year for which they are contracted, but that, if they are in excess of the funds for that year, they are to be paid pro rata.

The present case, in our opinion, is controlled by a decision of this court, namely, James v. Board of Commissioners of Socorro County, 24 N. M. 509, 174 Pac. 1001, where it was sought to put into judgment a claim against Socorro county for current

expenses. The answer in that case denied the liability of the county and the allegations of the complaint to the effect that the county had any funds for payment of the plaintiff's claim, and set up, among other things, that the plaintiff was only entitled to his pro rata share of the funds. A demurrer to this answer was filed on the ground that the allegations set up in the answer did not render such indebtedness void, nor in any manner preclude the plaintiff from obtaining judgment against the defendant as prayed for in his complaint. This demurrer was overruled. On appeal this court affirmed the action of the lower court in overruling the demurrer and holding that Laws of 1909, c. 108, did not authorize the rendition of a judgment against a county for current expenses, nor operate as a repeal of the Bateman Act.

In the present case the complaint shows upon its face it was for current expenses of the year 1920, and it alleges the claim was duly allowed by the defendant board of county commissioners of the county of San Miguel on the 8th day of November, 1920, but was not paid for the reason that there were no funds with which the same could be paid.

The appellant by one of his assignments of error attacks the judgment on the jurisdictional ground that the complaint does not state facts sufficient to constitute a cause of action. As has been often decided, the jurisdiction of the court may be challenged at any state of the proceedings. See Michael v. Bush, 6 N. M. 612, 195 Pac. 904; Baca v. Perea, 25 N. M. 442, 184 Pac. 482; Goode et al. v. Loan Co., 16 N. M. 461, 117 Pac. 856. Under James v. County Commissioners, 24 N. M. 509, 174 Pac. 1001, we consider the assignment of error well taken; that is, that the complaint did not state facts sufficient to constitute a cause of action, in that it shows on its face that the claim on which the judgment is sought

was for current expenses, had been allowed by the board of county commissioners, and payment thereof refused for lack of funds with which to pay it. Under such allegations the case of James v. County Commissioners, supra, applies, no cause of action is stated. The judgment therefore should have been set aside.

For the reasons above stated, the cause is reversed, with instructions to set aside the judgment; and it is so ordered.

PARKER, J., concurs.

DAVIS, J., did not participate in this decision.

[No. 2576. Nov. 9, 1921.]

CHISHOLM et al. v. BUJAC.

SYLLABUS BY THE COURT.

1. Tax sales made under the provisions of chapter 22 of the Laws of 1899 may be attacked only on the ground that the land was not subject to taxation or that the taxes had been paid. P. 376

2. Alhough chapter 22 of the Laws of 1899 was repealed by chapter 84 of the Laws of 1913, the curative provisions of the former act continue in effect as to sales made under it. P. 377

Appeal from District Court, Eddy County; Brice, Judge.

Suit by W. H. Chisholm and others against E. P. Bujac. Decree for defendant, and plaintiffs appeal. Affirmed.

J. B. Atkenson, of Artesia, for appellants.

E. P. Bujac and J. M. Dillard, both of Carlsbad, for appellee.

OPINION OF THE COURT.

DAVIS, J. This is a suit to quiet title to certain land in Eddy county. The complaint is in the usual form, alleging title and possession. The defendant

answered by denying the title of plaintiffs, and, by way of cross-complaint, set up ownership in himself, and asked that his title be quieted as against the plaintiffs.

On the trial of the case, plaintiffs proved title to the property under a regular chain of conveyances, except for an unredeemed sale for taxes. The defendant claimed under the tax sale. The sole question for determination here is, therefore, as to the validity of the tax sale. The district court held the tax sale to be valid and entered a decree quieting title in the defendant.

The land in question was assessed for taxes for the year 1906 in the name of "unknown owners." The taxes not having been paid, due publication of notice was made, and it was sold to Eddy county, March 2, 1908. A certificate of sale to the county was issued on the same day, and was recorded in the tax sale records of the county on May 12, 1909. A duplicate certificate was assigned to the defendant, appellee here, July 1, 1919, and a tax deed was issued to him April 21, 1920.

Appellants attack the tax sale upon various grounds, particularly because of the failure of the treasurer to keep a book of sales and his failure to make entry, "Sold to the county," on the tax rolls opposite the unpaid tax. Appellants also contend that the order levying the tax was not entered on the records of the county commissioners, and that the seal required by statute was missing from the warrant for the collection of the taxes issued to the treasurer. All these matters are irregularities not affecting the jurisdiction to make the sale.

[1] The sale in question was made under the provisions of chapter 22 of the Laws of 1899 then in force. Section 25 of that act provided that no sale made under its provisions could be invalidated by any proceedings except upon the ground that the

taxes, penalties, interests and costs had been paid before the sale or that the property was not subject to taxation. There is no suggestion in this case that the taxes had been paid or that the property was not subject to tax. Under the letter of this statute, the objections made here cannot be considered. Such was the opinion of the district court. This section was construed and its provisions held binding in Straus v. Foxworth, 16 N. M. 442, 117 Pac. 831; Id., 231 U. S. 162, 34 Sup. 42, 58 L. Ed. 168; and again in Maxwell v. Page, 23 N. M. 356, 168 Pac. 492, 5 A. L. R. 155. It is unnecessary to repeat or amplify the reasoning in those opinions.

[2] It is true that all of chapter 22 of the 1899 laws was repealed in 1913 by chapter 84 of the acts of that year. It is also true that at the time of the repeal the certificate of sale was still held by Eddy county, so that it was not protected by the constitutional guaranty against the impairment by the state of the obligation of contracts or the affecting of vested rights, as would have been the case if it had been held by an individual. In Pace v. Wight, 25 N. M. 276, 181 Pac. 430, this court considered the effect of the repeal of this law. The sale involved in that case had been made under the 1899 law, which allowed a definite period of redemption, and the certificate was still owned by the county at the time of the enactment of the 1913 law, which repealed the 1899 law and allowed a different period of redemption. The question there was as to which redemption period was applicable. The 1913 law was general in its terms, and on its face was applicable to all sales, whether theretofore or thereafter made. There being no constitutional objection so far as county property was concerned, it was held that the later law must control. Such was the plain legislative intent on the face of the enactment.

A different situation arises here. We are not

dealing with two conflicting laws. We are considering a sale made in 1908, and the question is whether or not it was valid when made, and under the law then in force, not whether it would be valid if made in the same way now or under the Law of 1913. There must be but one answer. The law then in force provided that various acts should be done in connection with such sale, but likewise said, in effect and with certain exceptions, that their performance was not essential and their omission should not affect its validity. The attacks made on the tax sale now before us are all because of nonperformance of these matters which the law declared unessential. The sale was therefore good when made. The subsequent repeal of the 1899 law did not invalidate it.

In Harris v. Friend, 24 N. M. 627, 175 Pac. 722, a somewhat similar question was presented. There a tax deed had been issued while section 4101, C. L. 1897, was in force. That section provided that the tax deed should be prima facie evidence of the regularity of the proceedings upon which it was based. This section was repealed in 1915 (Code 1915, p. 1665), but with a savings clause providing that it should remain in force as to contracts and events already affected. In discussing the result of this repeal this court said:

"Under the statute in force at the time of the purchase of the tax certificate in question, the purchaser was entitled, at the expiration of three years from his purchase, to a tax deed, the property not being redeemed, which was made prima facie evidence of the regularity of the prior proceedings and of the fact that the tax on the property had not been paid. This, it is true, as we have stated, was but a rule of evidence, but it was of material advantage to the tax purchaser, and without the statute the purchase might not have been made. The statute being in force at the time of the purchase, while not a right, and relating only to the remedy, did apply to the purchase. In other words, it was a remedy or a rule of evidence applying to the right which he had initiated, and the Legislature, in adopting the savings clause, said that the statute should remain in force so far as it applied to a contract or event already affected by it."

This language is of value in this case as indicating the importance of such statutes to the purchaser at tax sales, and under the 1899 law counties were expressly declared to be purchasers. The section of that law here under consideration entered into, qualified, and became a part of the sale and purchase of the land. And that section, differing from section 4101, above referred to, was more than a rule of evidence. It was a legislative declaration as to the effect of such a sale, the character of the right obtained under it, and the elements necessary to its validity.

The question here is not one of constitutional law, but of legislative intent. Irrespective of the power of the state by subsequent legislation to impair or invalidate sales of property for taxes, certificates for which are still held by the county, an intention to do so is not shown by the mere repeal of the law under which the sale was made.

In Pace v. Wight, supra, this court was dealing with acts to be performed after the passage of the 1913 law and the express granting of a new redemption period. Here we are dealing with a closed transaction, a sale completed long before the passage of the 1913 law, and we are of the opinion that it must be given the effect to which it was entitled under the law which authorized it, there being no later act by which it is modified.

The opinion of this court in Cooper v. Hills, 23 N. M. 696, 171 Pac. 504, is not in conflict with the views here expressed. The sale there in question was not made until after the passage of the 1913 law, and was therefore governed by its provisions only.

The district court was correct in holding that the irregularities claimed by appellants were not suf-

ficient to invalidate the tax sale under the provisions of this statute, and its judgment should be affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

[No. 2581. Nov. 9, 1921.]

MORRISON v. CRISP.

SYLLABUS BY THE COURT.

1. It is competent to show by parol that the consideration for a contract was different from the one expressed in it. P. 381

2. A complaint in an action on a note for stock held to state a complete cause of action by alleging its making, delivery, and nonpayment, and not defective for failing to allege that all the authorized capital stock of the corporation was subscribed, on the theory that such was an implied condition of each individual subscription. P. 382

Appeal from District Court, Union County; Leib, Judge.

Action by L. H. Morrison, as assignee of the Union County Farmers' Society of Equity, Limited, against Ira N. Crisp. Judgment for the plaintiff, and defendant appeals. Affirmed.

Thomas F. Savage, of Clayton, for appellant.

Hugh B. Woodward, of Clayton, for appellee.

OPINION OF THE COURT.

DAVIS, J. The complaint in this cause alleges that the Union County Farmers' Society of Equity was, in 1917 and 1918, a regularly organized corporation existing and doing business under the laws of this state; and that Ira N. Crisp, appellant here, prior to the organization of the company, subscribed for 10 shares of its capital stock, and in payment made, executed, and delivered to the corporation his promissory note for $100. The action is upon the note, which is set out in the complaint, and on

its face is payable to the Farmers' Society of Equity, association. The Union County Farmers' Society of Equity was incorporated shortly after the making of the note. It subsequently became insolvent, and L. H. Morrison, appellee here, became its assignee.

The amended answer, upon which the case was tried, admits that Crisp executed and delivered to the corporation the note sued upon, but alleges that there was no consideration for it. The issue as to consideration was the only one presented upon the trial. The case was tried to a jury. Upon the close of defendant's evidence the court, on motion of plaintiff, instructed the jury to return a verdict for him upon the ground that the evidence showed that there was a consideration for the note. The first question presented for review is as to the correctness of this instruction, or, more strictly speaking, as to whether there was evidence sufficient to go to the jury in support of the plea of lack of consideration.

From the evidence in the case, and chiefly from the testimony of appellant himself, it appears that certain persons requested him to become a stockholder in the Union County Farmers' Society of Equity, the organization of which was then contemplated. He understood that the corporation would be formed, and that he would receive stock in it. The note was given in payment for this stock, to be issued on the incorporation of the company, and he agreed that his note might be negotiated by the company in order to obtain cash with which to carry on its business. The company accepted his note in payment for the stock. Crisp participated as a stockholder in the organization meeting, stock was issued in his name, and hypothecated as collateral to his note. He testified that he expected that the dividends on his stock would pay the note.

[1] Counsel for appellant contends that the note was not given in payment for stock in the Union

County Farmers' Society of Equity but for a membership in the Farmers' Society of Equity, and this contention agrees with a recital on its face. The Farmers' Society of Equity was a separate association or incorporation, apparently having no direct connection with the Union County Farmers' Society of Equity. But this contention of counsel is not supported by any evidence in the case, and is directly contradicted by the testimony of appellant himself, which was that the note was in fact given as the purchase price of stock in the Union County Farmers' Society of Equity. Although the note recited one consideration, it was competent to show by parol that another existed. Morstad v. A. T. & S. F. R. Co., 23 N. M. 663, 170 Pac. 886.

The note was executed in payment for the stock. It was delivered to the company, which accepted it as payment, and issued a stock certificate accordingly. Plainly the claim of appellant that the note was without consideration is directly controverted by these facts, which are the only material ones bearing upon the question.

Counsel argues that the note was payable to the Farmers' Society of Equity, not to the Union County Farmers' Society of Equity, whose assignee is suing upon it. But this does not go to the consideration, and is therefore immaterial under the pleadings. No suggestion is made that appellee was not the legal holder of the note and entitled to maintain this action.

[2] Counsel for appellant contends that the complaint did not state a cause of action because it failed to allege that all the authorized capital stock of the corporation was subscribed; this being, he argues, an implied condition in each individual subscription. But this action was upon a promissory note, not upon a stock subscription. The complaint based upon the note was not defective in this respect,

but stated a complete cause of action by alleging the making and delivery of the note and its nonpayment. Lack of consideration for any reason was a matter of defense. The contention as to the validity of the subscription was not presented to the trial court, and will not be considered.

The judgment is therefore affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

[No. 2575. Nov. 14, 1921.]

WOOD v. CHISHOLM et al.

Appeal from District Court, Eddy County; Brice, Judge.

Action by Tom Wood against W. H. Chisholm and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. B. Atkeson, of Artesia, for appellants.

Dover Phillips, of Carlsbad, for appellee.

DAVIS, J. This case involves the validity of a tax title based upon a tax sale made at approximately the same time and with the same irregularities as the sale considered in the case of Chisholm et al. v. Bujac, 27 N. M. 375, 202 Pac. 126, decided at this term. The opinion in that case is decisive of this.

The judgment of the district court is therefore affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

[No. 2434. Oct. 22, 1921.]

STATE ex rel. EVANS v. FIELD, Com'r of Public Lands, et al.

[Rehearing Denied Nov. 26, 1921.]

SYLLABUS BY THE COURT.

1. Mandamus will not lie against the Commissioner of Public Lands to compel him to issue a deed conveying the public lands free from the reservation of the minerals therein, which reservation was contained in the contract of sale, because it is, in effect, an action against the state. P. 387.

2. No sovereign state can be sued in its own courts, or any other, without its consent. P. 387

Appeal from District Court, Santa Fe County; Holloman, Judge.

Application by the State, on the relation of Arthur J. Evans on a writ of mandamus against Nelson A. Field, Commissioner of Public Lands, and another, to compel delivery of a deed or patent for land previously sold by the State to the relator upon deferred payment plan. Judgment for the relator, and the defendants appeal. Reversed and remanded, with directions to discharge the writ.

Harry S. Bowman, Attorney General, for appellants.

Renehan & Gilbert, of Santa Fe, for appellee.

OPINION OF THE COURT.

PARKER, J. This is a proceeding in mandamus brought against the commissioner of public lands to compel the execution or delivery of a deed or patent for land previously sold by the state to relator upon the deferred payment plan. The contract of sale was in the usual form adopted by the state land office, and contained, among other provisions, the following:

"This land is being purchased for the purpose of grazing

and agriculture only; that while the land herein contracted for is believed to be essentially nonmineral land, should mineral be discovered therein, it is expressly understood and agreed that this contract is based upon the express condition that the minerals therein shall be and are reserved to the fund or institution to which the land belongs, together with the right of way to the commissioner, of any one acting under this authority, to at any and all times enter upon said land and mine and remove the minerals therefrom without let or hinderance."

After accepting and acting upon this contract from August 17, 1917, to March 19, 1919, on that day the relator, desiring to complete his purchase, tendered to the commissioner the total balance of the purchase price of the land, and demanded a deed conveying the same in fee simple. This was refused by the commissioner, on the ground that the minerals in the land were reserved to the state in the contract of sale, and no conveyance which included them could be demanded. The case was heard in the district court upon the petition and writ, and a demurrer to the same, and the demurrer was overruled. The respondent elected to stand on his demurrer, and not to plead further, and a peremptory writ was awarded commanding the commissioner to execute a deed conveying the fee to relator without reservation of mineral rights. This appeal is prosecuted from that judgment.

It is contended by the Attorney General for the respondent that this proceeding is in effect an action against the state, and cannot be maintained without its consent. This proposition was not raised by the demurrer in the lower court and is presented here for the first time under the first assignment of error, which is to the effect that the court erred in overruling the demurrer because the state was a necessary party. This assignment, under ordinary circumstances, in litigation between private persons, would hardly be held sufficient to present the ques-

tion argued, viz. that this is an action against the state and cannot be maintained. The question, however, is one of jurisdiction, if the argument advanced is sound, and we ought to and will consider it, especially in view of its public nature.

In approaching the discussion the facts should be clearly in mind. It is to be remembered that the lands involved are a portion of the lands granted in trust to the state by the federal government for certain specified purposes. The grant is of the fee, and when the required preliminaries of selection by the state had been performed, and the government had clear-listed the same to the state, it became the absolute owner of the lands, subject only to the trust imposed by the granting act. In order to avail themselves of the grant, the people in their Constitution created the office of commissioner of public lands (section 1, art. 5), and clothed him with power to select, locate, classify, and have the direction, control, care, and disposition of all public lands, under the provisions of the act of Congress relating thereto, and such regulations as might be provided by law (section 2, art. 13). At the first state Legislature an act was passed somewhat amplifying the constitutional provisions (see sections 5178 et seq., Code 1915), and in section 1 of the act (section 5178, Code 1915) his jurisdiction over the land is somewhat more broadly stated, to the effect that it extends to all cases except as otherwise specifically provided by law. It is further to be remembered that the commissioner made a contract of sale of the land in controversy in which the mineral rights were reserved to the state. The state has never contracted to convey the fee of these lands, but has reserved from the sale the mineral rights therein.

The relator bought only the right to the lands for agricultural and grazing purposes, and did not buy the right to the minerals, if any, in the lands. He

now seeks to exact from the state something which the state has never contracted to convey. If he were seeking to compel the commissioner to perform the contract as made, a different question would be presented. If the commissioner were arbitrarily, for some illegal reason or no reason, refusing to carry out a contract which he had made on behalf of the state with the relator, the performance of which would be a mere ministerial duty, his action might perhaps be controlled by mandamus. But he is doing nothing of the kind. He is simply standing on the contract as made, while relator is seeking from the state something different from what the contract specified. Under such circumstances it is not the action of the commissioner which is sought to be controlled, but it is the action of the state which it is sought to compel, and thereby secure a property right now held and owned by the state and which it has never agreed to convey. Under such circumstances the proceeding must be considered one against the state.

[1, 2] It is a fundamental doctrine at common law and everywhere in America that no sovereign state can be sued in its own courts or in any other without its consent and permission. See Smith v. Reeves, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140, in which many former decisions of the Supreme Court are referred to. See, also, Kawananakoa v. Polyblank, 205 U. S. 349, 27 Sup. Ct. 526, 51 L. Ed. 934. See, also, 25 R. C. L. "States," § 49. At an early date the Supreme Court of the United States held, that under the constitutional provision granting judicial power to the federal courts extending to controversies "between a state and citizens of another state," the citizens of one state might sue another state in the federal courts. Chisholm v. Georgia, 2 Dall. 419, 1 L. Ed. 440. This decision met with such popular disapproval that the Eleventh Amendment to the Constitution was immediately

proposed, and in due course was adopted by the states. This amendment restrained the federal power in terms, and prohibited citizens of one state from maintaining a suit in the federal courts against another state. See Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842.

While the question as to the jurisdiction of the federal courts under the Constitution and the Eleventh Amendment is not always identical with the question as to the jurisdiction of state courts to entertain actions by its own citizens against the state, it is nevertheless true that the Supreme Court of the United States has been called upon in numerous cases to determine what is and what is not a suit against the state, and the great learning of that court has so illuminated the question as to make those decisions of the highest controlling influence in determining such questions. We believe that the state of opinion of the Supreme Court of the United States may be stated as follows: Where the contract is between the individual and the state, any action founded upon it against defendants who are officers of the state, the object of which is to enforce the specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the state, or to forbid the doing of those things which, if done, would be simply breaches of the contract of the state, is in substance a suit against the state itself, and within the prohibition of the Constitution. See In re Ayers, 123 U. S. 443, 502, 8 Sup. Ct. 164, 31 L. Ed. 216; Pennoyer v. McConnaughy, 140 U. S. 1, 9, 11 Sup. Ct. 699, 35 L. Ed. 363; Reagan v. Farmers' Loan, etc., Co., 154 U. S. 362, 389, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805; Cunningham v. Macon, etc., R. Co., 109 U. S. 446, 455, 3 Sup. Ct. 292, 609, 27 L. Ed. 992; Louisiana v. Jumel, 107 U. S. 711, 2 Supt. Ct. 128, 27 L. Ed. 448; Antoni v.

Greenhow, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. Ed. 468; Louisiana ex rel. New York Guaranty, etc., Co. v. Steele, 134 U. S. 230, 10 Sup. Ct. 511, 33 L. Ed. 891. The later cases in the Supreme Court of the United States merely amplify and illustrate the principles which have been developed in the cases cited above, and need not be cited here.

On the other hand, where the law directs or commands a state officer to perform an act under given circumstances, which performance is a mere ministerial act, not involving discretion, mandamus will lie to compel the action, notwithstanding performance of the state's contract may incidentally result. In such a case the action is not really upon the contract, but is against the officer as a wrongdoer. He is, under such circumstances, not only violating the rights of the relator, but is disobeying the express command of his principal, the state. Injunction will likewise lie to restrain illegal action of a state officer, notwithstanding a breach of the state's contract may thus incidentally be prevented. Upon this subject there are many cases, only a few of which need be noticed.

Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363, was a suit in equity to restrain and enjoin the Governor, secretary of state, and treasurer of the state of Oregon from selling and conveying a large amount of land to which the appellee asserted title. The law in that state provided a method for the disposal of the lands, and appellee's predecessor in title made application to purchase a large quantity of these lands in pursuance of the provisions of the act, and paid to the board of commissioners, as required by the act 20 per centum of the price of the lands. After appellee's predecessor in title had made his application, but before he had made his first payment, the Legislature of Oregon passed an act repealing the

act under which the application for the lands had been made, and authorized and directed the commissioners to cancel all certificates of sale of the kind held by the appellee's predecessor in title. In pursuance of this act the board of land commissioners cancelled the certificates of sale in question and ordered the lands to be sold, and had actually sold a portion of the same when the action was filed. After an elaborate review of all the cases up to that time the court said:

"This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself.

"In the application of this latter principle, two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

"The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so oparate as to compel it to specifically perform its contracts. [Citing cases.]

"The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the state. [Citing cases.]

Following this statement is an elaborate review of most of the cases in the Supreme Court up to

that time, and the decree enjoining the board of land commissioners was affirmed. This case is authority, for the proposition that the fact that the rights ought to be protected or secured arise out of a contract with the state is not determinative of the question as to whether the suit is in fact against the state. If the action sought to be controlled is wrongful, either by reason of being in pursuance of an unconstitutional statute, or by reason of the unlawful action of a public officer, the right to restrain the action is complete, and a proceeding for that purpose is not a suit against the state.

Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185, was an action in detinue to recover possession of personal property seized for taxes under an unconstitutional statute which impaired the obligation of a contract between the state of Virginia and holders of coupon bonds of the state to receive said bonds and coupons in payment of the taxes. The action was held not against the state. In the discussion it is pointed out that, unless the state is a party in a substantial sense, suits between individuals may be maintained, notwithstanding their determination may incidentally and consequently affect the state's contract.

In Board of Liquidation v. McComb, 92 U. S. 531, 23 L. Ed. 623, the decree appealed from was for an injunction to restrain the board of liquidation of the state of Louisiana from using the bonds of the state for the liquidation of a certain debt claimed to be due from the state to the Louisiana Levee Company, and from issuing any other state bonds in payment of said pretended debt. McComb alleged that he was the holder of some of the bonds, and that the employment of the bonds for the purpose proposed would depreciate their value. The defendants demurred, and, the demurrer being overruled, and the defendants refusing to plead further, a decree was

entered. These bonds were issued under an act of the Legislature for the purpose of refunding the state debt. Subsequent to the issue of these bonds the Legislature passed an act authorizing the diversion of a portion of the same to the Louisiana Levee Company in liquidation of a debt to it which was not of the character or kind contemplated by the act under which the bonds were issued. The court held that injunction was a proper remedy in such cases, as the state officers, in order to justify their conduct, must rely upon an unconstitutional law, which was no protection, and left them in the position of wrongdoers. In that case it is said that, where a plain official duty, requiring no exercise of official discretion, is to be performed, mandamus to compel action or injunction to restrain illegal action may be had, citing Osborn v. Bank, 9 Wheat. 859, 6 L. Ed. 204; Davis v. Gray, 16 Wall. 230, 21 L. Ed. 447.

In Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 Pac. 1125, 15 L. R. A. 369, 31 Am. St. Rep. 284, it was held that the court had jurisdiction of an action brought for the purpose of requiring the state board of land commissioners, which included the Governor, to receive money of the plaintiff, and to issue it a deed or patent to be signed by the Governor. This case was followed in Colorado Fuel & Iron Co. v. State Land Commissioners, 14 Colo. App. 84, 60 Pac. 367, in which the land commissioners were compelled to issue a lease after it had exercised its discretion and had contracted for the lease; also, in State Land Commissioners v. Carpenter, 16 Colo. App. 436, 66 Pac. 165, an action was maintained against the state land commission respecting the reinstatement and cancellation of leases.

In State ex rel. McEnery v. Nicholls, 42 La. Ann. 209, 7 South. 738, the relator had contracted with the then Governor of the state in pursuance of an

act of the Legislature to recover for the state all lands donated to her by the government as swamp lands, and he was to receive a certain percentage of the lands secured by him as the attorney for the state. The succeeding Governor and the then register of the state land office refused to comply with the contract and to allot to the relator his proportion of the lands. The court awarded a peremptory mandamus to compel the performance of what the court denominates a ministerial duty prescribed by the law authorizing the making of the contract with relator.

In State v. Toole, 26 Mont. 22, 66 Pac. 496, 55 L. R. A. 644, 91 Am. St. Rep. 386, a mandamus against the state furnishing board to compel it to enter into a formal contract for furnishing supplies by the relator was sustained. Relator's bid had been accepted, but the board refused to enter into the contract, solely because some labor organizations had protested against the contract. The proposal of the plaintiff was regularly accepted, and the contract let to it as the lowest responsible bidder after a compliance with all the statutory requirements. The state, by its authorized agent, awarded a contract, and the object of the proceeding was to compel the defendants as public officers to sign the formal contract, and thereby perform what is alleged to be their ministerial duty. The court, after quoting from In re Ayres, 123 U. S. 506, 8 Sup. Ct. 164, 31 L. E. 216, holds that mandamus will lie to compel the execution of the contract, and says:

> "If the defendants owe to the plaintiff the performance of an act which the law specifically enjoins as a duty resulting from an office—in other words, if the defendants as members of the board owe to the plaintiff a duty, and the performance of that duty is a ministerial act not involving the exercise of discretion or judgment—the writ of mandate will lie to compel such performance, and the state is not thereby subjected to an action or proceeding."

See, also, on this subject 26 Cyc. p. 227; 36 Cyc.

917; 25 R. C. L. "States," § 50; 26 A. & E. Ency. Law, 490, 491; 1 Rose's Code Fed. Proc. pp. 50, 51.

Exhaustive notes are appended to the following cases, where most, if not all, of the cases on this subject are collected. See Pitcock v. State, 91 Ark. 537, 131 S. W. 742, 134 Am. St. Rep. 88; Louisville & Nashville R. R. Co. v. Railroad Com'rs, 63 Fla. 491, 58 South. 543, 44 L. R. A. (N. S.) 189; Miller v. State Board of Agriculture, 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811; Cooke v. Iverson, 108 Minn. 388, 122 N. W. 251, 52 L. R. A. (N. S.) 415.

There is a distinction sometimes pointed out in the cases between the applicability of injunction and mandamus where the question is as to whether suit is or is not against the state. This distinction is pointed out, and other cases discussed, in Pennoyer v. McConnaughy, supra. The two remedies largely cover the same field. If the state has commanded, and the duty is ministerial, mandamus may be had to compel action or injunction to restrain violation of the duty. Board of Liquidation v. McComb, supra. Neither would be actions against the state. The control of the officer would be, in either case, merely effectuating what the state had already commanded. In case, however, a state is the wrongdoer, and the officer is in no way personally concerned, mandamus to compel action by the officer by way of performance of the state's contract cannot be maintained because it is a suit against the state. On the other hand, where the state is the wrongdoer and the officer is proceeding under the unconstitutional mandate of the state, he may, in a proper case, be restrained, notwithstanding the indirect effect of the injunction is to prevent the breach of the state's contract. This is so because the unconstitutional law is no law and leaves the state officer in the position of a wrongdoer. McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304. The fore-

going distinctions do not exhaust the subject, but they are correct so far as they go, and are sufficient for our purposes in this case.

It seems clear from the foregoing cases that, if the relator was seeking to compel the commissioner of public lands to execute a deed in accordance with the contract, there would be no difficulty in enforcing the duty by mandamus, because under the provisions of section 5236, Code 1915, it is made the statutory duty of the commissioners, upon payment of the purchase price for the public lands, to immediately issue a deed for the lands so purchased.

As heretofore pointed out, however, this is not what the relator is seeking. He is seeking to compel the commissioner to execute to him a deed conveying the absolute fee without reservation of the mineral rights in the land. If he is to succeed he is compelling the state to part with something which it has never contracted to sell. He is seeking to compel the state, through its only authorized agent, the commissioner, to make a contract with him, and to execute the same, such as it has never agreed to do. The state had a direct, pecuniary, and property interest in the matter involved, and there is no law which can be pointed to making it the official duty of the commissioner to execute the deed as claimed by relator. It seems clear, therefore, that under such circumstances this is a suit against the state of New Mexico to which the state has never given its consent, and which cannot for that reason be maintained.

An argument is presented by counsel for appellee in support of the judgment to the effect that the reservation in the contract of sale was without authority on the part of the commissioner, and is therefore void and of no effect, and does not authorize the commissioner to refuse to him a deed of the absolute fee. The argument proceeds upon the the-

ory that a condition imposed by the executive officers of the land department which is in contravention of, or unauthorized by, law is void, and the purchaser will take his title free from the condition. Counsel relies upon the federal cases, and principally that of Burke v. S. P. R. R. Co., 234 U. S. 696, 34 Sup. Ct. 907, 58 L. Ed. 1527. We do not deem these United States cases as applicable. Whether the commissioner of public lands has power and authority to make the reservation, which he has made in this case, it is unneecssary for us to determine. If he has not the power, when the purchaser takes a deed with the reservation contained therein, there may arise a question as to the effect of the reservation in some controversy which may arise when the commissioner or some one under him begins to explore for minerals; but mandamus is not a proper remedy to try such a question in a case of this kind where the state itself is involved.

It appears from the record that an oil and gas lease has, subsequent to the tender and demand for deed by relator, been executed to Reed, the other respondent. The same considerations heretofore pointed out control in regard to this lease. Mandamus to cancel this lease cannot be maintained if mandamus to convey without the reservation which contemplates the making of the lease cannot be maintained.

It follows from the foregoing that the judgment of the court below is erroneous, and should be reversed, and the case remanded, with directions to discharge the writ; and, it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

[No. 2476. Oct. 22, 1921.]

HUNT v. ELLIS.

[Rehearing Denied Nov. 29, 1921.]

SYLLABUS BY THE COURT.

Possession or occupancy of land, by one not the holder of the record title, to imply notice of an outstanding title to one purchasing from the holder of the record title, must be such as would under the circumstances put a prudent man upon inquiry.

Appeal from District Court, Union County; Leib, Judge.

Suit by Charles L. Hunt against Dave Ellis. Judgment fo rthe defendant, and the plaintiff appeals. Affirmed.

Hugh B. Woodward, of Clayton, and A. Paul Siegel, of Nara Visa, for appellant.

Toombs & Taylor, of Clayton, for appellee.

OPINION OF THE COURT.

RAYNOLDS, J. This is a suit to quiet title to 320 acres of land brought by Charles L. Hunt against Dave Ellis in the district court of Union county. Title is claimed by Hunt under a deed from Frederick Zivansky, patentee from the United States government, dated February 26, 1916, regularly executed, acknowledged, and filed for record in the office of the recorder of Union county, December 26, 1916. Title is claimed by the defendant, Dave Ellis, under a warranty deed from Frederick Zivansky, patentee from the United States government, dated December 6, 1916, also regularly executed, acknowledged, and delivered and properly filed for record in the office of the recorder of Union county on December 6, 1916. The plaintiff, Hunt, appellant here, on trial sought to prove actual notice to the defendant, Ellis, of plaintiff's deed at the time the defendant,

Ellis, received his deed from Zivansky, and sought further to prove such facts as would impute constructive notice to Ellis, the defendant, if he had no actual notice of plaintiff's title. The evidence of actual notice was controverted, and the court found in favor of the defendant, Ellis, on this issue.

The facts relative to the constructive notice were substantially undisputed and uncontroverted, but the court held them insufficient to effect the defendant, Ellis, with notice of the plaintiff's title and entered a judgment that the title of Ellis was paramount. The court also found as a fact:

"That the defendant, Ellis, purchased said lands in question from said Zivansky in good faith and for valuable consideration and without knowledge or notice of the existence of the unrecorded warranty deed executed by said Zivansky to the plaintiff, Hunt, on February 26, 1916, and without knowledge or notice that said lands had been sold to said Hunt."

The court further found:

"That the defendant Ellis, had no notice, actual or constructive, of any possession or ownership of the lands in question by the plaintifl, Hunt, at the time he received the warranty deed from Zivansky."

From the judgment in favor of Ellis holding his title paramount the plaintiff, Hunt, appeals to this court.

The facts out of which this controversy arose are as follows:

On February 14, 1916, Frederick Zivansky received from the United States land office at Clayton a final certificate for the half section of land which is the subject of this controversy. Thereafter he listed the land for sale with one Ernest Snyder, who sold the same to the appellant for $500 and February 26, 1916, Zivansky made a warranty deed to Hunt. This deed on completion of the payment of the purchase price in May, 1916, was sent to Tucum-

cari, the county seat of Quay county, for record, instead of to Clayton, Union county. The deed was returned by the clerk to appellant's agent, who laid it away in his files, and it was not recorded in Union county until December 26, 1916. The appellant is a rancher engaged in the cattle business in Union county. The land in controversy lies within his pasture and near his home place. The ranch of appellant consists of 12,000 to 13,000 acres. He used the land in controversy for grazing while Zivansky was occupying the same as entryman. Zivansky had lived on this land continuously until the date of his final proof for a period of eight years. After selling the land to appellant, Zivansky vacated the house, but returned subsequently and lived thereon for a short time while he was working for appellant.

The record shows that Zivansky was the holder of a final receipt from the United States government at the time of Ellis' purchase. It appears in the testimony that Ellis went to the home ranch of Hunt, but that Hunt was not at home, although his wife was. He could see the Zivansky property from Hunt's home place. He made no inquiry of Mrs. Hunt as to Zivansky's claim, but immediately after inspecting the land returned to town, and a few days thereafter purchased the same from Zivansky. On trial of the case Zivansky testified first that he told Ellis he had sold the land to Hunt. This was denied by Ellis. Before he sold the land to Ellis he signed an affidavit, which was introduced in evidence, that he owned the land. He did this in order to get his patent thereto from the United States government, although at the time it appears that he had already made a deed to Hunt for the property in question. The testimony of this witness, Zivansky, was contradictory, and unsatisfactory, and was probably disregarded by the court as he seemed uncertain on

every particular about which he testified and contradicted himself numerous times.

Appellant assigns 11 errors, but simplifies the issue before this court by two statements in his principal and reply brief to the effect that the whole case turns upon one question, i. e.: Was the possession of Hunt as proved by the uncontroverted evidence sufficient to charge the subsequent purchaser, Ellis, with knowledge of Hunt's title? Appellant further states that in this case, the court having found the defendant had no actual notice of the unrecorded deed, plaintiff's case fails unless his acts of possession were sufficient to impute constructive notice to the defendant of plaintiff's title. Further appellant states that it is the conclusion of the court, set forth in the second finding above quoted which appellant alleges is error, and submits to the appellate court the question whether the undisputed facts were not such as to effect Ellis with constructive notice of Hunt's unrecorded deed.

As shown from the above quotations from the brief of appellant, the whole question turns upon the proposition of whether or not the possession of Hunt was such as to amount to constructive notice to Ellis and whether the court came to an erroneous conclusion as to such notice. Appellant claims that he exercised the following acts of possession over the land in question after the purchase: First, that he altered the fences thereon; second, that he used the house upon said land as a tenant house for his employees; third, that he used the lands continuously as fenced and inclosed pasture for the purpose of grazing cattle bearing his recorded brand to the exclusion of other cattle; fourth, that he used the house on the land in question as a storehouse for cotton seed cake from the middle of October, 1916, continuously until May, 1917, and during these months this house was under lock and key, and that

appellant carried the keys; fifth, that he used the vicinity of the house upon the land in question as a feeding place where he fed 270 head of cattle cotton seed cake daily from the first week in November, 1916, until the following May.

In regard to the first proposition that he altered the fences thereon, the appellant testified on cross-examination that the fence to the property was practically in the same position subsequent to the purchase as it had been for years before Zivansky proved up. In regard to the four other acts of possession, they were identical with appellant's action before the purchase; that is, he had used the house for his employees; had grazed his cattle upon the land in question; Zivansky had lived in the house subsequent to the purchase; and it is not shown by the evidence that the act of storing cotton seed cake in the house and keeping it under lock and key made any apparent change in the possession of which the appellant had notice.

The general principle as to notice to effect purchaser for value is as follows:

"Knowledge of such facts as ought to put a prudent man upon inquiry as to the title charges a subsequent purchaser with notice, not only of those facts which are actually known, but also of all other facts which a reasonably diligent investigation would have ascertained, provided the inquiry becomes a duty and would lead to the knowledge of the requisite facts by the exercise of ordinary diligence and understanding. * * * In applying the rule each case must be governed by its own peculiar circumstances." "Vendor and Purchaser," 39 Cyc. p. 1703.

This case turns upon the question of possession or occupation by another as being notice to the purchaser from one having the record title.

"The occupation must be of a character which would put a prudent person upon inquiry; it must indicate that some one other than he who appears by the record to be the owner has rights in the premises. What acts may or may not

constitute a possession are necessarily varied and depend to some extent upon the nature, locality, and use to which the property may be applied, the situation of the parties, and a variety of circumstances which have necessarily to be taken into consideration in determining the question. Actual residence upon the land is not required to effect constructive notice of title. If the party is in actual possession, and there are continuous acts of ownership, it is sufficient. It has been held that possession must be evidenced by an inclosure, or something equivalent, as showing the extent and fact of his dominion and control in the premises. But this is not necessary where there are other appropriate acts of occupancy." Vendor and Purchaser." Cyc, pp. 1749 and 1750, and cases cited.

As stated in the above quotation, notice depends upon many circumstances and varies with the particular case. There is a conflict of opinion as to what is actual notice (29 Cyc. 1113, "Notice"), and the words "constructive notice" are sometimes used to denote such notice as the law implies from the recording acts and also from acts and circumstances. Distinctions are also made as to implied and express notice. See "Notice," 20 R. C. L. 339, par. 2 and cases cited. It is unnecessary for us in this case to discuss or attempt to reconcile the various definitions or elucidate the distinctions.

It is vigorously contended by the appellant that the case of McBee v. O'Connell, 19 N. M. 565, 145 Pac. 123, is controlling, and we agree that, although the facts in that case are different, the principle therein announced governs this case. In that case the court, after considering the authorities, quoted from the case of Dickey v. Lyon, 19 Iowa 544, as follows:

"A person who purchases an estate in the possession of another than his vendor is in equity—that is, in good faith—bound to inquire of such possessor what right he has in the estate. If he fails to make such inquiry which ordinary good faith requires of him, equity charges him with notice of all the facts that such inquiry would disclose."

The case, however, differs from the present one in

the nature of the possession. In that case it was held that the possession of the plaintiff's tenant was such as to put defendants on inquiry as to plaintiff's rights. That situation does not exist in the present case. The subsequent possession of Hunt was not different from that which it had been before the transfer, and there was nothing under the circumstances of this case in his subsequent possession —that is after the making of the deed to him—to put Ellis upon inquiry as to Hunt's rights in the property.

For the reasons above stated, we hold that the conclusion of the trial court was correct.

The judgment is therefore affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

[No. 2498. Oct. 8, 1921.]

DOUGLAS FIR LUMBER CO. v. STAR LUMBER CO.

[Rehearing Filed Oct. 19, 1921.]

[Rehearing Denied Dec. 2, 1921.]

SYLLABUS BY THE COURT.

The term "creditor," as used in the Bulk Sales Law (Laws 1915, c. 22), includes one who has obtained a judgment against the seller for his claim, although no execution has been sued out and return made thereon; and such creditor may recover judgment against the purchaser at the sale upon said judgment against the seller, where it is alleged in the complaint in the suit against the purchaser that the seller is insolvent and that the property transferred has been commingled by the purchaser so that it cannot be identified and separated.

Appeal from District Court, Union County; Leib, Judge.

Action by the Douglas Fir Lumber Company

against Star Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. S. Macy and Toombs & Taylor, all of Clayton, for appellant.

O. P. Easterwood, of Clayton, for appellee.

SYLLABUS BY THE COURT.

RAYNOLDS, J. On November 23, 1917, the Clayton Construction Company, a partnership doing business at Clayton, N. M., sold to the Star Lumber Company, the appellant herein, all its merchandise and equipment used in its lumber business at Clayton, N. M. It is conceded that an attempt was made to meet the requirements of the Bulk Sales Law (Laws 1915, c. 22), but that the provisions thereof were not complied with. The purchase price was approximately $7,000. Part of this money was used in paying some of the cerditors of the Clayton Construction Company. The appellee, the Douglas Fir Lumber Company, an Oregon corporation, in October, 1917, sold to the Clayton Construction Company a carload of lumber, in payment of which, on December 31, 1917, a note for $1,459.22, due in 60 days, with interest at 8 per cent. and attorneys' fees threon, was given by the construction company to the Douglas Fir Lumber Company. This note not being paid at maturity, suit was brought and judgment recovered against the Clayton Construction Company for $1,697.48, which sum included interest and attorneys' fees provided in the note. Subsequently the appellee, Douglas Fir Lumber Company, demanded payment of this judgment from the Star Lumber Company, the appellant, and upon refusal brought this suit against said appellant. No execution was sued out against the Clayton Construction Company, but a transcript of the judgment was filed with the recorder of Union county. Upon trial of the case below by the court without a jury judgment was entered in favor of the Douglas Fir Lumber

Company against the Star Lumber Company for the amount of its prior judgment against the Clayton Construction Company, with interest, and additional attorneys' fees of $250 was also allowed in the present suit; the judgment amounting in all to $1,889.85. The Star Lumber Company appeals to this court from said last-mentioned judgment.

The appellant relies principally upon a demurrer filed by it to the effect that the court was without jurisdiction in a case of this kind; that the complaint did not state facts sufficient to constitute a cause of action, in that appellee, plaintiff below, was in no position to obtain judgment against the appellant, not having exhausted his remedy at law, nor having had an execution returned unsatisfied, nor having obtained a lien on the property transferred to the appellant.

The whole case turns upon the construction of the Bulk Sales Law, namely, chapter 22, Laws 1915, which is as follows:

"Section 1. A sale of any portion of a stock of merchandise, otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or a sale of an entire stock of merchandise in bulk, shall be void as against the creditors of the seller, unless the seller and the purchaser together shall at least five (5) days before the sale, make a full detailed inventory, showing the quantity and, so far as possible, with the exercise of reasonable diligence, the cost price to the seller of the various articles included in the sale; and unless such purchaser shall, at least five (5) days before the sale, in good faith, make full explicit inquiry of the seller as to the names and places of residence, or places of business, of each and all of the creditors of the seller, and the amount owing each creditor, and obtain from the seller a written answer to such inquiries; and unless such purchaser shall retain such inventory and written answer to his inquiries for at least six months after such sale; and unless the purchaser shall, at least ten (10) days before the sale, in good faith, notify or cause to be notified, personally or by registered mail, each of the seller's creditors of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge, of said proposed sale, and of the said cost price

of the merchandise to be sold, and of the price proposed to be paid therefor by the purchaser."

The legislation represented by the above act is of recent origin, but is in force in many states of the United States. The provisions of the law are similar in most instances, and it seems to be conceded that all have for their object the prevention of the sale of goods in bulk until the creditors of the seller have been paid in full. The history of the law, its object, the purpose of its adoption, and construction thereof in many states are found in notes to Everett Produce Co. v. Smith, 2 L. R. A. (N. S.) 331, and McGreenery v. Murphy, 76 N. H. 338, 82 Atl. 720, 39 L. R. A. (N. S.) 374. It will be noticed by the terms of the statute that when its provisions are not complied with the sale made thereunder is void. Cases construing similar laws in other states are numerous, but the construction given to the law is not uniform. Many states have provisions of law in regard to fraudulent conveyances which are applied to and construed with the Bulk Sales Law, and a uniform or harmonious system is thus brought about. In this state, however, we have no statutory enactments in regard to fraudulent conveyances except as to assignments (chapter 7, Code 1915), which have no application in this case.

The law which we are considering makes no provisions as to the rights of creditors when the terms of the statute are not complied with. In many states a distinction is made between certain classes of creditors, as, for instance, a lien or judgment creditor being given a right of action in cases where he has made himself a lien or judgment creditor, and denied that right when he is not in such position. See Kohn v. Fishbach, 36 Wash. 69, 78 Pac. 199, 104 Am. St. Rep. 941; Rothchild Bros. v. Trewella, 36 Wash. 679, 79 Pac. 480, 68 L. R. A. 281, 104 Am. St. Rep. 973. Other states give the creditor a right to sue the purchaser at such a sale and obtain a

personal judgment against him, although no lien has been obtained, nor garnishment process sued out. Daly v. Sumpter Drug Co., 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101. From the language of the act and the apparent purpose thereof, we assume that the governing principle in legislation of this kind is that—

> "Courts look with favor upon the rights of creditors, and will afford them every remedy and facility to detect and defeat any effort to defraud them of their just rights, and courts of law and courts of equity generally have concurrent jurisdiction in the matter of affording relief against fraudulent conveyances of debtors." 20 Cyc. 655.

As no distinction is made as to creditors and no remedy is given to them in attempting to collect their claims, many interesting questions arise which are not necessary for the determination of this case but which we note in passing. It is not apparent whether the law favors the diligent creditor who seeks to collect his claim from the purchaser, or whether the purchaser holds the property transferred as a trustee for all the creditors of the seller. To hold the purchaser as a trustee for the amount and value of the property transferred to him for the claims of the creditors of the seller is probably the most equitable method in such a case. Such a holding would be in conformity with the theory of the assignment and bankruptcy laws. But the Legislature has attached no conditions precedent to the creditor's recovery, nor has it determined the liability of the purchaser under such a sale. The word "creditors," as used in the statute, in its broadest sense would include all creditors of the seller from whom assets had been removed out of which they could collect their claims. It would include even mortgagees with deficiency judgments of this class. It would also include claims which might be contingent, and give the right of action to all who had claims at the time when by the transfer or sale the assets of the seller were de-

creased to such an extent that their accounts or claims could not be paid in full. It would, of course, include all creditors, whether or not they had by process of law attached or garnished the seller or his purchaser and segregated by process certain assets of the seller, out of which they sought to have their claims satisfied. By a broad construction of the law, the transfer from the seller to the buyer might render the latter liable, not only for the value of the assets transferred to him, but for all the seller's debts, although largely in excess of the property transferred.

We thus see that by the unlimited terms of the statute it would apparently cover many cases not intended by its makers, and we must seek a reasonable construction of it in the case before us.

Where the statute has not been complied with, as has been held by many courts, the sale is voidable only at the instance of any creditor. As between the parties the sale is valid. The sale thus being voidable, it would seemingly follow that the procedure is governed by that applicable to any ordinary transaction voidable because of fraud. Here we have a transfer of personal property subject to execution if it had remained in the hands of the debtor and vendor. It is transferred to the vendee in fraud of the rights of creditors of the vendor. The creditor in this instance is seeking to subject the property to execution, and such would be his remedy if the property were still in the hands of the vendee.

The complaint in this case shows that property of the debtor of much greater value than the indebtedness owing the appellee was transferred to the appellant in violation of the bulk sales statutes and in fraud of the rights of the appellee; that the original debtor was insolvent; that a judgment had been obtained against him; that the original debtor

had no property in the state subject to execution; that the appellant had commingled the property with other like property owned by the appellant; and that it was impossible to segregate the property upon which appellee had a right to have execution levied.

Because of these facts appellee asked that the sale be avoided and that it have personal judgment against the appellant for the amount of its claim against the original debtor. It is argued that the demurrer should have been sustained because the complaint failed to show the issuance of execution against the original debtor and its return nulla bona. There is authority to sustain the proposition, but before equitable relief will be afforded by the courts in case of a fraudulent transfer of property by the debtor, it is essential for the complainant to show that he has exhausted his remedies at law; and this fact can be established only by the securing of a judgment, the issuance of an execution, and its return nulla bona. The issuance of the execution and its return nulla bona are, however, only evidence of the fact that the complainant has no adequate remedy at law; and this fact can be established by other evidence as completely and conclusively as by the issuance of the execution and the return thereon. A case fully discussing the proposition is that of Williams v. Adler Goldman Commission Co., decided by the Circuit Court of Appeals (Eighth Circuit) and reported in 227 Fed. 374, 142 C. C. A. 70. It is there held, and ample authority is cited in support of the holding, that nonresidence of the debtor and his insolvency has each been held sufficient to dispense with prior judgment and execution at law; the first because of the great impracticability, if not impossibility, of proceeding against the debtor in that way, and the second because it stands for what the judgment and execution would conclusively prove, and that insolvency may be shown otherwise

than by judgment at law and execution returned nulla bona. See, also, Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004. See, also, case note to the case of Ziska v. Ziska, 23 L. R. A. (N. S.) 85, 88.

We have, then, a complaint which, by proper allegations, shows the utter futility of issuing an execution against the property of the debtor, and that all the property of the debtor originally subject to execution has been transferred in violation of law to the defendant in the case, against whom judgment is sought.

The more troublesome question is as to the right of the appelle to a personal judgment against the appellant for the amount of its claim of judgment against the original debtor. Undoubtedly the property only should be proceeded against if available. In other words, if the fraudulent vendee had in his possession the original property transferred to him by the debtor in violation of the statute, the court would avoid the sale and permit the creditor, or creditors, to levy execution upon and sell the property. But here the showing is that the vendee has either disposed of the property or has commingled it with other like property, and has thus placed it beyond the reach of an execution. Thus by the wrong of the vendee the creditor is deprived of his right to reach the property of the original debtor. Under these circumstances we see no reason why the transferee should not be liable to the creditors of the vendor to the extent of the value of goods taken by him and converted in fraud of their rights. There is ample authority to support such right. Daly v. Sumpter Drug Co., 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101; Peters Branch Int. Shoe Co. v. Gunn, 121 Miss. 679, 83 So. 742; Marlow v. Ringer, 79 W. Va. 568, 91 S. E. 386, L. R. A. 1917D, 619; Armfield v. Saleeby, 178 N. C. 298, 100 S. E. 611.

Confining ourselves to the case, we have a creditor

whose claim against the seller is represented by a promissory note upon which he has obtained judgment. The purchaser has not complied with the Bulk Sales Law, and, the sale being void, no property passes to him. If he has disposed of the property or mingled it with his own so that it cannot be distinguished, he is in possession of money or property which the creditor is entitled to have applied to the payment of this claim.

The principal point upon which the appellant relies, raised by the demurrer in the lower court and the assignment of error, is that the court had no jurisdiction, because the complaint showed on its face that the plaintiff creditor is not in this case one who is in a position to bring the action against the purchaser. As we have stated, the law does not limit creditors to any one class or kind. We conclude, therefore, that a creditor who has obtained judgment against the seller, and who, in his complaint in a suit against the purchaser upon such judgment, alleges that the seller is insolvent and that the goods transferred have been so commingled by the purchaser that they cannot be identified or separated, may recover judgment against the purchaser, although execution on his first judgment has not been issued and return made thereon. Under such a state of pleadings the insolvency of the seller and the commingling of goods by the purchaser dispense with the necessity of issuing the execution and levy thereunder. The extent of the creditor's recovery, the time at which his right accrues to him, and many similar questions suggest themselves to us, but as no proper exception was taken to these points, and the findings thereon in the lower court are not properly alleged as error here, they are not before us for consideration in this case.

For the reasons above stated, the judgment is affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(No. 2423. Sept. 10, 1921.)

STATE V. KELLY.

(Rehearing Denied Oct. 31, 1921.)

SYLLABUS BY THE COURT.

[1] A prosecution for obtaining money by false pretense cannot be predicated upon false testimony given in a suit in court for the recovery of money or property. P. 417.

[2] Code 1915, c. 91, which makes the Attorney General, the state auditor, and the state treasurer a "board of loan commissioners of the the state of New Mexico," and invests such board with power to ascertain and determine the debts and liabilities of the territory of New Mexico and the debts of the counties thereof which were valid and subsisting on January 20, 1910, and which were assumed by the state of New Mexico under the Constitution, and providing for the payment or refunding of such indebtedness by the issue and sale of bonds or otherwise by such board, does not confer judicial power upon such board in a constitutional sense, and such board does not constitute a court, and a finding or judgment by such board under such statute is not a judicial judgment or decree. Such board is an agency created by the state for the purpose of auditing, passing upon, and allowing claims against the state under the statute, and false pretense can be predicated upon a claim presented to such board where the facts warrant. P. 417.

[3] A duty to be performed is none the less ministerial because the person who is required to perform it may have to satisfy himself of the existence of the state of facts under which he is given his right or warrant to perform the required duty. P. 421.

[4] What might be a judicial proceeding in determining controversies between private individuals is not necessarily such where the interests of the sovereign state are involved. The state can adopt whatever mode or method it elects to determine whether it shall become liable and discharge a given obligation. It can select whatever agency it sees fit and proper to pass upon the question and provide that upon the determination of such agency the claim shall be paid, and the inquiry conducted by such agency may be administrative or judicial as the Legislature elects. P. 428.

[5] The fact that an appeal is provided for from the decision of the board of loan commissioners to the district court does not alter or change the character of the proceedings. P. 428.

[6] False pretense may be established by conduct and acts

as well as by words, written or spoken. The presentation of a bogus bond to an agent of the state for redemption is false pretense where the parties so presenting the bond know that it is spurious. P. 430.

[7] Where a duty is intrusted to a board composed of different individuals, such board can act officially only as such in convened session with the members or a quorum thereof present. **Held,** that there was substantial evidence, in addition to the record kept by the board, of the fact that such board, in passing upon the bond in question in this case, did so in a regularly convened session, with the members thereof present. P. 433.

[8] Where a bogus bond is presented to an agent of the state authorized to act in the premises, for payment or refunding, by a letter of transmittal, there is no variance because the letter refers to a territorial bond and the bond in question was a county indebtedness which the state had assumed. P. 435.

[9] The admissions, statements, and declarations of an agent are not admissable to prove agency. There must be prima facie proof of agency before such declarations or statements are admissable for any purpose; but the fact of agency, when it rests in parol, may be established on the trial by the testimony of the agent himself. P. 436.

[10] The existence of an agency may be shown by or inferred from circumstantial evidence. **Held,** that there was sufficient evidence in this case to warrant the jury in finding that the Santa Fe Bank, in presenting the bond to the board of loan commissioners, was acting as the agent of the appellant, under proper authority. P. 437.

[11] The general rule is that the credibility of witnesses is in all cases a question for the jury, and where a witness in the trial of a cause, when first placed upon the witness stand, testifies positively to a given state of facts,, and later upon being recalled to the stand for further cross-examination, states that he was mistaken about the facts first testified to, and from certain investigations which he has made after leaving the stand, knows that he could not have had knowledge of the facts so testified to, the weight of both statements is for the jury, and they have a right to decide which statement they will believe, or whether any credence should be given to either statement. P. 441.

[12] The setting of a case for trial by the court will not be reviewed except upon a plain showing of a gross abuse of discretion. P. 447.

[13] Code 1915, § 5901, which provides that the trial court shall set cases for trial not less than 20 days before the first day of the term, is directory. P. 448.

[14] Instructions on reasonable doubt approved. P. 449.

[15] An appellate court will not search for reasons to reverse a case, and the duty rests upon the appellant to show that error has interevened to his prejudice. P. 451.

Appeal from District Court, Santa Fé County; Brice, Judge.

William G. Kelly was convicted of obtaining money and property from the State of New Mexico by false pretenses, and from the judgment and sentence, he appeals. Affirmed.

Catron & Catron and A. B. Renehan, both of Santa Fé, for appellant.

Harry S. Bowman, Atty. Gen., for the State.

OPINION OF THE COURT.

ROBERTS, C. J. The appellant was indicted, tried, and convicted of obtaining money and property from the state of New Mexico by false pretenses. From the judgment rendered on the verdict sentencing him to the penitentiary, he appeals.

The facts upon which the prosecution was based may be briefly stated as follows: When Congress passed the Enabling Act, authorizing New Mexico to adopt a Constitution and form a state government, and providing for its admission into the Union, it provided that the state of New Mexico should assume the debts and liabilities of the territory and the debts and liabilities of the various counties of the proposed state. Pursuant to the Enabling Act the constitutional convention provided for the assumption of such debts by the state. In 1912 the Legislature, by chapter 16, Laws 1912, created a state loan board and provided a method of procedure by which the debts and liabilities of the state so assumed under the Constitution should be refunded into state bonds. At this time we will not go fully into said act, as it will later be treated in

detail in the opinion. It is sufficient to say that provision was made for presenting to the board evidences of indebtedness of the territory and various counties so assumed, and the issuance by said board of new bonds, in lieu thereof, or the issuance and sale of said bonds for the purpose of providing money to retire the old bonds. The indictment alleged that appellant presented to said board for redemption and refunding a bogus or spurious bond, No. 254, of the county of Santa Fé, and represented said bond to be a genuine, valid, and outstanding obligation of said county. The bond in question was admitted by the appellant on the trial of the case in the lower court to be a counterfeit bond, and the evidence satisfactorily established the fact that it was counterfeited from Santa Fé county bond No. 187, except as to the number. The indictment further alleged that the bond was presented to the board of loan commissioners by the Santa Fé Bank, acting as agent for appellant. No objection was made upon the trial, in fact it was conceded that, if the Santa Fé Bank was acting as agent, it had no knowledge of the fraudulent character of the bond. Appellant did not testify as a witness in the case. The transcript of the record is very voluminous, and there are several questions which require consideration.

The first logically which requires discussion is as to whether the indictment was sufficient to charge an offense. It is contended by appellant that the court erred in not sustaining the demurrer to the indictment, which was based upon the ground that false pretenses could not be predicated upon representations made to the state board of loan commissioners relative to any claim presented to it under the statute, as such board was a judicial body, with power to hear the parties, hear proof, investigate and decide, and that perjury was the only crime

which could be charged under false pretenses or representations made to such board.

The said board of loan commissioners was created by Laws of 1912, c. 16 (chapter 91, Code 1915). Section 1 of the act (section 4545, Code 1915) made the Attorney General, the state treasurer and the auditor the board of loan commissioners of the state of New Mexico, and the board was created—

"for the purpose of ascertaining and determining the debts and liabilities of the territory of New Mexico and the debts of the counties thereof which were valid and subsisting on June 20, 1910, and which are assumed by the state of New Mexico under the Constitution thereof and for the purpose of providing for the payment or refunding thereof by the issue and sale of bonds or otherwise."

Provisions were made in the act for certifying to such board the debts and liabilities of the territory of New Mexico by the state auditor, and a like certification by the boards of county commissioners of each county of the county indebtedness assumed by the state. Section 4551 is as follows:

"All persons, counties and municipalities having any claim or demand against the territory of New Mexico or against any of the counties thereof in respect of debts which were valid and subsisting on June 20, 1910, and so assumed by said state, may submit the same to the said board of loan commissioners and may produce before the said board of loan commissioners the evidences of said indebtedness; and it shall thereupon be the duty of the said board of loan commissioners, after twenty days' notice to the Attorney General of the state of New Mexico, or the board of commissioners of the respective counties as the case may be, to proceed forthwith and without delay, to hear the parties and to take testimony and to investigate, inquire into and determine the validity of the said claims and demands and the liability of the state of New Mexico for the same by reason of its assumption of the debts and liabilities of the said territory and the debts of the counties thereof pursuant to the provisions of the Constitution of the state of New Mexico. Any party aggrieved by the determination of the board of loan commissioners may appeal to the district court and the said board of loan commissioners shall certify to the said district court all testimony, documents and proceedings of the said board with respect to the matter under review and said district court may, if it deems the interests

of justice so require, take additional testimony and shall render its decision or judgment from which decision or judgment an appeal shall lie to the Supreme Court of the state of New Mexico at the instance of any party aggrieved. If no appeal be taken from the decision or determination of said board of loan commissioners or the said district court within twenty days after the same shall have been made, such decision or determination shall be final and binding as to the right to have the said claim or demand paid or refunded under the provisions of this article."

Section 4552 gave the board of loan commissioners power to issue bonds of the state of New Mexico for the payment or refunding of the debt contemplated. The remaining sections provide the form of the bonds, maturity, etc., and the rate of interest.

(1, 2) Appellant is undoubtedly correct in his contention that, if the board of loan commissioners of the state of New Mexico constituted a court, and the presentation of the claim to such board and the proceedings had before such board upon such claim constituted a judicial inquiry and resulted in a judicial judgment or decree, there could be no prosecution for false pretenses made to such board in regard to any claim, and that the remedy would be a prosecution for perjury instead. U. S. ex rel. McManus v. Moore, 3 McArthur (10 D. C.) 226; Hunter v. State, 46 Tex. Cr. R. 498, 81 S. W. 730; commonwealth v. Harkins, 128 Mass. 79. But does it necessarily follow that the board of loan commissioners was a judicial body clothed with the exercise, in this instance, under the statute, with judicial functions? If this be true, grave consequences indeed must follow such a determination, for this board was made up of three executive officers of the state, and if it was invested with judicial powers in a constitutional sense, the act of the Legislature would run counter to article 3 of the state Constitution, which divides the powers of government into three distinct departments, the legislative, executive, and judicial, and provides that no person or collection of persons

charged with the exercise of powers properly belonging to one of these departments shall exercise any powers belonging to either of the others except as in the Constitution otherwise expressly directed or permitted. To give assent to the contention of appellant would, as stated, probably invalidate all the proceedings of this board in passing upon, auditing and allowing claims against the state aggregating millions of dollars. In an early case, Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 15 L. Ed. 372, the Supreme Court of the United States, had before it the consideration of an act of Congress which provided for the issuance of a distress warrant for the amount upon determination by said auditor to be due against such delinquent officials. It was there urged that the duties performed by this auditor were judicial and violated the provisions of the Constitution of the United States which require the judicial power of the United States to be vested in one Supreme Court and such inferior courts as Congress may, from time to time, ordain and establish, and also violated that provision which declared that the judicial power shall extend to controversies to which the United States shall be a party. The court said:

"It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings."

The court said further:

"That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795, 12 Wheat, 19, or of a commissioner who

makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power that they involve the exercise of judgment upon law and fact. * * * It is necessary to go further, and show not only that the adjustment of the balance due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until review, it is final and binding; and the question is whether its subject-matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not."

After reviewing the argument of counsel in that case, the court said:

"But the argument leaves out of view an essential element in the case, and also assumes something which cannot be admitted. It assumes that the entire subject-matter is or is not in every mode of presentation, a judicial controversy, essentially and its own nature, aside from the will of Congress to permit it to be so; and it leaves out of view the fact that the United States is a party."

And further on it is said:

"Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title."

In the case of U. S. v. Ferreira, 13 How. 40, 14 L. Ed. 42, the court had before it a statute of the United States passed to carry into effect a treaty between the United States and Spain, under which this country had undertaken to make satisfaction to Spanish officers and individuals for losses incurred by reason of the operations of the American army in Florida. The law authorized the justices

of the superior courts established at St. Augustine and Pensacola to receive and adjust all claims arising within their respective jurisdictions; and it provided that, where the judges decided in favor of the claimant, the decision with the evidence on which it was founded should be by the judge reported to the Secretary of the Treasury, who, on being satisfied that the same was just and equitable and within the provisions of the treaty, should pay the amount thereof to the person or persons in whose favor the same was adjudged. The court said:

"Nor can we see any grounds for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right therefore to make the approval of the award by the Secretary of the Treasury one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him; and his decision against the claimant for the whole or part of a claim as allowed by the judge is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court or in any other way, without the authority of an act of Congress."

And the court further said:

"The powers conferred by these acts of Congress upon the judge as well as the secretary are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands, or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary as well as on a commissioner. But it is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."

The Secretary of the Treasury in this case, under the act of Congress, reviewed the evidence taken before the judge and determined whether the claim

should be paid by the United States. This action on the part of the Secretary of the Treasury was as much judicial in its nature as was the action of the board of loan commissioners under our statute. The state prescribed the conditions upon which it would issue the new bonds or pay the old. Its payment or the issuance of the new bonds was made dependent upon the approval of the board of loan commissioners or a judgment of the court on appeal from that body. In the case just referred to the Secretary of the Treasury determined the extent of the damages suffered by the claimant and also as a matter of law whether the claim came within the provisions of the act of Congress. In the case of American Sulphur C. Mining Co. v. Brennan, 20 Colo. App. 439, 79 Pac. 750, the court had before it a statute which gave the state board of land commissioners power to cancel a lease of state lands. The statute provided:

"If, through any fraud, deceit, or misrepresentation, any party or parties shall procure the issuing of any lease for state lands, the board shall have the authority to cancel any such lease."

(3) There the board had authority, under the statute, to investigate and hear evidence, and, if convinced that such lease was procured through fraud, to cancel the same. The court held that the board was not by law constituted a court, and that it could not exercise the functions of a court, and that in the hearing contemplated under the statute the board was not acting in a judicial capacity within the meaning of the Constitution.

In the case of Owners of Land v. People, 113 Ill. 296, the court held that judicial power has never been held to apply to those cases where judgment is exercised as incident to the execution of a ministerial power.

In De Camp v. Archibald, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692, the court said:

"The term 'judicial power' as used in the Constitution, is not capable of a precise definition. It is included in the power to hear and determine, but does not exhaust the power. That it embraces the hearing and determination of all suits and actions, whether public of private, there can be no doubt. But we think that it is equally clear that it does not necessarily include the power to hear and determine a matter that is not in the nature of a suit or action between parties. Power to hear and determine matters more or less directly affecting public and private rights is conferred upon and exercised by administrative and executive officers. But this has not been held to affect the validity of statutes by which such powers are conferred. State ex rel. v. Hawkins, 44 Ohio, St. 98-109. The term 'judicial power' has never been taken with such latitude of construction in the usages and customs of our American commonwealth; and to so extend the jurisdiction of the courts would lead to the most embarrassing results with little or no compensation whatever."

As said by the Supreme Court of West Virginia in the case of Wheeling & E. G. R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. (N. S.) 321:

"What is a judicial function does not depend solely upon the mental operation by which it is performed or the importance of the act. In solving this question, due regard must be had to the organic law of the state and the division of powers of government. In the discharge of executive and legislative duties, the exercise of discretion and judgment of the highest order is necessary, and matters of the greatest weight and importance are dealt with. It is not enough to make a function judicial that it requires discretion, deliberation, thought, and judgment. It must be the exercise of discretion and judgment within that subdivision of the sovereign power which belongs to the judiciary, or, at least, which does not belong to the legislative or executive department. If the matter in respect to which it is exercised belongs to either of the two last-named departments of government, it is not judicial. As to what is judicial and what is not seems to be better indicated by the nature of a thing than its definition."

In the case of the Post Printing & Publishing Co. v. Shafroth, 53 Colo. 129, 124 Pac. 176, the court had before it for consideration an amendment to the Constitution of that state which provided for the funding of existing indebtedness represented by outstanding state warrants issued without authority of law, and provided for a board which should pass upon and determine the validity of the warrants

with much the same power as that conferred upon the board of loan commissioners. It was there argued that the board exercised judicial functions and powers in violation of a constitutional provision similar to our own. The court said that boards for the auditing and adjustment of public indebtedness in claims against the state were very common instrumentalities in the administration of their finances, and that statutes creating such boards were not invalid; that in creating the board the amendment did not delegate to it powers properly belonging to the judiciary, or encroach upon jurisdiction vested in the courts by any other provision of the Constitution.

In the case of State ex rel. Mills v. McNutt, 87 Wis. 277, 58 N. W. 389, the Legislature had created the town of Knapp from a portion of the town of Millston, and provided that the county board should determine what portion of the indebtedness, if any there be, of said town of Millston should be charged to the new town of Knapp. It was held that the power thus conferred upon the board was not judicial. In the case of In re Sanborn, 148 U. S. 222, 13 Sup .Ct. 577, 37 L. Ed. 429, the question arose as to whether the petitioner had a right to appeal to the Supreme Court of the United States from the disallowance of a claim presented for services rendered certain Indians. The statute authorized the presentation of such a claim to the court of claims, and directed the court to report its findings and conclusions to the Secretary of the Interior. The court said:

"We must find an answer to the question thus put to us by a construction of the Act of March 3, 1887, read in the light of the previous legislation establishing the Court of claims, and regulating the subject of appeals from its judgments to this court.

"This subject came, for the first time, before this court in the case of Gordon v. United States, 2 Wall, 561, wherein it was held that, as the law then stood, no appeal would lie from the Court of Claims to this court. The reasons

for this conclusion are stated in the opinion of Chief Justice Taney, reported in the appendix to 117 U. S. 697, and interesting as his last judicial utterance. Briefly stated, the court held that, as the so-called judgments of the Court of Claims were not obligatory upon Congress or upon the executive department of the government, but were merely opinions which might be acted upon or disregarded by Congress or other departments, and which this court had no power to compel the court below to execute, such judgments could not be deemed an exercise of judicial power, and could not, therefore, be revised by this court.

"A similar question arose in this court as early as 1794, in the case of United States v. Yale Todd, an abstract of which case appears in a note by Chief Justice Taney to the later case of United States v. Ferreira, 13 How, 52, and wherein it was held that an act of Congress conferring powers on the judges of the Circuit Court to pass upon the rights of applicants to be placed upon the pension lists, and to report their findings to the Secretary of War, who had the right to revise such findings, was not an act conferring judicial power, and was, therefore, unconstitutional."

In the case of Ex parte Gist. 26 Ala. 156, the court, after quoting from the case of U. S. v. Ferreira, supra, said:

"So likewise in our own court in the case of Gaines v. Harvin, 19 Ala. 491, 498, a similar provision in our state Constitution came under review; and we there held that it was not the intention of the framers of the Constitution to deny to the Legislature the power to confide to ministerial officers, who do not constitute a part of the judiciary properly so called, many duties involving inquiries in their nature judicial. It was said: 'The practice of this, as of all other governments having their judicial, executive, and legislative departments separate and distinct, very clearly shows that, in the administration of the laws, inquiries partaking of the nature of judicial investigations are confided to persons other than judges, whose acts have never been questioned on constitutional grounds.'"

In the case of State v. Hathaway, 115 Mo. 36, 21 S. W. 1081, the court had under consideration a statute which vested in the state board of health power to examine not only into the literary and technical attainments of the applicants for a cer-

tificate to practice medicine, but also into his moral character. The court said:

"A judicial duty within the meaning of the Constitution is such a duty as legitimately pertains to an officer in the department designated by the Constitution as judicial. And we can but commend in this connection the language of the same court in Flournoy v. City, 17 Ind. 169, 'An act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act.' This rule is one quite familiar in this state. It is one that governs sheriffs and constables in making levies and has been applied to the Secretary of the State in determining the sufficiency of a certificate under the election law. State ex rel. v. Lesueur, 103 Mo. 253."

In the case of Lorenzino v. James, 18 N. M. 240, 135 Pac. 1172, it was contended that the board of county commissioners acted judicially in determining whether a liquor license should be canceled. The statute provided for the revocation by the board of county commissioners of a liquor license upon a hearing for specific causes not necessary to set out here. There the liquor license was used outside the locality for which it was granted. We said:

"It is true the board was required to determine whether the facts existed which required the cancellation of the license; but in so satisfying itself that the state of facts existed, which required the cancellation of the license, it acted only in a ministerial capacity. A duty to be performed is none the less ministerial because the person who is required to perform it may have to satisfy himself of the existence of the state of facts under which he is given his right or warrant to perform the required duty."

In the case of State ex rel. Perea v. County Com'rs, 25 N. M. 338, 182 Pac. 865, this court considered an act of the Legislature which required the state board of loan commissioners to determine the amount of indebtedness owing the counties from which De Baca county was created, and to apportion the indebtedness between the new county and the old ratably in proportion to the taxable property

taken from the old counties. We quote from the syllabus as follows:

"A 'ministerial act' is an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done. Held , that chapter 11, Laws of 1917, requiring the board of loan commissioners to determine the amount of indebtedness owing by certain counties, from parts of which a new county was created, and to apportion such debts between the new county and the old counties upon the basis of the assessed valuation which the property taken from the old county bore to the total assessed valuation in such old county, did not confer upon such board judicial powers."

Considering as we must the facts, circumstances, and conditions which led to the creation of the board in question, let us determine whether it was the intention of the Legislature to invest this board with judicial powers. In view of the constitutional provision prohibiting such action, the presumption would be that such was not the legislative intent. Next, it must be borne in mind that the state could not be sued without its consent. Assuming that an individual held an obligation against the state or against a county, the payment of which debt the state had assumed under the Constitution, there was no provision under the Constitution, nor the statute law of the state, by which such an obligation could be enforced. The Legislature knew that millions of dollars worth of bonds were outstanding which, under the terms of the Constitution, the state had assumed and agreed to pay. That these bonds and obligations were valid and binding obligations of the state was also known, and it was the intention of the Legislature to provide for the conversion of the territorial and county debts into direct obligations of the state. It desired to create an agency with power to audit these claims and to refund them. The three officers named created a board for the purpose of auditing and determining the validity of such indebtedness in the

first instance. It provided a method by which the state could be sued upon these obligations; not that the proceeding before the board of loan commissioners in the first instance was a suit against the state, but that the claimant was required, in order to be able to maintain suit against the state upon such an obligation, to first present his claim against the state to this board for audit and approval or disapproval, and, in the event of disapproval, the right of a judicial proceeding and a judicial inquiry on the part of the claimant against the state were given by an appeal to the district court. Where the state elects to give a suitor the right to sue it, it may provide the rights and conditions upon which the suit can be maintained and the mode of procedure to be employed.

Under section 4551, defining the powers and duties of the board of loan commissioners, the board was given power to hear the parties and to take testimony and to investigate, inquire into, and determine the validity of the claims and demands and the liability of the state of New Mexico for the same by reason of its assumption of the debts and liabilities of said territory, and the debts of the counties thereof, pursuant to the provisions of the Constitution of the state of New Mexico. This power was not judicial in the constitutional sense. It was akin to the power that has always rested in the state auditor, or territorial auditor before statehood, to audit all claims against the territory or state, and, if correct to issue a voucher for the same upon the state treasurer. It is like the power given to boards of county commissioners to investigate, determine, and pass upon the claims against the county. The duty of the board in this instance was clearly fixed by law. The discretion was to determine whether the claim was valid or invalid. If it was found to be valid, then the board was required to issue new bonds in lieu thereof, or to pay the

claim in cash. Take, for example, a claim against a city on an account, or for damages for personal injuries; the city council may take evidence on the matter and inform itself as to whether it ought to pay the claim, but this act is not judicial.

(4) Further, no power rests in any one to sue the state. The adjustment and payment of claims against the state rest entirely with the Legislature and such agencies as it may provide. It would have been competent for the state to have made the determination of this board final and conclusive as to the liability of the state to pay the old bonds or to issue new ones in lieu thereof. Of course, a moral duty rests upon the state to take care of its legal obligations, but in the absence of a statute or constitutional provisions there would be no available judicial remedy to enforce them. What might be a judicial proceeding in determining controversies between private individuals is not necessarily such where the interests of the sovereign state are involved. The rights and liabilities of a private individual are fixed by law and are to be determined by judicial inquiry or investigation, but not so where the liability of the state is the question involved for determination. Here the sovereign state can adopt whatever mode or method it elects to determine whether it shall become liable and discharge a given obligation. It can select whatever agency it sees fit and proper to pass upon the question and provide that, upon the determination of such agency, the claim shall be paid, and the inquiry conducted by such agency may be administrative or judicial, as the Legislature elects.

(5) The fact that an appeal is provided for from the decision of the board of loan commissioners to the district court does not alter the character of the proceedings. In the case of U. S. v. Ritchie, 17 How. 524, 15 L. Ed. 236, the Supreme Court of the

United States had before it for consideration an appeal from the decree of the District Court for the Northern District of California involving proceedings taken before certain commissioners appointed to settle private land claims in California under the Act of March 3, 1851, (9 Stat. at L. 631). The commissioners, after hearing proof in the case before them, ordered the title confirmed in the claimants. Thereafter a transcript of the proceedings before the board, with their decision, was filed with the clerk of the United States District Court of the Northern District of California. On a hearing had before the said court, the decision of the board of commissioners was confirmed, and the cause was taken on appeal to the Supreme Court of the United States. On the appeal there taken, a motion was made to dismiss the same by reason of the alleged lack of jurisdiction of the District Court to entertain an appeal from the board of commissioners, for the reason that the said board was not organized as a court, and lacked authority to exercise judicial power, and hence an appeal would not lie from it to the court. Considering this objection, the Supreme Court of the United States said:

"It is also objected that the law prescribing an appeal to the District Court from the decision of the board of commissioners is unconstitutional; as this board, as organized, is not a court under the Constitution, and cannot, therefore, be invested with any of the judicial powers conferred upon the general government. Am. Ins. Co. v. Canter, 1 Pet 511, 7 Law Ed. 242; Benner v. Parter 8 How. 235 (13 L. Ed. 119; U. S. v. Ferreira, 13 How. 40, 14 L. Ed. 42.)

"But the answer to the objection is that the suit in the District Court is to be regarded as an original proceeding, the removal of the transcript papers and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court The transfer it is true is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The District Court is not confined to a mere re-examination of the case as heard and decided by the board of commissioners, but hears the case de nove, upon the papers and testimony which had been

used before the board, they being made evidence in the District Court; and also upon such further evidence as either party may see fit to produce."

In the case of In re Initiative Petition (No. 23) 35 Okl. 49, 127 Pac. 862, the court had before it for consideration a statute which provided for the filing of the initiative petition with the secretary of state signed by a certain number of voters, and which gave the secretary of state the power to determine whether the signers were qualified voters, and provided for the appeal from his decision to the courts. The court held that the secretary of state did not exercise judicial power and that the fact that an appeal was provided for to the courts did not affect the nature of the power; that in the courts the case was to be tried de nove.

In the case of Cunningham v. N. W. Improvement Co., 44 Mont. 180, 119 Pac. 554, the court had before it for consideration a workmen's compensation act which placed the administration of the act in the hands of the state auditor, and authorized him to investigate the injury of employes and to determine the compensation, the compensation being fixed by statute and was dependent upon the nature of the injuries. The court held that the adjustment of claims under the statute was an administrative function, and not a judicial proceeding.

(6) From the foregoing authorities it is clear that the proceedings in question were not judicial, as that term is commonly understood; that the provisions in the statute providing for an appeal from the determination of such board to the district court did not alter the nature of the proceedings; that such board was a mere administrative agency created by the Legislature authorized to determine in the first instance the validity and the legality of the claims against the state covered by the act.

Consequently it necessarily follows that false pretenses could be made to such board, or to the state through such board, and the court properly overruled the demurrer to the indictment.

It is next argued that no presentation or pretenses of any kind were ever made by appellant or any one for him to the board of loan commissioners, acting pursuant to law and in behalf of the state of New Mexico. Under this point it is contended that, by reason of the fact that Robert W. Lynn, cashier of the Santa Fé Bank, and who was the officer of the bank acting in the premises, did not go in person to the board of loan commissioners at the time of the presentment of said evidence of indebtedness, and make oral representations to the board concerning the validity of the instrument, the state failed to prove false pretense, even though bogus bond 254 was transmitted to the state of New Mexico for consideration by the board for refunding, accompanied by a letter of transmittal. There is, however, no merit in this contention. In fact it would be wholly immaterial as to whether any letter accompanied the bond. The question is, Was there a presentation to the board of loan commissioners, for payment or redemption, of the bogus bond under circumstances which would import a representation that it was a valid and subsisting indebtedness of the county of Santa Fé, and which the party was entitled to have redeemed by the board? There is a controversy between the state and the appellant as to the letter which accompanied the bond. The letter itself was put in evidence, as was a supposed copy of the letter incorporated into the record of minutes of the board of loan commissioners. There was a variance between such copy of the letter and the original, in that the original letter stated, "We herewith inclose for your consideration and action certain bonds and detach coupons," while, as copied into the record, the letter stated, "We here-

with inclose for your consideration and action certain detached coupons," omitting any reference to bonds. Accompanying the letter was a detached list of the indebtedness presented. Included in the list was county of Santa Fé bond 254.

Volume 2, Bishop's New Criminal Law, §430, lays down the rule as follows:

> "With a few exceptions under statutes in special terms, it is immaterial to the pretense whether it is in writing, in oral words, by signs or conduct, or by any combination of parts of these; it is simply required that the idea be with due distinctness conveyed. * * * The uttering of a counterfeit note as a genuine one carries with it by implication a representation that it is genuine." See cases cited under note 5.

Volume 2, Wharton's Cr. Law (11th Ed.) §1434, states:

> "Conduct is a sufficient pretense. The conduct and acts of the party will be sufficient, without any verbal assertion, and words written or spoken, imperfectly setting forth a pretense, may be supplemented by proof of facts completing the false pretense. * * * The mere passing business paper, also, at its nominal value, is an affirmation that such value is real."

Mr. Wharton, in the same work, further lays down, in section 1425, that it is obtaining money by false pretenses generally to pass spurious notes or coins if goods or money be obtained thereby. 12 R. C. L. p. 152, states:

> "The true rule seems to be that the mere offer of the false instrument with fraudulent intent constitutes an uttering or a publishing, the essence of the offense being as in the case of forgery, the fraudulent intent, regardless of its successful consummation."

In this case no heed need be paid to the contention that the state is bound by the recitals in the record, to the effect that the letter, purporting to transmit the evidences of indebtedness, refers only to coupons, and does not mention bond 254, for, if the state is bound by the record, the defendant would

be likewise bound; and if the defendant is bound, then he would be concluded by the recital in the record to the effect that bond 254 was presented with the letter. It would be wholly immaterial whether the letter mentioned the bond; if it was included in the list of indebtedness transmitted with the letter, the presentation would be as complete as if it had been mentionel in the letter itself. It is the presentation for payment, or refunding under circumstances which imply a representation as to its validity, which makes out the offense. As we have seen from the authorities the mere presentation of spurious evidence of indebtedness for payment, and the obtaining of money thereon, makes out the offense, unless all the facts and circumstances in evidence would tend to show that there was no intent to deceive. Take, for example, the case of an individual who might obtain a forged order on a merchant for the delivery of goods, on the credit of the forged payee. He presents the order to the merchant without any explanation or representations, and the merchant fills the order. Would not such individual be as guilty of obtaining money by false pretenses as though he had said to the merchant: "This order is valid and binding; I saw the payee sign it and he delivered it to me." It is the presentation with intent to deceive, and under circumstances calculated to deceive, which makes out the offense.

It would necessarily follow that, if appellant had knowledge of the invalidity of bogus bond 254, and authorized the Santa Fé Bank to present the same to the board of loan commissioners for refunding, the mere presentment of said bogus bond was false pretense.

(7) Under this same point it is argued that, the state board of loan commissioners held no meeting of the board on June 3, 1916, the date named in

the record as the meeting of the board and the consideration of the evidences of indebtedness, and providing for their refunding or payment; that Frank Marron, deputy state treasurer, presented the evidences of indebtedness and the minutes first to one member of the board and then to the other members, and that by reason thereof no false representations could be or were made to the board, because a false representation could not be made to individual members of the board. There was proof in the record, however, to the effect that the board did meet on the 3d of June and acted as a board upon such matter. William G. Sargent, state auditor at the time, testified at one time during his examination as a witness, that there were no meetings of the board as such, but that Frank Marron, deputy state treasurer, made up the minutes and carried them around, together with the evidences of indebtedness, to the individual members of the board, and procured their signatures. It is argued, and correctly, that, where a duty is intrusted to a board composed of different individuals, that board can act officially only as such, in convened session, with the members, or a quorum thereof present. But Mr. Sargent also testified to other facts which would, however, authorize the jury to infer that there had been a meeting of the board on June 3, 1916. Hon. Frank W. Clancy, who was Attorney General at the time and a member of the board, had no distinct, personal and independent recollection of the matter, but based his evidence wholly upon the recitals in the record, and testified that he would not have signed the record unless satisfied that it spoke the truth. Mr. O. N. Marron, state treasurer at the time, and the third member of the board, testified positively that there had been a meeting of the board on June 3, at which he was present when this matter in question was considered, and that it was considered by the board in its official capacity. Some two or three days later Mr. Mar-

ron was recalled to the stand and testified that he had been mistaken in his former testimony; that he was not even in the city of Santa Fé on June 3; that he left Santa Fé on the evening of the 2d of June, and consequently all his former testimony as to what occurred was incorrect, but, as we shall see in a later portion of the opinion, it was for the jury to say whether his first testimony was correct or his subsequent testimony. Consequently, if it be conceded that it was essential that there should have been a presentation of the claim to the board in formal session, there was substantial evidence before the jury of the fact that there had been such meeting, and such evidence is sufficient to support the verdict.

(8) The Attorney General contends that, even if there had been no meeting of the board, the conviction could be sustained under section 1604, which provides:

"In any case, when the intent to defraud is necessary to constitute the offense of forgery, or any other offense that may be prosecuted, it shall be sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient and shall not be deemed a variance if there appear to be an intent to defraud the United States, or any state or territory, county, city or precinct, or any body corporate, or any public officer in his official capacity, or any copartnership or member thereof, or any particular person."

That under this statute it is not incumbent upon the state to allege in the indictment that the false pretense was made or bogus bond 254 was presented to the board of loan commissioners, or to any particular person, so that it got to the state with intent on the part of appellant to defraud the state. Further, that it was not incumbent upon the state to prove that the board of loan commissioners met in pursuance to law and passed upon said bogus bond 254; that it was only incumbent upon the

state to allege that there was an intent on the part of Kelly to defraud the state by the presentment of the bond and to prove that the bond was bogus, and that appellant knew it and received a part of the spoils from the fraudulent transaction, citing in support of his contention State v. Pilling, 53 Wash. 464, 102 Pac. 230, 132 Am. St. Rep. 1080; State v. Ice & Fuel Co., 166 N. C. 366, 81 S. E. 737, 52 L. R. A. (N. S.) 216, Am. Cas. 1916C, 456. See, also, note to the case of Commonwealth v. Johnson, 167 Ky. 727, 181 S. W. 368, L. R. A. 1916D, 267, at page 270, for note. But, in view of the holding that there was substantial evidence of the fact that the board did meet, we do not find it necessary to determine this question.

It is argued that, because the letter of transmittal by the Santa Fé Bank referred to indebtedness of the territory of New Mexico, and the board found that the evidences of indebtedness were of the county of Santa Fe, there was a variance. We fail to appreciate the force of this contention. The question for determination by the jury was whether there had been a presentation of bogus bond 254 to the board of loan commissioners for refunding under circumstances which constituted false pretenses. If bogus bond 254 actually accompanied the letter of transmittal, and was in fact the bond presented and intended to be presented by the letter, and the presentation of the bogus bond was at appellant's request, the fact that it was erroneously referred to as a bond of the territory of New Mexico in the letter would be wholly immaterial.

(9) It is earnestly insisted by the appellant that there was no proof that the Santa Fé Bank was the agent of William G. Kelly, nor that the said Santa Fé Bank with its full knowledge and consent made any representation to the said board of loan commissioners as to bond 254, set forth in the indict-

ment. Under this proposition it is first argued that there is no evidence by any officer of the Santa Fé Bank, or the Santa Fé Bank & Trust Co., or by any other person, that the Santa Fé Bank was the agent of William G. Kelly. The letter of transmittal stated that the presentation was made on behalf of Kelly & Kelly, of Kansas City, Mo. Appellant was a member of this firm.

(10) It is argued that admissions, statements and declarations of an agent are not admissible to prove agency, and this proposition is correct. There must first be prima facie proof of agency before such declarations or statements are admissible for any purpose. While agency may not be proved by the extrajudicial statements and declarations of one pretending to act as agent the fact of agency when it rests in parol, may be established on the trial by the testimony of the agent himself. See note to the case of Dispatch Printing Co. v. National Bank of Commerce, 5 A. R. C. 218. The note will be found on page 224. Many cases are cited in support of the proposition, and we know of nothing to the contrary. Another general rule may be stated, which is that the existence of an agency may be shown by, or inferred from, circumstantial evidence. See cases cited in note to the case of Frank v. Board of Education, 5 A. R. C. p. 155. The note will be found on page 161. With these two rules stated, it will be necessary to review the evidence to determine whether appellant's contention is correct. The direct evidence of agency for Kelly, if such has been established, is afforded by the testimony of Robert W. Lynn, who was cashier of the bank at the time of the presentation of the bond in question. Almost three years had elapsed between the time of the presentation of the bond and the trial. The cashier of the bank had handled many thousands of transactions in the interval. His memory was naturally not very clear on the facts and circumstances at-

tending the presentation of the bond. He testified that some one other than himself, or any one connected with the bank, prepared the letter which accompanied the bond; that all he did was to sign the letter. Mr. Lynn testified on cross-examination in part as follows:

"Q. You have no definite recollection of the manner in which this paper was transmitted, if it ever was transmitted, to the board of loan commissioners, have you—or to the treasurer? A. Do you want me to explain the regular routine it would go through?

"Q. Yes; you may do that, but my question first I would have answered. A. I have no definite recollection.

"Q. Do I understand that your best recollection is that the paper reached your hands with the certificate by Mr. Edwards upon it already written and signed? A. I do not state that as a fact, but it is my recollection.

"Q. Did Mr. Kelly, so far as you know, ever see this paper in your possession? A. I don't think he did.

"Q. That circumstance that you had no written copy of this letter in your bank, does it not refresh your memory or enable you to say more positively how this letter came to be presented to you for signature? A. I can't state definitely. I can state in a roundabout way my idea.

"Q. That would only be an impression, except what you have said with reference to your belief that Mr. Edwards gave it to you? A. I did not say it was my belief that Mr. Edwards gave it to me.

"Q. I mean that his name was on it when you got it. You are able to say positively that you did not get this derect from William G. Kelly or from Kelly & Kelly? A. To the best of my belief I did not.

"Q. Are you able to say, Mr. Lynn, that, when this letter was presented to you, you accepted it as a mere matter of collection business, assuming that it came into your hands by some proper authority? A. That is correct.

"Q. But what that authority is or what it was you can not recall now; that is, who vouched for this letter; that you cannot say? A. I believe I considered this letter a matter of form necessary for the collection of the items attached.

"Q. Are you able to say, in view of the fact that you cannot recall the items, whether those items were attached and listed with the list mentioned in the letter was brought to you? Briefly ,was the letter with the attached items and

list brought to you at the same time? A. I can't say definitely. I think they were.

"Q. Under all these circumstances are you able to say that you had or had not any authority from Kelly & Kelly with reference to this transaction whatever it may be mentioned in the letter of June 2d, Plaintiff's Exhibit No. 6? A. I believe I did.

"Q. From whom? A. From W. G. Kelly.

"Q. Now, in reference to what was that? Can you tell by that letter? A. To the best of my memory Mr. Kelly instructed me to submit these items when called upon.

"Q. But what items are referred to in this letter of June 2d you don't know? A. I have no definite knowledge of those items."

Later Mr. Renehan made the following suggestion in the record:

"If the court please the witness has testified he did not know this particular transaction, but that he had permission from Kelly to submit matters."

Whereupon the witness followed.

"I don't believe I so testified in my answer. I said I had instructions from Mr. Kelly on this particular matter.

"Q. Now what particular matter did you refer to? A. To the items covered by that letter.

"Q. Now, what were those items? A. I don't know. I mean I have no definite description and can give no definite description.

"Q. You don't know whether or not the letter ever reached the board of loan commissioners? A. I have no knowledge of that letter after it was sent by the bank to the office of the state treasurer."

It will be observed that the witness testified that he had instructions from Kelly to submit the items covered by the letter, or submitted with the letter, when called upon, and that he had instructions from Kelly on this particular matter. We thus have direct evidence of the agent of the fact of agency, and in addition to this we have a circumstance which tends very strongly, indeed, to establish the fact of agency. In refunding the evidence of indebtedness

submitted to the board by the Santa Fé Bank, acting through its cashier, the board issued four bonds, each of $1,000, and a state warrant in favor of Kelly & Kelly for $682. This state warrant represented the amount due under the transaction, less than $1,000. It was the practice of the state loan board to issue only bond in $1,000 units, and to liquidate in cash the old amount. This warrant was received by Kelly and indorsed, and on the trial it was admitted by the counsel for appellant that he had received a warrant and obtained the proceeds. Such being true, it would be somewhat difficult to understand why appellant obtained the amount and appropriated it to his own use, and made no inquiry whatever as to the reason for the payment. But it is argued that some valid evidence of indebtedness was presented, and that this warrant might have come from such indebtedness, but, again, there is no showing that at that time Kelly had before the board for consideration valid indebtedness amounting to the face value of the warrant. There is another circumstances, and that is that Kelly knew where the original bond 187, from which the bogus bond was made, was located. By wire he requested the Capital City Bank of Santa Fé to buy this bond from a given bank in New York City, which was done. The Santa Fé Bank had theretofore presented for Kelly other matters to the board of loan commissioners for refunding. All these facts and circumstances and the direct evidence of Mr. Lynn were amply sufficient to establish the fact that, whatever Mr. Lynn purported to present on behalf of Kelly & Kelly, he had authority and directions from Kelly to do. Appellant argues that at most the Santa Fé Bank was simply a carrier, and did not act in the capacity of agent, but Lynn's testimony shows that he was instructed by Kelly to submit the items to the state treasurer. This, if true, clearly established the relation of principal and agent, and, as we have seen, the submission of the

bond for consideration and refunding necessarily constituted the representation as to its legality and validity.

It is further argued that the bank acted for Kelly & Kelly, a copartnership, and that William G. Kelly, appellant, personally may have had no connection with the fraudulent transaction; that, in order to render him criminally liable, it would be necessary to show personal participation; but this argument, in view of Mr. Lynn's testimony wherein he stated that he had instructions from William G. Kelly to submit these items, is without basis upon which to rest.

There is one other question in this case which requires consideration, and that is the inability of Mr. Lynn to recall the items which he submitted with the letter to the board of loan commissioners. We must begin with the proposition that, whatever he did submit, he was authorized by Kelly to do so.

(11) The next question for consideration is whether the evidence shows that at the time in question he submitted bogus bond 254 to the board of loan commissioners. In other words, then, having stated that whatever he submitted with the letter of June 2d he was instructed by Mr. Kelly to submit, we must next determine whether the evidence shows that bogus bond 254 was submitted with the letter of transmittal. First, we have the record made by the board of loan commissioners showing that this bond was included in the list of items accompanying the letter. Next we have the testimony of O. N. Marron in which he says he was present at the meeting of the board; that bond 254 was presented with the letter and included in the list of indebtedness which accompanied the letter; that it was presented by the Santa Fé Bank; that there was no territorial bond presented with the letter, but that county of Santa Fé bond 254, the bogus

bond in question, was the one presented. Then we have the testimony of William G. Sargent, state auditor, to the effect that on June 3, 1916, a letter of transmittal from the Santa Fé Bank was presented to the board, together with coupons and one bond, No. 254. Mr. Sargent further testified that there was no other letter of that date, or near that date, from the Santa Fé Bank presenting any other evidence of indebtedness. It is true that the effect of Sargent's testimony was greatly impaired by other evidence given by him to the effect that there was no meeting of the board and that he was testifying largely from the record as made by the board. Then we have the testimony of Hon. Frank W. Clancy to the effect that at the time he signed the minutes he was satisfied that they spoke the truth; but, eliminating both the testimony of Mr. Sargent and Mr. Clancy, Mr. Marron's testimony is sufficient to support the verdict, if believed by the jury. His testimony being vital upon two points of the case, it is argued by the appellant that it should be wholly eliminated from the case, because, after testifying positively upon the two propositions as we have seen, he was some two days later recalled to the stand and further cross-examined, at which time he stated that he had been mistaken in his former testimony; that he was not in Santa Fé on June 3d, did not attend the meeting of the board, and knew nothing about the matter about which he had testified.

The general rule is that the credibility of witnesses is in all cases a question for the jury, and it is said in 38 Cyc. 1518 et seq. that this rule has been applied where the testimony of a witness is contradicted or conflicts with testimony previously given by him or conflicts with the statements previously made by him, or is shaken on cross-examination, or his testimony is given under circumstances such as would naturally throw discredit on him. The jury

here had the right, if it so elected, to believe that Mr. Marron told the truth upon his first appearance upon the witness stand, and that his testimony given some two days later was untrue and unworthy of belief, or conversely; it had a right to believe his later statements to the effect that he was not present at the board meeting, was not in Santa Fé, and knew nothing about the transaction previously testified to by him. Many instances occur upon the trial where witnesses give contradictory testimony, but because of such contradictions we know of no rule which requires the court as a matter of law to withdraw the testimony, from the consideration of the jury. In the case of Bruger v. Princeton, etc., Ins. Co., 129 Wis. 281, 109 N. W. 95, it was contended that testimony of the plaintiff in the case should be disregarded because of prior inconsistent admissions, but the court held that it was for the jury. In the case of Van Salvellergh v. Green Bay Traction Co., 132 Wis. 166, 111 N. W. 1120, which was an action for damages for personal injuries, the court said that the witness had testified first in a contradictory way as to whether she saw the car before it reached her, and upon cross-examination testified that as it approached she was looking in the general direction from which it was coming, but did not see or hear it; following this with contradictory evidence as to whether she did or did not forget about the probability of a car coming. Later she testified that she was looking away from the car. The court said:

"Even in the case of an adult where he as a party testifies in a contradictory way in respect to a vital point in issue it is not necessarily fatal to the case; it is competent for the jury to say which of the two conflicting statements is correct. * * *

"So, notwithstanding the contradictory character of plaintiff's evidence it was proper to send the case to the jury on the subject of whether she was unmindful of the probability of a car approaching and did not see or hear one or look in

the direction from which the car was coming, from the time she started south on the crosswalk till she was struck."

In the case of People v. Chapleau, 121 N. Y. 266, 24 N. E. 469, appellant's counsel argued that the jury should not have been allowed to consider the testimony of two witnesses because they were perjured witnesses on their own showing. The court said:

"If this were true, it would be no reason for any such instruction by the court to the jury."

And further:

"The doctrine as to the treatment of testimony which is affected by contradictions and inconsistencies, or by evidence making its falsity manifest and establishing a consciousness in the witness of its falsity, has been much considered in the books. Opinions have not always been in accord, but the weight of authority was in favor of the general rule that the question of the credibility of a witness was one for the jury, and that the only exception to the rule was in cases where the discrepancies in the testimony were the result of deliberate falsehood. The Santissima Trinidad, 7 Wheat, 339; Conray v. Williams, 6 Hill, 444, 446; People v. Evans, supra; Wilkins v. Earle, 44 N. Y. 172; Pease v. Smith, 61 N. Y. 447; Place v. Minster, 65 N. Y. 80; People v. Petmacky, 99 N. Y. 415.

"But, since the enactment of section 714 of the Penal Code and section 832 of the Code of Civil Procedure, we must hold that a new rule obtains, and that the rule and policy of the law are to allow all testimony to go to and be weighed by the jury. By those sections, a person convicted of any crime is, notwithstanding, a competent witness in any cause or proceeding, civil or criminal; but proof of his conviction is allowed for the purpose of affecting the weight of his testimony. In People v. O'Neil, 109 N. Y. 251, 266, the court had refused to charge that, if the jury should find that certain witnesses had in their previous testimony, in respect to the same matters, committed willful perjury, the jury should wholly disregard their testimony given on the trial. This was held not to be error, and Andrews, J., said, in reference to the force of section 714 of the Penal Code: 'It would be manifestly absurd, in the sight of this statute, now to hold that an unconvicted perjurer was an incompetent witness, whose evidence could not be considered by the jury, when, under the statute, if he had been convicted, his evidence must be received and weighed by the jury. Here the witnesses in testifying to facts, of which upon the preliminary

examination they had denied knowledge, or which they had suppressed, may have been moved and deterred, as they swore they were, by motives of fright; and they appear to have been perfectly free from improper instigations, or motives to swear falsely. At any rate, it was for the jury to decide whether they were to be believed or not."

In the case of Williams v. D. L. & W. R. R. Co., 155 N. Y. 158, 49 N. E. 672, the action was for personal injuries, the plaintiff claiming that he had been knocked off a freight car while going under a bridge. On the first trial of the case the plaintiff testified that he had passed under the bridge regularly for three weeks and frequently on top of a box car. The accident occurred in the daytime, the bridge was in plain sight, and that, knowing the train was about to pass under it, he turned his back to it and was going to the rear of the car when he was struck. The case was reversed on the ground that plaintiff knew the danger. On the second trial plaintiff testified that prior to the accident he had never passed under the bridge in question on top of the box car, and that he did not know it was a low bridge. The trial court, because of his previous testimony, instructed a verdict for the defendant. The court said, after reviewing the authorities:

"In this case the plaintiff gave testimony which, if credited by the jury, would have entitled him to a verdict. The trial judge apparently did not credit it, and it is quite likely that his view of the testimony was the correct one, but the difficulty with the situation is that, under our method of procedure, it was the province of the jury, not the court, to say whether his testimony was entitled to belief."

The judgment was reversed.

A similar case is that of Odell v. Webendorfer, 60 App. Div. 460, 69 N. Y. Supp. 930. See, also, Voss v. Smith, 87 App. Div. 395, 84 N. Y. Supp. 471, and Murr v. Western Insurance Co., 50 App. Div. 4, 64 N. Y. Supp. 12.

It would follow from these authorities that, if the trial court was not authorized to take a case from

the jury where the plaintiff had testified directly contradictory upon the first and second trials of the case, he would not be justified in so doing where the contradictory evidence was given upon the same trial. It thus follows that there was ample evidence by the testimony of Marron alone, if it were believed by the jury, to establish the fact that bond 254 was submitted, together with other evidence of indebtedness, with the letter of June 2. There was in addition the circumstantial evidence afforded by the fact that Kelly, without question, accepted the warrant issued for $682.20, which grew out of the presentation of the items accompanying the letter.

We cannot appreciate the force of the argument advanced by the appellant to the effect that the bond on its face was prima facie evidence of a valid and subsisting indebtedness of the county of Santa Fé, and that the question as to whether it was or was not was a question of law for the board to decide, and that false pretense could not be predicated upon a question of law. It was a question of fact for the board to decide whether the bond was a forged bond or otherwise. Of course, if it was a forged bond as a matter of law, necessarily there was no liability on the part of the county, but it certainly was a false pretense to hold out the bond to such a board as a genuine bond of the county of Santa Fé.

It is next argued that there was no evidence that the defendant directly or indirectly procured the Santa Fé Bank, or any other person, to make any false pretenses to the board of loan commissioners, nor that the defendant had any knowledge thereof, or consented thereto. There were facts and circumstances in evidence from which the jury could properly infer that appellant knew that the bond in question was a spurious bond. There was evidence also that he had in his possession other spurious evidence of indebtedness against the county of Santa

Fé in the form of bonds. If he procured the Santa Fé Bank to present this bond to the board of loan commissioners for refunding, it would necessarily follow that the mere presentment of the bond, under the authorities heretofore cited, would constitute false pretense.

(12) It is next argued that the court erred in setting cause No. 4212 (the case in question) for trial over the objection and protest of the defendant. The facts out of which this contention arose are as follows: Appellant had been theretofore indicted for the same offense under an indictment, No. 4172, and had been indicted at the same time for several other offenses of a like nature. This was some three or four months prior to the trial in question. There were some technical defects in the first indictment, or at least the state was doubtful as to the advisability of proceeding to trial under the first indictment. The cases had all been set for trial, and the state elected to reindict the defendant, which was done on the 31st day of March, 1919. The court set the case for trial on the next day. When the case was called to trial appellant filed objection and protest to proceeding to trial, claiming that, by the fact of the case having been set for trial on the next day, appellant was deprived of his constitutional right to be aided and assisted by counsel, and present witnesses in his defense. In 21 Ency. of P. & P., p. 975, it is said:

"The trial court or judge is vested with a large discretion in the conduct of the trial of causes, and an appellate court will not interpose to control the exercise of such discretion by a court of original jurisdiction unless there has been an abuse or a most unwise exercise thereof."

In Wartena v. State, 105 Ind. 445, 5 N. E. 20, the court said:

"It is nevertheless the undoubted province of the nisi prius courts, in the exercise of a sound discretion, to regulate the course of business during the progress of trials. Included

in this is the right, during the term, in a proper way, to control its own sittings."

That case had to do with the holding of night sessions over the objection of counsel for appellant, and in the light of the facts it was held the court did not abuse its discretion. In State v. Silvius, 22 R. I. 322, 47 Atl. 888, three cases were set for trial for the same day against the defendant. The third case on the calendar was tried first over objection. It was held under the practice of that state that such action was permissible, the court saying:

"The defendant having been duly notified that all the indictments against him were down for trial on the day in question, he was bound to be ready, or to show good cause why he was not."

In the case of State v. Parry, 26 N. M. 469, 194 Pac. 864, there were three cases against the defendant, and the court first called the last numbered case for trial over the objection of the defendant. The court said:

"The power to regulate the order of precedence in the trial of cases rests in the discretion of the trial court, and the defendant, in the absence of a showing of diligence, can not complain of the taking up for trial of the last of three cases set for trial on the same day, instead of one of the other two cases."

There was no showing that any additional witnesses were required in order to enable appellant to present his defense, whose testimony could be procured by a delay. No motion for a continuance was filed. The fixing of a time for trial in a case rests in the discretion of the trial court, and in the absence of a showing of prejudice, the action of the court in the matter will not be interfered with on appeal. There was no showing of prejudice in the instant case.

(13) It is next urged under this proposition that the court set cause No. 4212 for trial in violation of

the provisions of section 5901, Code 1915. This section reads as follows:

"That is shall be the duty of the judge of each district court to fix a day for the trial of each criminal case in the district court, which day shall not be earlier than the third day of the term, and shall be fixed by the judge, not less than 20 days before the first day of the term at which it shall be tried, except that no date shall be fixed for the trial of any criminal case which the judge has reason to believe will not be tried at such term, and witnesses summoned on behalf of the state in any case so fixed for trial shall be summoned to appear at the courthouse of the proper county at 9 o'clock a. m. of the day in which said cause shall be fixed for trial, to testify in behalf of the state in such cause."

The statute is only directory. If it were held to be mandatory then no case could be tried during the term at which an indictment was returned, and it has always been the practice in all the district courts of the state to set cases for trial during the term at which the indictment was returned.

It is next argued that the court erred in refusing to give each of the 26 instructions upon defendant's theory of the case. Counsel for appellant say:

"It would be but duplicating argument and re-writing authorities to treat each of these instructions separately as the principle of law involved in the instructions are identically the same as the principles of law involved in the motion to instruct the jury to return a verdict of not guilty, and the demurrer to the indictment."

We have reviewed the law applicable to the propositions under which appellant says the instructions should have been given and have determined the same adversely to appellant's contention. Consequently it is unnecessary to treat the instructions separately, and appellant has not done so. It follows that there was no error in refusing the instructions.

(14) Appellant contends that the court erred in giving two instructions to the jury, as follows:

"If each and all of the material allegations of the indictment as stated in the last preceding paragraph, to wit, par-

agraph 6, have been established by the evidence to your satisfaction and beyond a reasonable doubt, you will find the defendant guilty as charged in the indictment; but if you have a reasonable doubt as to whether said material allegations, or any one or more of them, have been established, you will find the defendant not guilty."

"The defendant is presumed by the law to be innocent, and that presumption remains with him until his guilt is established by the evidence beyond a reasonable doubt of the offense charged against him, and it devolves upon the state to establish the guilt of the defendant beyond a reasonable doubt before you would be warranted in depriving the defendant of the benefit of this presumption and to find him guilty, and if you have a reasonable doubt of the defendant's guilt you should acquit him."

Appellant insists that in both these instructions the court told the jury that, if there was a reasonable doubt of defendant's guilt, they should acquit him. The instructions in question are the usual ones given and have been approved by many courts as shown in 2 Brickwood-Sackett's Instructions, § 2634.

Complaint is made because the court, during the examination of the state's witness, Ignacio Lopez, at the suggestion of the district attorney, sent the jury out and permitted the state to interrogate such witness in the absence of the jury for the purpose of refreshing his recollection. The witness was being interrogated as to his signature upon bond 187 and other evidences of indebtedness issued by the county of Santa Fé, together with the signature of two members of the board of commissioners on such bond. This, as stated, was for the purpose of establishing the genuine signatures of these people for the purpose of comparison, the object being to show that the signatures were forged to bond 254. The witness failed to testify positively to the signatures, and, after the jury retired, the state interrogated the witness as to whether he had not stated to counsel for the state theretofore that the signatures were genuine. The attorneys for the defend-

ant, when the examination was begun, interposed this objection:

"To which line of examination we object at this time in the condition the record shows the proceedings to be."

And later the objection was interposed that the procedure was improper. In his brief in this court counsel for appellant contents himself by saying:

"We will not attempt to cite authorities to the court on the proposition that the foregoing procedure is absolutely unheard of, but we will state that the correct procedure is, if the state has been surprised or a witness has become adverse, that the state should claim the right in the presence of the jury to cross-examine that witness, and when such right is given, to proceed with such cross-examination and let the jury see in just what manner the witness has given it."

(15) If the procedure adopted by the trial court in the present case violated any of the defendant's rights, it was the duty of counsel for appellant to point out to this court wherein he was injured or his rights violated. It is fundamental that an appellate court will not search for reasons to reverse a case; that the duty rests upon an appellant to clearly show that error has intervened to his prejudice. It is not argued by appellant that his constitutional right of trial by jury was violated by the procedure adopted. Further, it was later admitted by counsel for appellant in open court, in the presence of the jury, that bond 254 was not a genuine bond. The examination of Lopez was only preliminary to establishing that fact, and in view of the admission we fail to see how defendant's rights were prejudiced, unless it be that a constitutional right was violated, which is not contended by appellant.

The contention is made by appellant to the effect that error was committed in the introduction of evidence. For example, he contends that the court permitted the prosecution to offer in evidence, over the

objection of the defendant, evidence out of its proper order. The order of proof rests in the discretion of the trial court, and it is a frequent occurrence for the court to permit the introduction of evidence which properly should go later, upon the assurance of the state that the preliminary proof will be forthcoming. There was no error in this regard. Many of the objections to the introduction of evidence were based upon propositions of law heretofore in this opinion decided adversely to appellant, and require no further discussion.

Finding no error in the record, the judgment will be affirmed, and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

(No. 2536. Nov. 9, 1921.)

LEBERT V. MISNER.

SYLLABUS BY THE COURT.

Appeal from District Court, Mora County; Leahy, Judge.

Action by J. H. Lebert against F. B. Misner. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Leahy, of Raton, and C. W. G. Ward, of East Las Vegas, for appellant. J. B. Lusk, of Roy, and A. B. Renehan, of Santa Fé, for appellee.

OPINION OF THE COURT

DAVIS, J. Appellee brought this action to recover a commission upon the sale of real estate belonging to appellant, alleging in his complaint, among

other matters, that he was a real estate agent, that he was the procuring cause of the sale made by appellant, and that appellant expressly promised him a commission if the sale was made. He claimed a commission of 5 per cent. upon the sale price. The answer denied all these allegations. Trial was had to the court without a jury. The court made definite findings in favor of appellee, three of which are as follows: "That on the 15th day of September, 1919, the plaintiff herein took one C. E. Holcomb to the said lands of plaintiff; that at said time and place plaintiff said to defendant, 'If you sell your lands to this man (meaning said Holcomb) will you save me a commission?' to which defendant replied, 'Yes; if I sell my lands to him, I will save you a commission.'" "That shortly thereafter, at the same place and upon the same day, the said 15th day of September, 1919, the defendant and the said C. E. Holcomb did enter into an agreement whereby defendant sold to said Holcomb his 960 acres of land hereinabove referred to at a price of $35 per acre." "That a commission of 5 per cent. is a reasonable commission." We have examined the transcript, and find that all these findings are supported by substantial evidence. No questions of law are presented. The liability of appellant for the amount for which the court gave judgment follows from the findings. The judgment is therefore affirmed, and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2561. Nov. 17, 1921.)

SHACKELFORD V. McGLASHAN.

SYLLABUS BY THE COURT.

Payment in good faith of taxes, although the assessment on which the payment is made erroneously describes the land intended to be assessed, is a defense against a sale and tax deed based upon a second assessment of the same land with a proper description.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by W. H. Shackleford against A. E. McGlashan and another to cancel a tax deed and subsequent conveyance based on it. Demurrer to complaint sustained, and the plaintiff appeals. Reversed and remanded.

M. J. Helmick, of Albuquerque, for appellant.

George S. Downer and Simms & Botts, all of Albuquerque, for appellees.

OPINION OF THE COURT.

DAVIS, J. This is a proceeding to cancel a tax deed and subsequent conveyances based upon it. It was decided by the trial court upon a demurrer alleging that the complaint did not state facts sufficient to constitute a cause of action, this demurrer being sustained. The facts are therefore admitted, and we state them from the complaint. On January 1, 1908, John Schroeder was the owner of 160 acres of land described as the S. W. ¼, S. 17, Tp. 9 N., R. 3 E., N. M. P. M., the land being located in Bernalillo county. This was the only 160-acre tract which he owned at that time. For the year 1908 Schroeder made a return for taxation purposes in Bernalillo county in which he included this 160 acres of land, but through inadvertence, error, and mistake he incorrectly described the land, the descrip-

tion set out in his tax schedule, literally read, being as follows:

tp. 7

	Sec.	Tp.	Range	No. Acres
Precinct N. 1	SW¼	17	5E	160

This description was intended by Schroeder to identify and describe the 160 acres which he owned and was a bona fide attempt on his part to comply with the law.

The assessor in making up the rolls for the year 1908 did not copy exactly the return by Schroeder, but entered an assessment against him for the "SW¼, Sec. ——, Tp. 17, R. 5 E." Under this assessment Schroeder paid the taxes levied, intending thereby to pay the taxes upon the 160 acres of land which he owned, and this payment was accepted by the treasurer of Bernalillo county.

The land described in this assessment would be located in Sandoval county, and not in Bernalillo county, in which the assessment was made.

For the year 1908 the assessor made an additional assessment against "unknown owners," and there correctly described and assessed the lands owned by Schroeder as the "S. W. ¼, Sec. 17, Tp. 9, R. 3 E." Schroeder had no actual notice or knowledge of this assessment.

After Schroeder had paid the taxes under the assessment above set out, containing the incorrect description of his lands, the land was sold under the assessment to "unknown owners," and such proceedings were had that the tax title thus instituted became vested in the defendant A. E. McGlashan under a tax deed from the county. Later McGlashan and his wife conveyed the land by warranty deed to D. V. Wardall, who, with his wife, and likewise by warranty deed, conveyed the premises to J. J. Weisendanger, one of the appellees here. The as-

sessment to "unknown owners," the sale made under it to McGlashan, and the subsequent conveyances to Weisendanger all appear to be regular.

The tax sale was made during the year 1909, and is therefore governed by the provisions of section 25, c. 22, Laws 1899, which has frequently been before this court, the latest case being Chisholm v. Bujac, 27 N. M. 375 202 Pac. 126, decided at this term. This section expressly permits a tax sale made under that law to be attacked on the ground that the tax had been paid before the sale. In this respect it is merely declaratory of the rule which would exist without it. Non-payment of the tax is an essential foundation for every tax sale.

The question in this case is whether payment of the tax has in fact been shown, or, in other words, whether payment under this assessment which improperly described the land was good payment on the land he owned. It is conceded that appellant intended by this payment to pay the tax on his land and believed that he was doing so. Since the treasurer of the county accepted the money, it must be assumed that he understood it was payment on the same land, for he certainly would not knowingly accept the payment of taxes upon land not within his county. We have, therefore, a case where the owner has paid money to the county as taxes on a certain piece of land, and the county has accepted it as payment on that land, although in fact the land was not properly described on the tax roll and can only be identified by proof of circumstances wholly apart from the roll itself.

The assessment under which this tax was paid was not a valid one. It would not have supported the tax sale based upon it. On the record presented to us the assessment to "unknown owners" was a valid assessment, and the tax sale based upon it was regular on its face. The conclusion that this as-

sessment was valid necessarily follows from the decision of this court in Knight v. Fairless, 23 N. M. 479, 169 Pac. 312, in which this court held that an assessment of a specific piece of property to "unknown owners" could not be attacked by proof that the owner had attempted to include it in another assessment which did not describe it. We see nothing in the present record to differentiate that case from this one in that regard. But Knight v. Fairless did not involve the question of the payment of the tax. Here we are determining whether the tax was in fact paid, not primarily whether the assessment to "unknown owners" was good, and upon that point the former case is not authority.

We are not presented with the issue as to whether payment may be shown to avoid a tax sale based upon a record which incorrectly shows the tax unpaid, nor as to whether payment under one assessment, valid on its face, will avoid a sale under another equally regular, a question which arises in the ordinary case of double assessment. The authorities on such questions are uniform to the effect that payment in fact may be shown, and there would seem to be little chance for argument to the contrary. Here the question is somewhat different. We are determining whether payment under an assessment, invalid because it fails to describe the land sufficiently for identification, is good payment on the land intended to be assessed, so as to avoid a sale under another assessment with a proper description.

The primary purpose of every law for the enforcement of tax liens is to obtain payment of the tax. The end desired is the obtaining of the funds necessary for governmental purposes. If that payment has been obtained, the primary purpose of the law has been accomplished, and this is true whether or not payment is made with technical accuracy. While the law provides for a tax sale and allows a

purchaser at such sale to acquire title, divesting the former owner, that is but a method by which the county obtains its funds. The owner of the land having failed to pay, the county obtains its money from another. Under our statutes the purchaser at such a sale is amply protected. If the sale is invalid for the reason that no tax is in fact due, he recovers back from the county the amount which he paid to it. If his sale is valid, he obtains under it property usually worth many times the amount which he pays. He has all to gain and nothing to lose. The remedy as against the owner of the land is a harsh one in any event, and to hold that, where he has in good faith attempted and intended to return his land and to pay the taxes upon it, he must nevertheless lose it because of a failure to obey the provision of law which says that his assessment must properly describe the land, is to lay down too severe a rule. While it is true that the result would come from his own fault, the forfeiture of his property would be punishment far greater than the offense.

It being admitted in this case that Schroeder acted in good faith, intended to return his land, intended to pay the taxes upon it, and believed that he had done so, and that the county authorities accepted the payment with the same understanding, we hold that it was good payment in fact upon the 160 acres of land which he then owned, and that this payment was a bar to any sale under the second assessment to "unknown owners" may be shown in avoidance of it, and when so shown defeats it.

While cases presenting this exact question are few, we are not without authority for this decision. In Kellogg v. McFatter, 111 La. 1037, 36 South. 112, the facts were that Kellogg was the owner of 60 acres of land in the N. W. ¼ of section 20. For the year 1897 there was an attempt to assess this land, but it was described as "lying in the N. E. ¼" of

that section instead of the N. W. ¼. Another assessment was made to A. E. Minor of a portion of the N. W. ¼ of section 20, which included the Kellogg land, and under that assessment the land was sold for taxes. Before this sale Kellogg had paid the taxes under the assessment containing the erroneous description. The court held that the payment by Kellogg on his 60 acres of land was a good payment thereon, although the description of the land on the roll was erroneously given and further stated:

"A. E. Minor, having no interest in the matter, and being, besides, an absentee, made no opposition to this assessment; and Kellogg, having paid his own taxes in full for that year, rightfully considered that he was no longer concerned in the matter of tax sales for the taxes of that year. The attempt of the tax collector to collect taxes erroneously supposed to be due on that property and by A. E. Minor was utterly without justification, and any adjudication made under such circumstances was absolutely null and void."

In Meller v. Hodsdon, 33 Minn. 366, 23 N. W. 543, the facts were that Hodsdon was the owner of certain land in what was known as "lot 2." The lot contained about 55 acres. The land was assessed to him as the west 30 acres of lot 2, and he paid the taxes so assessed and listed in his name. This was not a good description of his land and did not cover all that he owned. An additional assessment was made to "unknown owners," the land being described as "that part of lot 2, except west 30 acres and southeast 10 acres," and under this description a tax sale was made. This tax sale was attacked on the ground that the taxes had been paid under the incorrect assessment. The court found that it was shown by the evidence of the assessor that he in fact valued and assessed the defendant's land in lot 2 in connection with the rest of his farm under the first description, so that an assessment and valuation of the entire lot was in fact made, and then, held:

"It is not necessary to consider whether the descripton would be sufficient to support a tax title as against the

owner; but, upon the issue of payment by him of the taxes, under the assessment originally made, we see no reason why the facts we have recited were not proper to be shown in evidence, and upon them we think the finding warranted that the taxes lawfully levied upon defendant's land in lot 2 for the years in question were actually paid by him."

In the case of Bender v. Bailey, 138 La. 433, 70 South. 425, it appears that an assessment was made for the year 1904 in the name of Gus Bender to the "south half of south half of section 17, township 22, range 15," and under this assessment the property was sold. For the same year there was assessed to L. A. Thomason land as follows: "Number of acres; 160, $200." This assessment contained no further description of the land. Thomason paid the taxes under this assessment and proved that the property on which he intended to pay was the same as that assessed to Gus Bender; Thomason not being the owner of any other 160 acres of land. There was no dispute as to the identity of the property, as there is none in the present case. The court said:

"It is quite clear from the evidence of this last witness that L. A. Thomason was the owner of the 160 acres in question; that he was not the owner of any other large body of land in Caddo parish in the year 1904 that the assessment of the property to him and the payment of the taxes thereon relieved the property from the assessment and taxes in the name of Gus Bender for the same property, for the same year; that the tax sale was null; that the property belongs to plaintiffs."

In Lewis v. Monson, 151 U. S. 545, 14 Sup. Ct. 424, 38 L. Ed. 265, certain land was originally described as lot 6 in a designated section, and under this assessment the owner paid the tax. By a later map, which was effective at the time of the assessment, not all of the land was included in lot 6, but a part of it was within lot 7. An assessment was made against lot 7, and, the tax not being paid under this assessment, the lot was sold. The question was as to whether the owner might invalidate this tax sale by showing that the payment which he made upon lot 6 was intended to cover all of the land.

After quoting from the opinion of the Mississippi court, the Supreme Court of the United States says:

"That the owner was not bound, as matter of law, to take notice of the new map is shown by that decision, and if he was not bound to know, and did not in fact know, and paid under a mistake, relying upon the ancient descriptions and the old map, and intended in good faith to pay all his taxes, then clearly, within the scope of that decision, the sale was invalid, and the deed fails."

The decision in this case cannot be influenced by the fact that the present claimant under the tax title is not the original purchaser, but a subsequent grantee from him. If the tax title in the hands of the first purchaser is invalid, it gains no validity by transfer to another. The stream of title rises no higher than its source. The purchaser of the tax title took with the knowledge that it might be defeated by proof of payment of the tax, and his grantee is in no better position. The question of notice and of the recording acts is not involved in this case.

For the error of the trial court in sustaining this demurrer, the judgment is reversed and the cause remanded; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2569. Nov. 19, 1921.)

SENA v. BOARD OF COM'RS OF GUADALUPE COUNTY.

SYLLABUS BY THE COURT.

[1] The indebtedness incurred by a county for the publication of the delinquent tax list, under Laws 1917, c. 80, sections 1 and 17, and Laws 1919, c. 43, section 3, is within the provisions and limitations of the Bateman Act; i. e., sections 1227 to 1231 inclusive, Code 1915. P. 462.

[2] No judgment can be rendered against a county on a claim for current indebtedness arising out of the publication

of the delinquent tax list, where such claim has been presented, allowed, and payment thereon refused, or denied, on account of insufficient funds with which to pay it. Optic Publishing Co. v. Board of County Commissioners of San Miguel County, 27 N. M. 371, 202 Pac. 124, followed. P. 462.

Appeal from District Court, Guadalupe County; Leahy, Judge.

Action by Leandro Sena against the Board of County Commissioners of Guadalupe County. Judgment for plaintiff, and defendant appeals. Reversed, with instructions to set aside the judgment and dismiss the complaint.

Chas. W. G. Ward, of East Las Vegas, for appellant.

Charles G. Hedgcock, of East Las Vegas, for appellee.

OPINION OF THE COURT.

RAYNOLDS, C. J. Leandro Sena, publisher of a Guadalupe county newspaper, in 1920 printed partly in English and partly in Spanish the delinquent tax list for the year 1919 for the county of Guadalupe. Subsequently he presented a claim for the amount due for the publication of said delinquent tax list, which was allowed by the county commissioners, but as there were no sufficient funds to pay it, it was not paid. Suit was then brought against the board of county commissioners of Guadalupe county for the sum of $5,607.96, the amount of the claim. Judgment for the full amount was rendered by the district court. From this judgment the board of county commissioners of Guadalupe county appeals to this court.

[1, 2] The appellant assigns four errors, but states in his brief that the sole question to be determined is whether or not the indebtedness in question, an indebtedness incurred for the publication of the delinquent tax list, is within the terms of the

Bateman Act. If so, the indebtedness admittedly becomes void, except in so far as it can be paid out of the revenues for the current year, and no judgment against the county to enforce the payment can be taken; or, as the matter is stated in another way, has the Bateman Act been repealed, or so modified as not to be a limitation on the indebtedness incurred in the publication of the delinquent tax list? Many authorities are cited by counsel on both sides, but most of them deal with cases construing constitutional provisions, where the statute is in conflict with the constitutional provisions limiting indebtedness. We are not confronted in this case with such a proposition. We are called upon to construe two enactments of the Legislature of equal dignity and force, and to determine whether a statute requiring the publication by the treasurer of the delinquent tax list for the county makes the indebtedness incurred by the county thereby an exception to the provisions of the Bateman Act, which declares void all indebtedness for current expenses in excess of current funds. The statutes in so far as they are necessary for the consideration of this case are as follows:

Section 1227, Cole 1915. "After March 12, 1897, it shall be unlawful for any board of county commissioners, city council, town trustees, board of education, board of trustees, or board of school directors of any school district, for any purpose whatever to become indebted or contract any debts of any kind or nature whatsoever during any current year which, at the end of such current year, is not and cannot then be paid out of the money actually collected and belonging to that current year, and any and all kind of indebtedness for any current year which is not paid and cannot be paid, as above provided for is hereby declared to be null and void. * * *"

Section 1230, Code 1915: "The void indebtedness mentioned in section 1227 shall remain valid to the extent and for the sole purpose of receiving any money which may afterwards be collected and belongs to the current year when they were contracted, and the collection thereof, when made, shall be distributed pro rata among the creditors having the void indebtedness, and in the event all of the valid and void

indebtedness of any current year are paid in full and there is money for that current year remaining the sum shall be converted into the fund for the next succeeding current year."

Section 1, chapter 80, Laws 1917: "Within forty-five days after the first day of June in each year the treasurer and ex-officio collector of each county in the state shall prepare and cause to be published in English and Spanish, once each week for four successive weeks, in some newspaper of general circulation published in the county, or if there be no newspaper published in the county, then in some newspaper published in the state and of general circulation in the county, notice that upon a date herein to be specified, which date shall not be less than twenty days nor more than ninety days from and after the last publication hereinabove provided for, he will apply to the district court within and for such county for judgment against the lands, real estate and personal property upon which taxes are delinquent and unpaid, and for an order to sell same to satisfy such judgment. * * *"

Section 17 of chapter 80, Laws 1917, provides a penalty for an officer failing to perform a duty imposed by the act. In section 3 of chapter 43 of the Session Laws of 1919 the Legislature specifies what notices of tax sales shall contain.

It is insisted by the appellee that section 1, chapter 80, Laws 1917, making it the duty of the treasurer to publish the delinquent tax list under certain penalties, creates a form of indebtedness which is not within the prohibition of section 1227, Code 1915, forbidding a county "for any purpose whatever to become indebted or contract any debts of any kind or nature whatsoever during any current year," etc. The language of section 1227, is very broad and does not make an exception of an indebtedness of this kind. A subsequent section (1229) provides that a preference shall be given to bills contracted for the boarding of prisoners, but there is no other exception nor preference given in the law. Under the language of the statute, if the indebtedness was in excess of the income it was void, and it is made unlawful under a heavy penalty for any of the officers named in the statute to violate any of the provis-

ions of said section. The Bateman Act (Code 1915, Sections 1227 to 1233, inclusive) was originally Laws of 1897, c. 42, Sections 15 to 21, inclusive. At the time of the passage of this act there was in force the law of 1882 (chapter 62, Sections 63 and 64,) being C. L. 1897, Sections 4075 and 4076, providing that delinquent tax notices should be published. No exception to such indebtedness or expense to the county was included with the Bateman Act, supra. Nor do any of the subsequent acts above referred to and quoted herein make any exception as to such indebtedness. If it had been the purpose of the Legislature to make an exception in case of the claims for the publication of the delinquent tax lists, it would have been an easy matter to have done so. In our opinion the law makes no such exception, and the indebtedness of the county incurred for the publication of such delinquent tax lists is no different from any other indebtedness and entitled to no preference.

We have held in James v. County Commissioners, 24 N. M. 509, 174 Pac. 1001, and in a recent decision of this court—No. 2568, Optic Publishing Co. v. Board of County Commissioners of San Miguel County, 27 N. M. 371, 202 Pac. 124, that a judgment cannot be taken against a county for current expenses, where it appears, as in this case and in the two cases cited above, that the claim has been allowed by the county commissioners and has not been paid for the reason that there are insufficient funds for that year with which to pay it. It is sought to distinguish the present case from the ones just cited, on the ground that such indebtedness is an exception, and should not be considered within the purview of the Bateman Act; i. e., section 1227 et seq., Code 1915. As before stated, we are unable to concur in this view.

For the reasons above stated, the judgment of the

lower court in favor of the appellee is reversed, with instructions to set aside the judgment and dismiss the complaint; and it is so ordered.

PARKER, J., concurs.

DAVIS, J., did not participate in this decision.

(No. 2661. Nov. 29, 1921.)

STATE V. CLEVENGER.

SYLLABUS BY THE COURT.

(1) A witness may be interrogated upon cross-examination concerning specific acts of moral misconduct and wrongdoing, to affect the credibility of such witness and the weight to be given to his or her testimony, but extrinsic or independent evidence regarding such matters is not admissible, as the cross-examiner is concluded by the answers given by the assailed witness with reference thereto. P. 467

(2) Evidence reviewed, and **held**, that the prosecutrix is not corroborated as is required in a case of this character, and therefore there is not sufficient evidence to sustain the verdict. P. 468

(3) In case of this kind, it is error to refuse a proper tendered instruction of a cautionary character advising the jury of the nature of the case, the ease with which an accusation of this kind may be lodged and the difficulty of defending against the same, and the necessity and extent of resistance required of the prosecutrix as well as the force used to overcome the same, where no proper instruction covering the subject is contained in the court's general instruction. P. 471

Appeal from District Court, San Miguel County; Leahy, Judge.

Jerome Clevenger was convicted of rape, and he appeals. Reversed and remanded, with directions to award new trial.

O. O. Askren, of Santa Fe, and Chas. N. Higgins, of East Las Vegas, for appellant.

H. S. Bowman, Atty. Gen., and A. M. Edwards, Asst. Atty. Gen., for the State.

OPINION OF THE COURT.

BRATTON District Judge. Appellant was convicted of the crime of rape alleged to have been com- upon one Daisey Agnes Madole, and was sentenced to serve a term of not less than five nor more than seven years in the penitentiary, from which he has perfected this appeal.

[1] During the trial Mrs. Harriet Fox became and was a very material witness in behalf of the appellant, testifying to certain facts which strongly contradicted the testimony of the prosecutrix. Upon her cross-examination, certain questions were propounded to her by which it was sought to prove that prior to her marriage to her present husband, Gradon Fox, she had lived with him in a state of adultery at Pratt, Kan., and further that prior to her said marriage, she had received congratulations from certain friends upon their supposed marriage of herself and her said husband. She denied each and all of these acts on her part. Upon rebuttal and over proper objections of the appellant, the state was permitted to prove by C. M. Gilmore and Mrs. C. M. Gilmore that said witness had lived in such state of adultery, and by J. R. Massie that she had received such congratulations. This action on the part of the trial court forms the basis of appellant's first assignment of error. We think this constituted impeachment of the witness upon collateral and immaterial matters by extrinsic and independent evidence beyond that given by the witness herself. It is the settled law in this jurisdiction that a witness may be interrogated upon cross-examination concerning specific acts of moral misconduct and specific acts of wrongdoing of such witness to affect the credibility of such witness and the weight to be given to his or her testimony, but it is equally well

settled that the cross-examiner is bound by the answers given to such questions and cannot produce other and independent evidence with reference to such matters beyond that given by the assailed witness; otherwise, the number of collateral issues presented might become so numerous and so confuse the real issues as to prevent their due consideration and correct determination. The rule here applicable was stated by this court in State v. Perkins, 21 N. M. 135, 153 Pac. 258, in the following language:

> "Complaint is also made of the refusal of the trial court to permit the appellants, on cross- examination of Mrs. Kubena, a very important witness for the state, to ask the witness as to specific acts of wrongdoing on her part. The same is true of the prosecuting witness, Mrs. Knapp. The law in this jurisdiction was settled by the territorial Supreme Court, in the cases of Territory v. Chaves, 8 N. M. 528, 45 Pac. 1107; Borrego v. Territory, 8 N. M. 446, 46 Pac. 349, and Territory v. De Gutman, 8 N. M. 92, 42 Pac. 48. There is a sharp conflict in the authorities upon this question. But, as the territorial Supreme Court has adopted the rule that proof of a witness' particular overt acts of wrongdoing are ordinary relevant as impeachment evidence, but that such acts can never be shown by any evidence outside the examination of the assailed witness, and that the extent of such examination rests largely in the discretion of the trial court, we can see no good reason to depart from the rule of practice thus established."

This rule was again announced and this case cited with approval in State v. Bailey, 27 N. M. 145, 198 Pac. 529. We think the court erred in permitting such rebuttal evidence, and therefore sustain this assignment of error.

[2] By four separate assignments of error, appellant challenges the verdict of the jury and urges a reversal of the case for lack of sufficient evidence to sustain the same. A decision upon these assignments requires a brief review of the evidence adduced. It appears from the record that the prosecutrix is a woman 25 years of age and weighs 130 pounds; that at the time of the alleged crime, she and her husband were tenants of appellant residing in a house

owned by him situated about 30 feet from the residence occupied by him and his family; that on the opposite side of the house so occupied by the prosecutrix and her husband was a residence about 12 feet away, which was then occupied by a family named Lorenzen; that said house so occupied by the prosecutrix was in a thickly settled part of the residential section of the city of Las Vegas, facing and bordering upon one of its well-traveled streets. The prosecutrix testified that on the morning of June 1, 1921, while she was clad only in her nightgown with a bungalow apron over it, appellant came into her house, stating that he wanted to see a place in the roof of the house that had been leaking; that she showed him the place and he then grabbed her, threw her down, and ravished her. She admits she did not make any outcry, her only explanation for not doing so being that she was too frightened; that her clothing was not torn, and neither was appellant's; that she was not bruised, scratched, nor hurt except a small lump about the size of a pea that was then in her right breast afterwards became enlarged to about the size of a marble; and that a small place in her private parts became sore; that one Doctor Fleming examined such sore spot. She admits that on Friday afternoon—this had occurred on Wednesday morning—appellant again came to her home while Mrs. Fox was there visiting her, and he then made some further examination regarding the leak in the roof of the house, during which time the prosecutrix showed him the place that had leaked, and she also talked with him concerning her making a trip to Santa Fé, whereupon he told her the trains had not been running on account of a washout and suggested she might telephone from his residence to ascertain if they were again running on schedule; that after he left, she told Mrs. Fox she would not go to appellant's house and use his telephone while his wife was away, as she might return and find her there. She further admits that on Thursday after

she had been assaulted on Wednesday morning she asked appellant's wife if her (prosecutrix's) brother might use her sewing machine, and also on the same day she went to the back door of appellant's residence and there asked appellant's wife how to find Mr. Drake's office, as she wanted to make some inquiry regarding her pass to Santa Fé. It further appears from the stenographic notes taken by the official court stenographer of the fourth judicial district, that at the preliminary hearing in this matter, which was held just one week prior to the trial of this case in the district court the prosecutrix testified to several vital matters which positively contradicted her testimony given upon the trial in the district court. This, we think, is a fairly complete and accurate résume of the testimony of the prosetrix. We have carefully examined the entire record and find there was practically no testimony offered which could be considered corroborative of this evidence. Her husband did testify to certain conversation which he contends he had with the appellant six days after the alleged offense, but the burden of such conversation seems to have been concerning a money settlement of the affair.

The improbabilities of the detailed affair thus outlined, when considered in connection with her admitted conduct with and toward appellant and his wife after she says she had been ravished, and its variance with human experience, are obvious and need no analysis or prolix discussion. The necessity of corroboration of a prosecutrix in a case of this character was stated by this court in State v. Ellison, 19 N. M. 428, 144 Pac. 10, as follows:

"It is of course true that in a sense, the testimony of a prosecutrix must be corroborated. That is, that it must bring together a number of surrounding facts and circumstances which coincide with and tend to establish the truth of her testimony. Without such surrounding facts and circumstances, the bald statement and charge of a woman against a man would be so devoid of testimonial value as to render

it unworthy of belief, and to cause it to fail to meet the requirements of the law, namely, evidence of a substantial character. In this sense there must, of course, be corroboration. In some of the states, by reason of the terms of the statutes, corroboration must come from some outside source in the form of testimony of an independent character, disconnected from the testimony of the prosecutrix. It is not in this sense, in this jurisdiction, that the prosecutrix must be corroborated."

Again, in the case of State v. Armijo, 25 N. M. 666, 187 Pac. 553, referring to the Ellison Case, the court further said:

"With this statement of the position of the court upon this subject we are entirely satisfied at this time, and see no reason to depart from it. If there were a single unequivocal fact, established by a single witness, shown by his examination to be fair and willing and able to tell the truth, which pointed unerringly to the guilt of the defendant, we should say that the verdict should not be disturbed. There is no such fact in this record, and for that reason the verdict is not supported by any substantial evidence."

We think the prosecutrix in this case is not corroborated as required under the law of this state as announced in the two decisions referred to.

[3] Appellant further complains of the refusal of the trial court to give to the jury his requested instruction numbered five which was of a cautionary character, advising the jury that the crime charged was a heinous one, and well calculated to create a prejudice in their minds against the accused, and calling their attention to the ease with which such an accusation could be lodged and the difficulty in defending against it. It further stated that the voluntary submission or reluctant yielding on the part of the prosecutrix to the lust of the appellant would not support a verdict of guilt, but that she must have resisted to the extent of her power. An instruction similar to the one here requested was tendered and refused in the case of Reynolds v. State, 27 Neb. 90, 42 N. W. 903, 20 Am. St. Rep. 659, which was held to be reversible error. A very ac-

curate statement of the general text covering this subject may be found in the following language in 22 R. C. L., p. 1229, § 66:

"On a trial for rape, where the evidence is conflicting as to resistance and force, the trial court should in its instructions caution the jury that prejudice is liable to be aroused against the accused because of the heinous nature of the crime charged, and it is customary to caution the jury that because of the difficulty of disentanglement from so heinous an imputation as compared with the ease with which it can be fastened on reputable persons, the utmost discretion should be exercised to avoid attaching undue weight to the uncorroborated accusation of a prosecutrix."

The instructions given did not cover this phase of the case, and we think the court erred in refusing to give the tendered requested instruction.

Other assignments of error are presented, but we think it is unnecessary to discuss them, as they pertain to matters which will not likely occur upon a subsequent trial.

For the reasons stated, the judgment of the trial court will be reversed and the cause remanded, with directions to award a new trial and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

MEYERS CO. V. MIRABAL ET AL.

(No. 2587. Nov. 30, 1921.)

SYLLABUS BY THE COURT.

A demand for exemption of a homestead from the levy of an execution does not invalidate a sale of the same land under an alias execution six months later, against which no demand for exemption was made.

Appeal from District Court, Torrance County; Ed Mechem, Judge.

Suit to quiet title by the Meyers Company against Rumaldo Mirabal and others. From a decree in favor of defendants, canceling a sheriff's deed, the plaintiff appeals. Reversed.

Heacock & Grigsby, of Albuquerque, for appellant.
G. W. Prichard, of Santa Fé, for appellees.

OPINION OF THE COURT.

DAVIS, J. This suit was commenced by appellant to quiet title to 80 acres of land in Torrance county, the complaint being in the statutory form. Appellee Macario Torres answered, alleging a fee-simple title in himself acquired under a warranty deed from appellees Rumaldo Mirabal and wife, who also appeared. They first disclaimed any interest in the property, but later filed an answer in which they alleged that, in 1906, Rumaldo Mirabal received a patent from the United States for the land; that it was their homestead; that in 1913 the sheriff of Torrance county sold it under an execution, in disregard of their claim of exemption; and that they later conveyed the property to Macario Torres, as alleged in his answer, and that plaintiff's title was based on the execution sale. They asked that the deed of the sheriff under the execution sale be set aside.

A reply was filed admitting the execution sale, but denying the other allegations of the answer. Upon these issues trial was had. The evidence is not before us. The court made detailed findings of fact; as to which there is no dispute, concluded that the execution was void because of a claim of exemption made by Mirabal, and entered a decree canceling the sheriff's deed.

The material facts upon which this conclusion was based are as follows: On February 1, 1913, a judgment was rendered in the district court of Torrance county against Rumaldo Mirabal, and on February

5, 1913, an execution was issued and placed in the hands of the sheriff. About six days later, Rumaldo Mirabal demanded of the sheriff that he set aside to him the 80 acres here in controversy as his homestead, exempt from execution. On June 3, 1913, this execution was returned unserved.

On August 9, 1913, an alias execution issued upon the judgment, and on the same day the sheriff made demand for payment upon Rumaldo Mirabal, and levied upon the 80 acres. Under this second levy the land was sold. Mirabal did not make a further claim of homestead or exemption, his only claim being the one made in May as against the levy of the original execution.

The decision of this case depends upon whether the claim of exemption made under the original execution continued effective to prevent a sale under the second or alias execution.

The right of exemption asserted rises under sections 2321 and 2324 of the Code of 1915, allowing husband and wife to hold exempt a family homestead not exceeding $1,000 in value, and providing the method by which it shall be claimed and its value determined. Section 2324 provides that it shall be allowed on application to the officer holding the writ. If the exemption is claimed and the officer sells in disregard of it, the sale is void, as was held in U. S. v. Lesnet, 9 N. M. 271, 50 Pac. 321. But the right of exemption is waived by failure to exercise it, as was decided in Pecos Valley Lumber Co. v. Freidenbloom, 23 N. M. 383, 168 Pac. 497.

The statute provides, in effect, that the officer executing any writ of execution, if the lands about to be levied upon constitute a homestead, shall, on application, cause to be set off the exemption to which the debtor is entitled. Evidently the application is to be made to the officer holding the writ

which is about to be levied. The statute refers to no other writ. In this case no application was made between the time of the levy of the alias writ and the date of sale. Reliance is placed entirely upon an application made six months earlier to an officer who then held a different writ. Although both writs were issued upon the same judgment, such an application is insufficient. A demand for this homestead exemption may be made verbally, and we can not say that a sheriff must, at his peril, carry in his memory for an indefinite period matters of this kind. While it is true that in this case the same officer served both writs, that does not affect the principle involved, as two writs might come to the hands of different sheriffs or of different deputies. Under section 3086, Code 1915, executions may issue at any time within five years after the rendition of judgment. If a notice of exemption claimed under one execution holds good to defeat a sale made six months later under a second writ, it would be equally effective against writs issued at any time during the five-year period, although no record is made of such claim, and it might not in any way come to the notice of the officer making the levy. It is no hardship for the debtor to claim his exemption as often as writs are issued and levies are about to be made upon his property, and this is the evident intent of the statute.

We are not dealing with property absolutely exempt from levy and sale. The land claimed as a homestead is exempt only up to a value of $1,000. It may well be that at the time of one levy the entire tract is obviously not worth that amount, and that when the exemption is claimed further proceedings are abandoned for that reason. But during the five-year period, and even within six months, as was the time in this case, the property might easily appreciate in value, so that there would be a surplus subject to levy. The judgment creditor would

then be in a position to recover his debt. The appointment of appraisers to set off the homestead to the statutory value would become necessary, and it certainly would be incumbent upon the debtor to apply for the appraisement if he desired it. Neither the judgment creditor nor the officer could be held to continuing notice of the claim of exemption arising from a past application.

The briefs in this court cite no authorities upon this question. Variance in the exemption statutes makes decisions of other states of little value. Most of the cases deal with exemptions of personal property, and some differentiate between such a claim for personal property and one for real estate. It is difficult to appreciate the distinction if the exemption is not specific. The views expressed in this opinion are sustained in principle in the following: Finley et al. v. Sly, 44 Ind. 266; Parker v. Independence Produce Co., 2 Ind. Ter. 561, 53 S. W. 335; McAfoose's Appeal, 32 Pa. 277; Gullett v. Conley, 81 Ill. App. 131; Briggs v. McKenzie, 16 Ill. App. 286; E. Super v. Alkire & Co., 37 Ark. 283; Weller v. Moore, 50 Ark. 253, 7 S. W. 130.

Counsel for appellees in his brief argues that the execution sale was void as to the community interest of Dolores Billa de Mirabal, wife of Rumaldo Mirabal, since she was not a party to the action in which the judgment was rendered. In her answer she made no such contention, nor did she allege the facts on which it must necessarily rest. Apparently the question was not presented to the trial court, since it is not covered either by the findings of fact or conclusions of law. We therefore cannot consider it.

The judgment of the trial court is therefore reversed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2532. Nov. 30, 1921.)

STATE V. DIAMOND

SYLLABUS BY THE COURT

(1) Chapter 140, Laws 1919, interpreted, and **held**, that the offenses therein enumerated are not confined to acts of violence or force or other unlawful things, but include all acts, peaceful or otherwise, which have for their object the destruction of organized government, or acts antagonistic to or in opposition to such organized government or acts inciting or attempting to incite revolution against or opposition to such organized government, or the teaching of such doctrines. P. 479

(2) The act is **held** to be unconstitutional as violative of the right of free speech guaranteed by section 17 of article 2 of the state Constitution. P. 479

(3) The word "revolution," as used in the act, **held** to include all forms of revolution, accomplished by peaceful means or otherwise, and not to be limited to revolution by force of arms. P. 482

(4) The act uses words of no determinative meaning, and the language is so general and indefinite as to embrace not only acts properly and legally punishable, but also others which cannot be punished, and it is for this reason void for uncertainty. P. 485

(5) Where an act creating a crime is found to be unconstitutional, the question may be raised for the first time on appeal. P. 488

(6) To "incite" to revolution is to arouse to action. P. 484

Appeal from District Court, Colfax County; Leib, Judge.

Jack Diamond was convicted of attempting to incite revolution and opposition to the organized government of the United States of America and of the State of New Mexico, and he appeals. Reversed and remanded, with directions to dismiss cause and discharge defendant.

Edward D. Tittman, of El Paso, Tex., for appellant.

H. S. Bowman, Atty. Gen., and A. M. Edwards, Asst. Atty. Gen., for the State.

OPINION OF THE COURT.

PARKER, J. The appellant, Jack Diamond, was convicted in the district court of Colfax county and sentenced to the penitentiary, from which judgment this appeal is prosecuted.

The indictment charged that—

The defendant "did then and there unlawfully and feloniously attempt to incite revolution and opposition to the organized government of the United States of America and of the state of New Mexico by then and there soliciting members for the Industrial Workers of the World, an organization which has for its purpose and aim the destruction of organized government, federal, state and municipal."

The statute under which the prosecution was had is chapter 140, Laws 1919, which provides as follows:

"Section 1. That it shall be unlawful for any person or persons, firm or corporation, to commit or perform or to cause to permit or to be performed any act of any kind whatsoever which has for its purpose or aim the destruction of organized government, federal, state or municipal, or to do or cause to be done any act which is antagonistic to or in opposition to such organized government, or incite or attempt to incite revolution or opposition to such organized government.

"Any person violating any of the provisions of this act shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars or by imprisonment in the state penitentiary for not less than one year, nor more than ten years, or by both, such fine and imprisonment in the discretion of the court.

"Sec. 2. It shall be unlawful for any person or persons, firm or corporation, to advocate or teach, or cause to be advocated, or taught, in any manner whatsoever, the doing or performance of any of the acts prohibited by section 1 hereof."

Counsel for appellant argues that the act is unconstitutional for several reasons, among which is is that it violates section 17 of article 2, of the state Constitution, which provides:

"Every person may freely speak, write or publish his sentiments on all subjects, being responsible for the abuse of

that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

[1] It is apparent from the terms of the statute, considered as a whole, that the offenses enumerated are not confined to acts of violence or force or other unlawful things, but include all acts, peaceful or otherwise, which have for their object the destruction of organized government, or acts antagonistic to or in opposition to such organized government, or acts inciting or attempting to incite revolution against or opposition to such organized government, or the teaching of such doctrines. In this particular the statute is unique. Under its terms no distinction is made between the man who advocates a change in the form of our government by constitutional means, or advocates the abandonment of organized government by peaceful methods, and the man who advocates the overthrow of our government by armed revolution, or other form of force and violence. Both are alike guilty. It prohibits alike the creation of public opinion by argument and persuasion, and the compulsion of action by the people by force of arms, intimidation, sabotage, or other criminal or illegal means. And we are not at liberty to supply by intendment the element of force and violence which would render the statute free from the objection raised to it. To do so would be to insert words in the statute which are not there and which would entirely change its meaning. This is not allowable, especially in statutes creating crimes, where the rule of strict construction must be applied. State v. Armijo, 19 N. M. 345-349, 142 Pac. 1126.

[2] In State v. Tachin, 92 N. J. Law, 270, 106 Atl. 145, the New Jersey court had before it a somewhat similar question to the one at bar. The statute of New Jersey (P. L. 1918, p. 130) provided in section 1 of the act punishment for inciting, or, by writing, speech, or other means, attempting to incite,

"insurrection or sedition." Section 2 of the act provided that—

> "Any person who shall advocate, in public or private, by speech, writing, printing, or by any other means, the subversion or destruction by force of the government of the United States, or of the state of New Jersey, or attempt by speech, writing, printing, or in any other way whatsoever to incite or abet, promote or encourage hostility or opposition to the government of the United States, or of the state of New Jersey, shall be guilty," etc.

Section 3 of the act prohibited membership in any society formed for the purpose of inciting, abetting, promoting, or encouraging hostility or opposition to the government of the United States, or of the state of New Jersey.

In the case before the court the defendant was charged with a violation of section 2 of the act by reason of a speech in which it was urged he attempted to incite hostility and opposition to the government of the United States. The section was challenged as unconstitutional upon the ground that it invaded the constitutional guaranty of the right of free speech. The majority of the court construed the section to the effect that the words "hostility or opposition to the government of the United States, or of the State of New Jersey," meant such hostility and opposition as involved the "subversion or destruction by force" of those governments, and held that the statute, as thus construed, was constitutional. The court states, however, that if the statute punished hostility or opposition to the government without force, the statute would be unconstitutional. Two vigorous dissents were filed in this case, which are reported in 93 N. J Law., 485, 108 Atl. 318. In one of these opinions sections 2 and 3 of the act are condemned on the ground that they violate the right of free speech, the freedom of the press, and the freedom of assembly guaranteed by the federal Constitution and the Constitution of New Jersey. Sections 2 and 3 of this same

act came before the New Jersey court again in State v. Gabriel, 112 Atl. 611. The court adhered to the former construction of section 2 of the act, but held section 3 to be unconstitutional, and said:

"At the close of the trial counsel for defendant moved that the court direct that the defendant be acquitted on this indictment, because the statute upon which it rested is unconstitutional, and this we think is sound. Under the Constitution and Bill of Rights the Legislature cannot make it criminal to belong to a party organized or formed for the purpose of encouraging hostility or opposition to the government of the United States or of this state, unless the hostility or opposition includes a purpose to overthrow or subvert such government. The constitutionality of the second section of the act was sustained in State v. Tachin, 92 N. J. Law, 269, 106 Atl. 145, because that section provides that the hostility or opposition prohibited involved subversion and destruction by force. While by the section under consideration it is made a crime to be a member of a society organized or formed for the purpose of encouraging hostility or opposition to the federal or state government, not to subvert or destroy them by force, and would apply to any citizen who sought a change in the form of government by a most peaceful means * * * In our judgment so long as an organization formed for the purpose reserved in the paragraph of the constitution referred to confines its purpose to peaceful hostility or opposition and does not advocate or indicate a purpose to overthrow or subvert the existing government by force, but only by constitutional methods, the right of the members of such society to assemble together and consult for the common good is protected by the bill of rights."

In Iowa they have an act very similar to the New Jersey act, and which is chapter 372, Laws 1917. Section 1 prohibits the inciting of "insurrection or sedition." Section 2 of the act prohibits the advocacy by speech, writing, printing, or other means of the subversion and destruction by force of the government of the state of Iowa or of the United States, or the attempt by speech, writing, printing, or other means to incite or abet, promote or encourage hostility or opposition to the government of the state of Iowa or of the United States. Section 3 of the act prohibits membership in any organization or society organ-

ized for the purpose of inciting, abetting, promoting, or encouraging hostility or opposition to the government of the state of Iowa or of the United States. This statute came before the Supreme Court of Iowa in State v. Gibson, 174 N. W. 34. The defendant was charged that—

> He "did attempt by speech, action, and manner of speaking to incite, abet, promote, and encourage hostility and opposition to the government of the state of Iowa and of the United States, contrary to the statutes in such case made and provided," etc.

The indictment evidently was brought under section 2 of the act and was sustained by the court upon the ground that it charged an attempt to promote sedition. If the construction of the statute by the court was intended to mean that the hostility and opposition to the government was hostility and opposition by force, the opinion of the court is no doubt correct. The court said:

> "It is presented that the statute violates the guaranty of article 1 § 7, of the Constitution of the state that all may speak, write, and publish their sentiments on all subjects, being responsible for the abuse of that right, and that no law shall be passed to restrain or abridge the liberty of speech or of the press. The constitutional guaranty itself qualifies the immunity by a plain indication that, while the right is given, the abuse of that right is not to be tolerated. The framers of our Constitution were laboring for the good of the commonwealth. They did not intend to protect what might destroy the state. It was not intended that the right of free speech included the right to promote sedition.".

If our interpretation of our statute is correct, as no doubt it is, the whole statute is unconstitutional upon the same reasoning as that adopted by the New Jersey court in regard to section 3 of their act. It is true that section 3 of that act violated the right of assembly, but the principles governing the right of assembly and the right of free speech are the same.

[3] What has been heretofore said refers to the statute generally. It remains to consider specifical-

ly the provisions prohibiting the inciting or attempting to incite revolution. Is the word "revolution" as used in the statute confined to an armed revolution, or does it include revolution by peaceful methods? "Revolution" has been variously defined as a radical change or modification of the government, McMullen v. Hodge, 5 Tex. 34-75; the overthrow of an established political system, Ballentine's Law Dictionary; a fundamental change in government or in the political Constitution of a country effected suddenly and violently, and mainly brought about by internal conditions, New Standard Ency.; a radical change in social or governmental conditions; the overthrow of an established political system, generally accompanied by far reaching social changes, Century Dictionary.

In the American mind the word "revolution," at first view, is associated with the war for independence by the colonies, which was, of course, a rebellion and a revolution accomplished by force of arms. But this cannot be said to be the ordinary meaning of the word in all cases. The promulgation and adoption of the Constitution of the United States was a revolution of far-reaching importance. At the time there was in existence a complete government of the 13 states under the Articles of Confederation. Under article 13 of that document the Articles of Confederation could be amended only with the consent of all the states, and they provided for a "perpetual union." Notwithstanding this contract between the 13 states, the Constitution provided that upon the ratification of the same by 9 states it should become established as a Constitution between the states so ratifying the same. As a matter of fact, 11 of the states ratified before any action was taken under the Constitution, leaving North Carolina and Rhode Island without any participation in the new government. The contract between the states was thus violated by the adoption of the Con-

stitution, and the Constitution went into effect without the consent of those two states. Upon this subject Judge Cooley says:

"This exclusion was not warranted by anything contained in the Articles of Confederation, which purported to be articles of 'perpetual union;' and the action of the eleven states in making radical revision of the Constitution and excluding their associates for refusal to assent, was really revolutionary in character, and only to be defended on the same ground of necessity on which all revolutionary action is justified, and which in this case was the absolute need, fully demonstrated by experience, of a more efficient general government." See Cooley's Constitutional Limitations (7th Ed.) pp. 9 and 10.

[6] The result was accomplished by argument and persuasion, and, of course, no one would say that any law could now be passed which would make criminal the same kind of conduct. Nor is the meaning of the word changed by its connection with the word "incite." To "incite" is to arouse to action, nothing more, and cannot be held to narrow the word "revolution" to revolution by violence. The doctrine of noscitur a sociis is applicable here. The word " revolution" is directly associated with the words "opposition to such organized governments" and must be held to include the same thing. A fair, general view of the whole statute leads to the conclusion that it was designed to close the mouths and tie the hands of people who were dissatisfied with the government as at present constituted, and who advocated by any means, peaceful or otherwise change in the form of government, or the abandonment of organized government entirely. This act was passed after the Armistice and before the conclusion of peace with Germany, which has been accomplished only within the last few days. But the act is not a war measure, and none of the considerations which apply to conduct which constitutes a proximate and imminent danger to the government in the time of war, or danger to the success of its arms against the public enemy, apply here. See Schenck v. U. S.,

249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, and Gilbert v. Minnesota, 254 U. S. 325, 41 Sup. Ct. 125, 65 L. Ed. ——, where the distinction is pointed out that time and circumstances may be determinative as to whether a statute limiting the right of free speech will be valid.

[4] A further technical legal objection to the statute is its want of certainty. Where the statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty. 16 C. J. § 28. Thus in U. S. v. Reese, 92 U. S. 214, 23 L. Ed. 563, the defendant, with another, had been indicted for an offense under an act of Congress, and was charged with refusing to receive and count at an election the vote of a citizen of African descent. Congress had passed an act (16 Stat. 140) to put the Fifteenth Amendment into operation, section 4 of which provided for the punishment of any person who should by force, bribery, threat, intimidation, or other unlawful means, hinder, delay, or combine with others to hinder, delay, prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote or from voting at any election. It will thus be seen that this section went beyond the purview of the Fifteenth Amendment and was not limited in its terms to cases involving the deprivation of the right to vote by colored people, but included all classes of voters. The court pointed out that the statute did not confine its operation to unlawful discrimination on account of race, etc., and that the act was broad enough to punish discrimination against any class of voters, which was, of course, beyond the power of Congress. The court said:

"It remains now to consider whether a statute, so general as this in its provisions, can be made available for the pun-

ishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc.

"There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited power, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed it is general only. * * *

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In Augustine v. State, 41 Tex. Cr. R. 59, 52 S. W. 77, 96 Am. St. Rep. 765, the question was as to the uncertainty of a statute which provided for a different venue in cases of murder by "mob violence." The court said:

"We have given this question much thought and study, and we confess to be unable to solve the difficulty, and to determine what the Legislature really meant by the term 'mob violence,' or what character of cases they intended the act should embrace. It is so uncertain in its terms as to escape intelligible construction, and we therefore declare it inoperative and void."

In U. S. v. Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68, the question was whether an act of Congress which made it a criminal offense for the street railway company in the District of Columbia to run an insufficient number of cars to accom-

modate persons desiring passage thereon without crowding the same was so indefinite and uncertain as to be void. The court said:

"What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be reguarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. What may be regarded as grounds for acquittal by one court may be held sufficient to sustain a conviction in another. The principle of uniformity, one of the fundamental elements essential in determining the validity of criminal statutes, is wholly lacking. There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment."

In Czarra v. Board of Medical Supervisors, 25 App. D. C. 443, the question was whether an act of Congress providing for the cancellation of a physician's license to practice was void for uncertainty. The act (29 Stat. 200) provided that the license might be revoked for any of the following causes, to wit:

"The employment of fraud or deception in passing the examinations provided for in this act, chronic inebriety, the practice of criminal abortion, conviction of crime involving moral turpitude, or of unprofessional or dishonorable conduct."

The court said:

"Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible. But when the Legislature declares an offense in words of no determinate significance, or its language is so general and indefinite as that it may embrace within its comprehension, not only acts commonly recognized as reprehensible, but others also which it is unreasonable to presume were intended to be made criminal, the courts, possessing no arbitrary discretion to discriminate between those which were and those which were not intended to be made unlawful, can do nothing else than declare the statute void for its uncertainty."

The court then quotes from U. S. v. Reese, supra, as follows:

"It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

See, also, in this connection, Stoutenburgh v .Frazier, 16 App. D. C. 229; State v. Gaster, 45 La. Ann. 636, 12 South. 739; Ex parte Jackson, 45 Ark. 158.

In view of the foregoing considerations and the cases cited, it would seem clear that the statute under consideration here is void for uncertainty.

[5] The unconstitutionality of the act was not raised in the trial court, and the Attorney General insists that the weight of authority supports his contention that a constitutional question is not jurisdictional in character, and therefore cannot be raised for the first time on appeal.

It is true that we have held in State v. Chavez, 19 N. M. 325, 142 Pac. 922, Ann. Cas. 1917E, 127, and State v. Garcia, 19 N. M. 420, 421, 143 Pac. 1012, that where the alleged unconstitutional character of a statute concerns a matter of evidence, rather than the offense itself, the constitutional question cannot be raised for the first time on appeal. But in this case a different proposition is involved. Here the question of the constitutionality of the act involved determines whether a crime has been committed. If the law is void, no crime has been committed and none can be committed under it, and the court has no jurisdiction over the person of the defendant or the subject-matter of the cause. It is a proceeding to punish a man where there is no law authorizing the same. In such a case it would seem that the question is jurisdictional and may be raised for the first time on appeal and we so hold.

See, in this connection, Schwartz v. People, 47 Colo. 483, 104 Pac. 92; State v. Gibson (Iowa) 174 N. W. 34; and State v. Winehill & Rosenthal, 147 La. 781, 86 South, 181.

For the reasons stated, the judgment of the court below will be reversed, and the cause remanded, with directions to the district court to dismiss the cause and discharge the defendant, and it is so ordered.

RAYNOLDS, C. J., concurs.

DAVIS, J., did not participate.

(No. 2600. Dec. 2, 1921.)

RHODES ET AL. V. YATER ET AL.

SYLLABUS BY THE COURT.

A trust for the purpose of "evangelization" and "preaching of the gospel" is not void for uncertainty as to object or beneficiaries.

Appeal from District Court, Chaves County; Bratton, Judge.

Proceeding by William H. Rhodes and others against C. N. Yater and others to contest the will of William Rhodes, deceased. Will held invalid in the probate court, but held valid in the district court on appeal, and admitted to probate. Contestants appeal. Affirmed.

Ed. S. Gibbany, of Roswell, for appellants.

C. O. Thompson and Tomlinson Fort, both of Roswell, for appellees.

OPINION OF THE COURT.

DAVIS, J. William Rhodes, of Chaves county, died in January, 1920, leaving a will which is the subject of this litigation. His heirs at law were

two sons and a daughter, to whom bequests were made, and a daughter of a deceased son, of whom no mention was made in the will. It is agreed by all the parties interested that as to this grandchild, under section 5870, Code 1915, William Rhodes died intestate, and that she is entitled to a one-fourth interest in the property which he left.

The will, after providing for payment of debts and other matters not necessary to be mentioned here, proceeded in item 4 as follows:

"I direct that all my property, both real and personal, and of whatsoever nature or kind, except as provided in item 7, be sold by my executors at either private or public sale as may seem to them best, and that the proceeds from the sale of said property after the above mentioned items have been paid, be divided and distributed as follows:

"That my children, Homer H. Rhodes, William H. Rhodes, and Rosa Andrews, divide the household goods among themselves as they may agree and that my library and manuscripts be given to Dr. C. N. Yater, C. R. Nichol and Charles McMain, Trustees hereinafter named, same to become part of the fund hereinafter mentioned for evangelistic purposes."

Items 5, 6, and 7 cover payment and matters not involved here. Item 8 is as follows:

"That the remainder of said property be divided as follows:

"That one-half of said property be given to my said children and divided and prorated as follows: To equalize advancements made to me by my son Homer H. Rhodes, that he be paid the sum of $500.00 and that the remainder then be equally divided among my said children, William H. Rhodes, Homer H. Rhodes, and Rosa Andrews and that the remaining one-half to be used for the purpose of evangelization, and the publication of manuscripts heretofore prepared by me and for the purpose of carrying out the provisions of this bequest, I hereby appoint Dr. C. N. Yater, of Roswell, Charles McMain, of Dexter, New Mexico, and C. R. Nichol, of Clifton, Texas, and direct that the one-half of the proceeds of the estate as above mentioned, be paid to them as trustees and that they direct the use of the money in the preaching of the gospel as may to them seem best."

The controversy here arises over the bequest to

the trustees of the library and manuscripts and the one-half of the residuary estate to constitute a fund to be used "for the purpose of evangelization and the publication of manuscripts," theretofore prepared by him, with the provision that the trustees "direct the use of the money in the preaching of the gospel as may to them seem best."

Objections to the probate of the will were filed in the probate court by the three children of William Rhodes. These objections, so far as of importance here, are carried into the assignments of error filed in this court. The probate court held the will invalid and declined to approve it. Under section 5879, Code 1915, a transcript of the proceedings was then filed in the district court of Chaves county where the validity of the trust created by the will was again tried. The judge of that court in a careful opinion held the trust provisions valid and admitted the will to probate, subject to the one-fourth interest of the grandchild. From that ruling this appeal is prosecuted.

All parties have acquiesced in the method by which the validity of this trust is presented, and no question of procedure is involved.

The statutes of this state allow every person of sound mind and over 21 years of age to dispose of his property by will. Just as during his lifetime he may do with it as he pleases, so upon his death he may distribute it according to his wish. The statutory law imposes no limitations upon this power. The primary duty of a court is to ascertain the desire of the testator, as he has expressed it, and to carry it to fulfillment unless public policy or general rules of law imposes a prohibition. William Rhodes expressed his wish that one-half of his residuary estate should become the property of his children. The other half, with a benevolent intention to benefit his fellow man, he left to be used for the pur-

pose which he thought most likely to conduce to that end, the preaching of the gospel. If this property under the trust was devoted to the relief of physical distress and suffering, the class of beneficiaries being designated, there would be no hesitation in carrying out his directions. Man has spiritual needs as well as physical ones, and a bequest for the purpose of ministering to those needs is charitable. The fact that the beneficiaries are not designated as individuals nor as a distinct class, but may be any to whom the beneficence of the testator may reach, does not change the character of the trust. In every public charity the exact individuals who may be benefited are unknown. The wish and intent of the testator are plain. The only question then arising is as to whether the general rules of law prohibit the creation or execution of such a trust.

It is said that the trust is indefinite in purpose since the exact method in which it is to be administered is not stated. By its terms it is to be used "for the purpose of evangelization" and "in the preaching of the gospel." To evangelize is to preach the gospel; so there is no contradiction in these terms. The preaching of the gospel must be carried out through some human agency, and it is to be presumed that the fund is to be used in the assistance of those who are engaged in that work. True, the agents through which the result will be accomplished are not named; that being left to the trustees. In other words, the trustees select the individuals who will carry out the wish of the testator by the preaching of the gospel. But that does not make the purpose indefinite. It merely leaves to the trustees the selection of the agency through which that purpose is to be accomplished.

Again, it is said that, since no beneficiaries are designated, there is no one who could apply to a court for protection against a breach of duty by the

trustees. Without agreeing with the legal conclusion stated it is sufficient to say that we will not presume in advance that the trustees will violate their trust or will refuse to perform their duties. Human society is founded upon the virtue of its members, not upon their wickedness, and this court must presume integrity rather than dishonesty. The testator has selected his trustees, and has, without doubt, named men in whom he had full confidence and to whose character he was willing to trust the control of this fund. We cannot presume in advance that his confidence was misplaced.

In every trust there must be both a trustee and beneficiaries, and, while a court of equity can supply the lack of a trustee, it cannot supply the lack of a beneficiary. If this were a private trust, the objection would be sound, for a gift to one for the use of another not named is deficient on its face, but as to charitable and religious uses and purposes an exception to the general rule is recognized by the courts of most of the states. As to them it is generally held that the beneficiaries need not be named nor even identified as belonging to any particular class or locality. This should be the true rule, for the inherent idea of a public charity is that its benefits shall reach an indefinite number of people, and the broader the benevolence of the giver the wider his beneficence extends, and the greater in number and more impossible of identification become the recipients of his bounty.

In Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645, a devise "to the cause of Christ, for the benefit and promotion of true evangelical piety and religion," was sustained as valid against the contention that the beneficiaries were uncertain. In Chambers v. St. Louis, 29 Mo. 543, a well briefed and discussed case, it was held that a devise to the city of St. Louis in trust to constitute a fund "to furnish re-

lief to all poor emigrants and travelers coming to St. Louis on their way, bona fide, to settle in the West" was valid, the court saying:

"As the general object of the charity was specific and certain, * * * with a competent trustee to execute the charity designated, we do not see on what ground this objection can rest. If under such circumstances, the uncertainty of the persons to be relieved by a charitable fund could be available to destroy it, few charities could be sustained. If all the recipients of a charity could be designated with certainty at the time of its creation, there would be no necessity for a law for charitable uses different from that which govern all other trusts. * * * From the very nature of the subject, charitable gifts must be objects vague and uncertain. The subjects of the charity may be numerous, and they are to be sought for and ascertained by those to whose discretion and judgment the dispensation of the relief is entrusted. The founder of a charity, by placing his fund in the hand of a competent trustee, designating the general object of the trust, with power to carry that object into effect, makes the trustee his substitute or delegate. * * * As the donor of the bounty is willing to confide its management to the discretion of his agent, so long as that agent acts in good faith his acts are the acts of his principal, and there is no one but the principal to complain. If the agent abuses his trust, he, like all other fiduciary agents, is subject to the control of the courts."

In 37 L. R. A. (N. S.) 993, a note attached to the case of Buchanan v. Kennard, 234 Mo. 117, 136 S. W. 415, Ann. Cas. 1912D, 50, sets forth numerous cases illustrating the sufficiency of designation of beneficiaries in charitable trusts. In the case itself a devise for the benefit of sick and injured persons, without distinction of creed was held sufficiently specific. In 14 L. R. A. (N. S.) 75, 92, will be found a note to the case of Hadley v. Forsee, 203 Mo. 418, 101 S. W. 59, treating fully of this principle and citing numerous cases.

In the case of Quinn v. Shields, 62 Iowa, 129, 17 N. W. 437, 49 Am. Rep. 141, the testator provided that certain funds should "go to the support and encouragement of such worthy and charitable and educational and religious institutions of the Roman

Catholic faith, as my said friend, Marty T. Shields, may determine." The court said:

"The will does not specifically name the persons or institutions that are to receive the charity. It leaves the beneficiaries to be chosen and named by the person appointed to distribute the charity. It is competent for a testator to bestow a charity upon a person or institution to be chosen or named by a trustee or executor. In that case there is no uncertainty of the beneficiary, for the courts, when called upon to enforce the testament, will be advised of the direction of the charity by the act or declaration of the trustee or executor. Wills providing for the distribution and appropriation of charities in this manner are always upheld by the courts."

In Re Stewart's Estate, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723, property was left to certain trustees for the benefit of an academy, with the provision that, if the academy was not established, the trust should be used "for such other charitable purposes and uses as they may see fit in their discretion to employ the same." The academy was not established, so that the court was called upon to construe the language quoted. The court said:

"The provision that, in default of the establishment of the proposed academy, the trustees shall use the bequest for such other charitable purposes and uses as they may see fit in their discretion, was adjudged void in the decree before us. The testatrix appointed competent trustees, and they have entered upon the discharge of their trust. This is not a devise to charitable uses generally, without the designation of a trustee, or, in other words, the imposition upon the court of the appointment or designation of the beneficiaries. The testatrix has reposed this confidence in her trustees, and it cannot be said that they may not execute the trust. And, if there is an abuse of the discretion reposed in them, they may be subject to the jurisdiction of equity. The decree will therefore be modified so as to sustain the validity of the devise as set forth in the will, and, as modified, affirmed, and the cause remanded for such modification and entry of final decree."

In the case of Estate of Mary C. Dulles, 218 Pa. 162, 67 Atl. 49, 12 L. R. A. (N. S.) 1177, the provisions construed authorized named trustees to distribute the fund among such religious, charitable and benevolent purposes and objects or institutions

as in the discretion of such executors shall be best and proper. The court said:

"If the testatrix had made the writing referred to, and named the objects, persons, or institutions she desired should take, there could be no question of the validity of the bequest whether the courts or any one else thought the objects were religious, charitable, or benevolent or not. In naming the legatees she would have defined the terms 'religious,' 'charitable,' and 'benevolent' for the purposes of her will, and it was within her right to do so. She did not make the written directions, however, and therefore the alternative provision of her will became operative. The discretion which was hers to exercise she chose to delegate to her executors. It was her right to do so, and so long as their discretion is not legally abused its exercise is as valid as if it was expressly her own.

"It is argued that the conclusion is altered by the facts that the will created a trust, and that the use of the word 'benevolent' made the trust too indefinite to be enforced. The injustice as well as the illogical character of such argument is apparent. However, doubtful what the testatrix did in fact want may seem, it is certain she did not want her estate to pass under the interstate law. To prevent that she appointed executors presumably familiar with her wishes, and invested them with ample discretion to distribute the estate 'having full confidence in (their) judgment, ability, integrity and discretion.' Every element of certainty is potentially here, and yet, for fear the executors thus informed and thus trusted might ignorantly or intentionally fail to do what she wanted done, the court is asked to step in and do the one thing it is absolutely certain she did not want—pass the estate under the intestate laws. It is manifest that the testatrix intended distributing among others than the executors, and that the gift to them was in a fiduciary capacity. There was therefore a trust. But that does not interfere with the discretion of the trustees, except to limit their powers to the purposes intended, and to enable the courts to prevent a plain diversion of the gift which would be a fraud on the trust."

The decisions upon this subject are not uniform, and there are authorities which cannot be reconciled with the decisions cited above. The question has not been determined in this state, and we are therefore unhampered by direct precedent. We believe the rule sanctioned by the cases cited is sound in principle and based upon the better reasoning.

We therefore find no difficulty in upholding the trust created by the will before us.

From the language used the trustees are authorized and directed to use the fund to pay for the preaching of the gospel. The object is certain and the extent of power defined.

Appellants requested the trial court to make certain findings, the effect of which would have been to state the court's opinion as to its power to control the discretion of the trustees, the filling of vacancies, the extent of the trustees' interest, and other matters dealing with the construction and enforcement of the will. None of these requested findings was germane to the decision of the matters then pending, but all were abstract, dealing with questions that might or might not arise in the future. The court properly refused them.

For the reasons stated, the judgment of the trial court is affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2589. Nov. 30, 1921.)

ZINTGRAFF V. SISNEY ET AL.

SYLLABUS BY THE COURT

A decree against J. H. Zintgraff does not, of itself alone, prove an adjudication against T. H. Zintgraff.

Appeal from District Court, Guadalupe County; Leahy, Judge.

Action by T. H. Zintgraff against John T. Chapman and another on a promissory note, and to foreclose a mortgage, in which P. H. Sisney and another, doing business under the name and style of Sisney & Dykes, and another intervened, and from the

judgment in favor of the plaintiff, and against the interveners, the latter appeal. Reversed.

F. Faircloth, of Santa Rosa, for appellants.

R. A. Prentice, of Tucumcari, for appellee.

OPINION OF THE COURT.

DAVIS, J. This is a proceeding by T. H. Zintgraff against John T. Chapman and Bob Chapman to recover judgment upon a promissory note and to foreclose a mortgage securing it upon 160 acres of land in Guadalupe county. Appellants, Sisney and Dykes, intervened, answered, and were treated as defendants in the suit. Appellee Mrs. W. H. Bachman also intervened, and judgment was rendered against her, but, as she did not appeal and has not appeared in this court as an appellee, we are not concerned with the merits of the judgment against her, nor with the proceedings upon her intervention. The questions presented here arise solely upon the intervention of Sisney and Dykes.

After obtaining leave to intervene they set up in an answer that they were the owners of the land upon which Zintgraff was attempting to foreclose the mortgage "free and clear of any claim of plaintiff." They did not plead the source or character of their title, but a motion appearing in the transcript shows that they claimed under a tax deed. They alleged as a defense to the foreclosure that title had been quieted in them and against plaintiff by a prior decree of the district court of Guadalupe county in cause No. 1088, which was a suit to quiet title, a copy of the decree being attached to and made a part of the answer; that plaintiff, T. H. Zintgraff, was named as a defendant in that suit, and "was notified to enter his appearance in said cause," which he failed and refused to do, and that he was "therefore guilty of laches, and has waived any interest which he might, could or does have"

in the real estate, and is estopped from making any claim under the mortgage. This was treated in the lower court as a plea of former adjudication, and, however inartificial it may appear, its sufficiency as such a plea was not attacked in the trial court, nor is it questioned here.

Plaintiff replied to this answer, denying that the title to the property had been quieted as against him; denying that title was in interveners free from his claim; admitting that the instrument attached to the answer was a true copy of the decree referred to; but denying that it affected his cause of action, and denying that plaintiff "was ever notified to enter his appearance in said cause," or that he was a necessary or proper party thereto, or that he had been guilty of laches, had waived any rights, or was estopped.

Overlooking several features of these pleadings, including various matters of legal conclusion, since they are not suggested here by either party, the result is that interveners alleged that plaintiff was a party to, and barred by, the former decree, and that plaintiff, while admitting the entry of the decree, denied that it had the effect claimed for it. The trial court held that the former decree was a bar to the present action, and entered judgment on the pleadings, dismissing the complaint and quieting the title of Sisney and Dykes against any claim of Zintgraff under his mortgage.

The sole question for our determination is whether the allegations of interveners' answer, taken with the admissions and denials of plaintiff's reply show that plaintiff, T. H. Zintgraff, is barred by the former decree from prosecuting his present suit.

Counsel for appellant in his brief attacks the conclusion of the trial court upon various grounds. Only one needs to be noticed, as it is conclusive. The

copy of the former decree attached to the answer and admitted to be correct does not contain the name of T. H. Zintgraff as a defendant or otherwise. In the title of that case J. H. Zintgraff is named as a defendant, and the name J. H. Zintgraff also appears in the body of the decree as one of the defendants against whom judgment was given; but in the face of the denials of plaintiff in his pleadings in this case we cannot presume that the J .H. Zintgraff named in the decree is the T. H. Zintgraff who is appellant here, nor could the trial court properly so conclude. None of the proceedings in case 1088, prior to the decree, were presented to the trial court, so that there is no complaint, process, notice of pendency of suit, or pleading of any kind which is available in aid of the decree. A copy of the decree is pleaded and nothing else, and this, on its face, does not show the identity of the parties.

The case is therefore reversed and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2618. Dec. 2, 1921.)

STATE V. LISTON.

SYLLABUS BY THE COURT

(1) Proof that ownership of stolen cattle was in the person alleged by the indictment to be the owner, that the cattle were stolen, that shortly after the theft they were found near the ranch of defendant, bearing his brand, freshly put on, and that he then claimed to own them, is sufficient prima facie proof of an unlawful taking and asportation, and makes a prima facie case of larceny, although other cattle of the owner grazed in the same locality where the stolen cattle were found. P. 503

(2) The corpus delicti of a crime may be proved by circumstantial evidence. P. 503

Appeal from District Court, Sandoval County; Hickey, Judge.

Ross Liston was convicted of the larceny of cattle, and appeals. Affirmed.

Heacock & Grigsby, of Albuquerque, for appellant.

Harry S. Bowman, Atty. Gen., for the State.

OPINION OF THE COURT

DAVIS, J. In 1918 Evidardo Montoya was the owner of cattle ranging in Sandoval county. Among them were a number of calves then about a year old, so that they were referred to by some witnesses as yearlings. During the last of June or the first of July some of these calves were stolen. The last time Montoya saw them was about 20 days before he discovered the theft. About July 15th he went to the ranch of appellant, Ross Liston, to inquire about them. Liston told him he had not seen the calves. About 10 days later Montoya again went to the vicinity of Liston's place, and then found three of his missing calves. All were fresh-branded with Liston's brand. Two other witnesses saw these three animals at about the same time and place, and likewise identified the Liston brand. The country where they were found was apparently open range, and other cattle of Montoya's were grazing there. Liston then claimed these calves as his. There was testimony that he owned no cows.

In May, 1919, Liston was indicted for the larceny of "three head of neat cattle." The statement made above shows the condition of the evidence at the close of the testimony for the state. A motion for a directed verdict was made on the ground that there was no proof of the asportation of these calves, or, as alternatively expressed in the motion, no proof that Liston did "ride, drive, carry, or lead away any one of the animals alleged to be stolen." The motion was overruled, and this is assigned here as error.

Before a case of larceny is complete, there must,

of course, be evidence of an unlawful taking and asportation, and there was no direct proof of the commission by the appellant of these elements of the crime at this stage of the trial. But these facts may be shown inferentially. There was positive proof that the calves were stolen by some one while unbranded, and that within a few weeks they were found near the ranch of appellant, bearing his brand freshly put on, and that he claimed them as his own. The identity of the animals was sufficiently established. They belonged to Montoya. From appellant's claim that these fresh-branded calves were his, there is a natural and reasonable inference that they were so branded by him or under his authority. Before they could have been branded, they must have been in his control and possession; there necessarily was an actual physical taking. For some space of time the appellant was in the exclusive control and possession of these calves.

That this is a proper conclusion is shown by the testimony of appellant, later in the case, that he himself branded one of these calves and directed the branding of the other two, all in the corral of J. A. Whade, at Bear Springs. This admission only made absolute what was before inferential. An unlawful taking of property against the will of the owner, superseding his possession for at least an appreciable time, a removal of the property from its existing location, however slight, a manifest intent to steal, certainly show a technical asportation. The fact that other cattle, including some of Montoya's, grazed in the section of country where the calves were found, does not change the principle involved. In an open range country, where cattle of various owners are intermingled, the brand is usually the only proof of identity and indicia of ownership. The unlawful branding by one of calves belonging to another, with the other circumstances of the case, shows a sufficient taking and asportation, although

after branding they were again turned on the range, and other cattle of the owner continued to graze in the vicinity.

In State v. Cason, 23 N. M. 77, 80, 167 Pac. 283, 284, this court said, upon the authority of Territory v. Valles, 15 N. M. 229, 103 Pac. 984:

> "We therefore conclude, applying this rule to the case at bar, that, in a trial for the larceny of neat cattle, evidence that tended to establish the identity of the cattle, their ownership in the person from whom their taking is charged to be larcenous by the indictment, and the possession of the cattle by the defendant, is enough to make out a prima facie case of guilt and establish the corpus delicti."

[2] That the corpus deliciti of a crime may be proved by circumstantial evidence, see State v. Sakariason, 21 N. M. 207, 153 Pac. 1034. The trial court was not in error in denying the motion.

Appellant argues that the facts show a case of unlawful branding, which is a statutory crime, but do not prove larceny. What has already been said answers this suggestion. The indictment was for larceny. The facts sufficiently showed all its elements. That they may also have shown guilt of a lesser crime is no defense to the one charged.

[1] Appellant's main defense was his assertion that he was himself the owner of the calves bearing his brand. He testified that they were his, and that he had raised them from his own cows. On cross-examination he was asked in detail in regard to his ownership of these cows at various places and on various dates; some antedating the time of the larceny alleged in the indictment. Since the calves were then about a year old, and the appellant claimed he owned their mothers, all of this investigation was material. It was proper cross-examination, going to the very basis of the defense, and bearing directly upon appellant's claim of ownership. He testified upon this examination that he did own the cows,

mothers of the calves charged to have been stolen, at the times and places inquired about.

On rebuttal the state called several witnesses, whose testimony tended to disprove his statements in these respects; their evidence being that he owned no cows at these times. This testimony was objected to as not proper rebuttal, and its admission is assigned as error. But the state could not have anticipated this defense, and so put in this proof as part of its direct testimony. Until appellant made his defense of ownership of these calves, and attempted to support it by proof that they were calves from cows belonging to him, any evidence of his ownership of cows prior to the date alleged in the indictment was wholly immaterial. Nor is this a case of contradiction of a witness on collateral matters brought out on cross-examination. Whether or not appellant owned cows which might have been the mothers of these calves became a material fact of decisive importance. The cross-examination and the rebuttal went directly to an issue first presented by appellant in his testimony, and to the main fact on which his guilt or innocence turned, in no sense a collateral matter. Both were proper.

No other matters are presented in appellant's brief. The judgment of the trial court is affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2595. Dec. 3, 1921.)

STATE V. CHAVES.

SYLLABUS BY THE COURT.

(1) Evidence considered, and held to prove the corpus deliciti independent of a confession. P. 506

(2) If a confession has been made under circumstances rendering it involuntary, a presumption exists that a second

confession is the result of the prior influence. The circumstances of this case show that this presumption was sufficiently rebutted. P. 508

(3) It is not error to refuse a requested instruction which is merely cumulative. P. 509

(4) A requested instruction which incorrectly states the law is properly refused. P. 509

Appeal from District Court, Sandoval County; Holloman, Judge.

Luis Chaves was convicted of murder in the second degree, and he appeals. Affirmed.

Thos. K. D. Maddison and Simms & Botts, all of Albuquerque, for appellant.

Harry S. Bowman, Atty. Gen., and A. M. Edwards, Asst. Atty. Gen., for the State.

OPINION OF THE COURT.

DAVIS, J. On July 17, 1918, Pat Smith was manager of a store at Seda To in Sandoval county. On that day he was killed, and the store building burned to the ground. The first witnesses to reach the scene arrived at about 1 o'clock the following morning. The fire was still burning. In the ruins of the building they found the body of Pat Smith, badly burned. His skull was crushed as though from a blow with a blunt instrument, the wound being about two and a half inches in diameter, and evidently sufficient to cause his death. An inquiry was commenced among Navajo Indians living in the vicinity and two of them, one being Luis Chaves, appellant here, were arrested. They were interrogated at length and finally both confessed to the killing of Smith and the burning of the store, going into details as to the manner in which both crimes were committed. Some days later, on a preliminary examination before a justice of the peace at which they were accused of the murder of Smith, they

again admitted the crime. Both were later indicted for murder, but only Luis Chaves was tried. He was convicted of murder in the second degree, and appeals.

[1] Counsel for appellant argue that there was no sufficient proof of the corpus delicti, that his confession was improperly admitted, and that certain requested instructions were erroneously refused.

Upon the first point appellant contends that, excluding the confession from consideration, there is no sufficient proof of the corpus delicti. It is trite to observe that in every criminal prosecution the first step must be to prove that the crime charged has been committed by some one. This proof may or may not primarily connect the defendant with the offense. In homicide cases it must be shown that the person whose death is alleged in the indictment is in fact dead, and that his death was criminally caused. If these facts are shown the corpus delicti is sufficiently proven. And this need not be proved by testimony of eye-witnesses. Circumstances may demonstrate it. State v. Sakariason, 21 N. M. 207, 211, 153 Pac. 1034. The proof in this case unquestionably proved the death. The body was found and fully identified. And the fact that death was criminally caused was likewise shown. The body was found in a room occupied by Smith on the ground floor of a three-room store building destroyed by fire. There was a wound on the head sufficient to cause death. There is nothing to indicate suicide or accident. The conclusion that he met death at the hands of some human being who is criminally responsible for it is irresistible. Counsel for appellant suggest that the wound might have been caused by the falling of a stone from a wall of the building, but the facts controvert this theory, first, because negatived by the character of the wound, and, second, because there was

evidence that the walls were still standing when the body was found. There was sufficient proof of the corpus delicti without reference to the confession, and it is unnecessary to determine whether or not the confession might have been considered in aid of it.

The admission of the confession is claimed as error. There were two confessions, one made to the Indian agent and others at Crown Point, and the other before the justice of the peace at Bernalillo. The court inquired as to the voluntary character of each of these confessions to determine its admissibility. It concluded that the first was the result of urging and promises by the Indian agent, and therefore excluded it, but the second was held voluntary, and admitted. The second confession was made some 12 days after the first one at Crown Point upon the preliminary examination of appellant upon the charge of murder. Appellant then stated, in effect, that he went to the store where Smith was employed to buy a pair of overalls, which Smith refused to sell to him. Appellant and the Indian with him were drunk. Smith was sitting in a chair, and appellant struck him on the head with the butt of a pistol. He fell from the chair, and appellant himself, or the other Indian took the chair and "finished him up with it." Then they went to an oil house near the store, soaked some burlap with oil, threw it into the store, and, while appellant did not expressly state that they set fire to it, the connection between these acts and the fire is obvious. The trial court held that, while there was a presumption that this confession was involuntary, this presumption was removed by the evidence presented by the state. The admission of this confession is assigned as error, and counsel for appellant contend that, since the first was held involuntary because induced by the promises of the Indian agent, it must be presumed that the influence continued and the

second was of the same character. The action of the court in excluding the first confession is not before us for review, and for the purposes of this case we will assume that the ruling was correct.

[2] The general rule is that, if a confession has been made under circumstances rendering it involuntary, a presumption exists that a second confession is the result of the prior influence, and this must be overcome before the second becomes admissible. The trial court, following this rule, investigated the circumstances and determined that this presumption of a continuing influence was outweighed by the contrary proof. In State v. Ascarate, 21 N. M. 191, 153 Pac. 1036, and again in State v. Orfanakis, 22 N. M. 107, 159 Pac. 674, this court held that the admissibility of a confession must depend upon the facts and circumstances of the particular case, precedent being of little practical assistance.

The second confession was made 12 days after the first. The Indian agent who obtained the first was not then present, and there is authority to the effect that the presumption of involuntary character does not rise if the second confession is made to a person other than the one who induced the first. Com. v. Cuffee, 108 Mass. 285; State v. Middleton, 69 S. C. 72, 48 S. E. 35; State v. Guild, 10 N. J. Law, 163, 18 Am. Dec. 404; State v. Howard, 17 N. H. 171; State v. Needham, 78 N. C. 474; State v. Willis, 71 Conn. 293, 313, 41 Atl. 820. The confession admitted was made in the course of a judicial investigation. The justice of the peace warned appellant that he was not compelled to testify. The appellant was then represented by counsel, who was present. He had the benefit of his advice, and presumably acted under it. Judging this case in the light of its own facts, we agree with the trial court that these circumstances show that the second con-

fession was voluntary, and sufficiently rebutted the presumption that it was brought about by the influences which caused the first.

[3, 4] Appellant requested the trial court to instruct the jury as follows:

"(6) The jury are instructed that, in order to warrant a conviction, the state must prove beyond a reasonable doubt that a crime has been committed, and the fact of the death and identity of the body of the deceased are not sufficient to warrant a conviction, but you must further find beyond a reasonable doubt that the deceased came to his death by the unlawful act of the defendant before you can find him guilty."

"(7) You are further instructed that it is incumbent on the state to prove beyond a reasonable doubt that a crime has been committed and that the defendant committed it, and the confession of the defendant, if you find he did confess freely and voluntarily, is not of itself sufficient to sustain a conviction."

"(3) The jury are instructed that, if you believe from the evidence that the defendant made any confessions or admissions of guilt, such confessions or admissions are to be received with great caution, and, unless supported by other proofs in the case, are not sufficient to convict."

The substance of requested instruction 6 was given by the court. The jury was advised that to convict the defendant they must find from the evidence beyond a reasonable doubt that defendant unlawfully made an assault upon Smith with a certain instrument, and unlawfully struck him and inflicted upon him mortal wounds from which he died. The court applied the law of murder in the first and second degrees to the facts and advised the jury that the burden was on the state to prove beyond a reasonable doubt every material allegation of the indictment. Under these instructions the jury were obliged to believe beyond a reasonable doubt, in order to convict the defendant, not only that a crime had been committed, but that it was commit-

ted in the manner stated in the indictment, and by the defendant. Requested instruction 6 being merely cumulative, there was no error in refusing it. State v. Carabajal, 26 N. M. 384, 193 Pac. 406.

Requested instruction 7 may be a correct statement of an abstract rule of law, but it was not a proper one to be given under the facts proved. It is true, of course, that the state must prove beyond a reasonable doubt that a crime has been committed; in other words, the corpus delicti, and that the defendant committed it. These elements were fully covered by the instructions given. And it is equally true that the confession of the defendant is not of itself sufficient to sustain a conviction. There must be proof of the corpus delicti independent of the confession, a subject already discussed in this opinion, and the jury might properly have been so instructed. From appellant's brief we judge that this was the purpose of the proposed instruction. Its importance in this particular case may well be doubted, since, as we have already held, there was sufficient independent proof of the corpus delicti presented to the jury by uncontradicted evidence. If the purpose was to present to the jury the necessity for this independent proof, the instruction was not properly framed. The law is that the corpus delicti must be shown independently, but that, once shown, the other elements necessary to a conviction might be proved by the confession alone. As framed, the instruction was calculated to convey to the jury the belief that there must be proof, independent of the confession, not only that the homicide was in fact committed, but also that the defendant was the guilty person who committed it. This is not the law.

The same fault is inherent in proposed instruction

No. 3. All of the requested instructions were properly refused.

The judgment of the trial court is therefore affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2582. Dec. 3, 1921.)

STATE BANK OF COMMERCE V. SPEIDEL.

SYLLABUS BY THE COURT.

Appeal from District Court, Union County; Lieb, Judge. Action by the State Bank of Commerce against Jacob Speidel. Judgment in favor of the plaintiff, and the defendant appeals. Affirmed. Thos. F. Savage, of Clayton, for appellant. Hugh B. Woodward, of Clayton, for appellee.

OPINION OF THE COURT.

DAVIS, J. The material facts in this case are identical with those in Morrison v. Crisp, 27 N. M. 380, 202 Pac. 123, decided at the present term. The same defense of lack of consideration was pleaded to the note sued upon, and the same law applies. That decision governs this case. The judgment is therefore affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2022. Dec. 23, 1921.)

MANBY ET AL. V. VOORHEES ET AL.

SYLLABUS BY THE COURT.

(1) While findings of a referee and of the trial court will not be disturbed where they are supported by substantial evidence, they are subject to review in this court when not so supported. P. 514

(2) The act of February 1, 1858, appearing in Com. Laws,

1865, as chapter 73, §§ 1, 2, and as sections 1880, 1881, Comp. Laws 1884, interpreted and **held** thereunder that an uninterrupted occupancy of land adverse to the true owner, by one who has no title, not only defeated the title of the true owner, but also vested in such occupant a complete title. P. 519

(3) Recital of facts concerning the tax title involved. P. 521

(4) An assessment of land as "1649 acres at 33 1-3," without further description, is **held** to be an insufficient description to serve to identify the land within the requirement of section 25, chapter 22, Laws of 1899. P. 523

(5) Such defect in description is **held** to be a jurisdictional defect, and not avoided by the curative provisions of section 25, chapter 22, Laws 1899. P. 525

(6) A tax sale certificate, issued by a county collector covering an alleged tax sale by his predecessor in office, about which he has no knowledge, is void, and furnishes no basis for a subsequent tax deed. P. 526

(7) The assessment of land in the name of a deceased person is a defect which is cured by the statute above cited. P. 527

Appeal from District Court, Taos County; Leib, Judge.

Action by A. R. Manby and others against A. C. Voorhees and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded with directions.

A. C. Voorhees, of Raton, for appellants.

N. B. Laughlin, of Santa Fé for appellees.

OPINION OF THE COURT.

PARKER, J. The appellee, A. R. Manby, brought suit in the district court for Taos county against Daniel Martinez and others to quiet title to the Antonio Martinez land grant. From a judgment in his favor the persons hereinafter named as appellants have perfected this appeal.

The complaint of appellee Manby alleged in substance that the lands within the Antonio Martinez grant were granted by Spanish authority in 1716 to Antonio Martinez and his heirs and assigns; that it

was confirmed in 1892, and patent therefor was issued by the United States in 1897; that appellee is the owner in fee simple of more than an undivided three-fourths interest in said grant; that defendants are the owners in fee simple of a fraction less than a one-fourth undivided interest in said grant, but as to the extent of the respective undivided interests of each defendant the appellee has no knowledge. The complainant further alleged that many of the named defendants, and other persons, resided upon the grant, and had used and occupied divers and sundry tracts therein allotted and segregated from the body of the estate or common lands of the grant, and that he did not desire to molest or disturb said persons, but desired the same set off by the court to the various owners shown to be entitled thereto by the proofs to be submitted in the case.

The appellant, Voorhees, filed an answer and cross-complaint. The answer denied the allegations of the complaint, except with respect to the confirmation of the grant and the ownership in fee by defendants of certain segregated tracts within the grant. By way of cross-bill he alleged, among other things:

"The defendant herein owns and holds the title in fee simple, and is in actual possession of that certain tract of land lying and being within the exterior boundary lines of the said Antonio Martinez land grant * * * and the said defendant, through his ancestors, their ancestors and predecessors in title, have occupied, held, and possessed the same for a period of more than 10 years prior to the filing of the said complaint * * * herein and the commencement of this action, and have held and occupied and possessed said tracts of land by virtue of conveyances, devises, and other assurances purporting to convey an estate, in such land in fee simple."

Here follows a description by metes and bounds of the land claimed.

The answer of appellee Manby to this part of the

cross-complaint alleges that the appellee denied that the said defendant either owns or holds the title in fee simple or otherwise, or that he is in actual possession of the lands and premises attempted to be described and set forth in paragraph 4 of his said cross-complaint, and further denied on information and belief that the said defendant, A. C. Voorhees, himself, through or by his grantors and predessors, has occupied, held, or possessed the said land for a period of more than 10 years prior to the filing of the complaint in this cause, and the commencement of this suit, or that the said defendant has occupied or possessed said tract of land, or any part thereof, under any conveyance purporting to convey the estate thereof in fee simple or otherwise.

The evidence was taken before a referee, who found that the proof failed to show that Jose R. Vigil or the Hadleys, predecessors in title of the appellant Voorhees, ever took possession of or exercised any control over the Hadley tract in any way whatsoever; that the land was vacant sagebrush land, and that possession thereof had always been in the heirs, successors, and assigns of Antonio Martinez, the original grantee of the grant. The trial court approved this finding of the referee, and one of the principal contentions in the case is that the referee and the court both erred in making this finding.

[1] In approaching a discussion of the proposition involved, we will assume of course that if there is any substantial evidence in the record supporting the findings of the referee and of the court they will not be disturbed. We have carefully examined the record, however, and find that both the referee and trial court were clearly in error in making this finding, and we conclude that the error intervened by reason of the confusion in the mind of the referee and the court as to the period of time within

which the adverse possession of appellant's predecessors in title was maintained. The evidence introduced in behalf of appellant Voorhees shows without contradiction that Vigil, one of his predecessors in title, maintained exclusive possession of this land from about 1861 or 1862 to about 1885 or 1887. The testimony introduced on behalf of appellee in regard to possession of this land was directed to a time subsequent to 1885 or 1887. Thus it appears from the testimony of Gabina Duran de Vigil, widow of appellant's predecessor in title, that she married Vigil about 1861. The land was purchased by Vigil from his brothers, his brother-in-law, and his mother. The year of Vigil's death he planted the land to crops. Vigil was in possession from 1881 until he sold the land. In 1881 he had deeds for the property. Witness and Vigil lived both at Taos and at Desmontes on the land, in a house which in 1881 appeared to be rather new. When the witness and Vigil married he showed her deeds for the land, as well as the boundaries of the land, which included the tract in question. On cross-examination witness said she and Vigil moved each summer to the land in controversy, and cultivated it, and when they were not on the land they had tenants there. The land was unfenced. Water for irrigation purposes came from Arroyo Hondo. The house was near the Canyon Sandias, and contained two rooms and a hall.

The witness McClure testified that he purchased part of the land from Vigil in 1894 and 1895. The land was surveyed in 1887, at which time witness went around most of the tract with Vigil. Vigil obtained most of the land by purchase. Vigil told witness that he (Vigil) had deeds for the property. In 1877 Vigil was in possession of the land either through himself or his tenants. Vigil continued in that possession until 1896. Witness was not personally acquainted with the land in 1877. When he

first saw the house on the land it was in ruins. On cross-examination he said Vigil died in 1898. Some of the Hadley tract was cultivated in small patches (date not given); it was unfenced. Vigil told the witness that the ditch coming from out of the Arroyo Hondo, and from which the land was irrigated, he (Vigil) saw built about 1809, when he was a very small boy herding sheep. Witness first saw the house in 1888, and it was in ruins then. No improvements on the land since 1887, and no one has lived on it since that time. In 1898 witness permitted Vigil to farm his (witness's) part of the land, and Vigil pitched his tent on the land preparatory to farming it, but died before the seed had been sown.

Vincente Mares testified that he knew Vigil from about 1865 to his death. In 1874 the witness passed the Vigil house and saw him there farming the land. The house looked old at that time.

F. A. Gallegos testified that he knew that Vigil claimed the land in 1881. At that time the house upon the land was old.

Jose M. Santisteven testified that he knew Jose R. Vigil, and that he claimed the land in dispute. The father of the witness told him that Vigil used to live at Desmontes, but witness never saw Vigil there. There was a house and some corrals on the land about 1881, at which time such improvements were old. The land was surveyed in 1888. Vigil said the land was 1,000 varas wide, running from Desmontes to Rio Seco, but that it did not run through the Rio Seco creek at all. For 15 or 20 years the witness saw tenants of Vigil cultivating the land on shares for Vigil (prior to 1888). On cross-examination he said he knew only by hearsay

that people were planting the land for Vigil on shares.

Donaciano Duran testified that he knew that Vigil claimed the land for more than 30 years. Saw Vigil on the land. When asked how long ago that had been, he said for over 40 years that he knew of. Vigil planted the land and rented it on shares, and had many head of stock on the land. Did not know when Vigil discontinued farming the land. On cross-examination he said he did not know the quantity of land cultivated by Vigil.

Smith A. Simpson testified:

He came to Taos in 1859, and knew Vigil. Vigil lived on the land in 1861 and 1862 with his family and peons. He was farming the land, and "he had the finest piece of wheat land that I ever saw in Taos county."

"Q. Do you know of your own knowledge of his farming the land continuously either by himself or tenants? A. Oh, I think he farmed; I am certain he farmed it after I came out of the service in 1866, from 1866 on. He had some parties on the land, one by the name of Maes that lived with him; that was in 1870 or after 1870.

"Q. Now can you recall any other time that you were there or passed by there, A. Oh, yes, a number of times we passed there.

"Q. State whether or not you recall at any time seeing crops growing on that tract of land. A. In fact all of the tract of land in Desmontes was under cultivation. The reason I noticed this crop was he took me on the top of his house and showed me off toward the south. He said that was 'my wheat field.' It looked to me as though there was 80 to 100 acres. He said it was all his. He was always selling (wheat) to Mr. St. Vrain, the miller, and others would go to him to buy his crop. It came to considerable money. It was a very big crop of wheat. It made a big field if all he showed me was his."

On cross-examination:

"Vigil had woodyard and corrals there."

On behalf of appellee, Manby, he testified that he was acquainted with tract since 1885, and only a

small portion of the tract was cultivated, and that was at the upper end, the balance being sagebrush land, and that the land since that time had not been occupied by any one.

Enrique Gonzales testified no improvements on the land, except the Vigil house. On cross-examination: Heard that Vigil lived on the land, but never saw him on the land.

T. P. Martin testified that he knew the Vigil land from 1889, and it had never been in cultivation since that time.

Lauriano Garcia testified: Knew the house where Vigil lived many years, but no one lived there now. The land was cultivated some years ago, but not since 1885. The house stands in the middle of what was the cultivated land. Vigil claimed the property.

This evidence, while not as exact as to date and as to the manner and extent of possession by Vigil as could be desired, indubitably establishes the fact that long prior to 1885 Vigil had placed this land under his control and asserted title to it. It establishes a consecutive 10-year period of possession and dominion by Vigil antedating the year 1880, and it is of importance to note that none of the testimony of the appellee conflicts with such evidence offered by the appellant. Appellee's evidence is all directed to a time subsequent to 1880, at which time Vigil had consummated the exclusive right to the property by virtue of more than 10 years preceding possession. The referee failed to appreciate the importance of this evidence, or its relation to the evidence introduced by the appellee, and, there being no substantial evidence to support his finding that Vigil did not have the requisite possession, the find-

ing cannot be sustained on this appeal. Pueblo of Nambe v. Romero, 10 N. M. 58, 61 Pac. 122.

[2] It is to be observed that appellant, Voorhees, in his cross-complaint alleged his rights in the alternative, that is, that he had title by possession, and that he had title by possession under color of title. That his allegations were so treated by the appellee appears from his answer, in which he so treats the cross-complaint. It becomes, therefore, immaterial whether appellant showed color of title or not, if he did, in fact, show possession sufficient, as the statute then stood, to ripen into title. The statute in force during all the time that appellant's predecessor in title, Vigil was in the occupancy of the land in question was the act of February 1, 1858, appearing in the Compiled Laws of 1865 as chapter 73, §§ 1, 2, and appearing, unchanged, in the Compiled Laws of 1884 as sections 1880 and 1881. This statute has been twice construed by the Supreme Court of the United States during the time we were a territory in the cases of Probst v. Presbyterian Church, 129 U. S. 182, 9 Sup. Ct. 263, 32 L. Ed. 642, and Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 14 Sup. Ct. 458, 38 L. Ed. 279, upon appeal from the Supreme Court of the territory.

In the Probst Case, the Supreme Court of the United States, in interpreting this statute, said:

"Nor is it necessary that the defendant shall have a paper title under which he claims possession. It is sufficient that he asserts ownership of the land, and that this assertion is accompanied by uninterrupted possession. It is this which constitutes adverse possession, claiming himself to be the owner of the land. This is a claim adverse to everybody else, and the possession is adverse when it is held under this claim of ownership, whether that ownership depends upon a written instrument, inheritance, a deed, or even an instrument which may not convey all the lands in controversy. If defendant asserts his right to own the land in dispute, asserts his right to the possession, and his possession is ad-

verse and uninterrupted, it constitutes a bar which the statute intended to give to the defendant."

The court held in that case that it was error to refuse an instruction as follows:

"That an uninterrupted occupancy of land by a person who has in fact no title thereto, for the period of 10 years adversely to the true owner, operates to extinguish the title of the true owner thereto, and vests the right to the premises absolutely in the occupier."

In the Maxwell Land Grant Case, the court said:

"Plaintiff also complained of the instruction of the court upon the subject of the statute of limitation, namely, that if the plaintiff permitted defendant to take possession of the tract, claiming all of it as his own, and to continue such possession adversely under such claim of title for an uninterrupted period of 10 years or more, such possession would ripen into a right and title in the defendant, and forever afterwards prevent the plaintiff from taking possession of the property. We think, however, the instruction complained of was justified by the language of the statute, which provides (Comp. L. New Mexico of 1884, § 1881) that 'no person, or persons, nor their children, or heirs, shall have, sue, or maintain any action, or suit, either in law or in equity, for any land * * * but within ten years next after his, her, or their right to commence * * * such suit shall have * * * accrued, and that all suits * * * shall be had and sued within ten years next after the title or cause of action, or suits, accrued or fallen, and at no time after the ten years shall have passed.' Under similar statutes it has been held by this court that the lapse of time not only bars the remedy, but extinguishes the right, and vests a complete title in the adverse holder."

The court cites the Probst Case and other cases.

While the decisions of the Supreme Court of the United States upon such a matter are not binding upon this court, the two decisions referred to were, at the time they were rendered, binding upon the territory, and we see no reason, either upon principle, or as a matter of authority, to now depart from the conclusions reached by the Supreme Court of the United States.

It follows from the foregoing that the appellant

Voorhees, having shown occupancy and dominion under a claim of right adverse to the true owner by his predecessor in title for more than 10 years prior to the bringing of this suit, showed sufficient, not only to defeat the appellee in his recovery, but also showed sufficient to establish title in himself to the land in controversy.

[3] The appellant Voorhees in his cross-complaint alleged that the treasurer of the county of Taos had made, executed, and delivered to one William M. Frayne a certain tax deed dated September 6, 1905, covering the property in question, and that said deed was void and of no effect, and constituted a cloud upon appellant's title, and he prayed that the same be set aside and removed. The referee and the court below found that the tax proceedings were in all respects regular and valid. It appears by way of recital in the deed that the property on May 17, 1900, February 17, 1901, and February 17, 1902, was sold to the county. Likewise it so appears that on April 6, 1905, the property was again sold to the county for delinquent taxes for the years 1898, 1899, 1900, 1901, 1902, and 1903; that one Frayne paid to the collector the taxes, penalties, interest, and costs due, and in consideration thereof the then collector issued to him tax sale certificates (styling them certificates of purchase) Nos. 713, 714, 715 and 960, on August 17, 1905. It appears from the proofs in the case that certificate No. 960 was dated August 17, 1905, and was for the 1903 taxes, and that there was redemption by appellant's predecessors in title within 3 years after the sale. Certificate No. 715 was for the years 1898, 1899, and 1900 and was likewise dated August 17, 1905. The stub of the certificate recited that it was for the years 1898, 1899 and 1900, and that the dates of the sales for which the certificate was issued were May 17, 1900, February 17, 1901, and February 17,

1902. The stub contains the following remarkable recital:

"This certificate not having been made by De Cordova and Ygenio Sanchez, then collectors and ex-officio treasurers at the time of the above-mentioned sales of this property for said years, therefore, I have issued this certificate of sale this 17th day of August, 1905, and assigned the same to William M. Frayne, by paying the full face value and interest as follows: Here follows the figures showing the compilation of the amount due.) Recorded this 18th day of August, 1905, in Book 2, at page 409, of the Record of Sales, reported by collector October 6, 1905. Alex Gusdorf, Chairman."

Certificate No. 713 is for the taxes of the year 1901 and was likewise issued and sold to Frayne on August 17, 1905. Certificate No. 714 was for the taxes of the year 1903, and it was testified by one of the witnesses that it was dated March 17, 1904.

It appears from the evidence in the case that there is no record in the collector's book of sales, or elsewhere, containing the date of the sales and description of the property sold and the name of the purchasers and amount for which the same was sold, as is required by section 23, chapter 22, Laws 1899. It was attempted to be shown by a witness introduced on behalf of appellee that, as a matter of fact, tax sales of this property were held. He testified that notices of the tax sales were published, but no proof of such publication could be produced from the collector's office or elsewhere. The witness testified that he was sure that it was published, and that he was deputy collector covering most of this period, and knew as a matter of fact that the sales were made in accordance with the notices.

The tax rolls of the county shown in evidence disclosed assessments in the name of Mary C. Hadley or Mrs. O. A. Hadley from 1898 to 1907, inclusive. There was no description whatever of the property in the assessments of 1898 and 1899. The assess-

ments for 1900 to 1902, inclusive, described the property as "1643" or "1649 acres at 33 1-3 cents per acre," without further description. The assessments for 1903 refers for description to "Book A13, pp. 63 and 64, Taos Co. Records," and describes the property as 1,649 acres at 33 1-3. The assessments for 1904, 1905, and 1906 were identical with those for 1903. The 1907 roll showed a re-assessment for the years 1898 to 1902, inclusive, and for 1904 to 1907, inclusive, in the name of Mary C. Hadley, with a full and complete description of the property according to a detailed survey, with total taxes of $163.23, and the payment thereof by her heirs in full.

It is to be observed that the assessments for 1903, 1904, 1905, and 1906 referred to a certain book and page of the Taos county records for a description of the property assessed. It will not be necessary, however, for us to consider whether this is a compliance with the requirements of the statute as to the description of the property in the assessment for taxation, for the reason that the property was redeemed from the tax sale of April 6, 1905, for the taxes of 1903 within 3 years after the date of such sale, and for the further reason that the taxes for the years 1904, 1905, and 1906 are shown to have been paid by Frayne or Manby as owners of the property.

[4] We have then the question as to whether the description in the assessment rolls from 1898 to 1902, inclusive, is sufficient to support any tax whatever. They have heretofore been referred to. For the first two years they contained no description whatever. For the three succeeding years the assessment is upon "1649 acres at 33 1-3." The statute, section 4032, C. L. 1897, required a description by legal subdivisions, or otherwise, sufficient to identify the land. This same requirement is carried for-

ward in section 25, chapter 22, Laws 1899. The provisions of the latter much quoted act are as follows:

"If such property is described in the assessment roll and delinquent tax list for any year by such description as will serve to identify the same, the sale of such property for taxes as provided in this act shall not be void, or set aside on account of any error or irregularity in listing the same upon such roll or list, either as to the name or names of the owner or owners thereof, or by reason of its being listed in the name of the wrong person; and no bill of review or other action attacking the title to any property sold at tax sale in accordance with this act shall be entertained by any court, nor shall such sale or title be invalidated by any proceedings except upon the ground that the taxes, penalties, interest and costs, had been paid before the sale, or that the property was not subject to taxation."

It is to be admitted that if the descriptions heretofore mentioned are sufficient to "serve to identify" the land, they are to be held sufficient in this regard for the purposes of this tax sale. But can it be said that the descriptions do serve to identify the land? Its location, aside from being in Taos county, is not mentioned. Its boundaries are not attempted to be defined. The precinct or precincts in which it lies are not named. It is not identified by name. We are compelled to hold that such a description does not serve to identify the land as the subject of taxation, and forms no legal basis for the assessment and levy of taxes. In so holding we desire to be rather cautious in laying down any hard and fast rule on the subject of necessary description of property for taxation. We appreciate the difficulty in this state in properly describing real estate, because of the fact that a large proportion of the property is held by metes and bounds rather than by government legal subdivisions, growing out of the fact of the large areas covered by Spanish and Mexican land grants. The fact remains, however, that some method of identification must be resorted to in such descriptions other than merely stating the number of

acres taxed. That this is the general rule on this subject, see Black on Tax Titles (2d Ed.) § 112; 1 Cooley on Taxation (3d Ed.) p. 740 et seq. See, also 26 R. C. L. "Taxation," § 314; McClellan v. District of Columbia, 18 D. C. (7 Mack.) 94; Bush's Heirs v. Williams, Cooke (Tenn.) 360; Fed. Cas. No. 2,225; Smith v. Cox, 115 Ala. 503, 22 South. 78; Thibodaux v. Keller, 29, La. Ann. 508; Adams v. Larrabee, 46 Me. 516; Cogburn v. Hunt, 54 Miss. 675; Lyman v. Philadelphia, 56 Pa. 488;Newcomb v. Franklin Township, 46 N. J. Law, 437; Palomares L. Co. v. Los Angeles County, 146 Cal. 530, 80 Pac. 931; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112.

[5] We have three times had before this court the question of what are and what are not jurisdictional defects in taxation proceedings under chapter 22, Laws 1899. In Straus v. Foxworth, 16 N. M. 442, 117 Pac. 831, it was held that under section 25 of chapter 22, Laws 1899, defects or irregularities in the notice of sale were not jurisdictional and that the restriction of defenses to tax sales to the fact that the taxes had been paid, or the property was not subject to taxation, was a valid exercise of legislative power. It was carefully noted, however, that jurisdictional defects might always be taken advantage of.

In Maxwell v. Page, 23 N. M. 356, 168 Pac. 492, 5 A. L. R. 155, we held that a premature sale was an irregularity which was not available to the owner in view of the restricted defenses reserved in the statute. In that case we said that:

> "The essentials of taxation are the existence of the subject matter which is to be subjected to taxation, and its liability to the imposition of the tax, the assessing of the property for taxation, and the levying of the tax thereon."

In that case the question was not, as it is here,

whether a tax sale had in fact been had, but whether the sale had been had at the time prescribed by the statute. We did not have before us in that case any question as to whether, if no sale in fact had been had, the defects in the proceedings would have been jurisdictional.

In Pace v. Wight, 25 N. M. 276, 181 Pac. 430, however, we had the identical question which is present in this case, i. e., whether the tax sale was in fact made is jurisdictional, and whether that fact can be established by anything except the book of sales, required by section 23, chapter 22, Laws 1899. In that case it was first held by us that the fact of actual sale for taxes was jurisdictional, and that, there being no legal evidence to that effect, the tax deed was void. On rehearing, however, it was made to appear that the tax sale was an admitted fact in the case, and consequently our holding became obiter. It was arrived at, however, by a unanimous court, and stands as the opinion of this court on the subject. In that case the former cases were collected, and we held in terms that the curative provisions of the statute did not apply to jurisdictional defects in tax proceedings. We now add to the foregoing list of defects which are jurisdictional, and which are not cured by the statute, that of failure of description sufficient to identify the land. This must necessarily be so. If you have no description, you have no subject-matter upon which the tax can be laid, and you have no property which can be conveyed to the purchaser.

[6] In the Pace-Wight case the collector, who was supposed to have made the tax sale, had failed to make the record in the book of sales, and had left no written memorandum or evidence of any kind of the fact that he had made the sale. His successor in office, without any personal knowledge of the

matter whatever, made the record show that a sale had in fact taken place some 2 years and 3 months prior to the entry on the record, a fact wholly without his knowledge, and which, if it had occurred, it was the duty of his predecessor to have recorded. We held that such an act by the successor of the collector who made the sale was void, and furnished no basis for the tax deed.

In the case at bar there is no official record whatever of the fact that the sales for taxes for the years 1898 to 1902, inclusive, were in fact ever made by the collector except perhaps for the year 1902. The collector in office in 1905 wrote up some tax sale certificates purporting to be based upon some supposed sales made by two of his predecessors in office. Concerning the truth of the fact that these sales were actually made, he could have had no knowledge, and did not pretend to have the same. For this reason alone the tax certificates issued by the collector in 1905 are within the doctrine of the Pace-Wight case, to which we adhere, and are wholly void and furnish no basis for the tax deed here in question.

There is language in the Pace-Wight case to the effect that the only evidence admissible under any circumstances of the fact that a sale for taxes was made is the official record to be kept by the collector. We have some doubt of the correctness of this broad statement. Circumstances might perhaps arise under which the fact of sale might be otherwise shown, and when such a state of facts is presented, we will endeavor to state a rule on the subject. As applied to the facts in that case, however, where a record was made by reciting facts, which the collector could not and did not know, the statement was correct.

[7] Appellant urges that all of the assessments for all of the years in question were void for the

reason that they were assessed in the name of a deceased person. It seems that Mary C. Hadley, or Mrs. O. A. Hadley, died in 1898, and that the property was continuously assessed in her name during the period in question. In view of the language of section 25, of the act of 1899, above quoted, we do not see how appellant can successfully urge this objection to this assessment. Names of taxpayers are deemed by the provisions of the act to be unimportant, the tax being laid upon the property. A literal interpretation of the words used would be sufficient to dispose of the contention made, and we therefore hold that it is not a jurisdictional defect for property to be assessed in the name of a deceased person. Upon this subject see Grant v. Bartholomew, 57 Neb. 673; 78 N. W. 314, 315; Holroyd v. Pumphrey, 18 How. 69, 15 L. Ed. 264; Young v. City of Marshall (Tex. Civ. App.) 199 S. W. 1180.

There are other appellants in the case claiming right to possession of certain tracts of land within the grant, but the evidence in support of their claims is so uncertain and undeveloped that the findings below with respect to them must be affirmed.

It follows from all of the foregoing that there is error in the decree of the district court as to the appellant Voorhees, and that the same should be reversed, and the cause remanded to the district court with directions to enter a decree in favor of the appellant quieting his title to the land in controversy; and, it is so ordered.

RAYNOLDS, C. J., concurs.

DAVIS, J., did not participate.

(No. 2556. Dec. 23, 1921.)

JOYCE-PRUIT CO. V. MEADOWS ET AL.

SYLLABUS BY THE COURT.

(1) A debt barred by the statute of limitations is revived by an admission that it is unpaid made in writing and signed by the party to be charged. P. 531

(2) It is not necessary that such an admission amount to a new promise to pay, express or implied. P. 531

(3) It is not necessary that the admission be made to the creditor. P. 533

(4) The fact that the admission is made in a deposition in answer to cross-interrogatories does not alter its effect. P. 534

Appeal from District Court, Chaves County; Brice, Judge.

Action by the Joyce-Pruit Company against J. H. Meadows and others. Judgment for defendants on demurrer, and plaintiff appeals. Reversed and remanded, with instructions.

H. M. Dow, of Roswell, for appellant.

O. E. Little and Ed. S. Gibbany, both of Roswell, for appellees.

OPINION OF THE COURT.

DAVIS, J. On January 3, 1911, J. H. Meadows and Cordelia Meadows, appellees, gave to Joyce-Pruit Company, appellant, their promissory note for $1,881.56, payable June 1, 1911. Some payments were made upon it, but at the expiration of the six-year period of limitation a considerable amount was still unpaid. In 1920 an action was commenced by appellant upon the note against appellees, who then resided in Arizona. Their depositions were taken in Arizona by stipulation of the parties. A cross-

interrogatory was directed to J. H. Meadows relative to the note sued upon as follows:

"Q. When you went from New Mexico to Arizona did you know that the debt evidenced by the note which the appellant sued upon in this case was unpaid? A. Yes."

Cross-interrogatories were also directed to Cordelia Meadows, which she answered as follows:

"Q. When you went to Arizona, did you know that the note or debt sued upon was unpaid? A. Yes.

"Q. Did you know that you and your husband signed the note sued upon and described in plaintiff's complaint? A. Yes.

"Q. Is the debt which is evidenced by the note payable to Joyce-Pruit Company, and which you and your husband signed, and which is sued upon in this case unpaid? A. Yes.

"Q. How long have you known that this debt is unpaid? A. Since January, 1911.

"Q. Why are you not willing to pay this debt? A. Not able.

"Q. Do you know and acknowledge that the debt evidenced by the note that the plaintiff in this case sued upon is unpaid? A. Yes."

The deposition of each of these parties was in writing, duly signed, and acknowledged. Upon the incoming of these depositions the action then pending was dismissed without prejudice, and this action was commenced on April 12, 1920. The complaint stated the facts already recited, claimed the depositions to be admissions in writing sufficient to avoid the bar of the statute of limitations, and attached copies of them as exhibits. Appellees demurred on the ground that the complaint showed on its face that the action was barred, and that the answers in the depositions were not admissions sufficient to toll the statute or revive the cause of action. The demurrer was sustained, and appeal taken. The only questions presented are as to the effect of the depositions as obviating the bar of the statute, for it

is undisputed that the six-year limitation period had expired, and no new promise or admission is pleaded except the one referred to.

[1] The statute in question is section 3356, Code 1915, as follows:

"Causes of action founded upon contract shall be revived by an admission that the debt is unpaid, as well as by a new promise to pay the same; but such admission or new promise must be in writing, signed by the party to be charged therewith."

Appellees argue that the admissions relied upon are not ones "upon which the law can base an implied promise" and do not "acknowledge a present existing debt or liability." The statute does not in terms require that these elements be present in the admission, and it is not for a court to write into a statute provisions which the Legislature has omitted. In Buss v. Kemp Lumber Co., 23 N. M. 567, 170 Pac. 54, L. R. A. 1918C, 1015, this court quoted with approval the following statements:

"'As a gneral rule the courts are without power to read into these statutes exceptions which have not been embodied therein, however reasonable they may seem. It is not for judicial tribunals to extend the law to all cases coming within the reason of it, so long as they are not within the letter.' * * *

"'Wherever the situation of the party was such as, in the opinion of the Legislature, to furnish a motive for excepting him from the operation of the law, the Legislature has made the exception, and it would be going far for this court to add to those exceptions.' The rule is established beyond controversy."

[2] Under this rule the contentions of appellant might be disposed of in very few words. The statute does not require that the admission be one upon which the law implies a promise nor that it acknowledge a present existing liability. All that it requires is an admission that the debt is unpaid and if that is made the statute is satisfied. The implication that the law, apart from the statute, might attach to the admission becomes of no consequence,

for the statute itself declares its effect. We are spared the necessity of an investigation of the source of this statute or of its meaning and construction, or a comparison with similar statutes of other states, and the course of judicial interpretation in those states for all such matters are fully discussed in the opinion in Cleland v. Hostetter, 13 N. M. 48, 79 Pac. 804. We follow the construction laid down in that case. There it is said:

"Whatever may be the diversity of opinions, however, among the states which have adhered to the common-law language defining what shall be sufficient to toll the statute, we are of opinion that the statute of this territory does not stand on the footing of the older jurisdictions and that the rules there applicable are not binding here. Unlike the Statute of James, our statute in terms provides that either a new promise or an acknowledgment may revive the action; and, not content with leaving to uncertainty or to diversity of authority the scope of the acknowledgment necessary to toll the statute, it in terms provides that 'an admission that the debt is unpaid' shall have that effect. This very explicit statutory declaration limits the field of authority applicable and renders it unnecessary to discriminate between the two lines interpreting the common law. * * *

"'By statute in several jurisdictions it is not necessary that the acknowledgment shall imply a promise to pay; an admission of the debt as an existing liability is sufficient even though it is accompanied by words which repel any implication of such a promise.'"

Again, upon the question of implied promise, the court says:

"So in the concurring opinion of Mr. Justice Brewer, then a member of the Supreme Court of Kansas, that learned jurist emphatically disposes of the suggestion that an acknowledgment must under the Kansas statute evince a willingness to pay. He quotes this form of acknowledgment: 'I owe that debt, I admit it is an existing and just claim upon me; but I never will pay it.' 'Here,' says the learned justice, 'there is the express and clear acknowledgment of an existing debt, but there is not only nothing indicating a willingness to pay but on the contrary an express refusal to pay. Is such an acknowledgment within the statute? Unhesitatingly I answer Yes.'"

This case is decisive for this jurisdiction of at least two points: First, that the cause of action is

revived by the admission alone; and, second, that the admission need not in terms imply a promise or willingness to pay.

If it were necessary to hold that the admission must confess an existing debt or liability, and disregarding the fact that the statute does not in terms so provide, does not the fact that the debt is unpaid show that it is existing? The statute does not cancel the debt, but merely bars the remedy. The obligation itself continues. Appellees argue that this was not an existing debt because they intended to defeat it by their plea of the statute. But, assuming that such intention is shown by the record, the argument is faulty. A definite admission that the debt is unpaid revives the cause of action irrespective of the intention of the debtor as to payment. To say that the admission is ineffective to toll the statute because the statute has already run and the debtor intends to avail himself of it is to reason in a circle. If he has such intention, he should not prevent its accomplishment by bringing himself within the plain terms of a contrary law. It is futile to say that the debtor, while admitting the debt to be unpaid, intends nevertheless to avail himself of the statute, for the statute itself says he may not do so.

[3] Appellee also contends that the admission was ineffective because not made to the creditor. Here again an attempt is made to impose upon the admission a condition not provided in the statute. Cases which hold that such an element is necessary are those in which the theory is adopted that the admission must constitute a new contract, express or implied, and under such a contract there is reason for the rule that there must be two contracting parties, the debtor and the creditor. But our statute does not proceed upon that theory. The reason for the rule and its lack of application to a statute such

as ours is pointed out in Doran v. Doran, 145 Iowa, 122, 123 N. W. 996, 25 L. R. A. (N. S.) 805. It has been held that our statute was copied from that of Iowa, so the decision is directly in point. This was a suit to foreclose a mortgage given to secure a note barred on its face, and the admission which was relied upon to revive the note was a recital in a deed made by the debtor to a third party that the deed was "subject to a mortgage executed by the grantor * * * upon which is unpaid $500 and accrued interest." There was neither a promise to pay nor an admission to the creditor, but it was held sufficient to avoid the bar of the statute.

[4] The only remaining contention of appellees goes to the form of the admission. They say that the admission was made in answer to interrogatories propounded to them as witnesses, and that therefore their statements were involuntary and cannot be used against them.

Appellees were witnesses in their own behalf; the depositions were taken on their own motion; they were in no sense compelled to testify or to sign the depositions which contained the admission. The statements were voluntary in fact, and we know of no rule that makes them involuntary in law. That the statements as to the nonpayment of the note were made in a judicial proceeding, under the sanctity of an oath, would seem to lend strength to the admission instead of a reason for avoiding its effect. The statute does not except such admission from its terms, and we cannot do so.

In O'Donell v. Parker, 48 Utah, 578, 160 Pac. 1192, it was held that including a barred obligation in the schedule of liabilities of a bankrupt would not revive it. The contrary is held in Hyde Park Flint Bottle Co. v. Miller, 179 App. Div. 73, 166 N. Y. Supp. 110, and Crosst v. Hall, 170 N. Y. Supp. 64.

Other admissions in judicial proceedings have been held sufficient in a number of cases.

In Blakenley v. Wyland, 115 Iowa, 607, 89 N. W. 16, an account filed by a guardian acknowledging the receipt of money was held to interrupt the running of the statute. In Roberts v. Leak, 108 Ga. 806, 33 S. E. 995, a recognition of liability in a pleading was held to toll the statute. In Dinguid v. Scholfield, 73 Va. 803, it was held that a deposition signed by the maker of a note, admitting that it was in part unpaid, would defeat a plea of the statute. While these decisions are not directly in point here, they are somewhat analogous, since in all of them the admission was contained in some instrument, the filing of which was required in a judicial proceeding.

There is no authority for holding that this class of admissions is to be excepted from the statute.

For the foregoing reasons, the judgment of the district court is reversed, and the case remanded, with instructions to overrule the demurrer; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2663. Dec. 23, 1921.)

STATE V. CORRAL, ET AL.

SYLLABUS BY THE COURT.

(1) A verdict not supported by substantial evidence will be set aside on appeal. P. 540

(2) A requested instruction covered by instructions given of the court's own motion is properly refused. P. 540

(3) Assignments of error presented but not argued in the brief will not be considered. P. 540

Appeal from District Court, Grant County; Ryan, Judge.

Elauterio Corral, Romaldo Losano, and Jesus Rocha were convicted of murder in the first degree, and they appeal. Reversed as to Rocha and remanded and affirmed as to Corral and Losana.

J. H. Shetter and Joseph W. Hodges, both of Silver City, for appellants.

A. M. Edwards, Asst. Atty. Gen., for the State.

OPINION OF THE COURT.

DAVIS, J. Appellants Elauterio Corral, Romaldo Losano and Jesus Rocha were convicted of murder in the first degree in the district court of Grant County. All are natives of Mexico. At the time of trial, May, 1921, Corral was 16 years old, Losano 17, and Rocha 22. On April 1, 1921, all were prisoners in the Grant county jail. That night, or early the following morning, Corral and Losano escaped from their cell by removing some bricks in the wall, and went into a room where Ventura Bencomo, the jailer was sleeping. His pistol, cartridge belt, and jail keys were on a chair near his bed. Losano had obtained an axe which was kept in the jail and was carrying it. Corral took the axe from him and struck Bencomo in the head with it, rendering him unconscious and inflicting a wound from which he died a few hours later. They then took the pistol, cartridge belt, and keyes and completed their escape. Jesus Rocha, the other appellant, during all this time was locked in his own cell with another prisoner. Before leaving the jail Corral and Losano went back to Rocha's cell, had some conversation with him, and tried to unlock the door so as to permit him to escape; but they were unsuccessful, and Rocha remained locked in his cell during all of the night. Corral and Losano were captured some days later,

and they and Rocha were indicted and convicted for the murder of Bencomo.

Some of the facts given above were disputed, but the foregoing is a fair statement of the occurrences at the jail that night. Corral and Losano testified that they had left the jail and completed their escape before Bencomo was killed. Then, they said, Corral went back to get a small sum of money which one of the prisoners owed him. While passing through the jailer's room, he woke up, reached for his pistol, and then Corral picked up the axe, which Losano had left leaning against the bed, and killed Bencomo. Evidently the jury did not believe this story and it is contradicted by many features of the testimony.

When arrested both Corral and Losano made statements as to the details of their escape and of the murder. Each accused the other of having done the actual killing. Each charged Rocha with having been a party to the plan for the escape and of having suggested the method of effecting it ,including advice to hit Bencomo in the stomach with the axe. There is not a particle of testimony of such advice as to an assault or attack on Bencomo excepting these statements by Corral and Losano. On the trial both of them admitted that they made the statements, but denied the truth.

The three appellants having been tried jointly and the proof consisting largely of the statements, confessions, and actions of Corral and Losano occurring after the murder and escape, much evidence was admitted generally during the trial which was properly admissible only as against the one doing the act or making the statement. That this testimony should have been so limited, and that the court intended to confine it in this way, is apparent from his instruction to the jury when the case was submitted that

the statements of Corral and Losano were not to be given "any consideration whatsoever as bearing upon the question of the guilt or innocence of Jesus Rocha, except as to statements made in his presence," and that statements should be considered only against "the defendants, who actually made them and not in any respect as bearing upon the question of the guilt or innocence of the other defendants."

At the close of the testimony for the state the court was requested to instruct the jury to return a verdict of not guilty as to Jesus Rocha on the ground of insufficient evidence as to him. The court overruled the motion, and it is here argued that this action was erroneous. To determine this question it is necessary to examine the testimony given prior to the making of the motion. In doing this we exclude from consideration the statements of Corral and Losano made when Rocha was not present, in accordance with the ruling of the trial court.

It is certain that Rocha took no part in the actual escape or the murder. During all the time that Corral and Losano were committing the actual offenses, Rocha was locked in his cell powerless to do anything. His conviction of first degree murder must necessarily have been upon the theory that he "counseled, incited, procured, aided and instigated" Corral to kill Bencomo; this being the basis outlined by the court to the jury in its instructions in this regard.

Examining the record for proof of such facts, or even facts to show that Rocha was privy to the general plan to escape, we find very little on which to base a belief in his guilt. On the day before the homicide the three prisoners were together for a considerable time in what was known as the "bull pen" of the jail. A part of the time they were playing cards together in one of the cells. One witness,

George Bentford, also a prisoner, testified that they tried to avoid him and did not mix with the other prisoners, but that he did not consider their actions suspicious. No one heard their discussions, if there were any. That afternoon Rocha had received a present of a cake, and he gave some of it to Corral and Losano. There is no other testimony as to events or conversations between them prior to the murder. These facts may show that the three appellants were on friendly terms and had an opportunity to conspire and that Rocha had a chance to instigate murder, but they are far from showing that any such conspiracy or incitation occurred. After the assault on the jailer, when Corral and Losano came back to the cell where Rocha and another prisoner were confined, they tried to open the cell door. They told Rocha that the jailer was "knocked out" and asked him where the keyes to his cell were. He replied that they were in the money box, or desk, in the jailer's room. Another prisoner, Mrs. Bradshaw, had heard the wounded jailer groaning and called to him to know what was the matter. Rocha told Corral "to go and shut her up." After speaking to Mrs. Bradshaw, Corral came back to Rocha's cell. There was some further conversation about the keys; they found they could not open the cell door, and Rocha then said: "Beat it. Leave me here and don't say nothing about it." Corral and Losano then went away and escaped from the jail. These facts in themselves can show no instigation by Rocha of the assault on Bencomo or of the escape, for the assault had already been committed and the escape already undertaken. An inference might be drawn that the return of Corral and Losano to Rocha's cell and their attempt to unlock his door was the result of a previous understanding, and Rocha's advising them to silence Mrs. Bradshaw and to leave is sufficient evidence that he was in sympathy with their escape. He was not charged as an accessory after the fact. The advice

does not make him guilty of a murder already committed. The inference as to previous participation is not in our opinion sufficiently strong that Rocha should be held responsible for Bencomo's death. The Attorney General cites no other testimony in his brief. We have carefully examined the transcript and can find none. A case somewhat analogous to this is State v. McGhee, 23 N. M. 652, 170 Pac. 739, in which the evidence was held insufficient to convict a defendant who did not actually participate in the crime. See also State v. Garcia, 19 N. M. 414, 420, 143 Pac. 1012.

[1] It follows that the state by its testimony in chief failed to prove a prima facie case against Rocha and that the motion of this appellant, directed to the insufficiency of the proof as to him, should have been sustained.

[2, 3] Appellants assign as error the refusal of the court to give the jury two instructions which they requested and its failure to give certain other instructions which they argue were necessary. The first requested instruction was as to reasonable doubt and was intended to direct the mind of each individual juror, rather than the jury as a whole, to his duty to acquit if a reasonable doubt existed. The court gave substantially the stock instruction on reasonably doubt which was approved as correct in State v. Perkins, 21 N. M. 135, 139, 153 Pac. 258, and State v. Rodriguez, 23 N. M. 156, 184, 167 Pac. 426, L. R. A. 1918A, 1016, and it sufficiently covered the requested instruction. The second we need not discuss, since there is neither argument nor authority in appellants' brief in support of it. Hawkins v. Berlin, 27 N. M. 164, 201 Pac. 108. And as to the instructions not given and not requested, it would be sufficient to say that if appellants desired additional instructions they should have requested them. Territory v. Gal-

legos, 17 N. M. 409, 130 Pac. 245. Nevertheless, considering the youth of these appellants, the gravity of their offense, the extreme penalty, their alien birth and rearing, and their apparent low mentality, we have examined the instructions given by the court to satisfy ourselves as to their sufficiency. The instructions as a whole presented the issues fairly to the jury and correctly stated the law. We see no error in them or in the failure to instruct further.

The judgment and sentence of the district court is reversed as to appellant Jesus Rocha and remanded with instructions to set aside the judgment and dismiss the cause as to Jesus Rocha and discharge him, and as to appellants Elauterio Corral and Romaldo Losano, judgment and sentence is affirmed and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

No. 2694. Dec. 24, 1921.)

CAPITAL CITY BANK V. BOARD OF COM'RS SANTA FE COUNTY.

SYLLABUS BY THE COURT.

The Bateman Act is no defense to an action to recover judgment on certificates of indebtedness issued by a county in anticipation of the collection of a special tax levy, and payable from the proceeds of that levy, where the levy produced sufficient funds to pay the certificates, but the funds were diverted to other purposes.

Appeal from District Court, Santa Fé County; Holloman, Judge.

Action by the Capital City Bank against the Board of County Commissioners of Santa Fé County. Judgment for plaintiff ,and defendant appeals. Affirmed.

A. M. Edwards, Asst. Dist. Atty., of Santa Fé, for appellant.

E. R. Wright, of Santa Fé, for appellee.

OPINION OF THE COURT.

DAVIS, J. The complaint in this case is based upon three certificates of indebtedness issued by Santa Fé county, April 4, 1918, each for $500, payable April 4, 1919, with 6 per cent interest. They were issued under the act entitled "An Act to Provide for the Public Defense," approved May 8, 1917 (Laws 1917 [Ex. Sess.] c. 5), which authorized counties to levy a special tax of one mill for the years 1917 and 1918 to raise funds for highways and permitted them to anticipate the collection of the tax by the issue and sale of certificates of indebtedness. The levy of one mill was made by Santa Fé county in 1917, and certificates to the amount of $2,000 were issued and sold in anticipation of its collection. The certificates contained the recital that they were to be paid out of the proceeds of the collections of the tax levy of one mill on the dollar of the valuation of all property in said county of Santa Fé, subject to taxation for the state and county purposes for the year 1917. This levy brought into the fund more than sufficient money to pay these certificates, principal and interest, but only one of the certificates was paid. The balance of the proceeds of the levy was diverted by the county authorities, leaving no funds available for the three remaining certificates, and payment of them was refused by the county upon presentation on the ground of lack of funds.

This action was commenced to recover judgment against the county for principal and interest of the three unpaid certificates. The county defaulted, and judgment was rendered against it. This appeal is prosecuted from that default judgment, upon the theory that the complaint did not state a cause of action.

The argument made by appellant is that since the indebtedness was payable from revenues for the

year 1917, and there were no funds available for that year from which to pay these certificates upon presentation, they became void under the terms of the Bateman Act, and payment of them may not be enforced from the revenues of a subsequent year. Counsel for appellant relies upon the case of Optic Publishing Co. v. Board of County Commissioners of San Miguel County, 27 N. M. 371, 202 Pac. 124, recently decided, and previous similar decisions of this court.

The Bateman Act (Code 1915, § 1227 et seq.) has so frequently been before this court that extended consideration of it is unnecessary. The portion claimed to be applicable here provides that no board of county commissioners shall become indebted or contract any debts during any current year which at the end of such year cannot be paid out of money collected and belonging to that year, and that any indebtedness which cannot so be paid shall be null and void, and that if the funds are insufficient to pay creditors in full they are to be prorated among them. Obviously the act applies to the general expenses and indebtedness of the county which is paid from its general funds, the funds in which general creditors share, and which can be prorated among them. The act of 1917, authorizing the one-mill levy, created a special fund for a special purpose. When certificates were issued by the county and sold against the future collection of this levy, the county was obligated to use the proceeds of it for the redemption of the certificates. The moneys when collected constituted in a sense a trust fund to be devoted to that purpose, and to the extent necessary, that purpose only.

No question is raised as to the original validity of the certificates. They were valid when issued. A special fund had been created for their payment. They were payable out of that special fund only.

They were not entitled to share in the general funds of the county for 1917, and general creditors were not entitled to any portion of the proceeds of the levy in anticipation of which they were issued. Certainly the Bateman Act has no application to such a situation. Its purpose, as stated in James v. County Commissioners, 24 N. M. 509, 174 Pac. 1001, is to require counties to live within their incomes, and to keep the expenses in any year within the income for that year. Here it is admitted that the income from the levy out of which these certificates were to be paid was more than sufficient to meet them. The county authorities, in violation of the plain duty to conserve this fund for the payment of these certificates, diverted it to other uses, and then say, when the certificates are presented, that they can not be paid for lack of available funds. Such a contention does not appeal to a sense of justice, and is not sustained by the law. The misapplication of funds collected for the payment of these certificates cannot render them invalid.

The district court included in its judgment an order directing the board of county commissioners to make a sufficient levy upon the taxable property in the county of Santa Fé to pay the judgment. This feature of the judgment is assigned as error on the ground that it is sought thereby to apply revenues for the year 1921 to the payment of an indebtedness accruing in a previous year. For the reasons stated in this opinion we do not consider the order erroneous on this ground. As to the effect of such an order, or as to whether it might be successfully attacked on other grounds, we express no opinion.

The judgment of the district court is therefore affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2566. Nov. 28, 1921.)

VAL VERDE HOTEL CO. V. HUBBELL.

(Rehearing Denied Jan. 7, 1922.)

SYLLABUS BY THE COURT.

(1) Parol understanding held to devitalize written contract of subscription to capital stock, and to change the purpose in respect to a matter plainly covered by its terms and therefore to be inadmissable. P. 546

(2) Where the statute under which a corporation is organized permits organization upon subscription of less than the authorized capital stock, subscriptions made after incorporation are not subject to the implied condition that all the authorized capital shall be subscribed. P. 548

Appeal from District Court, Socorro County; Baca, Judge.

Action by the Val Verde Hotel Company against Frank A. Hubbell. Judgment for plaintiff, and defendant appeals. Affirmed.

Marron & Wood, of Albuquerque, for appellant.

James G. Fitch, of Socorro, for appellee.

OPINION OF THE COURT.

DAVIS, J. This is an action by the Val Verde Hotel Company upon a subscription made to its stock by Frank A. Hubbell. The issue was presented under a demurrer to an affirmative defense set up in the answer. The complaint alleged the incorporation of the company with an authorized capital stock of $75,000, and that the defendant subscribed for 10 shares at $100 a share, the par value, to be paid at certain specified times, the subscription signed by him and by other parties being in the following form:

"We, the undersigned, subscribe and agree to pay for the number of shares of stock in the Val Verde Hotel Company, set opposite our names, on a basis of one hundred dollars per share, to be paid for as follows:

"Fifty per cent. on or before June 1st, and the balance

of fifty per cent. on or before July 1, 1918:

"Lots 1, 2, 3, 4, 5, and 6, block 45, Stapleton addition—142x150—donated by C. T. Brown.

Name.	Address.	Shares.
Frank A. Hubbell	Albuquerque	10"

The defendant answered, admitting his signature, but alleging, in substance, that when he was requested to subscribe to this stock he was willing to contribute only $250 and to take stock to that par value only, and so stated to the persons soliciting the subscription; that these persons then verbally agreed that if he would sign for the 10 shares they would either procure other parties to subscribe for 7½ shares of the 10, or take them themselves, and that they would not deliver the subscription list to the company unless and until they had so provided for the 7½ shares; and defendant alleged that he never authorized a delivery of his subscription under any other conditions. Plaintiff demurred to this defense on the general ground that the parol matters set up were not effective to vary or alter the terms of the written instrument. The district court sustained the demurrer.

[1] The first question for determination here is as to the correctness of this ruling. The admissibility of oral agreements made contemporaneously with written contracts has been fully discussed by this court in Locke v. Murdock, 20 N. M. 522, 151 Pac. 298, L. R. A. 1917B, 267, Baca v. Fleming, 25 N. M. 643, 187 Pac. 277, and Prentice v. Vesper Automobile Co. et al, 27 N. M. 368, 202 Pac. 121. It is unnecessary to review the authorities. In the second case cited this court held that the parol agreement, to be enforceable, must be in respect of a matter distinct from that covered by the written contract, and that the party to that contract may not prove a parol agreement which devitalizes the writing and changes its stated purpose. Tested

by this rule, the parol understanding between Hubbell and the individuals who obtained his signature to the subscription cannot be considered. The subscription on its face is an absolute one for 10 shares of stock. The attempt is to change it by parol to a subscription for 2½ shares. To admit such a parol understanding would be to clearly devitalize the writing and change its purpose in respect to a matter plainly covered by its terms. This general rule is applicable to stock subscriptions in principle, and the authorities so hold. Collins v. South Brick Co., 92 Ark. 504, 123 S. W. 652, 19 Ann. Cas. 882 (note), 135 Am. St. Rep. 197.

Appellant attempts to avoid the effect of this rule by allegations that delivery of the subscription was not to have been made until the oral promise was complied with. A conditional delivery of a written instrument arises when the party executing it, although parting with its possession, authorizes its delivery to the other party only upon the occurring of a future event. In such a case the instrument does not become binding until the actual delivery, but at the time of the execution of the instrument it is intended that, when delivered, it shall speak according to its expressed terms. When made it expresses the agreement, but that agreement may or may not come into effect according to whether or not the terms of the conditional delivery are fulfilled.

Appellant's answer does not state such a case. According to his plea and under the oral agreement, his subscription was never to become effective for the 10 shares whether delivery was made or not. His contention, baldly stated, is that he agreed in writing to take 10 shares, and by parol to take only 2½, and that other persons were to take the balance. His contract stated that he would pay for these 10 shares at specified times; his answer says that he

was never to pay for them, but only for a part. The contract was not delivered to these persons conditionally upon the happening of a future event, upon the occurrence of which it would become effective, but under a parol understanding that never and irrespective of the occurrence or nonoccurrence of the events stipulated should it become effective. This is simply to attempt to alter a clear, written agreement, and may not be done. The demurrer to the answer was properly sustained.

[2] The demurrer filed by plaintiff to defendant's answer searches the record, and appellant under this familiar rule, raises the question of the sufficiency of the complaint, contending that it does not state a cause of action, since it fails to allege that all of the capital stock had been subscribed. Cases may be found from many states holding that the engagement of the individual subscriber to take stock is subject to an implied condition that all the authorized capital shall be subscribed. Such cases will be found in Cook on Corporations, (5th Ed.) § 176, and 2 Fletcher on Corporations 693. The reason for the rule is said to be that one who subscribes for a certain number of shares in effect agrees to become owner of an interest in the corporation in the proportion that the number of shares he is to take bears to the total number authorized, and, further, that he has a right to assume that the corporation will not commence business until all its proposed capital stock is provided for. If the statute under which the corporation is organized provides, or the articles of incorporation stipulate, that all the stock must be sold before the corporation may commence business, the rule has a logical foundation, and is doubtless a salutary one. But the decisions must be read in the light of the particular statute or situation to which they refer, and, when so considered, it will be found that those laying down the general rule have no bearing upon this particular case, which

must be decided under the statute of this state, since the company here under discussion is a New Mexico corporation.

Section 2, chapter 112, Laws 1917, provides that—

> The certificate of a corporation must set out the amount of the total authorized capital stock of the corporation, which shall not be less than $3,000; the number of shares subscribed shall be the amount of capital stock with which the company shall commence business and shall be at least $2,000.

Section 3 of the same chapter provides that upon making the certificate and filing and recording it as the act requires, the "persons so associating," etc., from the date of filing shall constitute "a body corporate by the name set forth in said certificate."

Under these statutes there can be no presumption that all of the authorized capital stock of the corporation will be subscribed before it will commence its business. The law itself recognizes the difference between authorized capital and the capital with which it will begin its operations. It may be authorized to issue its stock to a total of $1,000,000 and yet commence business and carry it on for as long as it pleases with $2,000. The reason for the general rule announced in states having a different statute fails. One who subscribes for stock in a New Mexico corporation, after its incorporation, has a right to assume that stock to the amount of $2,000 has been subscribed, and his subscription may be conditioned upon the existence of that fact, but there can be no further implied condition as to subscriptions. He contracts with the knowledge that the corporation may commence business with the amount of subscribed stock stated in its articles, and he can ask for nothing more.

In the note to Morgan v. Landstreet, 16 Ann. Cas

1253, the rule we consider applicable in this state is expressed as follows:

"Where the statute authorizes the organization of a corporation upon subscription of less than the proposed capital stock, the rule requiring the subscription for the whole amount does not apply."

The note cites ample authority to support the text.

The complaint in this case alleges that the Hotel Company is a corporation organized under the laws of the state of New Mexico, and that it was duly incorporated on the 12th day of April, 1918. If these allegations are true, as the demurrer admits them to be, it follows that its corporate stock had been subscribed to at least the statutory amount. The subscription of appellee made in April or may, 1918, could have been made upon no implied condition as to the amount of additional subscriptions. The complaint therefore stated a cause of action.

There being no error in the record, the judgment of the district court is affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2477. Oct. 31, 1921.)

ARMSTRONG v. CONCKLIN

(Rehearing Denied Jan. 16, 1922.)

SYLLABUS BY THE COURT.

(1) Where the transcript of records shows that an amended answer was filed on a given date, and that thereafter, and after the expiration of 20 days, no reply had been filed, and defendant filed a motion asking that the new matter in the answer be taken as confessed for want of a reply, which motion was overruled by the court, it will be presumed, in the absence of a showing to the contrary, that the trial court found that the answer had not been served upon counsel

for plaintiff at the time the answer was filed in the clerk's office and that the plaintiff was not in default. P. 553

(2) Questions not raised in the assignment of error will not be considered on appeal. P. 553

(3) The erroneous admission of testimony will afford no grounds for reversal in a case tried by the court, unless it appears that the court considers such testimony in deciding the case. P. 554

(4) Where the findings made by a trial court are supported by substantial evidence where the court heard the witnesses, such findings will not be disturbed on appeal. P. 554.

Appeal from District Court, Colfax County; Leib, Judge.

Suit by Harriet S. Armstrong against Walter W. Concklin. Decree for plaintiff, and defendant appeals. Affirmed.

J. Leahy, of Raton, for appellant.

W. R. Holly, of Springer, for appellee.

OPINION OF THE COURT.

ROBERTS, C. J. Appellee sued appellant for partition of certain real estate located in Colfax county, N. M. Appellant and appellee were brother and sister, and the only heirs of Isaac Concklin, their father, who died intestate August 8, 1907. In February, 1907, the father filed a homestead claim on the land in controversy, which consisted of 160 acres. After his death the son made final proof, in such cases necessary under the homestead law, and the patent was issued to the heirs of Isaac Concklin. An answer in the partition proceedings was filed by the appellant, which does not appear in the transcript. Thereafter on the 30th day of June, 1917, there was filed a first amended answer, which set up the proceedings taken to acquire title to the land by the father and the subsequent proceedings leading up to the patent, and further denied that the

appellee had any interest in or claim to the real estate in question because of the fact that she had sold her interest in the land to the appellant for $500, which money had been paid in full by appellant, and that after the payment of the money the appellee had refused to make a deed.

Thereafter on the 23d day of July, 1917, appellant filed a motion asking that the new matter set up in the answer be taken as confessed, because no reply had been filed thereto. On the 24th of July thereafter appellee filed a motion to make the answer more definite and also a motion to strike certain portions of the said amended answer. The court overruled the motion filed by the appellant asking that the new matter be taken as confessed, and sustained the motion to strike certain portions of the amended answer. Thereafter appellant filed a second amended answer in which he set forth substantially the same matters pleaded in the first amended answer, in more detail, however. To this a reply was filed denying the new matter set up.

On the trial appellant proved that he had paid to appellee the sum of $500, but there was no written evidence to show for what purpose. His testimony was to the effect that it was in payment of the sister's interest in the homestead claim. The sister contended that the father had advanced to the son the sum of $2,800 for the purpose of enabling the son to buy a farm in Colfax county near the homestead in question, and that the $500 paid was in lieu of the sister's interest in the farm so purchased. It appeared that the father had given certain property in Missouri to the sister at about the time he had advanced the $2,800 to the son. In his testimony the appellant admitted that he had promised the sister of his own free will that when he sold the farm he would give her part of the proceeds, but

denied that the $500 was a carrying out of the promise.

The court after hearing the evidence found in favor of the appellee and decreed partition of the homestead claim in question. To review the judgment this appeal is prosecuted.

[1] The first question argued is that error was committed by the court in overruling the motion of appellant asking that the new matter in his answer be taken as confessed for want of reply. Section 4120, Code 1915, provides that if the answer contains a statement of new matter and the plaintiff fails to reply or demur thereto within the time prescribed by law, the defendant shall have such judgment as he is entitled to upon such statement. Section 4122, Code 1915, provides that every pleading subsequent to the complaint shall be filed and served within 20 days after service of the pleading to which it is an answer, demurrer, or reply. While the record shows that the answer was filed on June 30, 1917, and the motion was filed on the 23d day of July thereafter, and no reply or other pleading had been filed by the appellee at that time, it does not show when such amended answer was served upon counsel for appellee. This being so, the presumption would be indulged that it was made to appear satisfactorily to the trial court that the pleading had not been served upon counsel for appellee 20 days prior to the filing of such motion. This being true, the record does not show that the appellee was in default.

[2] Appellant next argues that the court was in error in striking out certain portions of his first amended answer; but this action of the court was not assigned as error consequently is not subject to review. Questions not raised by the assignments of

error will not be considered. Trujillo v. Tucker, 24 N. M. 339, 171 Pac. 788.

[3] It is argued that the court was in error in not striking out certain portions of the testimony of the appellee touching the purchase and ownership of the land bought by the appellant with money furnished by the father. This case was tried by the court without a jury, and the presumption would be indulged, if the testimony was improperly admitted, that in deciding the case the court did not consider it, where there was other competent evidence warranting the finding and judgment.

"The erroneous admission of testimony will afford no ground for reversal unless it appears that the court considered such testimony in deciding the case." Halford Ditch Co. v. Independent Ditch Co., 22 N. M. 169, 159, Pac. 861, Crawford v. Gurley 23 N. M. 659, 170 Pac. 736; Grissom v. Grissom, 25 N. M. 518, 185 Pac. 64

Complaint is also made that the court was in error in not permitting the appellant to prove certain items of expense which he had incurred prior to the making of the entry by the father; but these items were not included in the pleadings, consequently were properly excluded. Other proffered evidence was excluded by the court, one item being a letter written by a lawyer in Idaho, who claimed to represent the appellee; but this letter was properly excluded because there was no showing that the relation of attorney and client existed between the appellee and such attorney, or that he was authorized by her to write the letter. In addition, there was nothing in the letter that was inconsistent with the claim made by appellee on the trial.

[4] The remaining assignments of error are predicated upon the findings of fact made by the trial court and the conclusions of law, all of which were adverse to appellant's contention. The propriety of the findings made and the findings refused depend-

ed upon the view of the facts which the court took. The court elected to believe the testimony of the appellee and that the $500 paid was not for her interest in the homestead claim, but was money which the appellant had paid to her for her supposed interest in the farm purchased by the appellant with money advanced by the father. There was substantial evidence supporting the findings made, and, this being true, they will not be disturbed by this court.

Finding no error in the record, the judgment will be affirmed, and it is so ordered.

RAYNOLDS and PARKER, JJ., concur.

(No. 2511. Nov. 30, 1921.)

STATE ex rel. SANCHEZ, et al. v. CASADOS, et al.

(Rehearing Denied Jan. 16, 1922.)

SYLLABUS BY THE COURT

An expense incurred, consisting of attorney's fees and costs in controversy between certain commissioners of a community ditch corporation, is a proper expense to be paid by the water users in proportion to their interests in the ditch, and for the nonpayment of which the use of the water can be denied to them.

Appeal from District Court, Rio Arriba County; Holloman, Judge.

Proceeding in mandamus by the State, on the relation of Narciso Sanchez and others, against Pedro A. Casados and others, to compel furnishing of water, and during the pendency of an appeal the court decreed the relators should have their proportionate share of water, and from the judgment denying mandamus and holding that certain charges against users were legitimate, and that for the nonpay-

ment thereof the relators could be deprived of water, the relators appeal. Affirmed.

Renehan & Gilbert, of Santa Fé, for appellants.

E. P. Davies, of Santa Fé, for appellees.

OPINION OF THE COURT

RAYNOLDS, C. J. The appellee La Acequia de San Rafael del Quiquem is a community ditch corporation, and Pedro A. Casados and Simon E. Casados were two members of the ditch commission, and one Juan C. Borrego was a third member of such commission. Prior to the institution by the relators of this suit below an action had been brought by Pedro Casados and Simon Casados against Juan C. Borrego in mandamus to obtain possession of certain books and records, which were in his possession under the claim that he was secretary of the ditch corporation. He had been elected secretary when the board was organized, but subsequently another meeting was held, which all of the commissioners attended, and at which Juan C. Borrego was displaced as secretary and elected treasurer, and Pedro Casados was elected or chosen secretary. Borrego denied the authority of the two members of the commission to displace him, claiming his election was for the entire year. The district court in the suit which arose out of this controversy held against Borrego's contention, and required him to deliver over the minute book of the corporation and a copy of a certain contract. Before the commencement of the present suit the respondents demanded from the relators their respective proportionate share of the costs, attorney's fees, and expenses of the original mandamus suit, brought to obtain possession of the minute book and contract, the total of which expense was $186.96.

It was admitted on the hearing by the respondents that the relators were not in default for failure or

refusal to do their respective proportionate shares of the ditch work, or to pay any amount assessed against them in lieu of said work upon the acequia, but that they and each of them had been refused water for irrigating their lands under said ditch because they had failed and refused to pay their respective proportionate shares of the costs and expenses of said mandamus suit. It is also admitted at the time the original suit was brought there was no rule of the ditch commissioners in existence for assessment against said water users for costs, attorney's fees, and expenses of such litigation, and that there was no by-law in force at the time of the making of the assessment. Each of the relators was a water user of the ditch, and entitled to water for irrigating purposes for their respective lands. The court below found as a matter of law that said right and title to the water was subject to suspension for failure to meet the assessments made by the commissioners for the payment of such costs and attorney's fees in the former suit. The court further found that the charges for which the assessment was made were legitimate charges incident to the proper conduct and care of the acequia, which was under the commissioners' charge. The court denied the mandamus to compel the commissioners to furnish relators with water, and held that the assessments were legitimate charges against the relators. During the pendency of the appeal, however, the court decreed that the relators should have their proportionate share of the water. From this judgment denying the mandamus and holding that such charges were legitimate, for the nonpayment of which the relators could be deprived of the water, the relators appeal to this court.

Appellants have assigned many errors, but stated in their brief that all of them may be grouped under one head, to wit, that the assessment was illegal and ultra vires, and that the lower court's approval

of it was erroneous. In the first place it is suggested by appellee that the case abate, as, the time having long since passed and new commissioners having been elected, the question is moot, and we are urged to dismiss the case on that account. We think the point is not well taken. Mandamus in this case is against the ditch corporation as well as the commissioners thereof, and does not abate by a change in the personnel of the commission. Commissioners v. Sellew, 99 U. S. 624, 25 L. Ed. 333. If the charge is held to be a legitimate one, it may still be assessed and collected by the successors of the respondents, and the question of the liability of the relators is not a moot question. The statute which governs this case (Code 1915, § 5754), or as much thereof as is necessary for this decision, provides that the commissioners are empowered to assess fatigue work or tasks to contract or be contracted with, and also to make all necessary assessments to provide funds for the payment of the salary of the mayordomo and all other legitimate expenses incident to the further conduct and maintenance of the acequias under their charge. It is contended by the appellant that the words "conduct and maintenance of the acequias under their charge" relate only to the operation of the acequia, such as repairing it, cleaning it, rebuilding when destroyed, and any other physical activity affecting the water conduit. It is also contended that the right to deprive participants in the ditch of water can only be exercised under section 5755, Code 1915, where a person after due notice has failed or refused to do his work or pay the amount assessed against him in lieu of such work, and that the relators could not be deprived of the water except for failure to do the work prescribed by this section. We think the view contended for by the relators is too narrow, and that the language of the statute permits assessments to be made for the payment of such costs and expenses as are the subject of this ap-

peal, and we hold that such costs and expenses are within the language of the statute, which provides that assessments may be made to provide funds for "other legitimate expenses incident to the proper conduct and maintenance of the acequias under their charge."

For the reasons above stated, we hold that the court below correctly decided that assessments for such expense were proper and could be enforced, as was done in this case, by depriving those refusing to pay the assessment of their proportionate share of the water. The case is therefore affirmed; and it is so ordered.

PARKER, J., concurs.

DAVIS, J., did not participate in this decision.

(No. 2492. Nov. 28, 1921.)

ROMERO v. HERRERA et al.

(Rehearing Denied Jan. 20, 1922.)

SYLLABUS BY THE COURT

Where neither party in an action in ejectment proves title in himself to the property in question, and the evidence as to prior possession on the part of the plaintiff is conflicting, it is error to direct a verdict in his favor. The case should have been submitted to the jury.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by Andres Romero against Felipe Herrera and others. Judgment on instructed verdict for plaintiff, and the defendants appeal. Reversed, with instructions to award a new trial.

Marron & Wood, of Albuquerque, for appellants.

Neill B. Field and Milton J. Helmick, both of Albuquerque, for appellee.

OPINION OF THE COURT

RAYNOLDS, C. J. This is an appeal by the defendants from a judgment of the Bernalillo county district court rendered January 12, 1920, upon an instructed verdict of a jury. The plaintiff below, appellee here, brought a suit in ejectment against the defendants in the district court of Bernalillo county. The complaint was in the usual statutory form and charged that the defendants on July 1, 1917, dispossessed the plaintiff of a certain tract of land in precinct No. 28, Bernalillo county, located within the bounds of the Atrisco grant. The complaint prayed for possession of the land and damages for dispossession. After a demurer to the complaint had been overruled and an application on defendants' part for a bill of particulars denied, separate answers were filed, which were similar, and denied the right of possession of the plaintiff. The answer set up by way of affirmative allegations claims of the defendants to the land to the effect that it was within the bounds of the Atrisco land grant, and that the defendants entered upon the various portions of the land by virtue of either applications approved by the trustees of the grant or conveyances from the trustees of the grant. The case was tried before a jury. At the conclusion of the evidence on both sides the court on motion of the plaintiff directed a verdict in his favor and assessed his damages at the sum of $1. After overruling the motion for a new trial judgment was entered decreeing to the plaintiff possession of the land described in his complaint. From this judgment this appeal is taken.

The appellant assigns 16 errors, but confines his argument in his brief to one point, upon which he relies for reversal; that is, that the court erred in instructing the jury to find a verdict for the plain-

tiff. The plaintiff did not attempt to show title through the original grantees of the Atrisco grant, or trace his title back to any grant by the commissioners, or proceedings under the commissioners, but apparently sought to sustain his title by adverse possession under color of title. He also introduced evidence of the payment of taxes for a period of more than 10 years before the institution of the suit. Plaintiff testified that he first got possession of the land when Pedro Perea turned it over to him 15 or 18 years ago; that there were no improvements on the land at the time he secured it; that there was a fence on the north and south of posts and wire; it was open on the west and on the river side; that the fences on the north and south at present belong to the owners of the land adjoining, and not to the piece of land in question; that he used to pasture stock on the land after he got it, and that other people's cattle also roamed and grazed on the same land; that he had not made any fences on the land, had never plowed the land, nor had it ever been plowed before he got it; that the new fences that had been placed there were on the same line as the old ones were; that the fences that were there when he got it had afterwards been removed; that the posts gave out and some of them were carried away, but those people who had taken land on the north and south had built fences on the same line; there were no houses on it; there was nothing to show that it had been occupied in any way; that he had known the land for 40 years; and that stock around generally in the neighborhood grazed on the land. There was other testimony on the part of the plaintiff as to possession similar to this class of testimony above set out. Other witnesses for the plaintiff also testified that the possession of the land in question was in the plaintiff or his predecessors in title, and had been for many years. They were instructed by counsel for plaintiff as to the legal definition of possession, that is, possessio

pedis—having one's feet on the land—and under such a question and instruction as to the meaning of possession (possessio pedis) they answered that the possession was in the plaintiff or his predecessors.

On the other hand, defendants and their witnesses testified that at the time application was made to the commissioners of the grant for the land in question nobody was living upon it; that it had been common land; that for 50 years or more the witness and defendant Jesus Jaramillo testified he had never seen any improvements on the land; that nobody claimed the land, lived on it, or cultivated it or used it in any way. It was a growth of willows and cottonwoods. Another witness and defendant, Alfredo Sanches, testified that he had lived on the land 7 or 8 years; he had known it about 40 years; that there were no improvements on the land except what he himself had put there; that there were no fences on any of it other than what he had built. He stated that the land in question was known as common land. Diego Sanchez, a defendant, testified that he had lived a little south of the land for 42 years. During all that time nobody claimed the land. There were no improvements upon it except what were made by the defendants in this suit. During all the time he had known it the land had not been inclosed. Jose de la Luz Sanches, a witness for the defendants, testified that he had passed over the land since 1855, and there were no improvements on the land when he first passed there, and he had never seen any until the last 6 or 7 years; that the improvements were put there by the defendants; that he first learned that plaintiff claimed the land at the trial and had never heard that he had any interest in it before that time. Defendant Felipe Herrera testified that the land in controversy was used as a common pasture for everybody and for the people who live on the grant.

Two other witnesses, Jesus Jaramillo and Jose Ignacio Lucero, testified that cattle had been pastured on the land for many years, and no one was prohibited from so pasturing the cattle. They never saw any fences, and it was common pasture.

Appellee maintains that he proved a perfect legal title to the land in question, but that, if the court does not agree with his conclusions in that respect, he argued that he acquired title to the property in question by color of title, 10 years' adverse possession, and the payment of taxes under section 3365, Code 1915. It is conceded by both counsel that the general rule applies to this case, and that plaintiff must recover on the strength of his own title, and not upon the weakness of his adversaries, and that the equally well known rule also applies that, where no legal title is shown in either party, the party showing prior possession in himself, or those through whom he claims, will be held to have the better right.

Under the rulings of the court when the case was tried below, the deeds from the commissioners to the defendants were rejected, and their title held to be a nullity. They were in effect mere trespassers under this holding of the court. If, therefore, the plaintiff had prior possession, he was entitled to hold it and to recover against the defendants in the suit under the principle of law too well known to need citation of authority that one showing the prior possession in himself can recover against a mere intruder or trespasser who enters without title, but the very basis of the plaintiff's possession is the point which is contested in this case. He and his witnesses testified as to his possession. The defendants and their witnesses testified to a diametrically opposite state of facts, and the question for our consideration at this time is whether the court erred in instructing a verdict in the plaintiff's

favor when the record discloses such a conflict of testimony as is here shown. We are not called upon to decide whether or not the plaintiff proved a perfect title under Sections 3364 or 3365, Code 1915, nor whether he obtained title by adverse possession under the laws of this state or not; neither are we called upon to decide whether the court properly or improperly rejected the deeds offered by the defendants as the basis of their claim to the land. The sole question is whether when the matter in issue is the prior possession of the plaintiff, and the evidence thereof is conflicting, the court can direct a verdict, for one side or the other, and not submit such question of possession to the jury. We are of the opinion that this cannot be done. That, where neither party to an action in ejectment shows legal title in himself, and the prior possession of the plaintiff and those through whom he claims is a matter upon which there is a conflict in the evidence, the court cannot properly direct a verdict, but the case should be submitted to the jury.

For the reasons above stated, the case is reversed, with instructions to award a new trial; and it is so ordered.

PARKER, J., concurs.

DAVIS, J., did not participate in this decision.

(Nos. 2490, 2508. Jan. 24, 1922.)

TERRY et ux. v. HUMPHREYS et al.

HUMPHREYS et al. v. TERRY et ux.

SYLLABUS BY THE COURT

(1) Assignments of error not argued in the brief are deemed abandoned. Alvarado Mining & Mill Co. v. Warnock, 25 N. M. 694, 187 Pac. 542, followed. P. 567

(2) Where it is sought to cancel an instrument on the

ground that its execution was obtained by false pretenses, statements, and promises, the complaint must allege that the plaintiff relied on such false representations, statements, and promises, and, if not so alleged, evidence thereof at the trial is properly excluded. P. 567

(3) Any transactions by the plaintiff with the defendant relating to the subject matter of the contract or agreement, inconsistent with an intention to rescind, amount to "ratification" of such contract or agreement. P. 568

(4) An oil and gas lease for a period of five years, or as long thereafter as oil and gas, or either of them, is produced from said land by the lessee, conveys "real property," and under chapter 84, Laws 1915, requires that the husband and wife join in such instrument. P. 568

Appeal from District Court, Eddy County; Bratton, Judge.

Suit by J. D. Terry and wife against S. G. Humphreys and the Artesia Oil & Gas Company. From the judgment, plaintiffs appeal, and from part of the judgment defendants file cross-appeal. Reversed and remanded, with directions.

J. B. Atkeson, of Artesia, for plaintiffs.

J. H. Jackson, of Artesia, and W. W. Arnold, of Robinson, Ill., for defendants.

OPINION OF THE COURT

RAYNOLDS, C. J. This is a suit brought by appellants, J. D. Terry and Elmyra N. Terry, his wife, in the district court of Eddy county, to cancel an oil lease executed by J. D. Terry, the husband of the appellant Elmyra N. Terry, on the grounds that the execution and delivery of said lease were induced by false and fraudulent representations, promises, and statements made to the appellant J. D. Terry by S. G. Humphreys.

Plaintiff below alleged that the representations and promises were not carried out in whole or in part; that the land in question was a homestead, and community property of the appellants, husband and wife; that the appellant Elmyra N. Terry had

not signed nor consented to the execution of the lease. The defendant below, S. G. Humphreys, disclaimed all interest in the lease, having assigned it to his co-defendant, the Artesia Oil & Gas Company, the appellee and cross-appellant herein. The defendant, the Artesia Oil & Gas Company, admitted the execution of the lease and filed a general denial as to the other allegations in the complaint. It also pleaded that plaintiffs were estopped by reason of having received an annual rental for an extension of such lease, which annual rental was to be paid in case the lessee did not begin work within the time specified in the lease. By way of new matter the appellee and cross-appellant, the Artesia Oil & Gas Company, alleged that it had spent large sums of money in an effort to discover oil and carry out the provisions of the lease. The case was tried before the court, which decided in favor of the defendant, the Artesia Oil & Gas Company, finding that two-thirds of the property leased was community property, but that the other one-third was the separate property of the wife, Elmyra N. Terry, and, as to the wife's interest in the property, the lease was void and of no effect.

Appellant J. D. Terry assigns error as follows: (1) That the court erred in finding the husband had a right to execute a valid oil lease on the community property in question without the joinder of the wife; (2) that the court erred in finding that the 40 acres of land in question was not a part of the homestead of the plaintiff; (3) the court erred in refusing to admit and consider the testimony of the plaintiff J. D. Terry as to the false statements and representations made by the defendant S. G. Humphreys in order to induce him to execute and deliver the lease in question; (4) the court erred in not finding that the plaintiff was induced to execute and deliver the lease in question by the statements, promises, and representations made to him by the

defendant S. G .Humphreys, which were never performed and carried out, and that by reason thereof the lease was not binding on the plaintiffs; (5) the court erred in not finding that the lease was to be placed in the First State Bank of Artesia to await the development of oil, and that, by reason of its not being so placed in escrow, it became null and void; (6) the court erred in not finding that the land in question was a homestead, and the lease could not be made without the wife's consent, and that, being so made, it was not enforceable, and should be canceled.

The defendant the Artesia Oil & Gas Company, in case No. 2508, also appeals from that portion of the court's decision finding that one-third of the land leased was the separate property of Elmyra N. Terry. The two cases were consolidated for the purpose of argument and submission to this court.

[1] As to assignments 2 and 6 regarding the homestead, they are not argued in appellant's brief, and are therefore deemed abandoned. Alvarado Mining & Mill Co. v. Warnock, 25 N. M. 694, at page 695, 187 Pac. 542.

[2] Assignments 3 and 4 are to the effect that the court erred in refusing to find that the plaintiff Terry was induced to execute and deliver the lease in question because of false statements, promises, and representations. As to these two assignments, it is sufficient to say that the complaint does not allege that the plaintiff relied upon such statements, promises, and representations, and the court properly excluded evidence of such promises and representations.

"The bill or complaint should show that the misrepresentations made were material, and that the complainant believed that the misrepresentations made by the defendant were

true, and acted in reliance thereon." 9 C. J. "Cancelation of Instruments," par. 151, subd. 5, p. 1235, and cases cited.

Assignment of error No. 5, in which it is alleged the court erred in finding that the lease was to be placed in escrow, and that the escrow agreement was not carried out, is not well taken. The record shows that the plaintiff is estopped, having under the terms of the lease received an annual rental which by the terms of the lease was to be paid, and was paid, because the work contemplated was not begun within the time specified in the lease. The annual rental received was the consideration under the terms of the contract of the delay in starting the development work contemplated by the lease, and amounted to ratification.

[3] "Any transaction with the defendant relating to the subject-matter of the contract and inconsistent with an intention to rescind" amount to ratification. 9 C. J. "Cancellation of Instruments," par. 78, subd. 2, p. 1199, and cases cited. See, also, 4 R. C. L. "Cancellation of Instruments," § 26, and New American Oil & M. Co. v. Troyer, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739.

[4] The proposition offering the greatest difficulty in this case is contained in the first assignment of error, to wit, that the court erred in finding that the husband had a right to execute a valid oil lease on community property without the wife joining therein. The answer to this question involves a construction of chapter 84, Laws 1915, which is as follows:

"Section 1. That section 16 of chapter 37 of the Laws of the Thirty-Seventh Legislative Assembly of the territory of New Mexico, (par. 2766) be amended so as to read as follows:

" 'Sec. 16. **Power of the Husband over Community Property.** The husband has the management and control of the personal property of the community, and during the coverture the husband shall have the sole power of disposition

of the personal property of the community, other than testamentary, as he has of his separate estate; but the husband and wife must join in all deeds and mortgages affecting real estate: Provided, that either husband or wife may convey or mortgage separate property without the other joining in such conveyance or mortgage: And provided, further, that any transfer or conveyance attempted to be made of the real property of the community by either husband or wife alone shall be void and of no effect.'

"Sec. 2. All acts or parts of acts in conflict herewith are hereby repealed."

In most jurisdictions which have adopted the so-called community system of property, the husband, as the head of the community, has the control and disposition of the community property.

"By virtue of the husband's sole right to control the community property, he may, in most jurisdictions where the community system obtains, alienate, during the coverture, even without the consent or joinder of the wife, any of the property belonging to the community. He must, however, act in good faith toward the wife, and, if he disposes of property with intent to defraud her of her rights, his conveyance or disposal will be voidable on that ground." 21 Cyc. "Husband and Wife," subd. 11, p. 1666, and cases cited.

The control of the husband over the community property in this state has been the subject of frequent legislative enactments, and his right and control of such property have been modified from time to time. It is not necessary for the decision of this case to enter into the history and course of legislation on the subject, and we will confine our attention to the enactment above set out, as it represents the state of the law in this jurisdicion at the present time. It will be noted that, by the terms of chapter 84, Laws 1915—

"any transfer or conveyance attempted to be made of the real property of the community by either husband or wife alone shall be void and of no effect."

Prior to this enactment community property could be alienated by the husband alone, except in certain instances set out in the law of 1907, which is section 2766, Code 1915, and which was repealed by chapter

84, Laws 1915, quoted above. By the terms of chapter 84, Laws 1915, no transfer or conveyance of the real property of the community could be made without both husband and wife joining, and the control and right of disposition of the husband alone of the real property of the community was done away with. As we construe the statute by its plain terms at the present time, neither husband nor wife can make a transfer or conveyance of the real property of the community without the other joining in such conveyance or transfer, and if such transfer or conveyance is attempted of such real property of the community by either husband or wife alone, such transfer or conveyance is void, and of no effect. This statute has been construed by this court in the case of Miera v. Miera, 25 N. M. 299, at page 305, 181 Pac. 584, where it was held that a conveyance of community property by a husband alone was void, and passed no title to the grantee. The assignment of error which we are considering turns upon the meaning of the words in the statute, "the real property of the community." If such an oil and gas lease as is here under consideration in this case transfers or attempts to transfer or convey real property, it is void and of no effect. If, however, the right or interest transferred or attempted to be transferred thereunder does not come within the meaning of the words "real property of the community," the conveyance can be upheld, and this assignment is without merit.

The instrument by which the rights of the parties in this suit are to be determined, in so far as it is material to the question under consideration, is as follows:

"'Original' Oil and Gas Lease.

"Agreement made and entered into the 24th day of October 1916, by and between J. D. Terry, of Dayton, New Mexico, hereinafter called lessor (whether one or more), and S. G. Humphreys, hereinafter called lessee, witnesseth that the said lessor, for and in consideration of one dollar,

cash in hand paid, receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the lessee to be paid, kept and performed, has granted, demised, leased and let, and by these presents does grant, demise, lease and let unto the said lessee, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, powers, stations and structures thereon to produce, save and take care of said products, all that certain tract of land, situate in the county of Eddy, state of New Mexico [describing land].

"It is agreed that this lease shall remain in force for a term of five years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

"In consideration of the premises the said lessee covenants and agrees:

"First. To deliver to the credit of lessor free of cost, in pipe line to which it may connect its wells, the equal one-eighth part of all oil produced and saved from the leased premises.

"Second. To pay the lessor one hundred dollars each year in advance, for the gas from each well where gas only is found, while the same is being used off the premises, and lessor to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling house on said land during the same time by making his own connections with the well at his own risk and expense.

"Third. To pay lessor for gas produced from any oil well and used off the premises at the rate of one hundred dollars per year, for the time during which such gas shall be used, said payments to be made each three months in advance."

The lease also provides that if no well is commenced within a certain time the lease shall terminate, unless the lessee shall pay or tender the lessor, or deposit to the lessor's credit in a certain bank, the sum of 25 cents per acre, which is to operate as a rental to cover the privilege of deferring the completion of the well for 12 months from that date. There are other provisions and stipulations as to drilling, damage to growing crops, right to remove machinery, privilege of assignment, and commencement of work, which are not material to

a consideration of the points involved in this branch of the case.

The rule to be applied in the construction of an instrument of this kind has been stated as follows:

"In determining the scope and legal effect of the instrument giving the rights and privileges to mine or take mineral, oil and gas, it is immaterial by what name it is called, whether a lease, contract, grant or conveyance. The courts will look to the language used in the instrument aside from the terms so used to determine its legal effect." 1 Thornton on Oil and Gas, par. 50, and cases cited.

In deciding the question in this assignment as to whether an instrument of this kind conveys or transfers the real property of the community, we are not concerned with the kindred questions which have arisen and have been determined involving the rights and remedies of parties to such instruments, except in so far as these decisions tend to throw light upon the question as to whether or not such an instrument as is here under consideration does or does not convey or transfer real property. It has been decided that the lessee who has not found oil or gas upon the premises is in no position to bring ejectment, as the lease—

"vests no title to any oil or gas which [the lessee] does not extract and reduce to possession, and hence no title to any corporeal right or interest. It is therefore insufficient to maintain ejectment by a grantee who has never taken possession of the land or prospected for or found any oil or gas under it." Priddy v. Thompson, 204 Fed. 955, 123 C. C. A. 277.

When oil has been extracted and the lease has been performed, either in whole or in part, the question of the division between a life tenant and the remainderman has sometimes been called in question. In such a case the courts treat the various interests in the oil and gas, whether in the ground or by sale converted into a fund, as real estate, and adjust the rights of the parties on the well-known principles governing such cases. In this

instance oil and gas leases are held to be an interest in the land. See Parker v. Riley, 250 U. S. 66, 70, 39 Sup. Ct. 405, 63 L. Ed. 847, and cases cited. There can be no partition among lessees of an oil and gas lease as their interests are held to be personalty. Beardsley v. Kansas Natural Gas Co., 78 Kan. 571, 96 Pac. 859; Watford Oil Co. v. Shipman, 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144.

The various adjudications as to the interests of the lessees and the difficulties courts have encountered in determining these interests can be found in the cases cited in 1 Thornton on Oil and Gas, pars. 60 and 63. The question as to whether or not an oil and gas lease is real estate or personal property is considered in a note to Duff v. Keaton, 42 L. R. A. (N. S.) 472. An oil and gas lease is considered an incumbrance upon real estate within the statute requiring joinder or consent of the spouse. Kokomo Natural Gas & Oil Co. v. Matlock, 177 Ind. 225, 97 N. E. 787, 39 L. R. A. (N. S.) 675. To detail the various constructions and operations of oil and gas leases, the interests attempted to be conveyed, and the adjudications of what these interests are at the various stages of the development for oil and gas would unduly extend this opinion, and serve no useful purpose. The cases on the subject can be found in 34 Century Digest, Mines and Minerals, § 200; 13 First Decennial Digest, Mines and Minerals, 73; 16 Second Decennial Digest, Mines and Minerals, 72 and 73; 1 Thornton, Oil and Gas, pars. 19, 21 27, 51, 53, and 60; Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222; Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 733. Where the question of the homestead is involved, the courts uniformly hold that the wife must join in the lease to make it valid, and that such conveyance or transfer is an interference with the homestead to such an extent that the consent of both husband and wife must be obtained. 1

Thornton on Oil and Gas, § 291; Franklin Land Co. v. Wea Gas Co., 43 Kan. 518, 23 Pac. 630; Wea Gas Co. v. Franklin Land Co., 54 Kan. 533, 38 Pac. 790, 45 Am. St. Rep. 297; Bruner v. Hicks, 230 Ill. 536, 82 N. E. 888, 120 Am. St. Rep. 332; Pope v. Ulrey, 233 Ill. 57, 84 N. E. 46. The so-called lease in this case has a provision as follows:

"It is agreed that this lease shall remain in force for a term of five years from this date, and as long thereafter as oil and gas or either of them is produced from said land by the lessee."

Similar instruments to this, containing the phrase, "as long thereafter as oil and gas shall be found," or "shall be found in paying quantities," have been construed in Illinois as granting an interest in the real estate, a "freehold estate," and not a lease for years. The construction given to such leases in Illinois is thus stated:

"It is settled by the decisions of the Supreme Court of Illinois that an oil and gas lease like that of the complainants passes to the lessee, his heirs and assigns, a present vested right—'a freehold interest'—in the premises, that this interest is taxable as real property, and that the clause giving the lessee an option to surrender the lease at any time is valid, does not create a tenancy at will or give the lessor an option to compel a surrender, and does not make the lease void as wanting in mutuality. Burner v. Hicks, 230 Ill. 536, 540 [120 Am. St. Rep. 332, 82 N. E. 888]; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 13, 14 [122 Am. St. Rep. 144, 84 N. E. 53]; Poe v. Ulrey, Id. 56, 62, 64 [84 N. E. 46]; Ulrey v. Keith, 237 Ill. 284, 298; People v. Bell, Id. 332, 339 [19 L. R. A. (N. S.) 746]; Daughetee v. Ohio Oil Co., 263 Ill. 518, 524 [105 N. E. 308]." Guffey v. Smith, 237 U. S. 101, 112, 35 Sup. Ct. 526, 529 (59 L. Ed. 856).

On the other hand such a lease has been held to be a lease for years, not conveying an interest in land, and has been variously designated a chattel, real, Duff v. Keaton, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (N. S.) 472; State v. Welch, 16 Okl. Cr. 485, 184 Pac. 786; an incorporeal hereditament, Funk v. Holderman, 53 Pa. 229; Kelly v. Keys, 213 Pa. 295, 62 Atl. 911, 110 Am. St. Rep. 547; Kansas Natural

Gas Co. v. Commission, 75 Kan. 335, 89 Pac. 750; Huston v. Cox, 103 Kan. 73, 172 Pac. 992, and cases cited; a right to explore or prospect—an inchoate right, Steelsmith v. Gartland, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; Lowther Oil Co. v. Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Campbell v. Smith, 180 Ind. 159, 101 N. E. 89; Frank Oil Co. v. Belleview Oil & Gas Co., 29 Okl. 719, 119 Pac. 260, 43 L. R. A. (N. S.) 487. It has also been held that such a lease is sufficiently definite in its terms to be a lease for years, and also not void for indefiniteness. 1 Thornton on Oil and Gas, par. 148.

"It is contended that the lease is void for uncertainty, in that its duration extends 'so long as gas or oil may be found in paying quantities.' This is a common expression found in such leases, and it is generally for the benefit of the lessee. Whether a gas or oil well is a source of profit can be determined readily by deducting the cost of production from the market value of the product. We have not been referred to any adjudicated cases involving the validity of gas or oil contracts like the one at bar, where leases containing such stipulations have been held void for uncertainty; on the other hand, the authorities on the subject sustain the validity of such contracts. [Citing cases.] Gas and oil leases are in a class by themselves. They are not strictly 'leases,' as defined and treated in the law of landlord and tenant; they are in the nature of written license, with a [conditional] grant conveying the grantor's interest in the gas or oil well, conditioned that gas or oil be found in paying quantities. * * *

"The lease before us does not create what may be likened to an estate at will, and permit the lesee at his option to terminate the lease at any time. The lessee could not arbitrarily declare that a profitable gas or oil well was not paying, and thus satisfy the condition of the lease above set out respecting a surrender. [Cases cited.]" Dickey v. Coffeyville Vitrified Brick & Tile Co., 69 Kan. 106, 76 Pac. 398.

See, also, South Penn Oil Co. v. Snodgrass, 71 W. Va. 438, 76 S. E. 961, 43 L. R. A. (N. S.) 848, and note.

We are of the opinion that the instrument before us for construction in this case which by its terms provides that the lease shall extend for a period of five years, and as long thereafter as oil

and gas, or either of them, is produced by the lessee, conveys an indefinite, indeterminable term, and is therefore more than a mere lease for years. It conveys by its terms more than a chattel interest or a mere license or incorporeal hereditament, and the interest attempted to be conveyed is included within the phrase "real property of the community." Conveyance or transfer of it by the husband or wife alone is made null and void, under the rules of construction which we have laid down for the determination. For the above reasons the court also erred in holding the lease in question valid without the joinder of the wife therein.

The question raised by the cross-appellant, Artesia Gas & Oil Company, in its assignment of error that the court erred in finding one-third of the property in question was the separate property of the wife is rendered immaterial by our decision that joinder by the wife is essential to give validity to an instrument like the one in suit.

The case is therefore reversed, with instructions to the trial court to proceed in accordance with this opinion; and it is so ordered.

PARKER, J., concurs.

DAVIS, J., did not participate.

(No. 2447. Dec. 23, 1921.)

STATE v. PRUETT.

SYLLABUS BY THE COURT

(1) Involuntary manslaughter, as defined by section 1460, Code 1915, is confined to cases where the killing is unintentional. P. 577

(2) It is reversible error to submit the issue of involuntary

manslaughter where all of the evidence and all of the inferences therefrom show that the killing was intentional.
P. 579

Appeal from District Court, Union County; Leib, Judge.

James C. Pruett was convicted of involuntary manslaughter, and he appeals. Reversed and remanded, with directions.

Theodore Pruett, of Anadarko, Okl., and O. P. Easterwood, of Clayton, for appellant.

O. O. Askren, Atty. Gen. for the State.

Percy Wilson and W. B. Walton, both of Silver City, and Clifton Mathews, of Globe, Ariz., amici curiae.

OPINION OF THE COURT

PARKER, J. This case has been twice before this court on appeal. See 22 N. M. 223, 160 Pac. 362, L. R. A. 1918A, 656; 24 N. M. 68, 172 Pac. 1044. The conviction each time was for voluntary manslaughter. Appellant was put on trial a third time, was convicted of involuntary manslaughter and sentenced, and has brought this appeal.

[1] The first question to be considered is whether there is any evidence authorizing a conviction of involuntary manslaughter. The evidence for the state is entirely circumstantial, the appellant being the only eye witness testifying to the immediate circumstances. The theory of the prosecution was that appellant waylaid deceased and shot him from ambush, while appellant claimed he was out hunting rabbits with a rifle and accidentally met the deceased in a public road. He says the deceased approached him on horseback and threatened to kill him then and there, and made an effort to draw his rifle from a scabbard on the saddle; that appellant then fired his rifle, but missed deceased; that the

shot frightened the horse, causing him to turn; that deceased straightened up the horse, had gotten the gun out of the scabbard and up to his shoulder in firing position, and was in the act of firing when appellant fired the fatal shot; that deceased then fell from the horse; that appellant fired in self-defense. There is nothing in the whole case to indicate, and no fact is shown from which the inference could be drawn, that the killing was done negligently or accidentally, or otherwise than intentionally. Attorney General Askren, who filed the brief for the state, so agrees.

Our statute is as follows:

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: 1st. Voluntary: Upon a sudden quarrel or in the heat of passion. 2nd. Involuntary: In the commission of an unlawful act not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection." Section 1460, Code 1915.

The act of killing the deceased by intentionally shooting him with a rifle could not be said to be a killing "in the commission of an unlawful act not amounting to a felony," under the first clause of the statute, as, if the act was not justified by the law of self-defense, it would constitute at least an assault with a deadly weapon and would be felony under section 1704, Code 1915. Under the same conditions the same act would not fall within the terms of the second clause of the statute, because the act of appellant, unless justified by the circumstances, would not be lawful. The words "in an unlawful manner, or without due caution and circumspection" necessarily refer, not to the quality of the act itself, but to the manner of doing it. The meaning of the words in the last clause of the statute, therefore, necessarily excludes all cases of intentional killing, and include only unintentional killings by acts unlawful, but not felonious, or law-

ful, but done in an unlawful manner, or without due caution and circumspection. In other words, the killing must be unintentional to constitute involuntary manslaughter, and, if it is intentional and not justifiable, it belongs in some one of the classes of unlawful homicide of a higher degree than involuntary manslaughter. We do not deem it necessary to cite authority in detail from other jurisdictions on similar statutes, but it will be sufficient to say that it seems to be uniformly held that an intentional killing is never deemed to constitute involuntary manslaughter. See 1 Michie on Hom. § 34, where many cases are collected and commented upon. See, also, 13 R. C. L. "Homicide," §§ 88 and 89.

[2] The only theory upon which this conviction can be sustained is that a defendant cannot complain of the submission of a false issue to the jury when the result is to convict him of a lesser offense than the one of which he is shown by the evidence to be guilty, for the reason that it is error in his favor. The absurdity of such a theory is at once apparent upon examination. A controlling consideration must be overlooked in order to sustain such a theory, and that is that a conviction of a lesser degree of homicide is an acquittal of all higher degrees. When, therefore, a verdict comes in convicting of involuntary manslaughter, the defendant stands acquitted of all higher degrees of the crime. He is not, and cannot be, any longer guilty, in a legal sense, of any of the higher degrees of the crime. The district court and this court in order to sustain the conviction in such a case must shut eyes to this consideration, and must say that, although the defendant is not legally guilty of the higher crime, he is so guilty in fact, and is not therefore in position to complain when he receives less punishment than he deserves. Such a proposition is so illogical and so contrary to the fundamental principles of jurisprudence as to have met

with only slight favor or recognition by the courts, and the overwhelming weight of authority is against it. A few states only seem to be committed to the doctrine. Thus, in Bennett v. State, 95 Ark. 100, 128 S. W. 851, the court said:

"We would not have disturbed a verdict, under the evidence, for murder in the first degree. There is evidence tending to show that appellant was guilty of murder in the first degree. There is no evidence tending to prove that appellant was guilty of voluntary manslaughter. His crime was murder in the first degree, if anything. By finding the appellant guilty, the jury accepted the testimony tending to prove guilt, and rejected the testimony of appellant tending to prove his innocence. Since there was testimony tending to show that appellant was guilty of murder in the first degree, he cannot complain because the jury, believing him guilty of some offense, found for a lower degree than that of which he was guilty, if guilty at all. Appellant was not prejudiced by the verdict as to the degree of homicide of which the jury found him guilty, since they might have found him guilty under the evidence of the highest crime in the indictment."

In Brown v. State, 31 Fla. 207, 12 South, 640, it was urged that there was error in submitting manslaughter to the jury under an indictment for murder. The court simply said in disposing of the contention:

"An accused cannot be heard to complain of error of this character, that is in his favor."

In State v. Quick, 150 N. C. 820, 64 S. E. 168, the defendant was indicted for murder and convicted of manslaughter. The court said:

"Suppose the court erroneously submitted to the jury a view of the case, not supported by evidence, whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder. What right has the defendant to complain? It is an error prejudicial to the state, and not to him. His plea of self-defense had been fully and fairly presented to the jury and rejected by them as untrue. What, then, was the duty of the jury, if there was no evidence of manslaughter? Clearly, under the law, they should have convicted the defendant of murder in the second degree. How, then, can the defendant, his plea of self-defense having been wholly discarded by the jury, and the burden being upon him to reduce the offense to something less than

murder in the second degree, reasonably complain of the charge, however erroneous in that respect, which permitted the jury to convict of a lesser degree of homicide?"

There is a vigorous dissent filed in this case by Walker, J., in which he points out the reasons why such a doctrine cannot be maintained, although he does concur in the result in the case on the ground that there was evidence of manslaughter.

In State v. Perry, 78 S. C. 184, 59 S. E. 851, a defendant was charged with murder and was convicted of manslaughter. The court said:

"There was testimony tending to show that the defendant was guilty of murder. Therefore, he has no just cause to complain that the jury took a merciful view of his case, and simply found him guilty of manslaughter."

In the state of Texas the decision upon this proposition seems to be somewhat in doubt. Thus, in Boren v. State, 32 Tex. Cr. R. 637, 25 S. W. 775, the defendant was convicted of murder. He complained because the court had instructed on murder in the second degree, contending that there was no evidence presenting this degree. The court said:

"We agree with counsel, that this homicide was murder of the first degree, or no offense whatever. If appellant was not insane, this was a cold-blooded murder. If he was, the homicide was excusable. The issue was * * * sanity or insanity. On such a state of the case a charge upon murder of the second degree was * * * clearly beneficial to appellant."

It was accordingly held that the error of the court in submitting the issue of murder in the second degree did not call for a reversal of the judgment.

In Chapman v. State (Tex. Cr.) 53 S. W. 103, the court instructed on the two degrees of murder and manslaughter and the instructions were sustained. The court said:

"We are not aware of any case in which this court has held that the judgment should be reversed because the court

gave the defendant the benefit of a charge on a less offense than that shown by the evidence."

In Robinson v. State (Tex. Cr.) 57 S. W. 811, the appellant was convicted of manslaughter. He complained that the evidence did not raise that issue. The court said:

"Concede that the evidence does not raise the issue of manslaughter, yet the charge is favorable to the rights of appellant, and he cannot be heard to complain of the same."

Serna v. State (Tex. Cr.) 105 S. W. 795, is to the same effect.

On the other hand, in Flynn v. State, 43 Tex. Cr. R. 407, 66 S. W. 551, where the defendant was convicted of negligent homicide in the second degree in a case where the evidence showed an intention to kill, the court said:

"We accordingly hold that the court erred in submitting the issue of negligent homicide at all, even if it be conceded that the same was properly submitted in the charge, which is not the case here."

In this connection we desire to express our great respect for the ability and learning of the courts of the five states mentioned above, but we must admit that we find in their decisions no legal principle asserted upon which, in our judgment, the doctrine which they uphold can be sustained. On the other hand, as before stated, the great weight of authority is against the proposition, and we need go no further than our own cases to demonstrate the same.

In Territory v. Fewel, 5 N. M. 34, 17 Pac. 569, the defendant was convicted of murder in the third degree (under the statute as it then stood, which punished killing without design to effect death, in the heat of passion, but in a cruel and unusual manner). The court examined the evidence and found that the defendant was convicted of the very degree,

to sustain which there was not a particle of evidence. The court said:

"The Attorney General contends that even if this instruction be held erroneous it was an error committed in defendant's favor, and he cannot complain. This may or may not be true. If it could be said from a consideration of the whole case, and in any view of it, that the defendant would have been convicted of a higher degree if this instruction had not been given, then the position might be sound. But if, from a fair and impartial examination of the evidence, the jury might have returned a verdict of not guilty, had their attention been confined by the instructions to an intentional killing constituting crime, or an intentional killing justified by law, then the defendant was prejudiced by the failure of the court to confine the attention of the jury to this issue. From a careful consideration of this evidence, in view of the rule that the jury is the sole judge of its weight, and the credibility of the witnesses from whom it is elicited, it can not be said that the jury was bound to find defendant guilty of an intentional killing without lawful excuse. This being true, an instruction which leads them away from the real issue is erroneous."

In Territory v. Hendricks, 13 N. M. 300, 84 Pac. 523, the defendant was charged with murder in the first degree, and the evidence showed that, if guilty at all, he was either guilty of murder in the first degree or murder in the second degree. The trial court nevertheless instructed the jury on murder in the third degree, and the defendant was convicted in that degree. The court held that there was no element of third degree murder in the case, and that the giving of the instruction on third degree murder was reversible error, and said:

"From what we have said above, if there is no evidence to show murder in the third degree, it follows, that it is error to charge in that degree, and to sentence on a verdict of guilty returned by a jury in that degree, * * * because of the well-settled rule, that no judgment will be sustained on appeal, unless there is evidence to support it. It is needless to quote authorities in support of this proposition.

"In the case at bar the evidence all goes to show that the killing was either murder in a higher degree than the third, or that it was justifiable homicide, and as there was no evi-

dence to sustain the verdict returned by the jury of guilty in the third degree, the case is reversed. * * *"

The converse of this proposition, viz. that it is not error to refuse to submit the issue of manslaughter in a case where the evidence does not warrant it, is held in State v. Smith, 24 N. M. 405, 410, 174 Pac. 740, and in numerous prior cases.

The only discordant note found in our reports upon this subject is contained in the special concurring opinion in State v. Kidd, 24 N. M. 572, 175 Pac. 772, in which it is stated that in the opinion of the writer a defendant in a prosecution for homicide cannot complain that he was convicted of a lower grade of the offense than the evidence showed him to be guilty of. The opinion, however, not being that of the court, has not committed the court to the doctrine therein stated. Some of the cases there cited in support of the doctrine have already been considered, and others will be considered hereafter.

In some of the Courts of Appeals in California, the erroneous doctrine has been sanctioned that a defendant cannot complain of the submission of a false issue as to the degree of crime in homicide cases. See People v. Tugwell, 32 Cal. App. 520, 163 Pac. 508. Others of these courts have held to the contrary. People v. Kelley, 24 Cal. App. 54, 140 Pac. 302.

In People v. Huntington, 138 Cal. 261, 70 Pac. 284, the defendant was charged with murder, and the evidence showed that, if guilty at all, he was guilty of murder. The trial court nevertheless instructed the jury on manslaughter, and the defendant was convicted of manslaughter. The Supreme Court of California held that there was no element of manslaughter in the case, and that the giving of

a manslaughter instruction was reversible error. The court said:

"Under the circumstances of the case at bar there should have been no instruction on the subject of manslaughter; the only question legitimately before the jury was whether appellant had caused death while attempting to produce abortion. If that was the fact, he was guilty of a murder; and there was no element of manslaughter present. But the jury, under the instruction, found him guilty of manslaughter, and he was therefore tried for one crime and convicted of an entirely different crime."

In the case of People v. Kelly, 24 Cal. App. 54, 140 Pac. 302, the defendant was charged with murder and found guilty of manslaughter. The California statute on manslaughter is identical with ours. The facts in this case presented the identical question that is presented by the facts in the case at bar. The defendant intentionally fired at the deceased under the belief that the latter was approaching him for the purpose, and with the intention, of inflicting upon him bodily harm. He made no claim that the killing was even the result of a sudden quarrel, or in the heat of passion, or that it was the result of an unlawful act not amounting to a felony, or the consequences of misadventure. Nor did the prosecution make any such claim. The court said:

"That the action of the court in giving to the jury the above quoted instruction upon that subject and in submitting to them a form of verdict conforming thereto was, under the circumstances of this case, prejudicial, we think is plainly manifest."

The court goes on to point out that involuntary manslaughter under such a statute is an entirely distinct crime from that of murder or voluntary manslaughter. It states that the three crimes possess but one element in common, and that this is the fact of the killing. The court said:

"In murder, there is, essentially, the element of malice or premeditation and the preconceived intention to kill. In voluntary manslaughter, while the element of malice or pre-

meditation in the taking of life is wanting, the intention to do so is present, as the term, 'voluntary,' necessarily implies. Involuntary manslaughter, as the phrase necessarily imports and as our Code defines that crime, is the taking of life in certain unlawful ways without any intention of doing so."

The court intimates, if indeed it does not assert, however, that a different question would arise in case voluntary manslaughter had been submitted to the jury and the defendant had been convicted thereof. People v. Barnhart, 59 Cal. 381; People v. Maroney, 109 Cal. 277, 41 Pac. 1097; People v. Lowen, 109 Cal. 381, 42 Pac. 32; People v. Muhlner, 115 Cal. 303, 47 Pac. 128—are cited as authority for the proposition that a defendant convicted of voluntary manslaughter might not be in a position to complain because the verdict is more favorable to him than is perhaps justified by the evidence. If this case of People v. Kelley, represents the state of opinion in California, it would seem that in that state a defendant might be convicted of voluntary manslaughter, and he could not complain on appeal that the evidence did not warrant such conviction. The doctrine seems to be founded upon a statute in that state (section 1157 of the Penal Code) to the effect that, whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of which he is guilty. Whether this is the proper effect to be given to such a statute it is not necessary in this case to determine. See, also, People v. Hamilton (Cal. App.) 192 Pac. 467.

In Dickens v. People, 67 Colo. 409, 186 Pac. 277, the defendant was charged with the murder of his father under the following circumstances, as stated by the court:

"The evidence, without cavil or dispute, shows that the killing was accomplished by lying in wait, that it was done maliciously, premeditatedly, and deliberately, in cold blood, an assassination pure and simple. There was not a scintilla of evidence to show that the killing was done in any other manner than as above stated. The defendant entered a plea

of not guilty, and the issue was whether Rienzi was guilty of murder of the first degree, or not guilty, and under the proofs that was the only possible issue."

The court instructed the jury, over the objection of the defendant, that it might return a verdict of either first degree murder or second degree murder. The court, after reviewing the Colorado cases, said:

"In view of the conclusive character of the evidence in this case as to the degree of the offense committed, the charge of the court permitting the jury to find second degree murder could not have failed to mislead and confuse them, and by all of the authorities was, under such circumstances, prejudicial and reversible error."

There is a strong dissenting opinion by three of the justices of the Supreme Court of Colorado.

In Jordan v. State, 117 Ga. 405, 43 S. E. 747, the defendant was charged with murder and convicted of involuntary manslaughter. The court said:

"The jury might with propriety have convicted the accused of murder or of voluntary manslaughter; on the other hand, there was evidence to justify an acquittal. The only verdict possible which was wholly unauthorized by the evidence was the verdict returned. * * * While mistrials are generally misfortunes, and often result in a miscarriage of justice; and while courts should do everything possible, within the limitations of their power, to aid juries in reaching a verdict, no instruction should be given to the jury for the purpose of enabling them to reach a verdict which does not speak the truth under any view possible to be taken of the evidence."

The case was reversed on this and other grounds.

In Coleman v. State, 121 Ga. 594, 49 S. E. 716, the defendant was charged with murder and convicted of manslaughter. The evidence showed that if guilty at all he was guilty of murder. The court said:

"We recognize the dilemma which frequently confronts the trial judge in this class of cases. If he improperly omits to charge on the subject of manslaughter, a new trial must be granted. Conversely, if he improperly includes that charge, a new trial will be granted. But such is the law. Consider-

ing the gravity of the issue, the error is one which has been repeatedly held to entitle the defendant to another hearing."

Georgia seems to have considered this question more often than any of the other states, but we do not deem it necessary to cite any more of the Georgia cases.

In People v. Schultz, 267 Ill. 147, 107 N. E. 833, the defendant was indicted for murder and the evidence showed that, if guilty at all, he was guilty of murder. The trial court nevertheless instructed the jury on manslaughter, and the defendant was convicted of manslaughter. The court held that there was no element of manslaughter in the case, and that the giving of the manslaughter instruction was reversible error. The court said:

"If the evidence justified the conclusion that plaintiff in error committed the homicide, it must be conceded that there was no proof of any circumstances to reduce the crime from murder to manslaughter. The instructions given on the subject of manslaughter stated correct propositions of law, and the objection to them is that there was no evidence upon which to base them. It is fundamental that upon the trial of an issue of fact it is erroneous to give such instructions not based upon any evidence. Only such instructions should be given as are based upon legitimate evidence. * * * It is the law that under an indictment for murder the defendant may be convicted of manslaughter, but this does not mean that a jury is authorized or warranted in finding a defendant guilty of manslaughter where there is no evidence tending to prove the commission of that crime, but where it is conclusively proven that if any crime was committed it was willful and deliberate murder."

The court makes an elaborate review of the Illinois cases down to the time the opinion was promulgated, and shows that this is the estabished doctrine in that state.

In State v. Bertoch (Iowa) 79 N. W. 378, the defendant was indicted for murder in the first degree by means of poison. The trial court nevertheless instructed the jury on murder in the second

degree, and the defendant was convicted of murder in the second degree. The Supreme Court of Iowa held that there was no element of second degree murder in the case, and that the giving of the instruction on second degree murder was reversible error. The court said:

"We now inquire whether the defendant was prejudiced by the instructions complained of. The punishment prescribed for murder in the first degree is 'death or imprisonment for life at hard labor in the penitentiary, as determined by the jury.' For the second degree it is 'imprisonment in the penitentiary for life, or for a term of not less than ten years.' So far as the penalty is concerned, the instructions were more favorable to the defendant than he had a right to ask. By the verdict he escaped liability to the death penalty, and gained the possibility of being sentenced for a term of years only; but it is not in the penalty imposed that the defendant is prejudiced. It was the duty of the jury, if they entertained a reasonable, well-founded doubt of the defendant's guilt of murder in the first degree, to have acquited him; for, as we have seen, he could not be guilty in any less degree. The jury must have entertained a reasonable, well-founded doubt as to the defendant's guilt as charged—that is, guilt in the first degree; otherwise, it would not have acquitted him of that degree, and convicted him of the second. Now, as we have seen, if the jury had such a doubt as to his guilt in the first degree, the defendant was entitled to have that doubt resolved in his favor, and to be acquitted. By the unauthorized latitude given in the instructions, the defendant was deprived of the benefit of this doubt."

But see to the contrary State v. Quan Sue (Iowa) 179 N. W. 972.

In Parker v. State, 102 Miss. 113, 58 South. 978, the defendant was charged with murder and convicted of manslaughter. The court said:

"There is no halfway ground here; no debatable question, except the defendant's guilt or innocence of the crime of murder. To advise the jury that they could compose their differences and doubts, if any they had, by finding the defendant guilty of a lesser crime, without evidence to support the verdict, is unfair to defendant and manifest error."

To the same effect is Rester v. State, 110 Miss. 689, 70 South. 881, where the defendant was in-

dicted for murder and convicted of manslaughter. The court said:

"The state's evidence, if believed, convicts the defendant of the crime of murder, if anything. The defendant's testimony, if believed, establishes a clear and unquestioned case of self-defense. As said by our court in similar cases, there is no middle ground. This is not a case where the jury, by believing certain portions of the state's evidence, and certain portions of the defendant's evidence, can thereby weave out or make a case of manslaughter. This is a typical case where the defendant is guilty of unprovoked murder or he is innocent. * * *

"The verdict of the jury rendered in pursuance of this instruction and convicting the defendant of the crime of manslaughter is not supported by the evidence in the case and constitutes error."

The court in commenting upon a previous case, Huston v. State, 105 Miss. 413, 62 South. 421, which held that the submission of manslaughter was harmless because favorable to the defendant, said:

"The majority of the court as now constituted believe the Huston Case was and is wrong and should be overruled, and this court should turn to the holding of and re-adopt the decisions expressly overruled by the court in the Huston Case. We have given this subject careful consideration, and hereby overrule the Huston Case, and return to the safer and sounder principle well announced by Judge Cook in Parker v. State, supra."

In State v. Punshon, 124 Mo. 448, 27 S. W. 1111, the defendant was charged with murder and convicted of manslaughter. The court said:

"That there was no evidence whatever upon which to predicate such an instruction, is admitted by the Attorney General in his printed brief, but he argues that, of this, defendant cannot complain, because, we presume, of his conviction of a less offense than that for which he was indicted and put upon his trial. We do not understand this to be the law. While, by statute, it is made the duty of the court to instruct on every phase of the case warranted by the evidence, it is not its duty to instruct upon any grade of offense not authorized by the evidence, and it is error to do so."

In Dresback v. State, 38 Ohio St. 365, the defend-

ant was charged with murder by poison, and was convicted of murder in the second degree. The court had instructed the jury that they might return a verdict either in the first or second degrees of murder, or for manslaughter. The judgment of the court was reversed for this error.

In Lesency v. State, 13 Okl. Cr. 247, 163 Pac. 956, the defendant was indicted for murder by poison and convicted of manslaughter in the first degree. The district court had instructed on manslaughter in the first degree. The court said:

"The giving of this instruction is assigned as error; and, as above indicated, we think, the assignment is well taken; for either the state or the plaintiff in error, one or the other, by this verdict has been cheated. If the plaintiff in error is guilty, no other punishment is prescribed by law for her crime than death or imprisonment for life. If, on the other hand, she is not guilty, or if the jury entertained a reasonable and well-founded doubt of her having committed the atrocious crime of which she was charged, then she was entitled to an acquittal at their hands. Under this record there is no middle ground, and it was the duty of the jury to bring in a verdict either of murder or an acquittal. But by the unauthorized latitude given them in this instruction they might, and they did, do neither."

In Swan v. State, 13 Okl. Cr. 546, 165 Pac. 627, it was held that there was no evidence which directly or indirectly raised the issue of negligent homicide or manslaughter in the second degree, and instructions submitting the question of guilt or innocence of that crime should not be included in the charge to the jury.

In State v. Ash, 68 Wash. 194, 122 Pac. 995, 39 L. R. A. (N. S.) 611, the defendant was charged with murder and was convicted of manslaughter. The Supreme Court held that there was no element of manslaughter in the case, and that the giving of the manslaughter instruction was reversible error, saying:

"The state contends that, since the greater includes the

less, manslaughter is included in murder in the first or second degree. Unquestionably this is true in law, but to be included in law is not sufficient; it must also be included in fact. We have so held in a number of cases."

The court then cites and quotes from two former Washington cases (State v. Kruger, 60 Wash. 542, 111 Pac. 769; State v. Pepoon, 62 Wash. 635, 114 Pac. 449), and goes on:

"Answering the rule of these cases, the state contends that, inasmuch as it is admitted that manslaughter is included in law in a charge of murder in the first degree, and as under our practice jurors are sole judges of the facts, the court cannot say, as a matter of law, there is no testimony to establish any of the lesser or included crimes, but must admit the legal inclusion and submit the inclusion in fact to the jury. This would be required where there was any fact or facts to be determined by the jury. But the court is not required to submit any determination of a fact to a jury when there is no fact, nor to permit a jury to establish by its verdict a fact which there is no evidence to sustain. * * * We are therefore of the opinion that it was error for the court to submit an instruction involving the crime of manslaughter."

In Pliemling v. State, 46 Wis. 516, 1 N. W. 278, the defendant was charged with murder in the first degree, and he was convicted of murder in the third degree. The court held that there was no evidence of murder in the third degree in the case and that the giving of the instruction on that degree was reversible error. The court said:

"Looseness and latitudinarianism in the construction of criminal law, and in judicial trials of grave offenses, and compromises of legal principles and of honest judgment, in order to effect some agreement or to render some verdict in the trial of high crimes or of offenses of any grade, induced by whatever influence, must not be tolerated by the courts; and the responsibility in such cases must rest upon the tribunal in which it is practiced or attempted. So far as possible, there should be absolute certainty in the administration of criminal law; and its essential principles will not be perverted or compromised by this court in any case, in consideration of future proceedings or ultimate results."

We have made this somewhat extensive review of the authorities on account of the importance of the

question, and also on account of the constant recurrence of the question before the court. It is of great importance to the district courts, who are constantly called upon to administer the doctrine under discussion. In the case at bar the result seems to be clear and irresistible. There was no evidence in the case under any possible construction, and no inference properly to be drawn, wherefrom the killing could have been found to have been involuntary. It was clearly error, therefore, for the court to submit such a false issue to the jury. It is to be observed in this connection, however, that the proposition is not quite so clear when the question is as to the submissibility of the issue of voluntary manslaughter in a murder case. The principle, however, must be the same in all cases.

The defendant has been acquitted by the verdicts in the two former trials of murder in the first and second degrees, and has been acquitted by the verdict in this case of voluntary manslaughter. Therefore he is now entitled to be discharged, as he cannot, under the facts, be convicted of involuntary manslaughter.

It follows from all of the foregoing that the judgment should be reversed and the cause remanded, with directions to set aside the judgment, dismiss the case, and discharge the defendant; and it is so ordered.

RAYNOLDS, C. J., concurs.

DAVIS, J., did not participate.

(No. 2547. Dec. 23, 1921.)

STATE v. TRUJILLO.

SYLLABUS BY THE COURT

(1) No mere words, however opprobrious or indecent, are deemed sufficient to arouse ungovernable passion, so as to reduce a homicide from murder to manslaughter. P. 596

(2) The rule that the court should limit the issues to the degrees of crime shown by the evidence is the same in cases where the evidence is wholly circumstantial as where the evidence is direct. In the former class of cases, however, where the circumstances shown are susceptible of two or more interpretations, it is for the jury, and not the court, to draw the proper inferences from the evidence. P. 598

(3) It is reversible error to submit, in a murder case, the issue of voluntary manslaughter to the jury where no such issue is involved in the evidence. P. 601

Appeal from District Court, Colfax County; Leib, Judge.

Sotero Trujillo was convicted of voluntary manslaughter, and he appeals. Reversed and remanded, with instructions.

L. S. Wilson, of Raton, for appellant.

H. S. Bowman, Atty. Gen., and A. M. Edwards, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

PARKER, J. Appellant was indicted for the murder of one Luke Casamoff, was tried and convicted of voluntary manslaughter, and was sentenced to a term of from nine to ten years in the state penitentiary. The case is here on appeal from that judgment.

The facts immediately surrounding the homicide are only circumstantially shown, there being no eyewitness to the tragedy. The deceased was found in the afternoon of the 21st of December, 1919, in

his room at the side of a cot or bed with his head crushed in on the left side by a blow received from a heavy instrument. An ax covered with blood was found right near the body. There was no evidence of any struggle at the time of the homicide. Deceased's clothes were undone—that is, unbuttoned —but were not removed, and his shoes were unlaced. He had been sitting upon the edge of the bed when he received the blow, the bedclothes having been turned down preparatory to his going to bed. Several days later the appellant was arrested, and he was wearing a coat which was taken by the sheriff to a chemist and criminologist in Denver, who testified that the coat had several blood stains upon it, and that the blood stains were of human blood. Several witnesses testified to seeing the deceased and the defendant in company of each other during the night preceding the morning when the homicide must have been committed.

One witness, Ivan Ramyak, was the most satisfactory witness as to the conduct and association of the deceased and appellant on the night previous to the homicide. He testified that at about a quarter after 12 of that night he went to the house of the deceased. He there found the deceased and the appellant. He says that they were quarreling, and that the deceased told the appellant that he (the appellant) had a wife and children and that he would not work; that, after taunting the appellant with the fact that he would not work to support his family, and stating that people of deceased's nationality worked, the deceased took out of his pocket a little bag of money, and showed it to the defendant, showing a considerable sum. He says that the deceased told him (the witness) that he would give him a drink if the defendant had not been there, and that the witness then told the deceased to come over to the witness' house and that he would give him a drink, and at the same time he told appellant

to come along also. The three went to the house of the witness and remained there from a little after 1 o'clock in the morning to a quarter to 5 of the same morning, during which time they were drinking wine. The witness says the deceased and the appellant went away from his house together, and that as soon as they left the house he shut the door and did not know where they went.

The defense of the appellant was that of alibi. He testified himself, and he was supported by his wife and his mother, that he went to his own house, and went to bed at about 1 o'clock, and did not leave the house thereafter until late the following morning.

At the close of the trial, the court, over the objection of appellant, submitted to the jury the question of the guilt of the appellant of voluntary manslaughter, and the principal contention here is that in so doing the court committed error, upon the theory that there was no evidence in the case justifying a submission of that issue to the jury.

[1] The Attorney General relies, in support of the judgment, upon two propositions: (1) That there is evidence of adequate cause for heat of passion; and (2) that, as there was no direct evidence of the immediate circumstances surrounding the homicide, it was not only proper, but necessary, to submit all the degrees of unlawful homicide to the jury.

Our manslaughter statute is as follows:

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: 1st. Voluntary: Upon a sudden quarrel or in the heat of passion. 2nd. Involuntary: In the commission of an unlawful act not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection." Section 1460, Code 1915.

As before seen, appellant was convicted of volun-

tary manslaughter, and consequently he must have killed deceased without malice and upon a sudden quarrel, or in the heat of passion, or the verdict was not supported by the evidence. There is absolutely no evidence in the record of a sudden quarrel. There is evidence of a quarrel some three and a half hours before deceased reached his room, where he was killed, but during that time deceased and appellant were together, and there was no quarrel between them. There is no evidence that the quarrel was ever renewed between them. The evidence likewise fails to show adequate cause for heat of passion. The most that appears is that deceased taunted appellant as being lazy and refusing to work to support his family. It is well established by the great weight of authority that no mere words, however opprobrious or indecent, are deemed sufficient to arouse ungovernable passion, so as to reduce a homicide from murder to manslaughter. 13 R. C. L. "Homicide," § 99; State v. Buffington, 71 Kan. 804, 81 Pac. 465, 4 L. R. A. (N. S.) 154. See, also, State v. Dickens, 23 N. M. 26, 29, 165 Pac. 850. In this connection we call attention to a minority doctrine recognized in England and a few states to the effect that it is the existence or nonexistence of sufficient passion, properly aroused, which is determinative; the means whereby the passion was excited being immaterial, so long as they were of a nature naturally calculated to excite such passion in the ordinary mind. Such rule is recognized by statute in Texas. See note to State v. Buffington, supra, where the cases are collected. See also State v. Grugin, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774, 71 Am. St. Rep. 553.

In the case at bar, however, no claim is made that heat of passion was aroused in the mind of appellant, and therefore we do not deem the question as

to the better doctrine to be properly raised here.

[2] The Attorney General relies upon two territorial cases, and argues from them that, where the evidence as to the immediate circumstances of the homicide is entirely circumstantial, it is not only proper, but required, to submit all degrees of unlawful homicide. He cites Aguilar v. Territory, 8 N. M. 496, 46 Pac. 342, and Territory v. Padilla, 8 N. M. 510, 46 Pac. 346.

In the Aguilar Case the defendant was convicted of murder in the first degree. He appealed, and assigned as error the refusal of the court to submit to the jury second and third degree murder. The facts in that case were that the appellant was travelling from the town of Cochiti to his home in San Miguel county, and met the deceased and another on the road and traveled with them that day, camped with them that night, traveled with them until late in the afternoon of the following day, when they all stopped for dinner. After dinner they separated, the appellant going in the direction of his home. Four days later the bodies of the two fellow travelers of appellant were found dead in their wagons some miles from the place where the appellant left them. They had been beaten to death with an ax. At the time of the occurrence and the trial the statue divided murder into three degrees. Murder in the first degree was defined practically the same as it now is. Section 1459, Code 1915. All murder perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor, or in the heat of passion without design to effect death, but in a cruel and unusual manner, or by means of a dangerous weapon, was designated as murder in the second degree. Every killing by the act, procurement, or culpable negligence of another, which was not murder in the first or second degree, as defined in the statute, was declared to be

murder in the third degree. See sections 1063, 1064, 1065, C. L. 1897. The question in that case was whether the proof that the deceased was found in his wagon beaten to death with an ax showed conclusively murder in the first degree, or whether it only showed killing with malice aforethought, and hence required the submission of second degree murder. The court held there was error in failing to submit to the jury second degree murder. There are expressions in the opinion to the effect that, where the evidence is circumstantial, all three degrees of murder should be submitted to the jury, but the court did not so decide, and simply held that under the facts shown in evidence it was only necessary to submit murder in the first and second degree.

In the Padilla Case, supra, the circumstances were a little more directly shown, but the evidence as to the facts immediately surrounding the killing was entirely circumstantial, and the killing was accomplished by shooting. Otherwise the facts are quite similar to the Aguilar Case. The court held that in that state of the proof it was error to confine the issue to first degree murder, and that second degree murder should have been submitted. The court said:

"There is no question but that a verdict of murder in the first degree would be supported by the evidence that defendant was hostile to deceased, that he followed after him with a gun, that a shot was heard, and the deceased was killed from the effect of a bullet in his body, as there would be circumstances tending to show deliberation and premeditation; but, before arriving at such a verdict, it was necessary for the jury to believe beyond a reasonable doubt that no sudden quarrel arose, and that deceased was (not) killed in the heat of passion, without design to effect death, or that defendant did not kill deceased in any other of the ways constituting murder in the second degree, and that it was not done by the culpable negligence of defendant, and it was not

done under such circumstances as constitute excusable or justifiable homicide. * * *"

The court further says:

"The cardinal distinction between all homicides not shown by eyewitnesses, and homicides where the killing is shown by eyewitnesses, is that as to the former class the jury must weigh the circumstances, and determine what degree of murder is proven, while as to the latter the court may instruct the jury as to a single degree, or two degrees, or all the degrees, as, or not, the evidence may be applicable to one or more degrees. If the secret killing were shown to be by poison or torture, or necessarily in the commission of, or attempt to commit, a felony, or by lying in wait, then, also, even in cases of circumstantial evidence, the court may restrict instructions to first degree. If the rule were that every secret homicide presumes murder in the first degree, then the slayer of a man whose body is found pierced by bullets, having in its hand a weapon recently discharged, is placed in the same category as he who has slain unseen a defenseless woman, whose polluted corpse bears evidence of the utmost atrocity. Such a rule is not reconcilable with reason, of which law should be the perfection; and the only escape from it is for the jury, and not the judge, to weigh all the circumstances which may satisfy their minds as to how the secret killing may have been effected, and determine the degree of the slayer's guilt."

It is to be seen that the language quoted is readily susceptible of misinterpretation, and its true meaning can be ascertained only when considered in connection with the question before the court and what was really decided in that case. It was decided merely that, where the facts are only circumstantially shown, and they are susceptible of two or more constructions, it is not within the province of the court to determine which construction shall be put upon them, but it is for the jury to construe the facts to determine the degree of the guilt of the defendant. We do not understand the court to have held in that case that the jury is authorized in any case to put with the facts shown by the evidence other facts which are not shown by the evidence, and which exist only in their own imaginations, and thereby convict a man of an offense of which he is not guilty. There is no reason to say that the prin-

ciple involved is any different in a circumstantial evidence case from a case in which the evidence is direct. The only difference as a practical matter is in the application of the principle. We have recently considered this question in State v. Smith, 26 N. M. 482, 194 Pac. 869, where all the New Mexico cases are collected. In that case the evidence for the prosecution was entirely circumstantial, and tended to show murder in the first degree accomplished by shooting by lying in wait. The evidence for the defendant tended to show killing in self-defense. The court, over the objection of the defendant, submitted second degree murder, and the defendant was convicted in that degree. Mr. Justice Raynolds, speaking for the court, analyzed our statute and pointed out the distinctions between the two degrees of murder. We held under the facts in that case that it was proper to submit murder in the second degree, because the jury had the right to discard the evidence of the State as to lying in wait and deliberation, and likewise to discard the evidence of the defendant as to self-defense, and to find from the evidence the premeditated malice which made the act murder in the second degree.

There seems to be, therefore, nothing in either of the two contentions of the Attorney General above mentioned.

[3] We have, then, a case where a man has been convicted of voluntary manslaughter, and where there is no evidence showing, or from which an inference can be drawn, that there was a sudden quarrel, or that there was heat of pasion. To say that either one was present would be to put into the case facts which are not there, and which the jury would have no right to do. We have just now considered this question in State v. Pruett, 27 N. M. 576, 203 Pac. 840, the opinion wherein is handed down along with this one. In that

case we held that the submission of involuntary manslaughter was erroneous, and that the appellant might complain of such error. We discarded what we deemed to be an unsound doctrine to the effect that a defendant might not complain of such error because it was in his favor, and beneficial to him. We wish to adhere to our holding in that case, and here extend the reasoning and doctrine of that case to this one. In that case we pointed out that to allow the court to say that a defendant might not complain of the submission of a false issue to the jury would be to substitute the court as a trier of fact in place of the jury, and to authorize it to hold the defendant guilty in fact of the higher degree of the crime, notwithstanding the jury had found otherwise. Supplementing that statement, it may be said that such holding deprives the defendant of the benefit of the doctrines of reasonable doubt and presumption of innocence. The present case well illustrates this. The crime here was a dastardly assassination. A man without warning was cruelly beaten to death with an ax. The defense was an alibi. The question was whether the appellant committed the act. If he did, he was guilty of murder either in the first or second degree. A verdict accordingly would be supported by the evidence, and no other verdict would be so supported. Why, then, did the jury convict of manslaughter? The only reasonable answer is that the jury had a reasonable doubt as to whether the defendant actually committed the act, and by way of compromise, and to avoid the terrible consequences of a mistake, they found defendant guilty of manslaughter, a crime of which he was not guilty. He thereby lost his right to the benefit of the doctrines of reasonable doubt and presumption of innocence.

There should be no practical difficulty in the administration of the rule that instructions should be limited to the degree of the crime shown by the evi-

dence. It is within the province of the court to submit to the counsel for the state and for the defendant in every case the question as to what degree should be submitted to the jury. When thus called upon by the court it is their duty to speak, and a refusal by counsel for defendant to take a position upon the matter will amount to a waiver of the error of the court in that regard, if error shall occur. It will be available error only in case the court fails to agree with counsel as to the proper scope of the instructions.

The defendant by the verdict has been acquitted of murder, and has been convicted of a crime of which he is not shown to be guilty, and he is consequently entitled to be discharged.

It follows that the judgment is erroneous, and should be reversed, and the cause remanded, with instructions to set aside the judgment, dismiss the cause, and discharge the appellant; and it is so ordered.

RAYNOLDS, C. J., concurs.

DAVIS, J., did not participate.

No. 2614. Jan. 5, 1922.)

GALLEGOS v. LOPEZ

SYLLABUS BY THE COURT

A general verdict in a replevin case is sufficient, in the absence of a request for special findings.

Appeal from District Court, Union County; Leib, Judge.

Action by Leandro M. Gallegos against Rumaldo

Lopez. Judgment for defendant, and plantiff appeals. Affirmed.

O. T. Toombs and Livingston Taylor, both of Clayton, for appellant.

T. A. Whelan, of Clayton, for appellee.

OPINION OF THE COURT

DAVIS, J. This is an action in replevin by which appellant sought to recover cattle of which he claimed ownership, and which were in possession of appellee. The cattle were taken and returned to him under the writ. Appellee's answer was a general denial. The issue on the trial was as to ownership, each party introducing evidence to show title in himself. The jury returned a general verdict for appellee, as follows:

"We, the jury in the above entitled cause, find for the defendant."

Upon this verdict judgment was entered, ordering that the cattle be returned to appellee, describing them according to the description in the writ.

The only error assigned is that the verdict is not sufficient to sustain the judgment. Appellant argues that the verdict should contain a description of the property and should have found specifically which of the contending parties was the owner of the cattle, and whether the withholding by appellee was unlawful. There is no merit in the argument. Appellant made no request for special findings. This form of verdict was submitted to the jury by the court, and appellant did not object in any way to it. The general verdict for defendant was a finding for him upon all the issues of fact made by the pleadings. There was no necessity for a description of the cattle. The verdict applied to the cattle in litigation, the description of which he himself furnish-

ed in the replevin affidavit. A repetition of the description in such a verdict was both unnecessary and improper.

The judgment of the court below is affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2571. Jan. 5, 1922.)

NEEL v. BARKER

SYLLABUS BY THE COURT

The restrictions and limitations of the Enabling Act admitting the territory of New Mexico to the Union (36 Stat. 557, c. 310; Act of June 20, 1910) in regard to the sale, lease, conveyance, or contract of or concerning any of the lands granted or confirmed by said act, or the use thereof, or the natural products thereof, do not apply to a grant or lease to explore for oil and gas executed by the commissioner of public lands of the state of New Mexico.

Appeal from District Court, Rio Arriba County; Bratton, Judge.

Action by George M. Neel against William J. Barker. From a judgment affirming the decision of the Commissioner of Public Lands, and denying plaintiff's application for an oil and gas lease on certain state lands, plaintiff appeals. Affirmed.

Francis C. Wilson, of Santa Fé, for appellant.

Harry S. Bowman, Atty. Gen. for appellee.

OPINION OF THE COURT

RAYNOLDS, C. J. This is an appeal from the district court of Rio Arriba county affirming the decision of the commissioner of public lands, deny-

ing the application of the appellant for an oil and gas lease upon certain state lands in Rio Arriba county. The appellee, William J. Barker, was the holder of an oil and gas lease issued by the state of New Mexico through the office of the state land commissioner, dated August 29, 1919. The lands included in this lease constituted a portion of those granted by the United States to the territory of New Mexico by an act approved June 21, 1898, known as the "Fergusson Act" (30 Stat. 484). These lands became the property of the state of New Mexico when it was admitted into the Union. On December 15, 1919, the contestant, George M. Neel, appellant here, made an application for an oil and gas lease upon a portion of the same lands which had been previously leased to appellee, furnished and filed with the application an appraisement of the lands, and requested that an oil and gas lease of such lands be put for sale at public auction to the highest and best bidder after public advertisement as provided by section 10 of the Enabling Act (chapter 310, 36 Stat. 557; Act of June 20, 1910). The lease issued to the contestee, appellee here, William J. Barker, was executed and issued to him by the commissioner of public lands without formal appraisement of the lands, without advertisement, and without sale at public auction. Appellant contended that section 10 of the Enabling Act was not complied with. The commissioner rejected the application of appellant, Neel, upon the ground that the lease had previously been executed to appellee, Barker, and was a valid and substituting contract at that time. The commissioner also held the contract with Barker, being an oil and gas lease, for a period not exceeding five years, was by the terms of section 10 of the Enabling Act excluded from its provisions, and that it was not necessary to appraise, advertise, and sell at public auction the lease in question.

The lower court, in affirming the action of the

commissioner, held that the provisions of section 10 of the Enabling Act applied alike to lands which became the property of the state through the grant to the territory by the "Fergusson Act," and to those which had been granted de novo to the state by the Enabling Act. It also held that Congress had power to place such restrictions as it saw fit upon the grant of lands to the state of New Mexico. With these two conclusions of the lower court the appellant states he has no quarrel. He maintains that there are only two questions to be passed upon by this court. He contends, first, that the lease of the appellee, Barker, was such a sale of lands or an interest therein as was required by the terms of the Enabling Act to be appraised, advertised, and sold at public auction; second, that said instrument was a lease, license, or interest not included within the proviso of section 10, to the effect that leases for a term of five years or less could be made without appraisement and sale at public auction. These two points were decided adversely to the contentions of the appellant below, and he brings his appeal to this court.

Eleven errors are assigned, but in his brief appellant confines his discussion to the two propositions above set out, seeking a reversal on the ground that the court below erred in deciding these two contentions against him. In the view we take of the case it is not necessary to determine the nature of the so-called lease issued by the commissioner of public lands, granting to the lessee the right to enter and explore for oil and gas for a term of five years, with provisions of renewal under certain conditions and upon certain payments. Nor is it necessary to determine the interest thereby granted or conveyed. It is conceded by both sides that oil and gas are minerals, and that the lands under which they may be found are mineral lands. The Enabling Act, which is chapter 310, 36 Stat. 557, by its provi-

sions grants certain land to the state of New Mexico, and restricts the sale and the leasing and conveyance thereof, and the natural products of such lands, by provisions making it necessary to appraise, advertise, and sell at public auction these lands, and declaring that, if the provisions are not carried out, the attempted sales, leases, conveyances, and contracts will be void. Section 10 of the act, in so far as it is material to the matter under discussion, is as follows:

"Nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice of publication thus provided for sales and leases of the lands themselves: Provided, that nothing herein contained shall prevent said proposed state from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required. * * *

"Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act shall be null and void, any provision of the Constitution or laws of the said state to the contrary notwithstanding."

The Enabling Act itself, together with prior enactments by Congress upon the subject, indicates to our mind that only agricultural land and contracts, leases, sales, and conveyances thereof were contemplated by Congress; that the mineral land was specifically reserved by provisions in the act itself, and by prior enactments on the same subject. As is stated by the trial court:

"The act of July 4, 1866 (14 Stat. 86, U. S. Comp. St. § 4613, Fed. Stats. Ann. 2318), expressly provides that all lands valuable for mineral shall be reserved from sale, except as otherwise expressly directed by law; said statute being in the following language: 'In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly directed by law.' In section 6 of the Enabling Act it is provided that in addition to sections 16 and 36 in each and every township within the proposed state, which had theretofore been granted to the territory, that sections 2 and 32 in each township should be granted to said state, for the

support of the common schools. Section 6 further provides that in all cases where said sections 2, 16, 32 and 36, or any parts thereof, were mineral, or had been sold, reserved, or otherwise appropriated or reserved by or under the authority of any act of Congress, or were wanting or fractional in quantity, or where settlement thereon with a view of preemption or homestead, or improvement with a view of desert land entry, then and in either of said events, other lands should be selected in lieu of said mentioned sections.

"Again, it is to be observed that sections 6 to 11, both inclusive, of the Enabling Act, are the ones concerning the lands granted to the state; that section 7 enumerates the institutions for which said lands were granted, with the acreage granted to each, respectively; section 8 provides that the institutions for which said lands are appropriated shall forever remain under the exclusive control of the state, and that no part of said lands shall be used for the benefit of any sectarian or denominational school; section 9 provides for the payment to the state of 5 per cent., less certain enumerated items of the proceeds arising from the sale of all public lands lying within said state which may be sold after the state has been admitted; and section 10 contains the provisions with regard to the sale or the leasing of said lands. The next succeeding section, numbered 11, expressly provides that the lands granted by said act, in quantity or as indemnity, shall be selected under the direction and subject to the approval of the Secretary of the Interior, from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the said state of New Mexico. Certain other provisions are contained in said section with respect to who should act for and on behalf of the state, but the vital part of it is that it expressly provides that all of said lands shall be selected from the nonmineral lands of the United States located within said state. With the federal statute providing that mineral lands shall be reserved to the United States, except where otherwise expressly provided by statute, with section 6 of the act granting certain lands, with the provision that if they are mineral other lands shall be selected in lieu thereof, and with the express provision in section 11 that the lands granted under the act shall be selected from nonmineral lands, it is obvious to my mind that Congress never intended to grant to the state any mineral lands whatsoever. If not, then Congress certainly did not contemplate that the state should follow certain formalities in the execution of leases for mineral purposes.

"It would be utterly inconsistent to say that Congress, by the Enabling Act, intended to provide that no mineral lands should be granted to the state; and at the same time that the state in leasing its mineral lands, which it was not to obtain, should follow the formalities prescribed in section 10 of the act. When Congress used the word 'lease' with

respect to lands it considered and denominated as nonmineral, it certainly did not have in mind a mineral lease. When the word 'lease' is used with respect to grazing land, a lease for grazing purposes is contemplated; when used in respect to timber lands, a lease for timber purposes is necessarily contemplated; when used regarding agricultural lands, a lease for agricultural purposes is obviously in contemplation, and the same is true with regard to other leases; but when the word is used with respect to lands considered to be nonmineral, certainly a lease for mineral purposes is not in contemplation. The word 'lease,' as used in the Enabling Act, did not contemplate nor include a lease for mineral purposes. Counsel amicus curiae contends that Congress did not intend to grant any mineral lands to the state, but that it knew minerals would, in all human probability, at some later date, be discovered on said lands, and hence the act covers and includes a mineral lease. If this be true, Congress could have expressly provided that, if minerals should be discovered on any of said lands, then leases for such purposes should be made with the same formalities as other leases; but the act contains no such provision, and it is a well-known rule of statutory construction that where no exception is found in a statute, that the Legislature intended none, and that an exception cannot be created by construction, where none is necessary to effectuate the legislative intention. This rule is very clearly and with entire accuracy stated in 25 R. C. L. 972, with authorities sustaining the same. Indeed, no such an exception is here necessary to effectuate the legislative intent. * * * It is well settled by the decisions from both the Supreme Court of the United States and the federal courts that, where lands are conveyed by grant or patent, and it is not known at the time of such conveyance that such lands are mineral, but afterwards are discovered, that such minerals become the absolute property of the owner of the lands, and the United States has no interest whatsoever therein. It is only when it is known at the time of making the grant, or issuing the patent, that such minerals exist, and such knowledge is knowingly or fraudulently withheld from the government, that it can thereafter claim them. This is true, regardless of whether the lands are finally passed by a patent or by clear listing of the same by the Secretary of the Interior. Numerous authorities sustain this proposition. See the following cases: Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; Railway Co. v. United States, 92 U. S. 733, 23 L. Ed. 634; Frasher v. O'Connor, 115 U. S. 102, 5 Sup. Ct. 1141, 29 L. Ed. 311; Mower v. Fletcher, 116 U. S. 380, 6 Sup. Ct. 409, 29 L. Ed. 593; Hough v. Buchanan (C. C.) 27 Fed. 328; Buena Vista Petroleum Co. v. Tulare Oil & Mining Co. (C. C.) 67 Fed. 226; Garrard v. Silver Peak Mines, 94 Fed. 983, 36 C. C. A. 603; Development Co. v. Endersen (D. C.) 200 Fed. 272.

"It is therefore obvious that if minerals were discovered on any of the lands granted to the state, after such grant

had been perfected by the selection of said lands on the part of the state, and after the Secretary of the Interior had approved the same, and that fact was unknown at the time they were conveyed, then and in that event the title and ownership in and to said minerals became absolute in the state, and it could sell, dispose of, or otherwise manage the same as it elected so to do, unless the provisions of the Enabling Act with respect to selling or leasing said lands are broad enough to constitute express statutory enactment governing and controlling the same. Bearing in mind that, in my opinion, Congress did not intend to grant to the state any mineral lands, I conclude that the provisions of the Enabling Act with reference to sale and leasing of said lands do not embrace nor include a lease for mineral purposes, and it follows that the state is not controlled nor restricted by said act in regard to leasing said lands for mineral purposes."

With this conclusion we agree, and the case is therefore affirmed; and it is so ordered.

PARKER, J., concurs.

DAVIS, J., did not participate in this opinion.

(No. 2617. Jan. 5, 1922.)

BACA v. COURY

SYLLABUS BY THE COURT

The facts that the clerk filed an attachment bond and issued the writ are prima facie proof that he approved the bond, although he failed to indorse his approval upon it.

Appeal from District Court, Guadalupe County; Leahy, Judge.

Action by G. J. Coury against Mauricio Chavez. Judgment for plaintiff and sale ordered of certain real estate levied upon under writ of attachment. Hilario Baca, a stranger to the proceeding, moved for permission to enter special appearance in order

to quash the attachment. Motion denied, and Baca brings error. Affirmed.

F. Faircloth, of Santa Rosa, for plaintiff in error.

W. T. Brothers, of Santa Rosa, for defendant in error.

OPINION OF THE COURT

DAVIS, J. On March 21, 1918, the district court of Guadalupe county rendered a money judgment in favor of G. J. Coury, defendant in error here, against Mauricio Chavez, in an action upon an open account. Certain real estate had been levied upon under a writ of attachment, and on October 31, 1919, an order of sale was made; the court finding that the writ had been duly levied upon the property. On April 20, 1921, Hilario Baca, up to that time an entire stranger to the proceeding, filed an instrument entitled "Motion for permission to enter a special appearance for the purpose of moving to quash the writ of attachment." The prayer of the motion was that the writ of attachment be quashed and the property released from the lien. The court denied the motion, and this writ of error is from that action.

The grounds for the motion to quash were that no attachment bond had been executed; that a pretended bond filed was not approved by the clerk; and that the clerk did not indorse his approval on the bond as required by law. No privity between Hilario Baca and party to the cause was alleged, although the motion stated that he was the owner of the premises by reason of a deed from other persons.

The attachment bond was in fact given and filed

before the writ issued, as is shown by the record. In the absence of other proof, we presume that it was approved by the clerk, since he accepted it, filed it, and issued the writ, which could be done only after approval under the statute. Section 4305, Code 1915. It has been held in other jurisdictions that filing the bond manifests its approval and is sufficient. Hyde v. Adams, 80 Ala. 111; Howard v. Oppenheimer, 25 Md. 350, 363; West v. Woolfolk, 21 Fla. 189; and Griffith v. Robinson, 19 Tex. 220.

The clerk did not indorse his approval on the bond. This was, at most, an irregularity. The important features are the giving of the bond and its approval; the manner in which the approval is shown being of less consequence. The question, however, does not lack for authority. In Whitman Agricultural Ass'n v. National Ry. Co., 45 Mo. App. 90, a statute somewhat similar to ours was involved, and the court said that the indorsement of approval on the bond is only evidence of approval, but not the only evidence, and that if the clerk receives the bond and issues the writ it amounts to an approval so far as the defendant is concerned, citing Drake on Attachments, § 120. That reasoning applies to this case.

For the reasons stated, the judgment will be affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2610. Jan. 5, 1922.)

NATIONS v. LOWENSTERN et al.

SYLLABUS BY THE COURT

(1) Where a mortgagee elects to file for record a copy of a chattel mortgage, the copy must be substantially ac-

curate, and a copy which shows no signature or acknowledgment does not constitute constructive notice. P. 617

(2) The filing of an incomplete copy of a chattel mortgage is not aided by the unauthorized certificate of the clerk that it is a true copy. P. 619

(3) An index to chattel mortgage records does not constitute constructive notice of an instrument not entitled to be filed for record. P. 620

(4) A mere presentation to the county clerk of an original chattel mortgage and the immediate withdrawal of it without recording or leaving a copy in its stead cannot be a filing within Laws 1915, c. 71, as amended by Laws 1917, cc. 36, 74, even though the clerk puts his file mark upon it; to "file" an instrument being to present it to the proper officer to be kept as an archive of his office. P. 617

(5) Laws 1915, c. 71, as amended by Laws 1917, cc. 36, 74, providing that a copy of a chattel mortgage may be filed instead of the original, contemplates a true copy; a "copy" of an instrument being a duplication or reproduction of it. P. 619

Appeal from District Court, Quay County; Leib, Judge.

Action by J. H. Nations against Hugo Lowenstern and others. Judgment for defendants, and plaintiff appeals. Affirmed.

O. P. Easterwood, of Clayton, for appellant.

Renehan & Gilbert, of Santa Fé, for appellees.

OPINION OF THE COURT

DAVIS, J. This is an action in replevin involving the right of possession of cattle. Both Nations and Lowenstern base their claim upon chattel mortgages executed by J. P. Airhart, and the question for determination is the priority of these mortgages. The district court held that the Lowenstern mortgage was prior, and from that holding and the judgment rendered accordingly this appeal is prosecuted.

The Lowenstern mortgage was dated April 27, 1918, and recorded April 30, 1918. Nations relies

upon several mortgages; the last two being dated June 3, 1918, and recorded August 8, 1918. Since these are subsequent to the date and recording of the Lowenstern mortgage, and no question is raised as to the sufficiency of that mortgage in either respect, any rights of Nations superior to it must arise under instruments executed earlier and filed and recorded so as to constitute notice. In determining the facts, the first step therefore is to ascertain the condition of the records as to existing mortgages at the time the Lowenstern mortgage was taken.

On December 1, 1917, J. P. Airhart executed a chattel mortgage to secure a note for $5,874.50. December 5, 1917, Nations sent this mortgage, with a copy, to the county clerk. He did not request that it be recorded, and it was not recorded. The original was returned to him by the clerk; the copy being retained. The copy which remained in the file was not a true one, since it lacked both the signature of the mortgagor and his acknowledgment.

On the same date a similar mortgage was executed to secure $11,207.55, which, with a copy, was also sent to the county clerk for filing December 5, 1917, the original mortgage not being recorded, but returned, and the copy retained in the files. This copy was likewise defective in not showing either a signature or an acknowledgment.

August 7, 1917, another mortgage was executed to secure $12,756.90. Like the two described above, the original was not recorded, and, while the copy sent to the clerk and retained in his files showed the signature of the mortgagor, there was no acknowledgment.

There was a fourth mortgage dated December 14, 1916, but since it had been renewed by, or the note

secured by it included in, one of the mortgages above described, and it is not relied upon in appellant's brief, it needs no further consideration. In passing, however, it may be observed that, like the later ones, it was not recorded, and the copy of it lacked both signature and acknowledgment.

On April 27, 1918, the date of the Lowenstern mortgage, an examination of the office of the county clerk would have disclosed no mortgages of record, and there would have been found three instruments in the form of mortgages, two, however, bearing no signature and no certificate of acknowledgment, and one showing a signature, but not acknowledged. Was this situation sufficient to put Lowenstern on notice of the existence of the actual mortgages? The decision of this case turns upon the solution of this question, for it is conceded that he had no actual knowledge or notice.

The statute governing the matter is chapter 71, Laws 1915, as amended by chapters 36 and 74, Laws 1917. The provisions applicable may be summarized as follows:

Sec. 2. All chattel mortgages shall be acknowledged by the mortgagor in the same manner as conveyances affecting real estate, and shall be filed or recorded as hereinafter required. The failure to so file or record any such instrument shall render it void as to subsequent mortgages in good faith.

Sec. 3. Every chattel mortgage, or a copy thereof, shall be filed in the office of the county clerk of the county in which the property affected is situated.

Sec. 4. The county clerk shall indorse on the mortgage or copy so filed the time of receiving it and retain it in the files of his office. If the instrument is recorded, the mortgagee may withdraw the filed original whenever a true copy thereof is filed with the county clerk.

Sec. 5. The county clerk shall keep a book in which shall be entered a minute of all such instruments, which shall be ruled off into separate columns with headings as follows: Time of Reception, Name of Mortgagor (alphabetically ar-

ranged), Name of Party in Whose Favor the Instrument is Drawn, Date of Instrument, Amount Secured, When Due, Property Mortgaged, and Remarks; and the proper entry shall be made under each of said headings. Under the heading of Property Mortgages it shall be sufficient to enter a general description of the property mortgaged, and the particular place where located, if set forth in such instrument.

Sec. 6. Every such chattel mortgage or other instrument of writing, filed in accordance with the provisions of this act, shall have full force and effect given to the recording of an instrument affecting real estate.

Sec. 9. The county clerk may charge and collect for certifying a copy of any such original chattel mortgage or other instrument of writing so filed or recorded, the sum of twenty-five cents and no more, where such copy is presented with such original chattel mortgage or other instrument of writing at the time same is filed or recorded, and not more than seventy-five cents where such copy is prepared by the county clerk. In cases where a copy of such chattel mortgage or other instrument in writing is filed in the first instance, instead of the original, the county clerk shall be entitled to charge the sum of 25 cents for certifying upon such original the fact that a true copy thereof has been duly filed, with the date of such filing, and such certificate, so indorsed upon such original chattel mortgage or other instrument of writing, shall be received in evidence as sufficient proof of the filing of a true copy of such chattel mortgage or other instrument in writing in the office of the county clerk so certifying.

The effect of these provisions may be further summarized, so far as important here, as follows:

The mortgagee may file either the original or a copy of his mortgage.

He may or may not have the filed instrument recorded.

If the original is filed, it may be withdrawn only when recorded and upon filing a true copy in its stead.

Failure to file or record the instrument renders it void as to subsequent mortgagees in good faith.

[1, 4] If Nations desired to protect his rights as

mortgagee by complying with this law, it was his primary duty to file either the original or a copy with the county clerk. The duty to do this rested upon him, and upon no one else. Apparently he chose to avail himself of the permission given in the statute to file as a permanent record a copy instead of the original. In his letters to the clerk he stated that both the original and a copy were inclosed and requested that "one copy" be filed and the "other copy" returned. The clerk took this to mean that he was to file the copy and return the original. He did this, and since Nations received and retained the original, we conclude that the clerk correctly interpreted his intention. The original was forwarded apparently only to afford an opportunity to compare the copy. That he intended to file the copy, not the original, is further shown by his withdrawal, or at least his retention, of it, in the face of the statute, which allows the withdrawal only if it is recorded and a true copy left in its place, neither of which conditions was complied with. The statute expressly provides that the instrument filed must be retained by the clerk in the files of his office, with the exception that if the original is filed it may be withdrawn under the conditions above stated. A mere presentation to the clerk of an original mortgage, and the immediate withdrawl of it without recording, or leaving a copy in its stead, cannot be a "filing" within this statute, even though the clerk puts his file mark upon it. The word "filing" itself imports some degree of permanency. To file an instrument is to present it to the proper officer to be kept as an archive of his office. The instrument is to be permanently preserved as a public record. An instrument merely delivered to the clerk and then withdrawn without leaving a copy, affords no notice or information to persons subsequently dealing with the property affected. It follows that the fact that Nations sent the original instruments to the clerk with the copies adds noth-

ing to them. The originals were not actually filed, and were not intended to be. The attempt was to comply with this statute by the filing of the copies, and under that filing the rights of the parties must be determined.

[5] It takes no argument to demonstrate that the statute in providing that a copy may be filed instead of an original means a true copy. A copy of an instrument is a duplication or reproduction of it. We do not lay down the rule that the copy, to conform to the statute, must be an absolute duplicate in every detail, or that some discrepancies may not be disregarded, as was done in Gillespie v. Brown, 16 Neb. 457, 20 N. W. 634, and Union Stockyards Bank v. Hamilton, 246 Fed. 586, 158 C. C. A. 550, cited in appellant's brief. But certainly it must be substantially identical, and a paper which omits such essential features as the signature of the maker and the certificate of acknowledgment cannot be said to be a copy of an original which contains them.

How then has appellant complied with this statute? It provides that unless the mortgage is recorded, or it or a copy is filed, it shall be void as to subsequent mortgagees in good faith. The Nations mortgages were not recorded. The originals were not filed in conformity with the statute. No copies were filed; the instruments relied upon not being copies of anything. It follows that the statute was not obeyed, its penalty becomes effective, and the mortgages are void as against Lowenstern, who is admittedly a subsequent mortgagee in good faith.

[2] Appellant argues that the situation was caused, not through his fault, but through the negligence of the clerk, who certified that the instruments left on file were true copies of the originals, which they were not. The clerk executed a false

certificate, but that does not excuse appellant from the consequences of his own negligence. The law places a duty of filing a true copy of the mortgage upon the mortgagee, not upon the clerk, and his failure to do so is not remedied by the fact that the clerk wrongly certifies the instrument to be a copy. Cases like Case v. Hargadine, 43 Ark. 144, Covington v. Fisher, 22 Okl. 207, 97 Pac. 617, Keys & Co. v. First National Bank, 22 Ok. 174, 104 Pac. 350, 18 Ann. Cas. 152, and Dabney v. Hathaway, 51 Okl. 658, 152 Pac. 77, cited in appellant's brief, which hold that the duty of the mortgagee ceases when he delivers to the clerk an instrument properly prepared, and that he is not responsible for the neglect or omissions of the recording officer, are not in point here. In those cases the person tendering the instrument for record had done all that the law required of him. The errors or ommissions in recording were attributable to the officer only. Here appellant himself has not complied with the statute.

[3] The clerk did keep the minute book prescribed by section 5 of the act, and entered in it the required facts as to the various mortgages. Appellant claims that the information contained in this book was available to appellee, and sufficient to put him on notice. But we are dealing with constructive, not actual, notice. If it were shown that appellee saw this book and thus obtained information of the existence of the mortgages, it may be that he would be put upon inquiry to the same extent as though he received the same information from some other reliable source. We do not decide that feature in this case, for the circumstances do not require it. In dealing with constructive notice under recording acts, we can go no further than the statute itself. It does not make this book, or the statements contained in it, constructive notice to any one,

confining that result to the filing or recording of the proper instruments, and to that alone. When such finding is lacking, constructive notice does not arise under the law. In this respect this case is similar to McBee v. O'Connell, 16 N. M. 469, 120 Pac. 734, and Vorenberg v. Bosserman, 17 N. M. 433, 130 Pac. 438, in which it was held that the recording of an instrument not entitled to record, because not acknowledged, was not constructive notice.

What has been said disposes of the only points argued in appellant's brief. It follows that the judgment of the district court should be affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2526. Jan. 6, 1922.)

LOPEZ v. LOPEZ et al.

SYLLABUS BY THE COURT

(1) Where, in a suit in equity for discovery in aid of an action at law, the defendant's answer is responsive to the bill (no interrogatories being filed with the bill), the plaintiff cannot, by filing a reply to the answer, treat the answer as a verified pleading, nor has he the right, on the trial of the consolidated law and equity cases, to cross-examine the defendants on their answers. P. 624

(2) In such a case he is bound by the answer elicited in his bill of discovery, and can only overcome such sworn answers by the contradictory testimony of two witnesses, or by the testimony of one witness and corroborating circumstances or documentary evidence, and where the burden of proof thus put upon him is not sustained, the case is properly dismissed. P. 626

Appeal from District Court, Valencia County; M. C. Mechem, Judge.

Action by Antonio Lopez, administrator of the estate of Maria Ignacia Baca de Lopez, against

Severo Lopez, and others, and from a judgment dismissing the complaint the plaintiff appeals. Affirmed.

Rodney & Rodney, of Albuquerque, for appellant.

Harry P. Owen, of Los Lunas, and R. P. Barnes, of Albuquerque, for appellees.

OPINION OF THE COURT

RAYNOLDS, C. J. This is an appeal from a judgment of the lower court dismissing the plaintiff's complaint. The plaintiff below, appellant here, filed his complaint below, entitling it "A Bill for Discovery and for an Accounting." In it, after setting out that the appellant was the duly appointed administrator of the estate of Maria Ignacia Baca de Lopez, and that she died intestate leaving considerable property and ten children as heirs, he alleged that five of the heirs, naming them, had joined and conspired together to possess themselves of a greater portion of the estate than they were entitled to, and had refused the appellant any information in regard to the estate, although often requested to give him such information, and that they had also refused to render it possible for him to possess himself of the property belonging to the estate or make an inventory thereof, and that by reason of such facts he found it necessary to bring a bill for discovery against said defendants. He also alleged that they had appropriated the property in question; that they claimed it by virtue of a certain alleged transfer made during the lifetime of said Maria Baca de Lopez; and he prayed that the defendants make answer and discovery to each of the charges in his bill of complaint, but not under oath, and require them to discover and show what sum or sums of money were in the house at the time of the death of Maria Baca de Lopez, and also require them to discover and show what personal property, household furni-

ture, farming implements, etc., they had and possessed; and further prayed that—

"In default of making such a showing as will relieve them in the premises, and after issue joined by this complaint of the allegations in his bill, to be awarded judgment against the defendants, and each of them, as may be proper on the proofs, * * * for such sum or sums as may be found in the court in possession of them, or either of them, and for such damages in lieu of the property appropriated, * * * and for damages in the premises for wrongs here complained of, with costs of suit in all in the sum of $25,000 and for other general specific relief as the court shall deem meet and proper."

To this complaint a demurrer was filed, which was sustained by the court, and the plaintiff given 20 days in which to file an amended complaint. Within the 20 days an amended complaint was filed, which was entitled, "Amended Bill for Discovery and in Aid of a Suit at Law." In this amended bill the allegations made in the original bill were repeated, but respondents were required to answer under oath, and there was added thereto a statement that the administrator, the appellant here, seeks to recover the sum of $25,000 damages on account of personal property belonging to the estate taken possession of and kept by the respondents.

At the same time this amended bill was filed in the original case No. 2081 a second action was filed, No. 2134, in which appellant sought to recover, as administrator aforesaid, the sum of $25,000 from the respondents. To the amended bill in No. 2081 a motion to strike from the files was filed and denied, a demurrer was subsequently filed to the amended bill, which was overruled, and thereafter an answer was filed by the defendants, setting forth their claims to the property in question. To this answer to the amended bill a "replication" was filed by the appellant, denying the allegations set forth in the answer. To the complaint filed in cause 2134 (the action at law) a motion to make more definite

and certain was filed and denied. A demurrer was then filed and overruled. Upon the overruling of the demurrer defendants answered, denying the allegations in the complaint. To this answer a "replication" was filed. The two cases were consolidated and tried before the court without a jury. At the conclusion of the appellant's evidence, upon a motion made by the appellees, the court dismissed the complaint on the ground that the plaintiff below, appellant here, had not made a prima facie case.

The appellant assigned numerous errors, many of which relate to the ruling of the court on the exclusion of certain evidence, but, in our opinion, the whole matter is controlled by assignment No. 1, in which appellant alleges that the court erred in holding that plaintiff had not made a prima facie case and for which alleged failure the consolidated cases were dismissed.

[1] Appellant's contention apparently is that the allegations of appellees made in their answer to his bill of discovery amounted to no more than testimony under oath, and that he had the right to cross-examine them. He further seems to contend that the answer under oath of these defendants amounted to no more than a verified pleading of denial, the truth of the allegations, denials of which, by filing his replication, he put in issue as in any ordinary suit, and that upon a trial of the case he would apparently not be bound by such answers. No attempt in this case was made to comply with sections 2171 or 2172, Code 1915, as to the filing of interrogatories. The bill was evidently brought under section 4068, Code 1915, which is as follows:

"That suits in equity may be begun, injunctions granted, or receivers appointed, in aid of any suit at law whether the same has been prosecuted to a judgment or not, provided, that such suit at law has been begun at the time any such equitable relief is sought."

It is questionable whether the amended bill for

discovery was not a departure from the original bill and should have been stricken on that account. At the time the original bill was filed there was no suit at law pending, and the authorities uniformly hold that a suit at law must either be pending or contemplated in order that a bill of discovery may be filed. We do not decide these questions, as they are not insisted upon by the appellees, and treat the amended bill of discovery in aid of the action at law as if properly filed at the time the law action had been begun. We have been unable to find authority, nor has counsel for appellant cited any, which sustains his contention that he may cross-examine the respondents on their answers, and that said answers in such a case are merely verified pleadings, which have little or no weight in the plaintiff's case. On the other hand, the authorities are unanimous that answers to a bill of discovery, or an answer in an equity suit, are evidence and are binding upon the complainant. Keeney v. Carillo, 2 N. M. 480, at page 497; 21 C. J. "Equity," par. 695, note 23; Id. par. 704D; 18 C. J. "Discovery," p. 1066, par. 39; Jones' Heirs v. Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430, 432; Pollard v. Lyman, 1 Day (Conn.) 156, 2 Am. Dec. 63, at pages 68, 69; Corbin v. Mills' Executor, 19 Grat. (Va.) 466; Bell v. Moon, 79 Va. 341; Carpenter v. Providence, etc., Ins. Co., 4 How. 185, 11 L. Ed. 931, at page 946.

As to the conclusiveness of answers to interrogatories filed with the bill of discovery, there is not that uniformity of decisions as in the case of an answer in an equity suit. The rule is stated as follows:

"It has been held that the complaint in a bill for discovery by calling for an answer agrees to abide by it as well where it turns out to be unfavorable as where it makes for him, and that, at least under some circumstances, such answer is conclusive. Ordinarily, however, an answer to a bill of discovery in aid to a suit of law is not conclusive, especially as to matters in avoidance. What weight should be given

to answers is a question upon which the cases are not entirely harmonious. According to some authorities, the answer is entitled to no greater consideration than the answers of the parties' own witnesses on the stand, and may be controverted in the same way; but, according to others, a responsive answer to a bill for discovery in aid of a suit of law must be taken as true, unless contradicted by two witnesses or by one with pregnant circumstances, unless it has been held defendant is proved utterly unworthy of credit." 18 C. J. "Discovery," par. 40, and cases cited.

See, also, Ward's Adm'r v. Cornett, 91 Va. 676, 22 S. E. 494, 49 L. R. A. 556; Thompson v. Clark, 81 Va. 427, at page 428; Shurtz v. Johnson, 28 Grat. (Va.) 657.

Although the amended bill had not attached to it interrogatories in form, it was in the nature of an interrogation to the respondents and was therefore, in our opinion, governed by the rule as to the conclusiveness of answers to interrogatories propounded in or with a bill of discovery. The rule applicable to the conclusiveness of such answers is that they can only be overcome by the contradictory testimony of two witnesses, or the testimony of one witness and corroborating circumstances or documentary evidence. See cases supra. See, also, 9 R. C. L. "Discovery," § 25.

[2] The complainant, by his form of action sought to elicit facts from the respondents, and he must be bound by their answers in such a case to the extent which the law attaches to such answers. Appellant cannot treat the verified answers or the sworn answers to interrogatories in the form of answer to his bill as a verified pleading merely, but is bound by them as evidence in the case in this form of action. The court below, by his decision, evidently came to the conclusion that he did not make a prima facie case, considering both the testimony of his own witnesses and the sworn answers of the respondents to his interrogatories. We have carefully

read the record and agree with the conclusion of the trial court in this respect.

As to the other assignments of error in regard to the exclusion of evidence offered, we hold that the assignments are without merit. They relate to the exclusion of hearsay evidence and to the rejection of offers to prove immaterial matters.

Finding no error in the decision of the lower court, the same is affirmed; and it is so ordered.

PARKER, J., concurs.

DAVIS, J., did not participate in this decision.

(No. 2513. Jan. 6, 1922.)

BANK OF COMMERCE OF TAIBAN v. DUCKWORTH et al.

SYLLABUS BY THE COURT

(1) In a replevin suit to recover cattle held under a chattel mortgage for breach of condition in such mortgage, where a third person claims some of the cattle as his own under a bailment to the chattel mortgagor, it is error to instruct the jury that "there is no evidence in this case that at the time the mortgage in question was executed the plaintiff had any knowledge of such contract. Therefore if the defendant Duckworth at that time mortgaged to the plaintiff bank any cattle that may have been intrusted to him by Knox, it was entitled to the possesslon of the same at the time this action was begun," because mere possession by one without other indicia of ownership does not give the possessor the right to convey any better title than he has. P. 629

(2) In a replevin suit to recover cattle under a breach of the conditions of a chattel mortgage, it is error to instruct the jury that the burden of proof is upon a defendant, who claims some of the cattle in question, to prove his claim by preponderance of evidence, for the burden in a replevin suit is upon the replevin plaintiff to prove his right to possession, and the defendant's claim of ownership amounts only to a

general denial of the plaintiff's right to possession. It is not new matter as to which the burden of proof is upon him. P. 630

(3) A requested instruction as to the construction of a chattel mortgage considered, and held properly refused. P. 630

Appeal from District Court, Union County; Leib, Judge.

Action by the Bank of Commerce of Taiban, N. M., against W. A. Duckworth and another. Verdict and judgment for plaintiff, and defendants appeal. Reversed and remanded, with instructions to award a new trial.

G. L. Reese, of Portales, for appellants.

James A. Hall, of Clovis, and O. P. Easterwood, of Clayton, for appellee.

OPINION OF THE COURT

RAYNOLDS, C. J. This is an action in replevin, brought by the Bank of Commerce of Taiban, N. M., against W. A. Duckworth and F. P. Knox, to recover possession of 185 head of cattle.

Plaintiff alleged the execution of a chattel mortgage on said cattle by Duckworth and a breach of the conditions of said mortgage entitling it to the possession of the property therein conveyed. The defendant Knox answered, pleading general denial of the allegations in the plaintiff's complaint, and claimed to be the owner of some of the cattle which had been levied upon, and further alleged that the cattle claimed by him were not described, included in, nor covered by the chattel mortgage. In his answer he further alleged that these cattle were delivered to the defendant Duckworth by him prior to the time the chattel mortgage was executed under a verbal agreement that Duckworth should run the cattle, care for, and feed them at his own ex-

pense for a term of five years, and he should receive for his services one-half the increase of the same, and return to the defendant Knox the original cows so delivered, and one-half of the increase at the end of such term. He further alleged that the plaintiff knew the terms of the verbal contract at the time the mortgage was executed.

The defendant Duckworth answered, admitting the execution of the notes and mortgages mentioned in the complaint, but alleged the mortgage was a renewal of former mortgages on the same property; that the plaintiff knew the actual number of cattle at the time of the mortgage was only 300 head, and that either by mutual mistake or by act of the mortgagee, without defendant's consent, the number of cattle included in the mortgage was increased from 300 to 578 head.

Plaintiff, in reply to the answer of the defendant Duckworth, denied the allegations in said answer. Upon the issue thus made the trial was had before a jury, and verdict returned in favor of the plaintiff, Bank of Commerce. From the judgment upon this verdict the defendants, Knox and Duckworth, appeal to this court.

Appellants assign numerous errors, but in their brief confine their argument to four propositions:

[1] First. The appellants alleged the court erred in instructing the jury that there was no evidence in the case that at the time the mortgage was executed the plaintiff had any knowledge of an oral contract under which the defendant Knox claimed the cattle, and therefore plaintiff was entitled to the possession of them. The instruction complained of is as follows:

"As to the verbal contract testified to by the defendant Knox and the defendant Duckworth about the running of

the former's cattle, you are instructed that there is no evidence in this case that at the time the mortgage in question was executed the plaintiff had any knowledge of such contract; therefore, if the defendant Duckworth at that time mortgaged to the plaintiff bank any cattle that may have been intrusted to him by Knox, it was entitled to the possession of the same at the time this action was begun. An oral contract of that character is not a partido contract under our law and would have no validity as to one acquiring rights to the live stock involved without notice of such contract."

In our opinion this instruction is erroneous, as mere possession without other indicia of ownership does not give the possessor the right to convey any better title than he has. See Roberts v. Lubin, 25 N. M. 658, 187 Pac. 551, where the effect of possession of a chattel is discussed and the prevailing rule announced.

[2] Second. Appellants assign as error the action of the court in instructing the jury that the burden of proof was upon Knox to prove the affirmative allegations in his answer by a preponderance of evidence; appellants contending that Knox's ownership as alleged in his answer was a mere denial of the allegations in the complaint of the plaintiff that it was entitled to the possession, and that the burden was upon the bank to prove its right to possession and ownership before it could recover, and that the burden was not upon Knox to prove his ownership. We think this point is well taken. The allegations in the answer added nothing to the defendant's right. He could have proved his ownership under a general denial, and his allegations as to the manner in which he derived his title were surplusage and not new matter. 23 R. C. L. Replevin, Sec. 127; 10 R. C. L. Secs. 45, 48, 50; 34 Cyc. 1501; Walters v. Battenfield, 21 N. M. 413, 155 Pac. 721; Seinsheimer v. Jackson, 24 N. M. 84, 172 Pac. 1042.

[3] Third. Appellants assign error in the refusal

of the court to give the following requested instructions:

"You are instructed that a mortgagee who is entitled to foreclose his mortgage has the right to maintain an action in replevin to recover the property described in the mortgage for the purpose of foreclosure of the mortgage, but that this right to replevin does not entitle the mortgagee to take any other property thereby than that which is described in the mortgage."

The instrument under which the foreclosure and replevin suit was brought, after reciting the number of cattle and the brands thereof mortgaged to the bank, contained this language:

"Together with all the increase thereof and accretions or additions thereto, whether by purchase or otherwise."

It is clear that the requested instruction as applied to this case was too narrow and misleading. It was properly refused, as the mortgage included by its terms other cattle than those specifically described in it.

Fourth. The appellant contends that the verdict is uncertain, and that no judgment could be properly rendered upon it, because it did not sufficiently describe the cattle; that they could not be identified by it, and that it did not determine the question of unlawful detention. As this case will be reversed for the erroneous instructions considered above, it is unnecessary to consider this assignment.

For the reasons above stated, the case is reversed and remanded, with instructions to award a new trial; and it is so ordered.

PARKER, J., concurs.

DAVIS, J., did not participate in this opinion.

(No. 2625. Jan. 13, 1922.)

MERRILL v. PENASCO LUMBER CO. et al.

SYLLABUS BY THE COURT

(1) Actual dependency within the meaning of the Workman's Compensation Act is a question of fact, to be determined by the circumstances of each case. P. 633

(2) Legal liability to support does not of itself prove dependency. P. 635

(3) Failure of a husband to support his wife and children for a considerable time prior to the accident which caused his death does not of itself prove that they were not actual dependents. P. 635

(4) An accident to a workman employed in a forest, caused by a falling tree, and resulting in his death, under the circumstances of this case, arose out of his employment within the meaning of the Workman's Compensation Act. P. 636

Appeal from District Court, Otero County; Ed Mechem, Judge.

Proceeding by Ida B. Merrill against the Peñasco Lumber Company, employer, and the Western Indemnity Company, insurer, for compensation under the Workman's Compensation Act for the death of plaintiff's husband, J. M. Merrill. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Winter and Winter, Goldstein, Miller, McBroom & Scott, all of El Paso, Tex., for appellants.

Lee R. York, of Alamogordo, for appellee.

OPINION OF THE COURT

DAVIS, J. In March, 1920, J. M. Merrill was an employee of the Peñasco Lumber Company, working in the woods in the Sacramento mountains as a teamster. On the 3d of that month he was driving a team skidding logs. It was a very windy day, one of the witnesses describing the wind as a "fierce gale." Many trees blew down, not an uncommon occurrence in those woods. One of these trees in fall-

ing struck Merrill and killed him. No one was working on the tree, and his employer in no way caused its fall. Merrill was a married man with three children. This proceeding was commenced by the widow on behalf of herself and children to recover the compensation for his death allowed by the Workman's Compensation Act. Judgment was rendered in her favor.

[1] Appellants contend that the widow and children were not actual dependents upon Merrill, and consequently not entitled to compensation. The argument is that the burden was upon them to show actual dependency under chapter 83, § 12 (J) 2, Laws 1917, and that they failed in the proof, and indeed proved the contrary, since it was shown that at the time of his death Merrill was not actually supporting them. The statute provides that a widow, if living with the deceased, or legally entitled to be supported by him, and actually dependent upon him, is entitled to compensation under the act. Appellee and deceased were living separate and apart at the time of his death, but she was still legally entitled to his support. She was without income of her own. She had done washing, ironing, and canvassing, had received a small sum of money from the sale of a piece of property, and had had some assistance from her father and uncles. From these sources she had supported herself and her children.

While the statute uses the word "actually" as limiting the word "dependent,"this can mean nothing more than that the widow must have been dependent in fact as well as in law. In a sense every wife and child is legally dependent upon the husband and father, and there may in some instances be a distinction between such legal dependency and the dependency in fact contemplated by the statute. Courts have met with considerable difficulty in laying down a general rule as to who are actual depend-

ents under such a statute, and the rules established are of a negative rather than a positive character. It seems to be well settled by authority that the existence of a marriage with consequent liability to support does not of itself prove actual dependency, and instances easily come to mind of married women who are not actually dependent upon their husbands for support. Many statutes create a presumption of dependency in favor of certain classes, but ours does not, following in this respect the original English act. But just as the existence of the marital status does not of itself prove dependency, so the lack of actual support by the husband does not of itself negative dependency. The failure to support is only one circumstance for consideration. The reasons for it, the length of its continuance, the mutual attitude and means of the parties, the probable resumption of duty, and other similar matters may have a distinct bearing on the subject. If dependency were determined only by the fact of contribution to support, a wife and children might be dependent one week and cease to be the next according to the caprice of the husband and father. Such a theory lacks support from authority. In Parson v. Murphy, 101 Neb. 542, 163 N. W. 847, L. R. A. 1918F, 479, a mother was held to be dependent on her son although he had not actually supported her and was not contributing to her support at the time of his death. He had written five months before that he would come and live with her and support her, but for reasons beyond his control did not do so. The court said:

"Defendant's argument on this point cannot be sustained. We believe the statute is susceptible of an interpretation that more nearly accords with the main purpose of its enactment. The act is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it. Among its objects are these: That the cost of the injury may be charged to the industry in which it occurs; the prevention of tedious and costly liti-

gation; a speedy settlement between employer and employee; and to prevent dependent persons from becoming a public burden. * * * It is not shown that the widow's son made any contributions to her support. But in any event this feature is not important, in view of our holding that the question of contribution ,as it is contended for by defendants, is not controlling * * *

"That plaintiff's son was capable of earning the wages usual to his employment affirmatively appears. * * * But for the accident he would now, in human probability, be a wage-earner, and thus be in a position to supply plaintiff in pursuance of his promise. It is always presumed, until overcome by proof, that a man will do his duty. It cannot be known, and will not be presumed, that Nels Parson, if living, would be unmindful of his filial duty, with or without promise, to support his aged and dependent parent. The question of legal liability to support does not of itself determine the question at issue."

In Re Carroll, 65 Ind. App. 146, 116 N. E. 844, the court said:

"Among the elements that are indicia of a state of dependency are an obligation to support, the fact that contributions have been made to that end, that the claimant in any case is shown to have relied on such contributions and their continuing, and the existence of some reasonable grounds as a basis for a probability of their continuance, or of a renewal thereof, if interrupted. We would not be understood as indicating that all these elements must exist in each case, in order that there may be a state of dependency."

In Sweet v. Sherwood Ice Co., 40 R. I. 203, 100 Atl. 316, the doctrine was recognized that, while the obligation to support does not of itself determine dependency yet, when such legal obligation is coupled with a reasonable probability that it will be fulfilled, it constitutes one of the tests of dependency. Case notes upon this question will found in L. R. A. 1918F, 483, and Ann. Cas. 1918B, 749.

[2, 3] Coming now to the particular facts in this case, we find that Merrill and his wife separated in March, 1918, Merrill remaining in the vicinity for a short time and then going to Kentucky. Before leaving he arranged with local merchants to furnish her with groceries and dry goods, paying the bills

thus contracted up to about July, 1918. He sent her money on two occasions. After this he became sick, and wrote his sister saying he was unable to work, and to send him money. Shortly before the employment in which he met his death he returned to the place of his wife's residence, gave her a small sum of money, and told her he was going to support her and the children, and that he did not want her to work longer. She could reasonably expect this promise to be kept, and there was probability that her expectations would be realized. Without the temporary aid from the proceeds of the sale of her property, and without the voluntary assistance of her family, her ability to support herself and children may be doubted. In spite of his failure to contribute to her support for a considerable period, and of the fact that she was able to maintain herself and her children in some fashion through her own efforts, and with the assistance of her relatives, we conclude that, under the circumstances shown, she and they were nevertheless actual dependents upon him at the time of his death within the meaning of the statute.

[4] Appellants further contend that the accident which caused Merrill's death did not arise out of his employment and argue that the tree fell through no act or negligence of the employer, but because of a violent storm, for which no human agency could be responsible, and it is argued that the employee was in no greater danger from such accident than were the other employees or the general public. If we were dealing with a common-law action for personal injuries to an employee, the negligence of the employer would be the first subject of inquiry, for it would be the basis of the liability. But no such question arises under the Workman's Compensation Law. The economic theory of its enactment is to place upon the industry instead of upon the individual the loss resulting from injuries to its em-

ployees, and the loss is to be thus shifted in the case of all accidents arising out of and in the course of the employment. It is a new liability created entirely by statute, and having no relation in principle or effect to that which arose at common law for injuries, or under statutory provisions covering death by wrongful act.

The words "arising out of" the employment are found in the original English act and are in the statutes of most of the states. The question as to whether a particular accident falls within their scope has been the subject of frequent decisions. Certainly the employment must have had some causal connection with the accident; the accident must result from a risk reasonably incident to the employment, or the injury cannot be said to arise out of it. A risk common to the public generally, and not increased by the circumstances of the employment, would not fall within this language of the act. A risk peculiar to the industry certainly would. Between the two extremes comes the gradation in instances which are more difficult of solution as they reach middle ground.

The rule is illustrated by the decisions in cases where the death of the employee was caused by lightning. Without attempting to lay down an absolute rule, for each case must be determined according to its own facts, the authorities seem to hold that, if the deceased by reason of his employment was exposed to a risk of injury by a storm or other action of the elements greater than that to which the public was subject, or his employment necessarily accentuated the natural hazard, the injury arose out of the employment. Thus in State v. District Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344, dealing with the death by lightning of the driver of an ice wagon whose duties required him to be out of doors at all times and in substantial

disregard of weather conditions, and in holding that such an accident arose out of his employment, the court said:

> "If the deceased was exposed to injury from lightning by reason of his employment, something more than the normal risk to which all are subject, if his employment necessarily accentuated the natural hazard from lightning, and the accident was natural to the employment, though unexpected or unusual, then a finding is sustained that the accident from lightning was one 'arising out of employment.' An injury, to come within the Compensation Act, need not be an anticipated one; nor, in general, need it be one peculiar to the particular employment in which he is engaged at the time."

A general discussion of the principle applicable will be found in 28 R. C. L. 796, and many cases are collected in the notes to Central Ill. Public Service Co. v. Industrial Commission, 13 A. L. R. 974.

Examining the facts of the case now before us, we find that the accident occurred in the course of lumbering operations in the Sacramento montains. It needs no proof to show that the mountain regions of New Mexico are subject to sudden and violent storms. It is a matter of common knowledge that the blowing down of trees in such storms is not an unusual occurrence, and, if proof were necessary as to the particular region where this accident occurred, it is found in the evidence. The risk of injury from the falling of such trees is one naturally incident to an employment in that industry, and one which both employer and employee must anticipate. Their work is necessarily in the woods among the trees, and usually far from considerable habitations. The employees from the very conditions under which they must work are subjected to this risk in a much greater degree than the general public. Their work is carried on in a place peculiarly subject to such danger. Under the principle already pointed out,

the accident which is the basis of this proceeding did arise out of the employment.

The decision of the district court was correct, and is affirmed, and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2584. Jan. 13, 1922.)

HUMPHREYS et al. v. FLETCHER.

SYLLABUS BY THE COURT

(1) The term of an oil and gas lease, definitely fixed, is not extended by payment of rentals which, under the provisions of the lease, may be paid in lieu of drilling. P. 641

(2) Defects in a complaint, supplied by other pleadings or proof below, may not be raised for the first time on appeal. P. 642

Appeal from District Court, Eddy County; Bratton, Judge.

Action by Mary E. Fletcher against S. G. Humphreys and another. Judgment for plaintiff, and defendants bring error. Affirmed.

E. P. Davies, of Santa Fé, for plaintiffs in error.

S. D. Stennis, Jr., and Chas. H. Jones, both of Carlsbad, for defendant in error.

OPINION OF THE COURT

DAVIS, J. On the 19th of October, 1917, Mary E. Fletcher executed an oil and gas lease in favor of S. G. Humphreys upon real estate in Eddy county. The lease on its face was for a term of two years and as long thereafter as oil or gas should be produced from the premises by the lessee. Humphreys assigned the lease to Faris.

On November 1, 1919, after the expiration of the two-year period, a complaint was filed by Mary E.

Fletcher against Humphreys and Faris, alleging that they were still asserting some claim or rights under the lease; that no oil or gas had ever been produced from the premises; and praying that the lease be declared inoperative and canceled, and that the defendants be barred and estopped from claiming any rights under it.

After the introduction of evidence on the trial of the case the defendant Faris asked leave to file a second amended answer, so as to make his pleadings conform to his theory of the facts as proven. This permission was granted and the answer filed. In it he admitted that plaintiff was the owner of the real estate upon which the lease was executed, admitted that he was the owner of the oil and gas lease, and by way of new matter and cross-complaint alleged that the lease was for a term of five years instead of two years. The answer stated that Humphreys prepared the lease for a term of five years and sent it by mail to Mary E. Fletcher for execution; that she altered the form sent her by changing the word "five" to "two," so that the lease on its face was for a term of two years, and then returned it to Humphreys by mail. Humphreys did not read the lease, but took it on the assumption that it was for a period of five years, and under the same belief he assigned it to Faris and Faris accepted it, and the fact that the lease was for two years instead of five was not discovered until this proceeding was commenced. The prayer of the cross-complaint was that the lease be reformed so as to make it for a term of five years.

The only issue presented to the court under these pleadings was as to the term of the lease.

Plaintiff introduced the lease in evidence, proved that no oil or gas had been produced, and rested. Defendant Faris introduced evidence in support of

his contention that the intention of the parties was to make a five-year lease and some other evidence as to the payments of rentals, which, in the view we take of the case was immaterial. The court found the issues of fact in favor of the plaintiff, declared the lease inoperative, null, and void, and barred the defendants from claiming any rights under it.

[1] The lease contained the common provisions as to drilling by the lessee or payment of rent in lieu of drilling. It provided that if no well was commenced on or before the 19th day of October, 1918, the lease should terminate, unless on or before that date the lessee should pay a certain rental, payment of which should defer the obligation to drill for 12 months from that date, or until October 19, 1919. The lease likewise provided that similar payments should further defer the drilling for like periods. Plaintiffs in error argue that the complaint was insufficient to constitute a cause of action and therefore conferred no jurisdiction upon the trial court, because it did not allege that the term of the lease had not been extended by payments of this rental money. But the lease did not provide that the two-year term should be extended by payment of the rent. The only possibility of the extension of that period under the lease was by the production of oil or gas. The payment of rent obviated the necessity for drilling within the time stipulated, but went no further. Obviously the right of occupation of the premises for the purpose of drilling was limited by the term of lease, and the payment of rent in lieu of drilling was effective only during the lease term. To this effect is Indiana Natural Gas & Oil Co. v. Granger, 33 Ind. App. 559, 70 N. E. 395. Allegations relative to such rental payments were neither necessary nor proper in the complaint.

In Archer on Oil and Gas, p. 122, the construction above given is stated as follows:

"What is called the 'rental period' must not be confounded with the 'term' of the lease. The term is fixed. The rental period, while definitely stated, is the subject of modification or waiver during the term by the lessor and lessee at their pleasure, and such modification or waiver need not be in writing, while if oil or gas is not found in paying quantities, to extend the term a new lease or writing to that effect is necessary."

This construction of the lease likewise disposes of the argument of plaintiffs in error that the defendant in error ratified the lease and cured any defects in its performance as to drilling by the acceptance of partial payments of the rent, or that she was obligated to restore the status quo by returning amounts received in such partial payments. The payment of rental had nothing to do with the extension of the two-year term stated in the lease.

Plaintiffs in error likewise contend that the complaint was insufficient upon its face because it stated no ground for equitable relief, and the argument is made that it cannot be supported as a bill to remove a cloud on the title because the complaint does not allege title or ownership of the land, possession of it, nor in terms that the claim of plaintiffs in error constituted a cloud on the title or was adverse to her estate. No demurrer was filed nor was any attack made upon the sufficiency of the complaint in the court below. The only theory upon which the question can be raised here is that the complaint was so defective that no jurisdiction was conferred upon the trial court. In passing upon such a matter after trial, we look to the entire record.

[2] Plaintiffs in error, instead of attacking the complaint, invoked the equitable jurisdiction of the court by asking for the reformation of the lease, and by their pleadings and proof supplied the defect in the complaint in their failure to allege title, possession, and the adverse nature of their claim.

They cannot suggest the defects in this court for the first time. In Jamison v. McMillen, 26 N. M. 231, 190 Pac. 726, the court said:

> "If the defendant fails to object to the complaint and litigates the material fact or facts omitted therefrom, he cannot after judgment raise the question as to the insufficiency of the complaint, and on appeal the complaint would be amended to conform to the facts proven on the trial."

If equitable jurisdiction was lacking under the complaint, it was conferred by the amended answer and proof. The court determined the issues of fact against plaintiffs in error and refused to reform the lease. The finding of the issues against plaintiffs in error was conclusive of this case.

The plaintiff in error Humphreys filed no pleadings in the lower court and did not appear on the trial, but since no distinction is drawn between the two plaintiffs in error in the briefs of the parties here we make none.

The judgment of the trial court is therefore affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(No. 2646. Jan. 13, 1922.)

ADAMS et al. v. BLUMENSHINE.

SYLLABUS BY THE COURT

Real estate, acquired by two husbands by deed to them as individuals, but who are at the time engaged in a partnership business in which the real estate is used, is nevertheless community property and subject to the rights of their respective wives therein, in the absence of evidence that the real estate was acquired as a firm asset, and that the same was required to pay off firm debts or to adjust equities between the partners. A contract to convey such land by the

two husbands alone, and in which the two wives did not join, will not be specifically enforced.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Suit for specific performance by George H. Blumenshine against William H. Adams and others. Decree for plaintiff, and defendants appeal. Reversed and remanded, with directions.

Thos. J. Mabry, of Albuquerque, for appellants.

A. B. Stroup, of Albuquerque, for appellee.

OPINION OF THE COURT

PARKER, J. This is a suit for specific performance of a contract for the sale of real estate. The facts are all stipulated, and may be briefly stated as follows:

W. H. Adams and Mrs. W. H. Adams were husband and wife on April 15, 1916. James L. Curd and Annie B. Curd were husband and wife on said April 15, 1916. In the year 1910 Curd and Adams began the operation of a dairy business as copartners under the firm name of Curd & Adams. There was no written partnership agreement, but they divided the profits and shared the losses equally. In 1912 the property involved was conveyed by one Ferguson and wife to the said James L. Curd and W. H. Adams as individuals, $600 of the purchase price of the land being paid; each of the said vendees contributing one-half thereof. They thereupon borrowed $2,000 with which they completed the payment of the purchase price, and this loan was afterwards paid in due course out of the income of the dairy business. From the time of the purchase of this property until the 15th day of April, 1916, the firm of Curd & Adams operated their dairy business

on the premises, and the two Adamses and the two Curds used the premises for their homes, neither family having any other homestead during all that time. On April 15, 1916, Curd and Adams, "doing business as Curd & Adams," leased to one Miller and one Blumenshine, a partnership under the name of Miller & Blumenshine, the premises involved for a period of five years from that date, and covenanted with said Miller and Blumenshine that, upon the payment of $3,000 at any time within the term of the lease, they would execute and deliver a warranty deed for the premises. This lease and contract to sell was not signed by the wives of said Curd and said Adams, and the women protested against the making of the said lease, and especially as to giving the option to buy the property, but no notice of said protest was ever brought home to said lessees. About April 1, 1916, the said Curd and Adams negotiated with said Miller and Blumenshine to sell their partnership dairy business, cows, equipment, and all personal property connected with said business, and also to lease the premises with an option to buy as heretofore mentioned. Curd and Adams remained in possession of all of said personal property and said real estate until April 15, 1916, when the lease was executed and possession delivered to the said Miller and Blumenshine. On said date the firm of Curd and Adams ceased to exist, except for the purpose of collecting the accounts due it. The rent under said lease was thereafter paid and divided between the said Adams and Curd until the time of Curd's death in 1919, since which time Curd's share has been paid to his widow, the said Annie B. Curd. The said sale of the partnership property and the lease and covenant to sell the real estate in question was not made for the purpose of paying partnership debts, but was done simply in the course and at the time of closing out the partnership business.

It is stipulated by counsel that there is but one

question to be considered, and that is whether the real estate in question was partneship property, or whether it was the community property of the two families mentioned. The judgment of the court below was for specific performance of the contract to sell and convey, and the correctness of this judgment will turn upon the question, among other things, as to whether this real estate was partnership property or was community property.

In determining the question involved some general considerations will be first stated.

It may be said generally that a partnership, unaided by statute, cannot hold title to real estate. It is said by Mr. Parsons and others that the reason for this is that a partnership is not a person, and is consequently incapable of taking by deed. Parsons on Partnership (2d Ed.) p. 370.

Partners ordinarily hold real estate as tenants in common under a conveyance to them by name. 20 R. C. L., Partnership, § 56; Rowley, Mod. Law of Partnership, § 283.

The presumption is always against the inclusion in the firm assets of real estate held by the partners as tenants in common, and the presumption is that the ownership is where the muniments of title place it. 20 R. C. L. § 61; Goldthwaite v. Janney, 102 Ala. 431, 15 South. 560, 28 L. R. A. 161, 48 Am. St. Rep. 56, and note.

Real estate, however, may in equity be considered firm property, and will be so considered when such is the intention and agreement of the partners at the time of its acquisition. 20 R. C. L. § 61; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Amer. Rep. 788, and note; Goldthwaite v. Janney, 102 Ala.

431, 15 South. 560, 28 L. R. A. 161, 48 Ann. St. Rep. 56, and note.

There need be no express agreement to that effect, it may be implied, but in every case there must be such an agreement. The intention or agreement of the partners may be evidenced by parol proof, and need not be in writing. 20 R. C. L. § 62; Goldthwaite v. Janney, 102 Ala. 431, 15 South. 560, 28 L. R. A. 161, 48 Am. St. Rep. 56, and note; Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. Rep. 883, and notes; Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889, and note.

Evidence of various kinds of facts is admissable to show such intention or agreement, such as the use to which the property is put, or the manner in which the accounts of the firm, in regard to the purchase price, are kept, and showing whether or not each partner's share of the purchase price is charged to him, or whether the item is carried as a firm item; whether the property was purchased with firm money, whether it was purchased for firm purposes, and perhaps other similar facts. R. C. L. §§ 62-65.

Where real estate, the title whereof is held by the partners as tenants in common, is in fact acquired as, and intended by the partners to be, partnership property, that result is effectuated by means of the doctrine of equitable conversion, whereby the land is treated as personalty for the purpose of paying the firm debts, and adjusting accounts and equities between the partners. The basis of the application of this doctrine is that a trust is implied for the benefit of the partnership. R. C. L. § 74; Adams v. Church, 42 Or. 270, 70 Pac. 1037, 59 L. R. A. 782, 95 Am. St. Rep. 740, and notes.

In England the doctrine of "out and out" equit-

able conversion—that is, that the real estate will be treated as partnership personalty for all purposes, even as against the right of dower and inheritance —is recognized both by decisions and later by statute. R. C. L. § 75.

In America, however, the doctrine of equitable conversion is recognized only so far as is necessary to effectuate the payment of the partnership debts and the adjustment of the equities between the partners, and when this has been done, all real estate, remaining in specie, assumes all of its characteristics as such and is subject to dower or other rights of the wife, and descends to the heirs as in ordinary cases. R. C. L. §§ 76, 77, 79; Adams v. Church, 42 Or. 270, 70 Pac. 1037, 59 L. R. A. 782, 95 Am. St. Rep. 740; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. Rep. 637, and note; Sieg v. Greene (C. C. A.) 225 Fed. 955, Ann. Cas. 1917C, 1006.

This doctrine does not exclude the right of the partners to agree upon an "out and out" conversion of the real estate into personalty, but in the absence of such agreement the doctrine prevails without exception.

This doctrine is necessarily sound. A partnership can really own no property. The property of the firm is owned by the members thereof. It is charged in their hands with an implied trust for the payment of the partnership debts and the adjustment of the equities between the partners. When these things have been accomplished, the partners own the property discharged of the trust, in the absence of an agreement to the contrary.

Applying some of these considerations to the facts in this case, it becomes apparent that the appellee, plaintiff below, cannot recover. The real

estate in question was purchased by the two partners in their individual capacity, each paying at the time $300 out of his individual funds. There is no evidence in the record that the partners at this time agreed or understood that the purchase was made for the partnership, or otherwise than as tennants in common. The partners gave a mortgage on the property in their individual capacities, and the mortgage was afterwards paid out of the profits of the dairy business in which the partners were engaged. There is no evidence in the record that these moneys were treated as firm moneys, or that they were not paid out as the individual moneys of the parties, share and share alike. It appears that the premises were used in carrying on the operations of the dairy business by the partners, but it likewise appears that each partner, with his wife, resided upon the premises, and used the same as his home, and that neither had any other home during the existence of the partnership. The use of the premises was as much for a homestead for these parties as for the conducting of the diary business, and such use for said last-mentioned purpose cannot, under the circumstances, be said to be controlling. The mere use of the property for firm business is only a slight circumstance tending to show that the premises were intended to be partnership property. R. C. L. § 62. The partnership was free from debt. There were no equities requiring adjustment between the partners when they determined to sell out their dairy business to the appellee and his then partner. They sold out the dairy business, and at the same time executed the lease and the covenant to sell and convey. The real estate had served all of its purposes as a trust estate for the payment of debts and the adjustment of equities, if any there should be, and it was then released from said trust, and assumed all of its characteristics as real estate. So, even if it did appear from the evidence, which as we have shown it

does not, that the partners intended and agreed, at the time they bought the land, that it should be partnership property, when the business of the partnership was closed up, it was released from the trust, and was reconverted into real estate to take its course as such and to be subjected to community property rights, descent, and distribution as in other cases. The only direct words in the record hinting at the fact that the real estate was considered by the partners as partnership property is in the recital in the lease and covenant that it was executed by "Curd and Adams, 'doing business as Curd & Adams.'" This recital cannot be deemed as sufficient evidence to show that these two partners had, at the time they purchased this property, agreed or understood that it was to be partnership property, or that they intended at the time of the making of the lease and covenant to then agree that it was to be considered partnership property, and to be converted into personalty for distribution as such, if, indeed, this could be done without the consent of the wives. The recital is to be held more properly to be merely a description of persons.

It follows that this real estate was not partnership property when acquired, and never became such, and, even if it had become such it was reconverted into real estate by the widing up of the affairs of the partnership, and that the right of the respective wives of the partners attached to the same as community property.

If the premises were community property, then it became necessary for both husband and wife to join in any deed conveying the same under the provisions of chapter 84, Laws 1915, and any transfer or conveyance of the same attempted to be made by the husband alone was void and of no effect. If a transfer or conveyance of the property by these husbands without their wives joining would be void

and of no effect, then a contract to make such a transfer of conveyance would likewise be void and of no effect, at least so far as specific performance of the contract is concerned.

It follows from the foregoing that there is error in the decree, and that the cause should be reversed and remanded, with directions to set aside the decree in favor of the appellants and against the appellee; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(Jan. 14, 1922. No. 2707.)

STATE ex rel, READ, State Bank Examiner, v. RYAN, Judge of the District Court of Sixth Judicial Dist.

SYLLABUS BY THE COURT

Chapter 134, Laws 1921, which provides that the Attorney General, upon a report and opinion of the bank examiner, shall institute proper proceedings "for the purpose of having the bank examiner appointed as receiver" of an insolvent bank, does not make it compulsory on the district judge to whom the application is made to appoint said bank examiner as said receiver, but the judge has discretion in the matter and may appoint another as receiver.

Parker, J., dissenting.

Petition by the Attorney General, on the relation of James B. Read, as State Bank Examiner, for a writ of mandamus against Raymond R. Ryan, Judge of the District Court of the Sixth Judicial District. Writ denied.

Harry S. Bowman, Atty. Gen., and A. M. Edwards, Asst. Atty. Gen., for petitioner.

F. W. Vellacott, of Silver City, and A. B. Renehan, of Santa Fe, for respondent.

OPINION OF THE COURT

RAYNOLDS, C. J. This is an original proceeding in mandamus brought by the Attorney General, on the relation of James B. Read, state bank examiner of the state of New Mexico, against Raymond R. Ryan, judge of the district court of the Sixth judicial district, to compel said judge to appoint the bank examiner receiver of the State Bank of Lordsburg, N. M. Upon the filing of the petition of relator in this court an alternative writ of mandamus was issued commanding the respondent to appoint the bank examiner receiver, or show cause why he had not done so. To this writ respondent made a return challenging the constitutionality of the act as an encroachment on the constitutional power of the judiciary.

The admitted facts are as follows: The petitioner, as state bank examiner, proceeding under chapter 134, Laws 1921, after an examination of the affairs and condition of the State Bank of Lordsburg, became satisfied that the bank could not resume business nor liquidate its indebtedness to the satisfaction of all its creditors, and made a report of such examination and his opinion thereon to the Attorney General. The Attorney General then instituted proceedings in the district court of the Sixth judicial district before the respondent, the judge of said court, for the purpose of having said petitioner appointed receiver to take charge of said bank and wind up its affairs. The respondent refused to appoint the petitioner as receiver, but appointed another in his stead.

The sole question in this case is whether or not under chapter 134, Laws 1921, the district judge to whom application for the appointment of a receiver

for an insolvent bank is made is bound to appoint the state bank examiner receiver and has no discretion to appoint another. The statute (chapter 134, Laws 1921) is as follows:

"Upon taking charge of any bank, the state bank examiner shall, as soon as possible, ascertain by a thorough examination of its affairs its actual condition, and if he shall become satisfied that such bank cannot resume business or liquidate its indebtedness to the satisfaction of all of its creditors, he shall make a full and complete report of such examination and his opinion to the Attorney General who shall institute, forthwith, proper proceedings in the proper court for the purpose of having the state bank examiner appointed as receiver to take charge of such bank and wind up its affairs and the business thereof for the benefit of its depositors, creditors and stockholders. Such proceedings shall be governed by the provisions of the general incorporation laws for the winding up of insolvent corporations. And the bank examiner may appoint, with the consent of the district court, special assistant bank examiners and ex officio receivers to assist in the winding up of the affairs of such insolvent banks and such special assistant bank examiners and ex officio receivers shall qualify by subscribing and filing with the bank examiner an oath in form and substance the same as that required by said bank examiner and giving a bond in such form and amount as may be required by the district court, and for their services as such special assistant bank examiners and ex officio receivers they shall receive such compensation as may be fixed by the bank examiner subject to approval by the court; such compensation to be allowed by the court as costs in the case of the appointment of a receiver."

By the terms of this act the Attorney General is to institute proper proceedings for the purpose of having the state bank examiner appointed receiver, but there is nothing in this act, either by its terms or by inference, that makes it the duty of the court to appoint such bank examiner receiver. The act, on the other hand, provides that the proceedings shall be governed by the provisions of the general incorporation laws for the winding up of insolvent corporations (Codification 1915, §§ 954-976, inclusive), and thereby gives to the district court complete control and supervision of the receiver. The bank examiner is not by statute made receiver of insolvent banks, as he is in some jurisdictions,

nor is he a receiver for an insolvent bank appointed by the executive department. Under this statute he applies to the court to be appointed receiver, and is not in any better position by virtue of his office as state bank examiner than any other applicant. We hold that, had the Legislature intended the state bank examiner should be receiver of insolvent banks, it would have so provided, and a different question as to the constitutionality of such act might arise. But the statute does not so provide. It requires the Attorney General to institute proper proceedings for the purpose of having the bank examiner appointed as receiver. The act does not attempt to control the discretion of the court in appointing a receiver, and under it the court may appoint or refuse to appoint the applicant as receiver.

Whether the appointment of a receiver is a judicial act and is not within the constitutional power of the executive or legislative departments we do not decide, but hold in this case that the act which we are considering does not attempt to control the judicial discretion, nor encroach upon the judicial department of the state, but leaves the court free to act upon application of the bank examiner.

For reasons above stated, the writ is denied; and it is so ordered.

DAVIS, J., concurs.

DISSENTING OPINION

PARKER, J. I dissent. The statute is mandatory as to the appointment of the state bank examiner as receiver of insolvent banks in all cases, and such requirement is not an encroachment upon the judicial power.

(Jan. 14, 1922. No 2656.)

DAY v. TRIGG.

SYLLABUS BY THE COURT

A judgment rendered after trial, with full opportunity for the parties to be heard, and with no extrinsic fraud, may not be attacked by a proceeding commenced to vacate it after it has become final, solely on the ground that it was obtained by false testimony.

Appeal from District Court, De Baca County; Bratton, Judge.

Application by W. S. Day against H. Trigg in the district court for a writ of audita querela to vacate a judgment in favor of the latter and against the former. A demurrer to the petition was sustained, the proceeding dismissed, and petitioner appeals. Affirmed.

Ed S. Gibbany, of Roswell, for appellant.

T. E. Mears, of Portales, for appellee.

OPINION OF THE COURT

DAVIS, J. In June, 1919, appellee, H. Trigg, recovered judgment for $1,000 and costs against appellant, W. S. Day, in the district court of De Baca county. The recovery was based upon a claim for cottonseed cake furnished for appellant's cattle and for services in feeding it. On June 26, 1921, two years after the entry of judgment, appellant applied to the district court for a writ of audita querela to vacate it. A demurrer to his petition was sustained and the proceeding dismissed, and he thereupon took this appeal.

As grounds for his petition for the writ appellant alleged that the judgment was obtained by false testimony on the part of appellee and Fred Riley,

his employee. The specific charges are set out in his complaint as follows:

"That upon the trial of said action the said H. Trigg testified that all of the cotton seed cake which he fed to the cattle of the plaintiff was shipped from the town of Ft. Sumner, in said county and state, by him, the said H. Trigg, to the town of Buchanan, in said county and state, where the adjoining ranches of said parties to said judgement are situated, and that he had lost his bills of lading for such shipments; that upon said trial the said H. Trigg only produced receipts or bills for five or six tons of cotton seed cake which he had purchased at Ft. Sumner and shipped to Buchanan, from the mercantile house of Earickson & Co. at Ft. Sumner; that he testified that he had shipped many other shipments of tons of cake, which, together with the services of his hand, Fred Riley, would amount to more than $2,000, all of which was false and untrue, except as to the said cotton seed cake purchased and shipped from the mercantile establishment of Earickson & Co.; that complainant had no knowledge of the truth or falsity of the shipments claimed to be made by the said H. Trigg, and no way on the trial to prove the said statements were false; that the said H. Trigg falsely, willfully, and with intent to defraud and deceive this said court and to oppress complainant so advised and suborned the said Fred Riley, who had no definite means of knowing the amount of cake which was shipped to Buchanan by the said Trigg, and by the said Fred Riley fed to Trigg's and the complainant's cattle, so that the said Fred Riley believed him and testified in corroboration of the amount of said shipments as fed by him, believing such testimony was true."

Summarizing these allegations, the charge is that appellee swore falsely as to the amount of cotton seed cake he furnished appellant and induced Riley to swear falsely as to the amount he fed, although Riley believed his testimony true when given—an apparent inconsistency, since Riley necessarily testified from personal knowledge as to his own actions.

The demurrer was upon the ground that the complaint did not state a cause of action and, specifically, that it showed upon its face that the false swearing was upon an issue raised on the trial, was an intrinsic matter involved on the trial, and that the matters complained of were adjudicated in the original cause and determined against appellant. The

facts relied upon as the basis for this demurrer do affirmatively appear on the face of the complaint, and it may be further stated that on the trial of the original action both appellant and appellee were present and introduced evidence in support of their contentions.

In Turknett v. Western College, 19 N. M. 572, 145 Pac. 138, this court declined to hold that the writ of audita querela was not available in this jurisdiction. But, assuming that it is, the class of cases falling within its scope has not been extended either by statute or decision. The writ usually issued only on the ground of some matter of defense or discharge arising subsequent to the rendition of the judgment complained of.

The parties, however, have treated the case as though it were a bill of review or other proper method for securing relief against a judgement obtained by fraud, and we will therefore consider it in the same way.

The question for decision upon the merits is as to whether a judgment which has become final may be vacated through an independent proceeding in the nature of a bill of review, solely upon the ground that it was obtained by false testimony.

There is no allegation that through any act of appellee appellant was defrauded or deceived or that by concealment or otherwise he was prevented from making his defense, except as the perjury itself may constitute deceit. While it is alleged that the judgment was obtained as the result of the false testimony, there is no statement that it was the only evidence upon the disputed point. It is alleged that appellant had no knowledge "of the truth or falsity" of this testimony at the time of trial, but there is no allegation that by the exercise of rea-

sonable diligence he might not have obtained it. And in this connection it may be observed that from the facts as stated, though not pleaded in detail, it appears that the cake was fed to appellant's own cattle and was shipped by railroad from Ft. Sumner to Buchanan. The case was tried at Ft. Sumner, and the railroad records were presumably available there to show the actual shipments. The amount of cake actually shipped and fed was the vital issue contested in the case, and it would seem that appellant might well have prepared himself upon this point in advance of trial or during its course. In the absence of any showing that he was prevented from doing so by some act or deceit of appellee, or any allegation of facts showing diligence on his part, we are not able to say that the decision of the trial court did not result from his own negligence in preparation. There was no fiduciary relation between the parties, and no obligation upon appellee to disclose the facts upon which his action was based, nor could appellant rely upon him to furnish facts for his defense, except to the extent that he could assume that every witness, even an adversary party, will testify truly when he takes the stand. Nor is this court advised as to when appellant discovered the falsity of the testimony—information which likewise might be of value in considering his diligence. We have before us, therefore, the narrow question as to whether a judgment may be set aside for perjury committed on the trial, upon a proceeding instituted some two years later, and the situation is not complicated by various features which have furnished strong equitable considerations for vacating a judgment in other cases decided by other courts.

In determining this case we are met with two conflicting principles, both of which can not be given full effect. Any intentional false swearing shocks the conscience. The primary purpose of every legal

proceeding is to ascertain the rights of the parties and to do justice between them. If a court's decision is induced by perjured testimony, there is a miscarriage of justice, judicial machinery has to that extent failed to accomplish the purpose for which it was created, and the first impulse is to seek a way to relieve the defeated party from the loss sustained through the wrongdoing of his opponent.

On the other hand, there is the ancient and fundamental principle that there must be some end to litigation. An issue once fully determined, with complete opportunity for each party to present all available proofs in support of his contention, must be left at rest, or litigation will become interminable. In every case of conflicting testimony the charge of willful falsity may arise, and the tendency of each party, convinced of the justice of his own cause, is to charge intentional falsity to the witness testifying against him. A system which would permit the repetition of the trial of issues once fully decided would be intolerable.

Appellant, as we have seen, had full opportunity to present his proofs to the court. No act or failure to act on the part of appellee prevented him from doing so. He knew that the amount of cake furnished by appellee was the subject of the litigation. He might well have anticipated that the testimony given on the trial by appellee and his witnesses would be in accordance with the claim set up in the complaint. Since he was contesting this, he evidently believed the claim was unfounded. To what extent he prepared to meet the situation which he must have known would arise on the trial the pleadings in this case do not advise us, but at least he makes no claim of diligence, or that the facts apparently now available to show the falsity of the testimony could not have been obtained then by

proper investigation and effort. Under these circumstances, and at the risk of leaving in force a judgment wrongfully obtained, we must hold that he is not entitled to a second opportunity to disprove the facts upon which the judgment was rendered, and that the principle that one fair trial terminates the issues decided in it must control.

Appellant argues that specific fraud arose from appellee's testimony that he had lost the bills of lading covering certain shipments which he claimed to have made from Ft. Sumner, thus concealing the truth and deceiving appellant in this regard. But the underlying question was as to the amount shipped and fed. False swearing to that amount was directly material. A further false statement that he had once had bills of lading for such shipments and had lost them neither injured nor deceived appellant more than did the false testimony to the main fact.

The case of U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, is the leading federal authority upon the question. It arose under a bill of review, the purpose of which was to vacate a judgment which, it was asserted, was obtained by the use of a false document and by perjured depositions presented in its support. The court, after saying that there are no maxims of law more firmly established or of more value in the administration of justice than those designed to prevent repeated litigation between the same parties in regard to the same subject, stated that there is an exception to the general rule in cases where, by reason of some fraud practiced by the successful party directly upon his opponent, he was prevented from presenting all his case to the court, so that in fact there was no adversary trial or decision of the issues.

In laying down the rule which we believe ap-

plicable here the court said:

"On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. Mr. Wells, in his very useful work on Res Adjudicata, says, section 499: 'Fraud vitiates everything, and a judgment, equally with a contract; that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in general, the court will not go again into the merits of an action for the purpose of detecting and annulling the fraud. * * * Likewise, there are few exceptions to the rule that equity will not go behind the judgment to interpose in the cause itself, but only when there was some hindrance besides the negligence of the defendant, in presenting the defense in the legal action. * * *'"

After reviewing the authorities the court summarized the principle involved and applied it to the facts of that case in the following language:

"We think these decisions establish the doctrine on which we decide the present case; namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered. * * *

"The mischief of retrying every case in which the judgment or decree rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases.

"The case before us comes within this principle. The genuineness and validity of the concession from Micheltorena produced by complainant was the single question pending before the board of commissioners and the district court for 4 years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, 20 years after the decision of these tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on 20 years hence to retry the same matter on another allegation of fraudulent combination to

this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document."

The case of U. S. v. Throckmorton was followed by the Supreme Court of New Mexico in El Capitan Land & Cattle Co. v. Lees, 13 N. M. 407, 86 Pac. 924. This was an action brought upon a judgment recovered in Kansas; the ground for attack being false testimony on the trial of the case. The court said that the case of U. S. v. Throckmorton was directly in point and conclusive, and further said:

"It will be observed, that it is not every kind of fraud which constitutes an equitable defense to a suit upon such a judgment, but only such frauds as are 'extrinsic or collateral to the matter tried by the first court.'

"Fraud, in relation to the matter actually tried or so in issue that it might have been tried, is not available as a defense to such a judgment. As to such fraud, the case above referred to, holds, that 'the party is estopped to set up such fraud, because the judgment is the highest evidence and cannot be contradicted.' * * *

"Bearing in mind the law as declared by the authorities above cited, it is clear that the fraud alleged in the answer is not such fraud as would constitute an available defense to the judgment sued on. If Hockett's testimony was false, even to the extent of perjury, it is evident that it was concerning a matter either actually tried or which might have been tried in the action of the Kansas court. In fact it appears, that the judgment was rendered upon the testimony given by Hockett as to the correctness of the account—which is alleged to have been false—and hence the fraud allleged related to an issue actually tried.

"Counsel for plaintiff in error, contends, that there was fraudulent concealment and collusion as to the settlement which distinguishes this case from those above referred to, but we see no difference in the principle; for if there were such, it was in relation to matters tried in that case or which were within the power of the company to have litigated. The alleged fact that owing to the death of the treasurer of the company who made the settlement, the company was not sufficiently informed to enable it to make this defense until long after judgment was rendered in the Kansas court, does not serve to render it available as a defense or counterclaim in an attack upon a foreign judgment, although it might be available in a direct attack, in a proper case."

In Van Patten v. Boyd, 20 N. M. 250, 150 Pac.

917, there was an attempt to review the decision of the officers of the United States Land Ofifce, on the ground that it was obtained by false testimony. The court said:

"The theory upon which the second defense, and by way of counterclaim proceeds, is that the appellee testified falsely at the hearing upon his application in the United States Land Office at Las Cruces, N. M., relative to certain material facts, which are set out in the counterclaim, and that but for such false testimony, etc., necessarily affecting the judgment of the officers before whom it was given and by whom it was considered, appellant would have received a patent to the land. Appellant does not allege that by reason of any fraud practiced by appellee he was prevented from fully presenting his case to the proper officer, but his claim is based solely upon the ground that perjured testimony was given by appellee. The courts generally hold that the decision of the proper officers of the Land Department on questions of fact in a contest is conclusive on the courts and, in the absence of fraud in preventing a party from presenting his case, or fraud practiced by the officers of the Department, the decision is not subject to review by the courts by a charge of perjury against witnesses. This must necessarily be the correct rule, otherwise the losing party in such a contest would, in most cases, be able to secure a review in the courts, because he could secure the same by an allegation that the successful party had been guilty of perjury. In all these cases there is usually a conflict in the testimony, and the unsuccessful party, honestly no doubt, entertains the belief that the successful party has employed perjured testimony. This question, however, is settled by decisions of the Supreme Court of the United States, and requires no further discussion, save a reference to the decided cases."

The court then cites the Throckmorton Case and the other federal decisions.

In view of these decisions it is idle to review at length the authorities from other states. It is sufficient to say that, with very few exceptions, they support the rule adopted here. Many of them may be found in Boring v. Ott, 138 Wis. 260, 119 N. W. 865, 19 L. R. A. (N. S.) 1080, and in the notes in 10 L. R. A. (N. S.) 216, and L. R. A. 1917B, 429.

In obedience to the controlling legal principles,

and following our previous decisions, we hold that the district court was correct in deciding that the perjury committed on the trial of the original case was not of itself alone, and under the circumstances here alleged, sufficient to require the vacating of the judgment.

The judgment of the trial court is therefore affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(July 20, 1921. No. 2514.)

NEW MEXICO REALTY CO. v. SECURITY INVESTMENT & DEVELOPMENT CO.

(On Motion for Rehearing Oct. 31, 1921. Second Motion for Rehearing Denied, Feb. 27, 1922.)

SYLLABUS BY THE COURT

(1) As a general rule, in a suit to quiet title, the plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of that of his adversary. P. 667

(2) Where reliance is placed solely upon paper title, the plaintiff must trace his title to the government or a grantor in possession. P. 668

(3) Where both parties trace title to a common source, it is sufficient that the plaintiff connects his title to the common source. P. 668

On Motion for Rehearing.

(4) A cause of action prosecuted to judgment merges in the judgment and thereafter the judgment, for most purposes, is to be regarded as a new debt; held, that the taxes of 1904 on the land in controversy were extinguished by and merged into the judgment of 1906 and consequently Chapter 65, Laws 1907, remitting penalties and interest where the taxes were paid within a designated time, was without application. P. 669

(5) Under chapter 65, Laws 1907, a tender of the delinquent tax amount, including the legally assessed cost of publishing the delinquent tax list, must be made in order to entitle the party to a remission of the penalty imposed for

the nonpayment of taxes, and a tender of an amount less than that required by law is unavailing. P. 672

Appeal from District Court, Santa Fé County; Holloman, Judge.

Suit by the New Mexico Realty Company against James W. Norment and another. Judgment for the plaintiff, and the defendant Security Investment & Development Company appeals. Reversed and remanded upon rehearing, with instructions to set aside the judgment and thereafter to proceed as the parties shall elect.

J. H. Crist and J. W. Norment, both of Santa Fé, for appellant.

Frank W. Clancy, of Santa Fé, for appellee.

OPINION OF THE COURT

PARKER, J. This is a suit to quiet title to a number of lots and a tract of land in Santa Fé county, brought by the New Mexico Realty Company against James W. Norment and the Security Investment & Development Company.

The complaint was in the conventional form. The defendants answered denying the title of plantiff in said property and alleging that the said property was assessed for taxes for the year 1904; that a levy thereon was made; that the taxes became delinquent and a judgment was rendered for the delinquency; that on April 7, 1906, the property was duly sold at tax sale to the county of Santa Fé, duplicate certificate being delivered to James W. Norment on December 5, 1910, and duly recorded; that a tax deed for said property was delivered by said county to Norment on February 11, 1911; that subsequently a suit was brought by Norment against the county of Santa Fé, wherein it was decreed that the title acquired by Norment was a new, independent, and superior and paramount title and extinguished all

other title and liens; that the said decree was affirmed in the Supreme Court of the state, and that on November 25, 1914, Norment conveyed all his right, title, and interest in said premises to the Security Investment & Development Company, Norment disclaiming any right or title in said premises thereafter.

The trial court found that the said property was assessed to Phillip E. Moisson, for the year 1904; that said Moisson then owned said property, and that the tax proceedings mentioned in the answer occurred as alleged therein. It also found that Moisson, through his agent, L. Bradford Prince, on June 28, 1907, tendered to the county treasurer the "exact amount of taxes on said property levied in 1904, that is to say, the sum of $49.59, and said officer refused to accept the same in payment of said taxes." The court concluded as a matter of law that the tender aforesaid was equivalent to actual payment, and consequently the acts of the county in selling the land for alleged delinquent taxes for the year 1904 was illegal and void. From a judgment quieting the title of said property in the plaintiff, the Security Investment & Development Company has perfected this appeal.

The property involved in this suit is fractional lots 31, 32, 33, 34, 35, and 89 and full lots 30, 61, 62, 63, 85, 86, 90, 91, 92, 93, 96, and 97, "map of valuable building lots adjoining the railroad depot, Santa Fé, N. M. 1880," and a tract of land called the "hillside property" in the northern part of the city of Santa Fé. The paper title introduced in evidence by the appellee discloses the following: Warranty deed, William Bradley to Phillip E. Moisson, dated June 1, 1898, for all the lots above described; quitclaim deed of said Moisson to appellee, dated April 10, 1905, for the above-described lots; deed from Manuel Valdez and wife to Phillip E. Moisson, dated

1890, for tract 1 of the Hillside property and deed for tract 2 of said Hillside property from and to same parties, dated 1891. This entire tract was conveyed to appellee by Moisson by deed dated April 10, 1905. From recitations made in some of the foregoing deeds it would appear that on September 25, 1848, Ramon Martinez and wife deeded tract 1 of the Hillside property to Antonio Valdez, and that the grantee thereof was dead at the time Manuel Valdez and wife conveyed the Hillside property to Phillip E. Moisson in 1890 and 1891; that the city of Santa Fé quitclaimed its title in said property by its deed to Moisson, dated 1901, and that said city quitclaimed its title to lots 30 to 35, inclusive, to Moisson May 30, 1901.

It will be observed that the source of title of Ramon Martinez and wife, to the tract numbered 1 of the Hillside property, is not disclosed, nor is the source of title of Manuel Valdez to both tracts of said Hillside property anywhere disclosed. It also appears that the origin of title of William Bradley, as well as the city of Santa Fé, is nowhere disclosed. In other words, the paper title introduced in evidence by appellee to prove its title to the premises fails to show that appellee's mediate or immediate grantors were ever vested with the legal title to this property or to any of it, and the question arises as to whether under such circumstances the appellee, plaintiff below, made out a case entitling it to a decree quieting its title to said premises.

[1] It is settled beyond further controversy in this jurisdiction that as a general rule in a suit to quiet title the plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of that of his adversary. Union Land & Grazing Co. v. Arce, 21 N. M. 115, 124, 152 Pac. 1143.

There is no evidence in the record that the plain-

tiff, appellee, or any of its privies, were in possession of the property in dispute. The doctrine laid down in Holthoff v. Freudenthal, 22 N. M. 377, 162 Pac. 173, that possession under a deed from a grantor in possession is sufficient evidence of title to maintain the action, is therefore inapplicable here.

[2] It is a general rule that where reliance is placed solely upon paper title, the plaintiff must trace his title to the government or a grantor in possession. 32 Cyc. 1331; 10 Enc. of L. 484; People's Bank v. West, 67 Miss. 729, 7 South. 513, 8 L. R. A. 727.

In Bauer v. Glos, 236 Ill. 450, 86 N. E. 116, the court said:

> "The only evidence of appellee's ownership was a master's deed to Henry Bauer * * * and subsequent deeds from Henry Bauer * * * to Albert Bauer, and from Albert Bauer to appellee. The premises were unoccupied, and there is no evidence of title or possession in appellee or her grantors, or any of the parties to the decree by virtue of which the master's deed was made. A deed for land without proof of possession or title in the grantor is not proof of title in the grantee.'

In Madler v. Kersten, 170 Wis. 424, 175 N. W. 779, the court said that in actions to remove a cloud on title to land, plaintiff not tracing title to the government, proves no title by showing a deed from one not shown to have been in possession of the property. To the same effect is Rockey v. Vieux, 179 Cal. 681, 178 Pac. 712. Numerous cases support this doctrine, but the few cited here will suffice.

[3] A different rule prevails, however, where both parties claim title under a common source. In such cases the rule is that it need not be alleged that the grantor had title, and neither party will be permitted to deny it; it being sufficient if plain-

tiff connects his title with that of the common grantor. 17 Enc. P. & P. 330; Rockey v. Vieux, supra; 32 Cyc. 1331; 5 R. C. L. "Cloud on Title," § 48.

In Eickoff v. Scott, 137 Ark. 170, 208 S. W. 421, the court said:

"Appellees are not in a position to attack appellants' tax title because they trace their title to the same source, and an attack upon appellant's title is in effect an attack on the source of their own title. It is true, in an adversary suit, that the plaintiff must recover on the strength of his own title, and not the weakness of the defendant's title. [Authorities.] This rule is applicable where the parties claim title from independent sources, and has no application where the parties trace their respective titles to a common source. Where the parties trace their title to a common source, the one must prevail who has the superior equity."

See, also, Charles v. White, 214 Mo. 187, 112 S. W. 545, 127 Am. St. Rep. 674, 21 L. R. A. (N. S.) 481; Stephenson v. Austin, 217 Mo. 355, 116 S. W. 1090; Mo. St. Life Ins. Co. v. Russ (Mo. Sup.) 214 S. W. 860; City of Ft. Bragg v. Brandon (Cal. App.) 182 Pac. 454; and Buchannan v. St. L. & M. R. Co, 253 Fed. 698, 703, 165 C. C. A. 292.

As the parties hereto traced their title to a common source, viz., Moisson, the plaintiff below was not obliged to prove title in any predecessor of Moisson. The court found as a fact that Moisson was the owner of the property in 1904, and appellant made no objection thereto. Nor at the close of plaintiff's case in chief did appellant move for a nonsuit upon the ground that the plaintiff was required to prove title beyond the common source.

[4] The appellee proved that in the latter part of June, 1907, Moisson tendered to the county treasurer $49.59 as full payment of taxes levied on the property in 1904; but the tender was refused. From the tax rolls it appears that the land was sold to the

county of Santa Fé on April 7, 1906, for the delinquent taxes of 1904, and that the duplicate certificate of sale was assigned to Norment on December 5, 1910. The judgment against the land for the delinquent taxes of 1904 disclosed that the tax was $49.59, with penalty of $2.48 and advertisement costs of $2.75, and the appellant contends that the tender was bad because not for the full amount of the taxes, penalties, and costs. The solution of the proposition depends upon the construction of chapter 65, Laws 1907. Section 1 of the act provided:

"That all accrued penalties and interest upon taxes now or heretofore in this year delinquent, shall be remitted upon all such taxes which have been or shall be paid on or before the first day of July, A. D. 1907. Provided, however, that in all cases where taxes are now the subject of litigation the time for such payment as aforesaid is extended only to the first day of July, 1907, and if not paid on or before such first day of July, no abatement of interest or penalties shall thereafter be made."

To recapitulate: The taxes were assessed in 1904; became delinquent in 1905; judgment rendered for delinquency January 26, 1906; sold to the county at tax sale on April 7, 1906; tender of "taxes" made in June 1907 and refused, and duplicate certificate of sale assigned to Norment in 1910.

The tax was put in judgment, as heretofore mentioned, and whether the trial court was correct in applying the statute of 1907 with respect to the tender of taxes made by the appellee depends upon whether the judgment merged the "tax" or not. If it did, the statute was without application, because it spoke only to "taxes" as such, and not to judgments which may have been rendered on account of delinquent taxes.

We have found no case in point on this proposition, but the general law of merger applies. In 1 Freeman on Judg. (4th Ed.) it is said:

"The entry of a judgment or decree establishes in the most

conclusive manner and reduces to the most authentic form that which had hitherto been unsettled, and which had, in all probability, depended for its settlement upon destructible and uncertain evidence. The cause of action thus established and permanently attested is said to merge into the judgment establishing it, upon the same principle that a simple contract merges into a specialty. * * * The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. * * * It 'is drowned in the judgment' and must henceforth be regarded as functus officio." Section 215.

"The weight of authority in the United States shows that whatever may be a cause of action will, if recovered upon, merge into the judgment or decree. * * * It may even be merged by a statutory judgment."

"A person often has the privilege of pursuing either of several forms of action to obtain legal redress for a single wrong. Whenever he resorts to any action in which it is competent for the court to award him full compensation for the wrong of which he complains, and prosecutes such action to final judgment, the wrong merges in the judgment and thereafter there can be no further recovery therefor. * * *" Section 216.

See, also, 15 R. C. L. "Judgments," § 236 et seq.; 23. Cyc. 1108 et seq. In the last-cited work it is said that all the peculiar qualities of the claim are merged in the judgment.

For most purposes the judgment which merges the claim is to be regarded as a new debt. 1 Freeman on Judgments (4th Ed.) § 217; R. C. L. supra § 247; 20 A. & E. Enc. Law, p. 599 et seq.

After the rendition of the judgment against the land in controversy, there were no longer any "taxes" for 1904 due to the state or county chargeable against the land; the judgment superseding the tax, and the amount thereof being ordered realized by a judicial sale of the premises. The act of 1907 was not sufficiently broad to cover the situation existing in the case at bar, and the trial court erred in applying the statute.

For the reasons stated the judgment of the trial

court will be reversed, and the cause remanded, with directions to set aside the judgment and to proceed thereafter as the parties shall elect, and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

On Motion for Rehearing.

PARKER, J. By motion for rehearing, learned counsel for appellee suggests that the court was in error in holding that the taxes for 1904 were merged by judgment and that chapter 65, Laws 1907, therefore did not apply.

[5] Counsel states that in contemplation of law all taxes prior to 1906 had been merged in judgments prior to the passage of chapter 65, Laws 1907, so that if the construction placed by the court upon that chapter be correct there could be no room for the operation of the statute, except possibly for the first half of the taxes for 1906. Our attention is called also to section 2 of the act which provided substiantially that "all delinquent taxes" for the years 1901 to 1905, inclusive, should be distributed in a certain manner. Counsel contends that a clear legislative intent is disclosed to permit of a payment of taxes, without penalty and interest, whether the amount of such taxes be included in a judgment or not, and on further consideration of the matter we are satisfied that counsel is correct in the contention made.

In the former opinion we did not consider the sufficiency of the tender because it was rendered immaterial by the decision respecting the applicability of chapter 65, Laws 1907, to taxes which had been placed in judgment.

Counsel for appellant argued that the tender of

June 27, 1907, was insufficient because it did not include any sum imposed as costs. The tender was for $49.59, the exact amount of taxes levied on the property for 1904. The rolls for that year showed the imposition of a penalty of $2.48 on account of the failure to pay the taxes when due, and section 10, c. 22, Laws 1899, the law in force at the time, required the taxing authorities to impose that penalty. That sum was, however, remitted by chapter 65, Laws 1907, when its provisions were invoked. The additional sum of $2.75, described as costs of advertising, was charged on the rolls against said property for said year. The appellant contends that because the tender did not include that sum it was bad.

The statute, chapter 65, Laws 1907, provided for the remission of all "accrued penalties and interest," and the question now is whether it was necessary to pay or tender the amount charged as advertising costs in order to be relieved under the provisions of the act.

Under the law of 1899, if taxes were not paid within 90 days after delinquency, it became the duty of the collector to publish a delinquent tax list of owners of property upon which the taxes amounted to not less than $25; the list to state the "amount of taxes, penalties and costs due." The collector was required to append to the list and publish a notice that he would in a time stated apply for judgment against the lands and personal property described in the list, "with costs and penalties" and for an order of sale, and sell said property against which judgment may be rendered for the taxes, penalties, and costs due. Upon the completion of the publication and notice, the district attorney was required to file an omnibus suit against the property described in the publication, and where judgment was rendered it was to include the amount stated

in the publication, "together with penalties, interests and costs," and in entering up such judgments the clerk was required to add to the judgment amount a sum equal to 5 per cent. of the amount due, "which five per centum shall be the costs of such proceeding" to be paid over to the court fund of the county. Sections 15, 17, 18, and 20, c. 22, Laws 1899.

It will be observed that the law required the imposition of costs of publication of the delinquent tax list and also the cost of the omnibus suit brought to enforce payment of the tax. The statute fixes the amount of the costs of suit, but does not fix the publication costs.

It therefore appears that the cost of publication of the delinquent tax list became a charge against the property in suit here, unless the statute authorized its remission upon payment of the taxes proper the tender was insufficient.

The word "penalty," as used in the staute, clearly speaks to the arbitrary amount to be added to the tax proper imposed by section 10, c. 22, Laws 1899, as a punishment for failure to pay the tax within the time specified by the statute. This amount is added to the tax and becomes a constituent part of it. Our conclusion with respect to these matters requires no consideration as to the usual meaning attributed to the word penalty.

The word "interest" in the statute was evidently used inadvertently. Prior to 1899, 25 per cent. per annum was added as interest to delinquent taxes. Section 4066, C. L. 1897. So far as we have been able to ascertain, from 1899 to 1913 taxes did not draw interest, although we find the word "interest" appearing in the act of 1899 at several places.

It is elemental that "a tender to be sufficient in

law must be in amount at least equal to the amount due." 26 R. C. L. "Tender," § 20.

Under chapter 65, Laws 1907, a tender of the delinquent tax amount, including the legally assessed cost of publishing the delinquent tax list, must be made in order to entitle the party to a remission of the penalty imposed for the nonpayment of taxes, and a tender of an amount less than that required by law is unavailing.

The judgment of the trial court is therefore reversed, and the cause remanded, with instructions to set aside the judgment and thereafter proceed as the parties shall elect, and,

It is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

(Oct. 31, 1921. No. 2503.)

DIAMOND X LAND & CATTLE CO. v. DIRECTOR GENERAL OF RAILROADS et al.

(Rehearing Denied March 14, 1922.)

SYLLABUS BY THE COURT

(1) In the absence of special contract, the market value of property at the place of delivery or location controls, if there was such value there on the day in question. P. 678

(2) Market value, where such exists, affords the most satisfactory evidence, but value may be established notwithstanding that no market value exists. P. 679

(3) In the absence of an offer of proof, action of the trial court in excluding evidence cannot be attacked on appeal. P. 679

(4) Where requested instructions have been covered by

the court's charge to the jury, there is no error in refusing them. P. 679

(5) The duty devolves upon the shipper, where such shipment is accompanied by caretakers, to feed and water such animals if the railroad company stops its trains at suitable places and affords an opportunity of so doing to the shipper, and, even though the railroad company may unload the animals for the purpose of feeding and watering the same where facilities for such purpose do not exist, it is the duty of the shipper to render such assistance as is possible in caring for the animals and mitigating the damage which may be sustained. P. 680

(6) Railroad companies whose lines and facilities were taken over by the railroad administration established by the President in December, 1917, under the act of Congress (U. S. Comp. St. § 1974a), were not liable for the acts of omission or commission of the agents and servants of the Director General in operating such railroads. P. 682

Appeal from District Court, Chaves County; Brice, Judge.

Action by the Diamond X Land & Cattle Company against the Director General of Railroads and the Atchison, Topeka & Santa Fé Railway. Judgment for plaintiff, and defendants appeal. Affirmed as to the Director General, and reversed as to the railway company, with instructions to dismiss.

W. C. Reid, George S. Downer, and E. C. Iden, all of Albuquerque, for appellants.

L. O. Fullen and W. A. Dunn, both of Roswell, for appellee.

OPINION OF THE COURT

ROBERTS, C. J. Appellee sued the Director General of Railroads and the Atchison, Topeka & Santa Fé Railway to recover damages for injury to animals shipped by it and others from a station near Hagerman, N. M., on the line of the Santa Fé Railway to Interior, S. D. Three or four parties shipped from the same point of origin to Interior,

S. D., at the same time, and all suffered similar damages. The claims of the other shippers having been assigned to the appellee, all were joined in this suit and are included in the recovery. Upon a trial, the jury returned a verdict upon which judgment was entered against the appellants in the sum of $13,090, to review which this appeal is prosecuted.

Various elements entered into the claimed damages, such as needless delay in transportation, permitting the cattle to go without food and water, refusing to stop the trains at suitable places for unloading and feeding the cattle, jerking and rough handling occasioned by insufficient motive power, unloading at Murdo, S. D., in a snowstorm, where there were no adequate facilities for caring for the cattle, and other similar complaints.

The court instructed the jury to find the cattle's market value in the condition and at the time they should have arrived at Interior, S. D., and appellant claims that this instruction was erroneous, as there was no evidence before the jury upon the question of the market value of cattle in the condition in which these cattle were at the time of shipment. Two witnesses testified that they knew the cattle in question in Chaves county before their shipment, knew their condition, and were familiar with market conditions at Interior, S. D., and knew the market value of cattle at that place; that the market value of the same grade and class of cattle as those shipped at Interior at the time of the arrival of the cattle in question was a stated sum, classifying the cattle and value at different prices according to age. Appellant contends that the witnesses in saying that they knew the market value of the same grade or class of cattle at Interior were referring only to ages and breed, such as Herefords, Short Horns, etc. The trial court evidently assumed, and

in this we think it was justified, that the witnesses were speaking of the grade and condition with reference to the flesh and physical condition of the cattle. If they were right in their interpretation as to what the witnesses meant, they could have developed their view of the matter upon cross-examination.

[1] "In the absence of special contract, the market value of property at the place of delivery or location controls, if there was such value there on the day in question." 13 Eng. of Ev. p. 570.

These witnesses established the fact that there was a market value for cattle of the same grade and class as those in question at the time of delivery, and evidence of such value was, of course, competent and proper.

It is next argued that the court was in error in using the market value as one factor and the intrinsic value as another factor for the determination of the amount of damages. The jury were told in the instructions to first take the market value of the cattle in the condition they should have arrived, and next the intrinsic value in the condition they did arrive, and assess the damages at the difference. If the cattle had a market value in the condition they arrived at their destination, this would have been the proper measure of value; but the witnesses testified that on account of the injuries inflicted upon the cattle and the bad condition in which they arrived, there was no market value for them at Interior, S. D. Proof was then offered as to the intrinsic value of the animals in that condition. We fail to see how value could have been otherwise established at the point of destination.

"The market value of live stock at the place of destination is a measure of damages for loss of stock where mar-

ket exists there, otherwise the intrinsic value." Sutherland on Damages, § 93e.

[2] The rules for the ascertainment of value which require where possible proof of the market value and otherwise proof of the intrinsic value or actual value are all designed to serve as a yardstick by which to measure the loss which the complainant sustains by reason of the tort or wrong of the defendant. Market value, where such exists, offers the most satisfactory evidence, but value may be established notwithstanding that no market value exists. Sutherland on Damages, § 919.

[3] It is next complained that the court erred in refusing to allow appellants by way of rebuttal to show the intrinsic value of the cattle at the origin of shipment. Appellants sought to prove by a witness the value of the cattle at the point of origin of shipment. Objection to the question was interposed and sustained. Appellants have shown no injury by the ruling of the trial court in excluding evidence of the intrinsic value of the cattle at point of shipment, because they failed to state to the court what they expected to prove the intrinsic value to be by the offered evidence. In the absence of an offer of proof, the action of the court in excluding the evidence cannot be attacked on appeal. Ins. Co. v. Mercantile Co., 13 N. M. 241, 82 Pac. 363; State v. Goodrich, 24 N. M. 660, 176 Pac. 813; State v. Anderson, 24 N. M. 360, 174 Pac. 215. Suppose, for example, that in answer to the question appellant expected to prove an intrinsic value less than that established at point of destination. There could have been no injury by the exclusion of the evidence, consequently we cannot say the appellants were prejudiced by the ruling of the court.

[4] It is next argued that the court erred in refusing to give to the jury requested instructions Nos. 5 and 7, to the effect that mere proof of delay

in transportation of the cattle was not in itself proof of negligence, but that the burden was upon the plaintiff to show that such delays might reasonably have been avoided, and that such delays must have been caused by the defendant's negligence, and that the same was true as to the jerking and jarring or rough handling of the cattle. The court charged the jury generally that the burden of proof was on the plaintiff, and before it could recover it must establish by a preponderance of the evidence all the facts necessary to its recovery; also, that plaintiff must establish the several acts of negligence charged in the complaint before it could recover therefor, including negligent delays and negligent jerking and rough handling of the cars. The requested instructions having been covered by the court's charge to the jury, there was no error in refusing them. The same is true as to requested instructions Nos. 2 and 6, dealing with the nonliability of the carrier for damage due to the act of God, the elements, the authority of law, or the act or default of the shipper, in so far as a statement of the law was required by the evidence.

[5] It is also contended that the court erred in not giving tendered instructions Nos. 10, 11, and 12, which stated in effect that it was the duty of the owner of the cattle, or his agents who accompanied the shipment, to load and unload the same, feed and water them, and care for them while in transit. In so far as the tendered instructions correctly stated the law, they were covered by instructions 10 and 11 given by the court. These instructions were as follows:

"No. 10. The owners or their agents who accompanied the shipment of cattle in suit would be required to supply the cattle with feed and water necessary to keep them in proper condition, provided the defendants stopped their trains for such purposes at points where adequate facilities for feeding and watering the animals and obtaining the feed and water for them existed, but otherwise no such obligation

would devolve upon the plaintiffs or their agents and the defendants would be responsible for all damage negligently occasioned by reason of said animals not being properly fed and watered under such conditions.

"And I further charge you that if you find from the evidence in this case that the defendants assumed the responsibility of feeding and watering such animals at any place or places where adequate facilities existed for so doing, then and in that case the plaintiffs would be relieved from the responsibility as to such points and such responsibility devolves upon the defendants."

"No. 13. It was the duty of the caretakers in charge of such cattle to lend all reasonable assistance in caring for same, and when unloading at the town of Murdo it was their duty to give such assistance as they reasonably could in caring for said cattle at the time of such unloading and while unloaded at said town, and all loss occasioned by failure on the part of such caretakers to give such reasonable assistance as they could in caring for such live stock cannot be charged to the negligence of the defendants, and if you find from the evidence that the loss or injury to any of said live stock resulted from the failure of said caretakers in so caring for the live stock, you will exclude such losses from the damages, if any, which you may find for plaintiff."

Appellants in their supplemental brief have called to the attention of the court the opinion of the Circuit Court of Appeals (Eighth Circuit) in the case of A., T. & S. F. Ry. Co. v. Merchants' Live Stock Co., 273 Fed. 130, recently decided, in which the court in considering a similar question said:

"On the foregoing, the contention is made by plaintiff in error that the shipper, through its caretakers, was under the legal duty to assist in unloading, reloading, feeding and watering the cattle at Amarillo and Strong City—indeed, that these were primarily duties of the caretakers—and that the court should have expressly so instructed the jury, and that the caretakers could not be permitted to judge for themselves whether they would or would not lend assistance under the surrounding circumstances, and that plaintiff's damage should be diminished to the extent that the assistance of the caretakers would have lessened the loss. The general manager forbade the caretakers to give any assistance at Strong City, and there is testimony that they gave none at Amarillo, although a part of the damage claimed was dependent on the manner in which the cattle were unloaded, reloaded, and fed and watered at those points. The court, in the fore part of an instruction (No. 24), declared the law, as now and then contended for by plaintiff in error, that is, that it was the duty of the caretakers to assist in unloading, feeding, watering, resting and reloading the cattle, that if the care-

takers, by using their reasonable diligence and the means at their command, could have prevented or diminished the damage done, then any such damage which might have been so prevented, or the amount in which such damage might have been diminished, the defendant was not responsible for. But the court added to this declaration of law the following: 'And it is for you to say from all the evidence in this case bearing upon that point, whether or not, under all the circumstances as they existed at the time, the use of reasonable diligence on the part of the caretakers and the means at their command required them to assist in the unloading, feeding, watering, resting and reloading the cattle at Strong City.' The jury was instructed before argument, and the excerpt was added by the court after the case had been partly argued. The defendant saved its exception to the instruction as thus changed. We are of opinion that the instruction is right without the addendum—it declared its duty as a matter of law; and that with it, it was wrong and prejudicial for two reasons: First, it left the matter of duty a question of fact to be settled by the jury, and second, the instruction thus became self-contradictory. There was no issue on the fact as to the question of duty."

Instruction No. 13 made it the duty of the caretakers to render such assistance as they could at Murdo, S. D., where the cattle were unloaded, and it was contended that there were no facilities provided for caring for the animals, and that all loss occasioned by failure on the part of such caretakers to give such assistance should be deducted from the damages awarded, if any. The instructions given stated the law correctly and covered the subject; hence there was no error in refusing the requested instructions.

It is urged that the court committed error in excluding the testimony of C. O. Brown, a witness for the appellants, who was called as an expert to give his opinion as to whether part of the cattle involved were in shipping condition as to flesh and strength. There are two answers to this contention: First, no statement was made to the court as to what the witness would testify to in answer to the question; and, secondly, the witness later answered the question in full.

[6] Prior to entering upon the trial, a motion

was interposed by the railway company to dismiss the suit as to it on the ground that at the time the injuries occurred, and at the time the suit was instituted, its lines of railway were under the control of and being operated by the United States, by and through the Director General of Railroads pursuant to the act of Congress in that regard, which was denied. The court was in error in not sustaining the motion. Railroad companies, whose lines and facilities were taken over by the railroad administration established by the President in December, 1917, under the act of Congress (U. S. Comp. St. § 1974a), were not liable for the acts of omission or commission of the agents and servants of the Director General in operating such railroads. This is settled by decisions of the Supreme Court of the United States. See Northern Pacific Railroad Co. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897; Missouri Pacific Railroad Company v. Ault, 255 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. 647.

The case will be affirmed as to the Director General of Railroads and reversed as to the Atchison, Topeka & Santa Fé Railway, with instructions to the trial court to enter an order of dismissal as to the railroad company, and it is so ordered.

RAYNOLDS and PARKER, J., concur.

(Feb. 22, 1922. No. 2597.)

WOODWARD et al. v. LIBBEY.

(Rehearing Denied March 25, 1922.)

SYLLABUS BY THE COURT

Findings based on conflicting evidence will not be disturbed on appeal.

Appeal from District Court, Union County; Leib, Judge.

Action by Hugh B. Woodward and others against Wallace Libbey. Judgment for plaintiffs, and the defendant appeals. Affirmed.

J. Leahy, of Raton, for appellant.

O. P. Easterwood, of Clayton, for appellees.

OPINION OF THE COURT

DAVIS, J. The findings of fact in this case are to the effect that in December, 1917, appellant sold to appellees a bull calf, which he represented to be elegible to registry in the American Hereford Cattle Breeders' Association and the American Polled Hereford Breeders' Association. He promised to furnish certificates showing registration upon the books of both associations. Appellees paid the full purchase price of the calf upon delivery. They made repeated demands upon appellant for the registration certificates, but he failed to furnish them until some time after the action was commenced, more than two years after the purchase. This action was to recover damages for the breach of the agreement as to furnishing the certificates. Appellant defaulted, and judgment was rendered against him, but the judgment was later set aside, and the case tried on its merits. Following that judgment appellees sold the calves which had been sired by this bull. At this time they were still without the registration certificates, and therefore unable to show that the calves were the get of a registered sire, which, according to the findings, considerably affected their value.

There was a conflict in the tesimony, appellant denying any breach of the contract, but the court found for appellees on all the disputed issues. The findings are fully supported by the testimony, and there was direct and positive proof of the amount of damages. While many errors are assigned, they

raise no questions of law which need discussion. We cannot review the facts. For the reasons stated, the judgment is affirmed; and it is so ordered.

RAYNOLDS, C. J., and PARKER, J., concur.

(Feb. 21, 1922. No. 2554.)

BOWERS v. BRAZELL.

SYLLABUS BY THE COURT

(1) Where the main object in a suit or action is for the purpose of setting aside a judgment or decree, such an attack is a direct, and not a collateral, attack. P. 686

(2) A default decree in a suit to quiet title, in which the plaintiff's right and title were based upon a tax deed, invalid because the taxes for which it was issued had been paid, cannot, in the absence of fraud, be set aside by a subsequent suit for that purpose. This doctrine of res adjudicata applies. P. 687

Appeal from District Court, Union County; Leib, Judge.

Suit by Vada Bowers against James Brazell to quiet title. Judgment for plaintiff and the defendant appeals. Reversed, with instructions to sustain the demurrer to the complaint.

O. P. Easterwood, of Clayton, for appellant.

D. A. Paddock, of Clayton, for appellee.

OPINION OF THE COURT

RAYNOLDS, C. J. This is an appeal from a judgment setting aside a former decree in appellant's favor in a suit to quiet title. Upon overruling of appellant's demurrer to the complaint and his refusal to plead further, judgment was entered for

the appellee, granting the prayer of the complaint and setting aside the former decree.

On the 4th of March, 1913, the county treasurer of Union county attempted to sell certain land for taxes alleged to be due thereon for the year 1909, issued a certificate to one Bernard O. Gow, and thereafter issued to him a tax deed for the land covered by the tax certificate. On November 19, 1916, Gow conveyed the land to James Brazell, the appellant. On January 2, 1919, Brazell brought an action against the plaintiff to quiet title to the land in question, this case being No. 4157. Service upon the defendant was made by publication of the decree obtained March 3, 1919. On June 21, 1920, the present suit, No. 4754, was begun by the appellee, alleging, among other things, that the taxes on the land in question had been fully paid by her predecessor in title, and asking that the purported tax sale certificate and deed given to Gow by the treasurer be canceled and held for naught; that the former decree be declared void and of no effect. To this complaint the defendant below, appellant here demurred, on the ground that all the issues of the present suit had been determined by the prior suit; that the plaintiff was barred and estopped; that the proceeding was a collateral proceeding attempting to set aside a decree rendered in cause No. 4157, in which all the issues had been fully adjudicated, and that it was not a proper proceeding to set aside and attack the decree rendered in said cause No. 4157 on the 7th of March, 1919, more than 12 months preceding the filing of the complaint in this action. This demurrer was overruled by the court, and, appellant electing to stand upon the demurrer, judgment was entered for the appellee, and this appeal taken.

[1] Appellant assigns as error the action of the court in overruling the demurrer and rendering judgment in favor of the appellee for the reasons set

out in his demurrer to the complaint. He contends, first, that this suit is a collateral attack upon a judgment heretofore rendered by the district court, and as such cannot be maintained. In our opinion there is no merit in this contention. The attack as made in this case is a direct attack upon the judgment.

"A direct attack on a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of the same in a proceeding instituted for that purpose." 15 R. C. L., par. 312, "Judgments."

See, also, Black on Judgments, vol. 1, par. 252.

[2] It is conceded by appellee that he did not proceed under Code 1915, §§ 4227, 4230, which pertain to setting aside default and irregular judgments upon motion.

Appellee contends that there was fraud in the procurement of the judgment, and it is admitted by the appellant that if there was fraud in the procurement of such judgment it could be set aside, but he contends that there is no fraud alleged nor proved. Appellee alleges that the tax deed delivered to Gow was wrongfully and illegally issued; that the pretended deed was null and void and wrongfully and illegally issued. These allegations do not amount to allegations of fraud. If the taxes had been paid, the tax deed undoubtedly was wrongfully and illegally issued. Appellee argues in his brief that the judgment was obtained by suppressing the notice of said cause and by the suppression of evidence, but the assertions are not borne out by the record. The complaint alleges that the appellee was a nonresident of New Mexico, and received no information, and was never served with notice of the suit. It further alleged that if there was any notice given it was by publication in a weekly newspaper, to which appellee was not a subscriber and never saw. Such allegations, without others to the effect that

the action of the plaintiff in cause No. 4157, that is, the suit to quiet title, amount to fraud, are insufficient to sustain plaintiff's assertion in his brief and argument that the decree was fraudulently obtained, or that there was fraud in the procurement of it. No allegation is made in the complaint that appellant had knowledge of appellee's residence, nor suppressed the notice of the case and prevented such notice from reaching the appellee. It is also alleged that appellee had a full and complete defense against the suit if she had notice, but it is nowhere contended or alleged that by any activities of the plaintiff the appellee was prevented from interposing her defense. Fraud will not be presumed, but must be alleged. There are no allegations of facts in the complaint which can be construed to amount to fraud.

Appellee further contends that the judgment in No. 4157 was absolutely void, being founded upon a tax deed for property on which the taxes had been paid. In our opinion this defense is not available to the appellee in this case. It is not an attack under Laws 1899, c. 22, § 25, upon the title to property based upon a tax sale which is invalid because the taxes have been paid, but it is an attempt to set aside a judgment quieting title founded upon a tax deed, where it is admitted under the pleadings that the taxes have been paid. In this respect it is like any other attack on a judgment, and governed by the same rules. The right to attack the title to property sold at a tax sale under Laws 1899, c. 22, § 25, on the ground that the taxes have been paid, was available to the appellee in the suit to quiet title, which suit was based upon the tax deed. Such defense was not interposed in that case. It is now sought to use that ground of defense as a basis in this action to set aside a judgment rendered in the former suit. The fact that the tax deed was invalid and could have been no basis for a decree to quiet title if properly attacked in the former case

does not make the proceeding based upon it a nullity any more than it would make a judgment on a promisory note which had been paid a nullity, when the defense of payment was not raised during the case. As is said in Lockhart v. Leeds, 12 N. M. 156, at page 162, 76 Pac. 312, at page 314:

"It (the judgment) is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissable matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."

See, also, First National Bank v. Tome, 23 N. M. 255, at page 268, 167 Pac. 733; City of Socorro v. Cook, 24 N. M. 202, at page 209, 173 Pac. 682.

For the reasons above stated, the action of the lower court, overruling the appellant's demurrer and rendering judgment for appellee, was erroneous, and the cause is reversed, with instructions to sustain the demurrer; and it is so ordered.

PARKER, J., concurs.

DAVIS, J., did not participate.

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Where witness first testifies positively to state of facts and then states he was mistaken because of certain facts weight of both statements is for jury and jury has right to say which statement they will believe.
State v. Kelly, 441

Knowledge.

Evidence held material to question of knowledge of ownership and not as election.
State v. Curry, 208

Maps.

Printed map was properly admitted to show distance from one established point to another.
State v. Crumbley, 227

Materiality.

Evidence characterizing offense or showing its grade are admissable.
State v. Martino, 6

Offer.

Duty of counsel is to apprise court what he intends to prove by witness.
State v. Crumbley, 227
Party need not offer to make proof as to what witness will testify, to preserve proposition for review on appeal, where the testimony is sought to be elicited by cross examination.
State v. Martino, 8

Opinion.

Butcher held competent witness to testify as to color and breed of hogs after same had been dressed.
State v. Crumbley, 227

Other Crimes.

Evidence establishing another offense, relevant to show intent with which act charged in indictment was done, was admissible.
State v. Lazarovich, 288

Rebuttal.

Admission or exclusion of evidence not strictly in rebuttal is discretionary.
State v. Curry, 211

Evidence held proper in rebuttal.
State v. Liston, 504

Res gestae.

Evidence of breaking door in commission of criminal act held part of res gestae.
State v. Martino, 5

Venue.

Venue may be proved by circumstantial evidence.
State v .Mares, 213

Former Jeopardy.

Plea of former jeopardy must be interposed at earliest opportunity.
State v. Mares, 215

Principals Second Degree.

Second degree principal is as guilty as first degree principal and may be convicted although latter is acquitted or convicted of lesser offense.
State v. Martino, 6

Setting Cases.

Statute referring to setting of cases at least 20 days before first day of term is directory.
State v. Kelly, 448

Severance.

Severance of trial of two defendants is discretionary.
State v. McDaniels, 60
No error in denying severance where court limits testimony of admissions or confessions to one defendant affected.
State v. Diamond, 485

Statutes.

Insurrection statute held void for uncertainty.
State v. Diamond, 485
Where act creating a crime is unconstitutional, the question of the unconstitutionality of the act may be raised for the first time on appeal.
State v. Diamond, 488

Statute creating crimes must be strictly construed.
State v. Diamond, 479

Witnesses.

Credibility of witness is for jury.
State v. Kelly, 441
It is discretionary with court whether to exclude witnesses from court room and court may permit witnesses to sit with either side during trial.
State v. Curry, 210
It is duty of trial court to see that counsel and wit-

nesses are required to sit at such distance from jury as to prevent jury over-hearing remarks.
State v. Curry, 210

DEEDS.

Blanks.

Deed in blank passes no interest.
Jones v. Rocky Cliff C. M. Co. 45
To make blank deed operate as conveyance the blank must be filled by party authorized to fill it before or at time of delivery.
Jones v. Rocky Cliff C. M. Co. 45, 46
Claimant under deed with blank grantee, where name of grantee was subsequently inserted, has burden of explaining insertion.
Jones v. Rocky Cliff C. M. Co. 52

Consideration.

Nominal consideration of one dollar for quit claim deed is sufficient to pass title, unless made in bad faith.
Jones v. Rocky Cliff C. M. Co. 45

Quitclaim.

Quitclaim deed, where first recorded and without knowledge of prior unrecorded warranty deed gives better title.
Jones v. Rocky Cliff C. M. Co. 44

Title.

Quitclaim deed recorded before blank is inserted in warranty gives better title.
Jones v. Rocky Cliff C. M. Co. 45

DETINUE.

Detinue at common law was superseded here by replevin statute.
Troy L. M. Co. v. Carbon C .L. Co. 119

DISCOVERY.

Answers.

Answers in bills of discovery are evidence and binding on plaintiff.
Lopez v. Lopez, 625
Where defendant's answer is responsive plaintiff by filing reply cannot cross examine defendant on his answer or treat answer as verified pleading.
Lopez v. Lopez, 624
Where defendant answers burden is on plaintiff to overcome answer and in default thereof action is properly dismissed.
Lopez v. Lopez, 626
Plaintiff is bound by answer and can only overcome same by contradictory testimony of two witnesses or

testimony of one witness and corroborating circumstances or documentary evidence.
Lopez v. Lopez, 626

DIVORCE.

Alimony.

Alimony may be granted to either spouse, regardless of which may be guilty party.
Cassan v. Cassan, 257
Statute authorizes granting of alimony in installments or lump sum and granting it will be reviewed for abuse only as to amount.
Cassan v. Cassan, 257

DRAINS.

Complaint that drain designated in report or survey was not constructed and therefore land should be exonerated from assessments for benefits, states no cause of action, because survey or report is not final but is subject to modification until confirmed by court.
Strickland v. Elliott, 241
Drainage law provides comprehensive and complete system of judicial procedure and person aggrieved may appeal.
Strickland v. Elliott, 239
Foundation of right to lay assessments is particular benefit received by land assessed.
Strickland v. Elliott, 240
Decree confirming final survey is final decree and not subject to collateral attack.
Strickland v. Elliott, 241
Act providing for payment of assessments of drainage improvements against state lands, held unconstitutional, because state cannot improve such lands.
Lake Arthur D. D. v. Field, 188

EJECTMENT.

Evidence.

Plaintiff must recover on strength of his own title and not upon the weakness of his adversary.
Park v. Milligan, 101
Romero v. Herrera, 563

Verdict.

Held error to direct verdict where evidence as to prior possession is conflicting.
Romero v. Herrera, 559

ELECTIONS.

Electors.

In absence of contrary showing it will be assumed that the majority of votes cast were fortified by required af-

fidavits and hence successful parties were elected by qualified voters.
State ex rel Walker v. Bridges, 176

Registration.

Laws 1917, Ch. 89, Sec. 13, authorizes voting at municipal elections on affidavit.
State ex rel Walker v. Bridges, 170
Election without appointment of registration board or registration of voters is irregular but not void where voters participating vote on affidavit.
State ex rel Walker v. Bridges, 173

EMINENT DOMAIN.

Awards.

No appeal lies from action of county commissioners altering award made by viewers.
State ex rel Sisney v. Co. Com. 231
County commissions cannot alter award made by viewers to lay out road, except where owner is dissatisfied.
State ex rel Sisney v. Co. Com. 230
Certiorari is proper remedy to review action of county commissions respecting award by viewers.
State ex rel Sisney v. Co. Com. 231

EQUITY.

Forfeitures.

Court of equity is without power to relieve against statutory forfeiture.
N. M. Motor Corp. v. Bliss, 306

Remedy.

Equity courts will not review proceedings of subordinate political or municipal tribunals, and in absence of fraud, exercise of discretion by such tribunals is final and conclusive.
Nohl v. Board of Education, 235

ESCROWS.

Agents.

Corporation and officers composing it are not identical and officers may act as escrow agents for each other.
Macy v. Mielenz, 264

Delivery.

Where lease is escrowed to await happening of condition, and condition does not happen but lease is recorded, it may be canceled.
Roberts v. Humphreys, 277
Grantee in deed cannot hold it in escrow.
Macy v. Mielenz, 264

Evidence.

Parol evidence may be used to establish escrow agreement respecting lands.
Macy v. Mielenz, 264

Title.

Deed delivered to bank by one of its officers for his debt, though complete instrument does not prevent delivery in escrow and does not pass title until delivery to grantees.
Macy v. Mielenz, 264

ESTOPPEL.

Representation as to future operates as estoppel when made to influence others and relied upon to damage.
Vaughan v. Jackson, 296

EVIDENCE.

Admissions.

Admission of notice of fact not shown to have been received before purchase held properly disregarded by court.
Bell v. Kyle, 12

Consideration.

Consideration for contract may be shown by parol to be different than that expressed in writing.
Morrison v. Crisp, 381

Hearsay.

Ex parte certificate as to moral character held hearsay.
Keyes v. Keyes, 218

Parol.

Parol understanding held to devitalize written contract and therefore inadmissible.
Val Verde Hotel Co. v. Hubbell; 546
Parol evidence cannot be received to vary terms of written contract.
Prentice v. Cain, 368

Presumptions.

Filing attachment bond and issuing writ creates presumption clerk approved bond although his approval does not appear thereon.
Baca v. Coury, 611

Reputation.

Good moral character cannot be established by exparte certificate.
Keyes v. Keyes, 218
In civil suit, where reputation is not an issue, party will not be permitted to prove his general reputation.
Keyes v. Keyes, 217

EXECUTIONS. (See also HOMESTEADS.)

Levy.

Levy under execution may be made any time within five years after rendition of judgment.
Meyers Co. v. Mirabal, 472

EXECUTORS.

Claims.

Claims against estates cannot be maintained upon the uncorroborated testimony of claimant.
Bujac v. Wilson, 105

Corroboration required in claims against estates must be independent evidence which in itself tends to corroborate claimant as to making of agreement.
Bujac v. Wilson, 105

Qualifications.

Secs. 2222, 2223, 2242, 2243 and 2244, Code 1915 require nothing more than actual residence to qualify one for office of executor.
Bujac v. Wilson, 341

Desire of testator is controlling factor in determining right to administer, and only statutory disqualifications operate to defeat such desire.
Bujac v. Wilson, 343

FALSE PRETENSES.

Appeal.

Evidence that Board of Loan Commissioners passed on bond held sustained by substantial evidence.
State v. Kelly, 433

Evidence.

Offense may be established by conduct, acts and words, written or spoken and presentation of bogus bond to it for refunding is false pretense.
State v. Kelly, 430

Where bogus bond is presented to agent of state for payment or refunding, by letter of transmittal, there is no variance because letter refers to territorial bond and bond involved was county debt which state had assumed.
State v. Kelly, 435

Evidence held sufficient to prove that party presenting bogus bond to state board of loan commissioners was agent for appellant.
State v. Kelly, 437

Offense.

False pretenses cannot be predicated on pretense made

in a suit in court for recovery of money or property.
State v. Kelly, 417

Act creating Board Loan Commissioners does not confer judicial power on board in constitutional sense and false pretense can be predicated on claim presented to such board where facts warrant.
State v. Kelly, 417

FORCIBLE ENTRY AND DETAINER.

Appeal.

Evidence held to support findings.
Gray v. Tittsworth, 40

Evidence.

Inquiry is confined to actual, peaceable possession of plaintiff, irrespective of whether rightful or wrongful and forcible ouster of plaintiff by defendant.
Gray v. Tittsworth, 41

FRAUD.

Essentials of doctrine of false representations stated.
Bell v. Kyle, 15

FRAUD, STATUTE OF.

Escrow agreement may be proved by parol.
Macy v. Lielenz, 264

Payment of full purchase price, under parol agreement to convey land, does not vest equitable title in vendee.
Jones v. Rocky Cliff C. M. Co. 48

Where written contract is modified by parol and reliance is placed on modification by one party, other is estopped to take advantage of statute of frauds.
Vaughan v. Jackson, 295

FRAUDULENT CONVEYANCES.

Bulk Sales.

Creditor of sellor, holding judgment against him, may recover against vendee where seller is insolvent and property transferred has been commingled by purchaser so it cannot be identified and separated.
Douglas Fir. L. Co. v. Star L. Co. 403

Object of bulk sales law is to prevent sale of goods in bulk until creditors of seller have been paid in full.
Douglas Fir L. Co. v. Star L. Co. 406

Insolvency may be shown other than by execution and return nulla bona.
Douglas Fir L. Co. v. Star L. Co. 409

Creditor in bulk sales law includes person holding judgment against seller, though no execution issues or return thereof made.
Douglas Fir L. Co. v. Star L. Co. 403

Where law has not been complied with sale is voidable only at instance of seller, sale being valid as between the parties.
Douglas Fir L. Co. v. Star L. Co. 408

HOMESTEADS.

Exemptions.

Demand for exemption should be made to officer holding writ and may be made verbally.
Meyers Co. v. Mirabal, 474
Demand for exemption of homestead from execution must be made and such demand made under original execution does not suffice for alias execution issued six months later.
Meyers Co. v. Mirabal, 472
Sale made of homestead in defiance of demand for exemption is void.
Meyers Co. v. Mirabal, 474

HOMICIDE.

Appeal.

Instructions.
Submitting false issue to jury is error though conviction of lower offense results.
State v. Trujillo, 601
Instruction held confusing but harmless.
State v. Bailey, 161
Requested instruction on accidental killing held properly refused because erroneous.
State v. Bailey, 158
Instructions held to cover defense of accidental killing.
State v. Bailey, 158
Abstract instruction held properly refused.
State v. Bailey, 160
Instruction not excepted to is not subject to attack on appeal.
State v. Bailey, 163
It is reversible error to submit issue of involuntary manslaughter when all evidence and inferences show killing to have been intentional.
State v. Pruett, 579
It is reversible error to submit issue of voluntary manslaughter, where there is no such issue involved in the evidence.
State v. Trujillo, 601
Evidence held to warrant instructions on first and second degree and to exclude instructions on manslaughter .
State v. Martino, 5

Defense of Habitation.

Law of defense of habitation stated.
State v. Bailey, 162

Evidence.

Corpus delicti.

In homicide corpus delicti consists of death of person and that it was criminally caused.
State v. Chaves, 506

Reputation.

Reputation of deceased as peacable character is competent for prosecution after such character has been attacked by defense.
State v. Bailey, 153

Self Defense.

Law of self defense stated.
State v. Bailey, 162

Threats.

Threat, though no one be definitely designated, is admissible in homicide case.
State v. Bailey, 152
It is for jury as to whether general threat had reference to defendant.
State v. Bailey, 153

Variance.

Charge that murder was deliberate, with malice aforethought is sustained by proof that it was committed with such mind directed against a third person.
State v. Carpio, 270

Verdict.

Evidence held sufficient to justify overruling motion for directed verdict.
State v. Martino, 4

Indictment.

Indictment by outward form rather than legal effect is sufficient.
State v. Martino, 3
Indictment must allege assault was made on person murdered though malice was against another person.
State v. Carpio, 271

Malice.

Where assault missed antagonist and killed another malice follows the bullet and is transferred.
State v. Carpio, 272

Manslaughter.

Involuntary manslaughter is where killing is unintentional.
State v. Pruett, 577
Mere words do not reduce murder to manslaughter.
State v. Trujillo, 596

Second Degree.

Second degree murder defined.
State v. Sanchez, 63

Second degree instruction excluding premeditation as an element is erroneous.
State v. Sanchez, 63

HUSBAND AND WIFE.

Alimony. (See DIVORCE.)

Conveyances.

Husband and wife must join in oil and gas lease because it conveys interest in real estate.
Terry v. Humphreys, 568

Husband and wife must join in conveyances of community property.
Adams v. Blumenshine, 650

Property.

Property acquired jointly by two husbands engaged in partnership business in which property is used is community property in absence of showing it was acquired as firm asset and was required to pay off firm debts or adjust equities between partners.
Adams v. Blumenshine, 643

INDICTMENTS.

Knowingly.

Indictment having alleged unlawful purpose did not require use of word knowingly.
State v. Lazarovich, 286

Legal Effect.

Indictment according to outward form rather than legal effect is sufficient.
State v. Matrino, 3

Statutory Words.

Indictment in words of statute held sufficient.
State v. Lazarovich, 286

Words of indictment need not be [illegible]ended beyond those in statute where statutory words [illegible] sufficient to enable defendant to plead former acquittal or conviction.
State v. Lazarovich, 286

INJUNCTIONS. (See also ANIMALS.)

Remedy.

Injunction lies to restrain illegal action of state officer, notwithstanding breach of state's contract may thus incidentally be prevented.
State ex rel Evans v. Field, 389

Trespass.

Where other elements of equitable jurisdiction are present, injunction lies to restrain live stock owner from wilfully driving his stock upon premises of owner.
Harrington v. Chavez, 70
Where trespass is of continuing nature, the constant recurrence rendering law remedy inadequate except by multiplicity of suits, equity has jurisdiction by injunction.
Stroup v. Frank A. Hubbell Co. 38
Injunction does not lie for mere trespass where boundaries are not marked.
Sandoval v. Chavez, 73

INSURRECTION AND SEDITION.

Inciting.

To incite to revolution is to arouse to action.
State v. Diamond, 484

Revolution.

Revolution as used in Chap. 140, L. 1919, includes peaceable acts.
State v. Diamond, 482

Statutes.

Chapter 140, Laws 1919, construed and held to include lawful and innocent acts as well as unlawful acts.
State v. Diamond, 479
Chapter 140, Laws 1919, held unconstitutional as violative of right of free speech.
State v. Diamond, 479
Insurrection statute held void for uncertainty.
State v. Diamond, 485

JUDGMENTS.

Attack.

In suit to quiet title where plaintiffs title is quieted on tax deed under default decree fact that taxes had in reality been paid cannot be shown to defeat judgment in action to set aside decree, in absence of fraud.
Bowers v. Brazell, 687
Where main object of suit is to set aside decree it is direct and not collateral attack.
Bowers v. Brazell, 686
Judgment rendered after trial full opportunity to be heard and with no extrinsic fraud, cannot be attacked by proceeding to vacate it after it has become final on ground it was obtained by false testimony.
Day v. Trigg, 655

Construction.

Judgment is construed with reference to findings.
Stroup v. Frank A. Hubbell Co. 38

Merger.

Judgment merges taxes.
New Mexico R. Co. v. Security I. & D. Co. 669

Res Adjudicata.

As to effect of judgment as res adjudicata on parties and privies, see,
Bowers v. Brazell, 689
Decree against J. H. Z. is not of itself alone sufficient to prove an adjudication against T. H. Z.
Zintgraff v. Sisney, 497

Special Tribunal.

Finding of State Board of Loan Commissioners is not a judgment of a court.
State v. Kelly, 417

LANDLORD AND TENANT.

Forfeitures.

Secs. 2384 and 2386 constitute statutory forfeiture but it is not effective until expiration of three days afte notice, during which time tenant can pay rent and avoid the forfeiture.
N. M. Motor Corp. v. Bliss, 307, 308
Where notice to quit allows greater time than that of statute it governs and saves forfeiture within statutory time.
N. M. Motor Corp. v. Bliss, 310
On payment or tender of rent arrears, court of equity may relieve against forfeiture for breach of covenant to pay rent.
New Mexico Motor Corp. v. Bliss, 306
Court of equity has no power to relieve against statutory forfeiture.
N. M. Motor Corp. v. Bliss, 307
As to necessity of demand or notice to quit see,
N. M. Motor Corp. v. Bliss, 308

Liens.

Lien of landlord does not attach to property of tenant held under conditional sale contract.
Beebe v. Fouse, 198

Priorities.

Conditional sale contract, unrecorded, is superior to landlord's lien.
Beebe v. Fouse, 198

LARCENY. (See also ANIMALS.)

Evidence.

Evidence held material to question of knowledge of ownership and not as an election.
State v. Curry, 208

Proof of ownership, theft, and recent possession by defendant of cattle freshly branded in his own brand makes prima facia case.
State v. Liston, 503

LIENS. (See also specific heads.)

Equitable.

Where court found deed was to be held as security for borrowed money for purchase price of property, equitable lien for repayment thereof was properly impressed on property.
Macy v. Mielenz, 263

LIMITATION OF ACTIONS.

Replevin.

Where right to replevy goods under conditional sale contract begins to run from election to take the goods, the statute of limitations then begins to run.
Beebe v. Fouse, 199

Revival.

Admission need not be made to creditor.
Joyce-Pruit Co. v. Meadows, 533
Admission made in deposition in answer to cross interrogatory is good admission to overcome statute of limitations.
Joyce-Pruit Co. v. Meadows, 534

Revival of debts.

Barred debt is revived by admission in writing that it is unpaid, signed by party to be charged.
Joyce-Pruit Co. v. Meadows, 531
Admission need not contain new promise to pay express or implied.
Joyce-Pruit Co. v. Meadows, 531

Statutes.

Court is without power to read exceptions into limitation statutes.
Joyce-Pruit Co. v. Meadows, 531

MANDAMUS.

Remedy.

Mandamus does not lie to compel commissioner of public lands to issue deed free from reservation of minerals when minerals were reserved in contract of sale, the action in effect being against the state.
State ex rel Evans v. Field, 387
Where law directs officer to do act and performance is mere ministerial act, mandamus to do it lies.
State ex rel Evans v. Field, 389

MASTER AND SERVANT.

Workmans Compensation.

Course of employment.

Accident in forest caused by falling tree resulting in death of workman under circumstances held to arise out of employment.
Merrill v. Peñasco L. Co. 636

Dependency.

Failure of husband to support wife for considerable time does not disprove actual dependency.
Merrill v. Peñasco L. Co. 635

Actual dependency within workman's com. Act is question of fact in each case.
Merrill v. Peñasco Lumber Co. 633

Legal liability to support does not of itself prove dependency.
Merrill v. Peñasco L. Co. 635

MILLSITES. (See MINES.)

MINES AND MINERALS.

Assessment Work.

Expenditures on stamp mill do not constitute assessment work or expenditure.
Golden Giant M. Co. v. Hill, 128

Owner has whole year to do assessment work and is not limited to any particular part of it at any particular time.
Golden Giant M. Co. v. Hill, 138

Estoppel.

Where one goes into possession of claim under contract to do assessment work and defaults he cannot take advantage at any time of information obtained on account of his relation.
Golden Giant M. Co. v. Hill, 136

Forfeitures.

Failure to do annual assessment work does not of itself work forfeiture, relocation being essential.
Golden Giant M. Co. v. Hill, 143

Where relocator was required to do assessment work under contract for original locator and defaults therein he cannot assert forfeiture for failure of assessment work.
Golden Giant M. Co. v. Hill, 136

Mill Sites.

Erection of quart mill is location of mill site on which mill stands and land surrounding same for space sufficient for convenient use and occupation of mill, and locator may resist encrouchment of others claiming under U. S. mining laws.
Kershner v. Trinidad M. & M. Co. 335

Mill on land is notice of the claim to land upon which it stands and that surrounding it.
Kershner v. Trinidad M. & M. Co. 336
Posting of notice is not essential to mill site.
Kershner v. Trinidad M. & M. Co. 332
Right to mill site may be transferred by delivery of possession and retention by transferee.
Kershner v. Trinidad M. & M. Co. 334
Location of mill site over ground covered by subsisting location is void and cannot ripen into valid location, even though senior location is abandoned or forfeited.
Kershner v. Trinidad M. & M. Co. 331

Oil and Gas.

Restrictions of enabling act as to sale and lease of granted lands does not apply to mineral lands received by the State, nor oil and gas leases.
Neal v. Barker, 605
Oil and gas lease held to require signature of wife.
Terry v. Humphreys, 568
Term of oil and gas lease is not extended by payment of rentals paid in lieu of drilling.
Humphreys v. Fletcher, 641

MORTGAGES.

Defenses.

Where seller agrees to obtain release of mortgage and fails to do so he cannot plead that mortgage was void and no necessity for release therefore existed.
Hawkins v. Berlin, 167

Taxes.

Payment of taxes on mortgaged property by mortgagee only gives additional lien on property, enforcible with mortgage and mortgagee does not thereby acquire a title he can enforce against mortgagor.
Kershner v. Trinidad M. & M. Co. 330

MUNICIPAL CORPORATIONS.

Assessments.

Law of special assessments must be strictly followed.
Ellis v. N. M. Const. Co. 314

Bids.

The manner of performing its duty respecting bids in the absence of fraud or injury to abutting property owners, the court will assume in favor of the municipality.
Ellis v. N. M. Const. Co. 323.
Respecting conduct of municipality concerning bids, it will be presumed that municipality performed its duty.
Ellis v. N. M. Const. Co. 323
In absence of fraud or collusion or injury to abutting

property owners, complaint as to terms in advertisement for bids will not be considered.
Ellis v. N. M. Const. Co. 323

Officers.

Sec. 3598, prohibiting increase or decrease of salary of city officer during his term does not apply to city officer having no fixed tenure but who serves at pleasure of appointing power.
Bowers v. Albuquerque, 291

Powers.

Charters are measure of municipal authority.
Ellis v. N. M. Const. Co. 321

Streets.

Special assessments for paving may be made though owners abutting paving did not petition for paving nor have opportunity for effectual objection to paving.
Ellis v. N. M. Const. Co. 315
Authority to pave streets does not imply authority to make special assessments against abutting property owners, that power being derived only from express statutory enactment which must be strictly followed.
Ellis v. N. M. Const. Co. 314
Assessments for street paving upon front foot rule in conformity to statute is valid although in excess of benefits.
Ellis v. N. M. Const. Co. 322
Paving and its character and extent is wholly a matter of discretion for municipal authorities.
Ellis v. N. M. Const. Co. 322
Purpose of notice of Chapter 152, Laws 1919, is to afford property owners opportunity to object to paving.
Ellis v. N. M. Const. Co. 322
Where special charter adopted by municipality is silent on subject state law governs.
Ellis v. N. M. Const. Co. 321
There are two distinct laws on subject of paving in New Mexico.
Ellis v. N. M. Const. Co. 315
Sec. 3662, Code 1915, was repealed by implication by Chap. 42, Laws 1903.
Ellis v. N. M. Const. Co. 315

NOTICE. (See CHATTEL MTGS. etc.)

NOVATION.

Under conditional sale contract, where original purchaser is not released from liability, novation does not occur.
Beebe v. Fouse, 196

OBSTRUCTING JUSTICE.

In preliminary hearing of felony charge the justice is a court and the hearing is a cause.
State v. Lazarovich, 283

Essentials of offense under Sec. 3180, Code 1915, stated.
State v. Lazarovich, 284
Under circumstances evidence of larceny of property was admissible.
State v. Lazarovich, 286
Evidence that justice of peace record showed that certain persons were found guilty of larceny of whiskey was immaterial.
State v. Lazarovich, 286

OFFICERS.

Board composed of different persons can act officially only in convened session with members or quorum present.
State v. Kelly, 433
Duty is ministerial even though person executing it must satisfy himself of existence of state of facts under which he is given right to act.
State v. Kelly, 421

OIL AND GAS. (See MINES.)

PARTIES.

County School Board held indispensable party defendant in action against County Superintendent and school district to compel payment of teacher's salary.
Tadlock v. School Dist. 254

PARTNERSHIP.

Equitable Conversion.

Where title is held by partners as tenants and is intended to be partnership property by equitable conversion land is treated as personalty to pay firm debts and adjust accounts and equities between partners basis of doctrine being that trust is implied for benefit of partnership.
Adams v. Blumenshine, 647

Real Estate.

Doctrine of equitable conversion fully discussed.
Adams v. Blumenshine, 648
That real estate is firm property may be shown by parol and various sorts of facts are admissible to show agreement.
Adams v. Blumenshine, 647
Real estate may in equity be considered firm property when intention is clean by agreement of partners at time of its acquisition.
Adams v. Blumenshine, 646
Presumption is always against inclusion in firm assets of real estate held by partners as tenants in common and presumption of title is where muniments of title place it.
Adams v. Blumenshine, 646

Partners ordinarilly hold real estate as tenants in common under conveyance to them by name.
Adams v. Blumenshine, 646
Partnership cannot hold real property.
Adams v. Blumenshine, 646
Real estate acquired by two husbands engaged in partnership business held to be community property in absence of showing that same was acquired as firm asset and was required to pay off firm debts or adjust equities between partners.
Adams v. Blumenshine, 643

PAYMENT.

Payment is affirmative defense and burden is on party making it.
Tryone Knitting Mills v. Rubin, 324

PLEADING.

Amendments.

After evidence is heard or argument of counsel closed, it is discretionary with court to allow amendment.
West Texas Loan Co. v. Montgomery, 300

Answers.

Defendants claim of ownership in replevin is not new matter.
Bank of Commerce v. Duckworth, 630

Exhibits.

Contract or instrument not foundation of action or defense need be attached to pleading.
Beebe v. Fouse, 201

Fraud.

Fraud will not be presumed but must be alleged.
Bowers v. Brazell, 688

PRINCIPAL AND AGENT.

Evidence.

Admissions, statements and declarations of agent are not admissible to prove agency.
State v. Kelly, 436
When agency rests in parol it may be established by parol by agent.
State v. Kelly, 436
There must be prima facia proof of agency before declarations or statements of supposed agent are admissible.
State v. Kelly, 436
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Instrument providing for sale of "what ewe lambs I decide to sell from 6800 ewes" is valid contract and sale to third person constitutes breach of contract for which damages may be recovered.
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