REPORTS

of

CASES DETERMINED

in the

SUPREME COURT

of the

STATE *of* NEW MEXICO

1924-1925

By JOHN A. A. SEDILLO
Law Clerk and Reporter

VOLUME 30

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*Appointed January 5, 1926, to succeed Hon. John W. Armstrong, deceased.

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REPORT OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE STATE OF NEW MEXICO

JANUARY TERM, 1924

[No. 2783. May 9, 1924. Rehearing Denied June 16, 1924.]

BROWN v. HELLER et al.

SYLLABUS BY THE COURT.

1. An attack upon a will upon the ground that its execution was induced by improper and undue influence cannot be begun originally in the district court, by an action in equity to cancel and annul it, but must originate in the probate court, and it can reach the district court only by appeal from an order holding the will valid, or by being certified thereto by the probate judge upon his order declaring the will to be invalid.

2. A complaint which attacks a will and a deed upon such grounds states no cause of action against the will, but does state an equitable cause of action to cancel the deed.

3. Parties to an equitable action are not entitled, as a matter of right, to a trial by jury.

4. Denial of a trial by jury cannot be reviewed, when no exception to such action is taken.

5. Findings of fact which are supported by substantial evidence will not be disturbed on appeal. Record reviewed and **held** certain findings are supported by substantial evidence.

6. Section 5867, Code 1915, provides that a will may be revoked by an instrument in writing, executed and attested in the same manner as is required in the execution of a will, in which the maker shall distinctly refer to such will and declare his revocation thereof, or it may be revoked by a subsequent valid will disposing of the same property covered by the previous one.

7. The two methods laid out in the statute are not

exclusive, however, and wills may be revoked by operation of law.

8. A will is impliedly revoked, and the property adeemed from its operation and effect, where the testator, subsequent to its execution, voluntarily conveys such estate by an absolute deed of conveyance, not because the will is invalid, but because there is no estate left upon which it can operate nor to which it can pass title.

9. A deed, however, which is executed pursuant to the exercise of improper and undue influence, cannot serve to revoke a will previously made devising such property, nor to adeem such property from the effect of such a will.

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

Suit by Charles Leibalt Brown, an infant, by Irene Brown, his mother and next friend, and another, against Louise B. Heller and another. From a judgment for plaintiff, defendants appeal. Affirmed in part, and reversed and remanded in part, with directions.

A. T. Hannett, of Gallup, and H. B. Jamison, of Albuquerque, for appellants.

Appellants were entitled to a jury trial. Secs. 4193 and 4197, Code of 1915; Pankey v. Ortiz, 26 N. M. 575.

There is no evidence to support the court's finding that Mrs. Heller was the dominant party and that Brown executed the instrument in question under her dominance. Gilmore v. Lee, 237, Ill. 402, 86 N. E. 586, 127 A. S. R. 321; Stringfellow v. Hanson, 71 Pac. 1052; Hemenway v. Abbott, 97 Pac. 191.

Under any aspect of the case, the improvements were made in good faith. Williams v. Harlan, 88 Md. 1, 41 Atl. 51, 71 A. S. R. 394; Goan v. McMahon, 115 Md. 195, 80 Atl. 695, Ann. Cas. 1912C 1260; Leake v. Hayes, 13 Wash. 213, 43 Pac. 48, 52 A. S. R. 34; Ward v. Ward's Heirs, 40 W. Va. 611, 21 S. E. 746, 52 A. S. R. 911, 29 L. R. A. 449.

To the effect that a lien may be given see: Pomeroys Equity Jurisprudence, Vol. 3, par. 1240; Jackson v. Vicksburg S. & S. Ry. Co., 99 U. S. 513, 25 L. Ed. 460.

As to the amount of undue influence which must be proved. 18 C. J. 237, Note 76; Howard v. Farr, 115 Minn. 86, 92, 131 N. W. 1071.

It must appear that the undue influence was exercised at the time the act referred to was done and controlled it. 18 C. J. 237; Kline v. Kline, 14 Ariz. 369, 375; 128 Pac. 805; Turner v. Gumbert, 19 Ida. 339, 114 Pac. 33; Valbert v. Valbert, 282 Ill. 415, 118 N. E. 738; Wilcoxon v. Wilcoxon, 165 Ill. 454, 46 N. E. 369; Garner v. Garner, 4 Ky. L. 823; Turner v. Turner, 44 Mo. 535; Harshaw v. McCombs, 63 N. C. 75.

There is no presumption of undue influence from the mere fact of confidential relationship, Mackall v. Mackall, 135 U. S. 167; Towson v. Moore, 172 U. S. 17; Burton's Admr. v. Burton, 82 Vt. 12; Hawthorne v. Jenkins, 182 Ala. 255, 62 So. 505, Ann. Cas. 1915D 707; Sawyer v. White, 122 Fed. 223; Burwell v. Burwell, 49 S. E. 68; Orr v. Pennington, 93 Va. 268, 24 S. E. 928; Oliphant v. Liversidge, 142 Ill. 160, 30 N. E. 334; Prescott v. Johnson, 97 N. W. 891; Wessell v. Rathjohn, 89 N. C. 377, 45 Am. Rep. 696; Yeakel v. McAtee, 156 Pa. St. 600, 27 Atl. 277; Clark v. Clark, 174 Pa. St. 309, 34 Atl. 610, 619; Saufley v. Jackson, 16 Tex. 579; Haynes v. Harriman, 117 Wis. 132, 92 N. W. 1100; Vance v. Davis, 118 Wis. 548, 95 N. W. 939.

As to credits to be allowed a trustee. 26 R. C. L. par. 254, p. 1389; 39 Cyc. pp. 478-479, note 14; 7 R. C. L. par. 38, p. 842; Williams v. Harlan, 88 Md. 1, 41 Atl. 51, 71 A. S. R. 394; Hogan v. McMahon, 115 Md. 195. 80 Atl. 695, Ann. Cas. 1912C 1260; Leake v. Hayes, 13 Wash. 213, 43 Pac. 48, 52 A. S. R. 34; Ward v. Ward's Heirs, 40 W. Va. 611, 21 S. E. 746, 52 A. S. R. 911, 29 L. R. A. 449; Pomeroy's Equity Jurisprudence, Vol. 3, par. 1240 and cases cited.

Marron & Wood, of Albuquerque, and Bert D. Richards, of Gallup, for appellees.

The original judgment on the facts presented was a

final judgment upon all the issues made by the pleadings and became unquestionable upon the expiration of the six months period without any appeal being taken. Fullen v. Fullen, 21 N. M. 212; 1 Black on Judgments, Sec. 24; Forgay v. Conrad, 6 How. (U. S.) 201; St. Louis etc. Co. v. Southern Express Co., 108 U. S. 24; Mills v. Hog, 7 Paige (N. Y.) 18; Smith v. Walker, 57 Mich. 456; Damouth v. Klock, 28 Mich. 163; Schwartz v. Garhardt, 44 Ore. 425; Marguam v. Ross, 78 Pac. 698; Hunt v. Stockton Lumber Co., 113 Ala. 387; Neall v. Hill, 16 Cal. 146; Allison v. Drake, 145 Ill. 500; McMurray v. Day, 70 Ia. 671; Waverly Land Co. v. Buck, 64 Md. 338; Ayer v. Ternatt, 8 Minn. 96; Arnold v. Sinclair, 11 Mont. 556; France v. Bell, 52 Neb. 57; Merle v. Andrews, 4 Tex. 200.

The court ruling that the case was in equity and tryable without a jury was correct, and was acquiesced in by all parties, and no objection or protest made at the time or during the subsequent trial. 16 Cyc. 81, 83.

Undue influence need not as a rule be shown by direct proof, but must be gathered from all the circumstances. 29 A. & Eng. Enc., 2nd Ed., 110 and cases cited.

Although the mere fact of the relation of parent and child does not raise a presumption, at least against the child, of undue influence, yet a conveyance from the weaker to the dominant party is presumed to result from undue influence. Note in 38 Ann. Cas. at 712; Beach Mod. Eq. Jur., 125; Stepp v. Friampton, 179 Pa. 284; 2 Words & Phrases 1423, and 1 Supplement 885 and 886; Note 11 A. L. R. 735.

A fraudulent guarantee of land is not entitled to credit or to reimbursement for debts of the guarantor paid in pursuance of an agreement and as part of the consideration for the fraudulent transfer. Davis v. Leopold, 87 N. Y. 620; Union Nat. Bank v. Warner, 12 Hun. 306; Boyd v. Dunlap, 1 Johns Ch. 478; Briggs v. Merrill, 58 Barb. 302., Smith v. White, 27 N. Y. S. 228; Biggins v. Lambert, 213 Ill. 625; 20 Cyc. 639; 12 R. C. L. 643; Alvarado M. & M. Co. v. Warnock, 25 N. M. 694; Sands v. Godwise, 4 Johns. (N. Y.) 536; Milling-

ton v. Hill, (Ark.) 1 S. W. 547; Burt v. C. Gotzian & Co., 102 Fed. 937; Bunch v. Hart, (Ind.) 37 N. E. 537; Morley Bros. v. Springer, (Mich.) 95 N. W. 978; Byrns v. Volz, (Minn.) 54 N. W. 942; Kohl v. Sullivan, 140 Pa. 35, 21 Atl. 247; M. & M. Ry. Co. v. Soutter, 80 U. S. 517, 20 L. Ed. 543.

J. F. Simms, of Albuquerque, H. C. Denny, of Gallup, and J. O. Seth, of Santa Fe, amici curiae.

OPINION OF THE COURT.

BRATTON, J. Charles L. Brown died in Gallup, possessed of an estate of considerable value. He had been twice married. His first wife died, leaving as the only issue of that amrriage the appellant Louise B. Heller. The appellee Irene Brown was his second wife. On December 6, 1916, he secured a decree of divorce from her in which she was given a judgment for alimony at the rate of $10 per month, to begin one month after the delivery of the child of which she was then pregnant, and in which decree all property rights between the spouses were fully and finally settled and determined. Thereafter the appellee Charles Leibalt Brown was born, and he is the only issue of the second marriage, thus making the two children, Louise B. Heller and Charles Leibalt Brown, the sole heirs at law of Charles L. Brown deceased.

On April 21, 1917, and after the deceased had been divorced from his second wife and their property rights had been settled, he executed and published what purported to be his last will and testament, by which he gave to his infant son $300, with certain directions concerning its expenditure, and gave the remainder of the estate to his daughter. At the same time he executed a deed by which he conveyed to his daughter all the property which he then or at the time of his death owned, and these two instruments were placed in a bank in Gallup, where they remained until shortly before Brown's death, when they were delivered to him and later appeared in the custody of the daughter who claims under them.

This suit was brought by the infant son, Charles

Leibalt Brown, acting by and through his mother as next friend, joined by her in her individual capacity, to set aside, vacate, cancel, and annul both of said instruments upon the theory that their execution and delivery was obtained by force, fraud, undue influence, improper and undue persuasion, compulsion, and by overreaching the will of said Brown. The son sought to recover his share of the estate and the mother, in her individual capacity, to collect the monthly installments upon her judgment which had accured since Brown's decease.

The appellants denied that the instruments were executed under the circumstances pleaded by the appellees, and affirmatively charged that they were executed without the knowledge of the daughter and in consideration of the love and affection which the deceased bore for her, and, further, that the estate was not liable for anything upon the judgment in favor of Irene Brown since the death of Charles L. Brown.

The trial court filed a carefully prepared opinion, followed by full findings of fact and conclusions of law, wherein he found that the deed was secured in the manner and by the processes charged in the complaint, and was therefore invalid, because tarnished with fraud, and hence by decree dated October 13, 1920, it was not canceled and vacated but a trust was impressed upon the half interest which belonged to the minor son. The court further concluded that the will was adeemed by the deed, and that the two children were entitled to inherit equally from their deceasd father; that the daughter should be deemed to be a trustee for the benefit of the other child. She was directed to make an accounting of the receipts and disbursements since the death of her father, and following this, and on June 26, 1922 judgment was rendered in favor of the son for the sum found to be due him, from which this appeal has been taken.

Preliminary to our consideration of the questions involved, we note the suggestion of the appellees that the first decree and the proceedings leading up thereto are not properly before us, because it is a final

judgment and was not separately appealed from in the manner and within the time prescribed by law. At the time that decree was entered, the parties filed a written stipulation waiving the requirement that a separate appeal from that decree should be taken, and expressly agreeing that the entire record might be reviewed upon this single appeal. Having thus agreed, we shall consider the entire case in accordance therewith.

[**1**, **4**] 1. At the outset, the appellants contend that the trial court erred in denying them a trial by jury. A jury was regularly impaneled, and afterwards the court concluded that the suit was one in equity, that the parties were not entitled to jury trial as a matter of right, and thereupon the jury was discharged and the trial proceeded before the court. The suit was necessarily and essentially one in equity to vacate the deed upon the grounds stated. It could not be said to be a suit to vacate the will, because the district court had no jurisdiction to try the issues tendered by the complaint concerning the will, as an attack of this kind upon a will cannot be instituted originally in the district court, but must begin in the probate court, and it can only reach the district court by an appeal taken pursuant to a finding the will is valid, or by being certified thereto by the probate judge upon his finding that the will was invalid. These are the only ways by which proceedings attacking the validity of a will upon the grounds charged here can reach the district court. Sections 5879-5883, inclusive, Code 1915; Miera et al. Akers et al., 25 N. M. 508, 184 Pac. 817. The complaint therefore stated no case of action as against the validity of the will, and the trial court evidently so regarded the same, because he did not determine its validity, as we shall see later. The action being essentially one to cancel the deed upon the enumerated grounds, it was necessarily a proceeding in equity, and therefore the parties were not entitled, as a matter of right, to a jury trial. The right to a trial by jury in equity cases is discretionary with the trial court, and a denial thereof is not a reversible error. The court did not, therefore, err in discharging the

jury. Young et al. v. Vail et al., 29 N. M. 324, 222 Pac. 912, and Owen v. Thompson et al., 224 Pac. 405, decided by us under recent date and not yet officially reported. This assignment is without merit, for the additional reason that no objection or exception was taken to the action of the trial court in discharging the jury and proceeding with the trial before the court. On the contrary, all parties proceeded without objection or exception and thereby fully acquiesced in the action of the court, and for this further reason appellants cannot now be heard to complain.

2. It is next urged that the findings of the court with reference to the deed being obtained by the exercise of undue and improper influence, with the wrongful and fraudulent motive and purpose of inducing the deceased to disinherit his infant son, are erroneous. This contention proceeds upon the theory that the court reached such conclusion by finding that a confidential or fiduciary relation existed between the parties at the time said deed was executed, and from these facts presumed the existence of undue and improper influence. While some expressions may be found in the record indicating that the court entertained such belief, yet it appears from the findings that such influence was affirmatively found to exist without reference to any confidential or fiduciary relation. This finding of fact was made:

"That the said Charles Brown was induced and influenced by the defendant Louise Brown Heller to make the said will and to make and deliver the said deed, wrongfully, fraudulently, and by the exercise of undue and improper influence exerted upon him by the defendant Louise Brown Heller, with the improper, wrongful, and fraudulent motive and purpose of inducing and which did induce, influence, and control the said Charles Brown to disinherit his child, the plaintiff Charles Leibalt Brown, and make no substantial provision for the care, support, or maintenance of the said child, and to disregard the claims and rights of the said child as a proper object of his bounty and instead to give his entire property and estate to the said defendant Louise Brown Heller."

[5] From this it appears that the existence of such influence and wrongful and fraudulent purpose was

expressly and affirmatively found. And from our careful review of the evidence, we think such finding is supported thereby. Under the now familiar rule of this court, declared in so many cases, it will not be disturbed on appeal.

[**6**, **7**] 3. The next question presented for our consideration is the correctness of the trial court's view that by the execution and delivery of the deed, by which Brown conveyed all of the property of which he was then and at the time of his death seized, said property was adeemed and taken out of the provisions of the will, and that thereby said will was impliedly revoked. It is provided by statute in this state that a will may be revoked by an instrument in writing, executed and attested in the same manner as is required in the execution of a will, in which instrument the maker shall distinctly refer to such will and declare his revocation thereof, or it may be revoked by subsequently executing a valid will disposing of the same property covered by the previous one. Section 5867, Code 1915. But the two methods laid out in the statute are not exclusive, and it is settled in this jurisdiction that, under the common-law rule, wills may be revoked by operation of law in other ways than those specified in such statute. Teopfer v. Kaeufer, 12 N. M. 372, 78 Pac. 53, 67 L. R. A. 315.

[**8**] We may say generally it is firmly established, both at common law in England and under the common-law rule in this country, that where a testator, subsequent to the execution of his will specifically devising his estate, voluntarily conveys such estate by an absolute deed of conveyance, the will is impliedly revoked, and the property thereby adeemed from its operation. This rule has been frequently applied in cases where the deed conveyed only a part of the estate, and in such instances it is construed as an implied revocation pro tanto, but it has equally specific and direct force in a case of this kind where the testator conveys his entire estate by his deed executed subsequent to the will. This must necessarily be the rule

because there is nothing left upon which the will can operate. There is no estate for it to affect. There is no property to pass under its terms; it is nothing but an idle ceremony, and the testator must be deemed to have kept these facts in mind when he executed such deed. What force or effect could he have intended his will to have after parting with the title to his entire estate? How could he have further intended that it should pass title to his property as he had directed, when he thereafter had nothing to give, devise, or bequeath? 4 Black. Com. §§ 528, 529; 1 Jarman, Wills, p. 167; Rood, Wills, §§ 368, 369; Schouler, Wills, § 651; 1 Waerner, Administration, § 53, p. 146; 28 R. C. L. Wills, § 151, p. 191; Lang v. Vaughn et al., 137 Ga. 671, 74 S. E. 270, 40 L. R. A. (N. S.) 543, Ann. Cas. 1913B, 52; American Trust & Banking Co. v. Balfour, 138 Tenn. 385, 198 S. W. 70, L. R. A. 1918D, 536; Evans v. Minn Trust Co. et al., 145 Minn. 252, 177 N. W. 126, 8 A. L. R. 1631; and the many cases cited in the notes thereto.

It is held by some courts that, where the will devises the property to the same person to whom it is subsequently conveyed by deed, no ademption or implied revocation occurs, that the deed is to be regarded as confirming the will, because there is no inconsistency between the two, and that the will is not impliedly revoked nor the property adeemed from its operation unless there be something in the subsequent conveyance inconsistent with the terms of the will, thereby evidencing a different purpose and desire on the part of the testator from that contained in the will. See Wells v. Wells, 35 Miss. 638; Caine et al. v. Barnwell, 120 Miss. 209, 82 South. 65; Aubert's Appeal, 109 Pa. 447, 1 Atl. 336; Pickett et al. v. Leonard, 104 N. C. 326, 10 S. E. 466. But by the weight of authority, it is held that a conveyance by the testator, subsequent to the execution of the will, of property devised therein, removes such property from the operation of the will, and of necessity operates as an ademption of such property, and effects a revocation of such will to the extent of the property conveyed. Hence, if a part only of the property affected by the will is conveyed, the

ademption is limited to such part, and the revocation is partial or pro tanto, the remaining parts of the will still being effective, but, if all of the property affected by such will is conveyed by deed, a complete or total revocation is wrought. This is not due to any infirmity of the will or lack of its validity in law, but because the entire estate is withdrawn from its operation, and it becomes impossible for it to affect or pass title to anything. This rule obtains whether the property is conveyed to the devisee or donee in the will or to a third person. This conclusion seems irresistible when we pause to consider the real purport and effect of a will which is merely the designation or appointment of some one to take certain property which belongs to the testator at the time of his death. The necessary consequence that he must own such property at the time of his decease is indeed indispensable in order that the will have any effect whatever. If the devised property is conveyed to the devisee, such will can have no effect thereafter, because the deed takes effect from its execution and delivery, while the will can have no effect until the death of the testator, with the inevitable result that there can then be no estate so far as the lands devised and conveyed are concerned, upon which the will can operate or to which it can pass title. 28 R. C. L. Wills. § 151, p. 193; 40 Cyc. 1205-1209; Kean's Will, 39 Ky. (9 Dana) 25; Rose v. Rose, 7 Barb. (N. Y.) 174; Arthur v. Arthur, 10 Barb. (N. Y.) 9; Woolery v. Woolery, 48 Ind. 523; Gage v. Gage, 12 N. H. 371; Gregory et al. v. Lansing, 115 Minn. 73, 131 N. W. 1010; Miller v. Klossner et al., 135 Minn. 377, 160 N. W. 1025; Gore v. Ligon, 105 Miss. 652, 63 South. 188; Watson v. McLench, 57 Or. 446, 110 Pac. 482, 112 Pac. 416; Conn. Trust & Safe Deposit Co. v. Chase et al., 75 Conn. 683, 55 Atl. 171; Davis v. Close, 104 Iowa, 261, 73 N. W. 600; in re Miller's Will, 128 Iowa, 612, 105 N. W. 105; Hall v. Hall, 132 Iowa, 664, 110 N. W. 148; Rice et al. v. Rice et al. (Iowa) 119 N. W. 714; Phillippe et al. v. Clevenger, 239 Ill. 117, 87 N. E. 858, 16 Ann. Cas. 207.

4. As we understand the contention of the appel-

lants, however, they do not question the correctness of the general rule that we have just declared, but say that this case falls within an exception thereto, namely, that a deed which is obtained by the exercise of undue and improper influence or by over-reaching the will of its grantor cannot serve to adeem the property thereby conveyed from the operation of a will previously made, nor can it affect an implied revocation of such will, either total or pro tanto—depending upon the part of the devised premises conveyed by such a deed. We shall now consider this contention. There is a direct conflict among the English authorities upon the question. It has been held that a void conveyance of property operates to revoke a prior will devising it. Hicks v. Mors. Ambl. (Eng.) 215, 27 Eng. Rep. 143; Lincoln's Case, 1 Eq. Cas. Abr. (Eng.) 411, Par. xl, 21 Eng. Rep. 1140; Shove v. Pincke, 5 T. R. (Eng.) 124, 101 Eng. Rep. 72; Simpson v. Walker, 5 Sim. (Eng) 1, 58 Eng. Rep. 238. As opposing these cases and declaring the contrary doctrine, see Hawes v. Wyatt, 3 Bro. C. C. (Eng.) 156, 29 Eng. Rep. 463; Eilbeck v. Wood, 1 Russ. (Eng.) 564, 38 Eng. Rep. 217; Mathews v. Venable et al., 2 Bing. 136, 130 Eng. Rep. 257.

[**9**] There seems to be no contrariety of opinion among the courts of this country, as they agree that a deed, which is secured, and whose existence is brought about, in the manner found to have been exercised here, cannot operate to adeem the property from the provisions of the will and thereafter conveyed by the deed, and that it is insufficient to serve as a revocation of the will—either wholly or pro tanto, as the case may be. This is clearly seen to be the correct rule, when we keep in mind what we have previously said herein, that the reason for ademption or revocation is that after the conveyance there is no property or estate left upon which the will can operate, nor title to any estate which can be passed by it. Such would not be the situation where the conveyance is void because secured by undue and improper influence, or by overreaching the grantor's will. Such a

deed does not pass title to the property. It is a nullity, and the real title still remains in the testator in the will, because no valid conveyance has been executed by him which passed such title to another, although the ostensible or record title has passed. This has been the uniform holding by the several courts having occasion to pass upon the question, and the rule seems sound and meets with our approval. In 28 R. C. L. Wills, § 151, p. 193, supra, this is said:

"But it has been held that a conveyance set aside as having been obtained from the grantor by undue influence cannot operate as an implied revocation of his will."

In 1 Schouler's Will, § 652, p .749, the author says:

"A void deed will not operate to revoke a valid will, and a deed not testamentary in character may, not amount to an attemped revocation."

And at 40 Cyc. 1208, this language is used:

"And both at common law and under modern statutes, a contract or conveyance, executed by one who is mentally incapacitated, or under disability, or which is founded upon an illegal consideration, or adjudged void for fraud or undue influence is ineffectual as a revocation."

To the same effect, see Smithwick et al. v. Jordan, 15 Mass. 113; Graham v. Burch, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339; Yott et al. v. Yott et al., 265 Ill. 364, 106 N. E. 959; Caine et al. v. Barnwell, 120 Miss. 209, 82 South. 65. In Smithwick et al. v. Jordan, supra, the Massachusetts court said:

"The testatrix was not disseised at the time of making her will, nor at the time of her death. For, although she had signed and sealed instruments, purporting to convey her title to the tenant, yet those instruments never operated to pass the estate; and it does not appear that any possession was taken under them until after her decease. The deeds read in evidence cannot operate as a revocation of the will; because, by the verdict of the jury, it is established that the testatrix never, in a legal sense, made such deeds—her extreme old age and imbecility having been taken advantage of, by the pretended grantee, to procure them."

Again, in Graham v. Burch, wherein the case of

Smithwick v. Jordan was expressly followed, the Supreme Court of Minnesota thus expressed its views upon this question:

"Under the clause saving revocations, 'Implied by law from subsequent changes in the condition or circumstances of the testator,' it is claimed that the conveyance to Mrs. Burch above referred to, and which was set aside by the court on the ground of undue influence, must be construed as an implied revocation of the will in question. Of course, a sale of the estate devised must operate as a revocation, for the will cannot thereafter take effect on it; and it is admitted that, if the deed had been valid and effectual to convey the premises, it would have worked a revocation; but the respondent insists that the rule is not applicable to a deed adjudged invalid, and not the deed of the grantor, for fraud or undue influence. If, in opposition to the allowance of a will in probate proceedings, a revocation in writing, executed in due form by the testator, had been produced, clearly the proponent would not be concluded from showing that it was not the voluntary act of the testator, but that it was procured by fraudulent devices and undue influence. O'Neall v. Farr, 1 Rich. (Law), 80. But we can see no distinction in this respect between such an instrument and a deed which is claimed to work a revocation by implication, if the deed was not the act of the testator, and the existence of the deed is due to fraud and undue influence, especially where, as in this instance, the fact is already adjudicated that the instrument, though in form the testator's deed, is no deed. 'Whoever orders it to be delivered up declares it to be no deed,' says the chancellor in Hawes v. Wyatt, 3 Brown, Ch. 156. The general rule is that no revocation can be good which is procured by fraud, or where the testator was unduly influenced to make it. Schouler, Wills, § 184."

And in Yott et al. v. Yott et al., the Supreme Court of Illinois followed both of the cases just referred to, and there well and tersely said:

"A conveyance by a testator of lands which he has specifically devised by his will revokes the will as to the lands conveyed. Phillippe v. Clevenger, 239 Ill. The reason is that the act of the testator subsequent to its execution shows an intention inconsistent with the will. Such an act must be the result of a sound mind and a free will. A deed procured by fraud or undue influence or executed by one who is mentally incapacitated does not show such an intention and cannot operate as a revocation of a will. Smithwick v. Jordan, 15 Mass. 113; Graham v. Burch, 47 Minn. 171."

From all of what has been said, it appears that the

trial court erred in concluding that the deed in question, which he found was secured by the exercise of undue and improper influence, served to adeem the premises therein conveyed and operated as a total revocation of the will. The validity of the will was not affected by the deed, its execution having been thus obtained. It naturally and necessarily follows that the duty of the court ended with the cancellation of the deed and its decree should have gone no further, unless it be to restrain a sale of any of the premises until the validity of the will is determined. Just what has been done towards probating the will does not clearly appear in the record, but that is not material. Its existence was fully admitted by all parties in their pleadings filed, and the court specifically found that it was executed and published. What has been done in probating it is not material. But when its existence was admitted the trial court should not have disregarded its effect as he did.

6. The last contention made by the appellants is that the court erred in deciding the cause upon a different theory from that contended for by either party. It is said that the plaintiffs below proceeded upon the theory that the deed and will were secured by fraud and the exercise of undue and improper influence and that they should be canceled, and the plaintiff's (Charles Leibalt Brown's) title to an undivided one-half interest in the land quieted and set at rest, and that they so prayed, while the theory of the appellants was that the instruments were valid, and that her (Louise B. Heller's) title to the whole was therefore good, and that the trial court declined to follow either theory, but concluded, as we have proviously said, that the deed adeemed or impliedly revoked the will; that the deed was void because obtained by improper and undue influence; that a trust should be impressed upon the one-half interest in said lands belonging to the appellee Charles Leibalt Brown, and the appellant Louise B. Heller deemed to hold the same as trustee. The contention is without merit. The facts which appellees contended surrounded the execution of the will and the deed were fully pleaded,

and the court found them to be true, but granted relief different from that prayed for. The appellees prayed that the instruments be canceled and title of Charles Leibalt Brown to one-half interest in the lands quieted. Instead of granting this relief, the court concluded to grant the relief hereinbefore stated. The prayer is no part of the pleading, and cannot be used as a test to determine the nature or the cause of action stated or the relief to be granted. Morgan v. Doughton, 24 N. M. 274, 171 Pac. 503; Beals v. Ares, 25 N. M. 459, 185 Pac. 780; Board of Education v. O'Bannon, 26 N. M. 606, 195 Pac. 801. Appellants strenously argue that the cause should have been tried and disposed of upon some definite theory, known to and understood by the parties at the time of the trial. The essential facts to support the relief granted by the trial court were fully and explicitly pleaded in the complaint, and the issues of fact were clearly tendered and thoroughly tried; they being whether or not the deed was executed pursuant to the exercise of improper and undue influence. When the court found that these facts existed, the relief to be granted was a matter of applying the law thereto, and upon this, the appellants cannot say that they were in any wise injured, so long as the relief granted was in accordance with that authorized by law.

That part of the decree entered on October 13, 1920, which declares and adjudges the deed in question to be defective and invalid because obtained as hereinbefore stated, will be affirmed; all other parts of that decree and the entire judgment rendered on June 26. 1922, will be reversed, and the cause remanded, with directions to the lower court to proceed in accordance herewith, and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

[No. 2820. May 22, 1924.]

DURHAM v. RASCO.

SYLLABUS BY THE COURT.

1. Justice courts possess no equitable jurisdiction, as

the exercise of original equity jurisdiction is vested exclusively in the district courts.

2. A justice court may rightly retain a case for the trial of the issues of law remaining after all equitable features have been eliminated, where sufficient facts remain to constitute a cause of action at law over which that court has jurisdiction.

3. The prayer is no part of a pleading, and cannot be considered to determine the nature of the case nor the relief to which a party is entitled.

4. Where default is made in the payment of a part of an indebtedness secured by a mortgage, which provides that upon such default the entire indebtedness may be declared at once due and payable, such holder has the right to accelerate all of such indebtedness for all purposes.

5. The negotiability of promissory notes is not destroyed by virtue of such a provision in a mortgage securing them.

Appeal from District Court, Guadalupe County; Leahy, Judge.

Action by Homer Durham against Eugene Rasco. From a judgment for defendant, plaintiff appeals. Affirmed.

F. Faircloth, of Santa Rosa, for appellant.

W. P. Harris, of Vaughn, and E. R. Wright, of Santa Fe, for appellee.

OPINION OF THE COURT.

BRATTON, J. On June 4, 1921, the appellant executed his two certain promissory notes, each payable to the appellee's order—one being in the sum of $100, due November 1, 1921, and the other being in the sum of $55, due November 1, 1922. At the same time, and to secure the payment of these notes, the appellant executed his chattel mortgage covering certain chattels situated in Guadalupe county. This mortgage contained the usual provision that, should default be made in the payment of any part of the debt described therein, the holder and owner should have the right to declare the full sum then unpaid to be at once due and payable. It further provided for 10 per cent. additional upon the amount unpaid as attorney's fee. Default was made in the payment of the first note, and

appellee declared the second note to be due, and instituted this suit in the justice court of Guadalupe county by filing a written complaint, which fully pleaded the notes and chattel mortgage and sought judgment upon the notes and a foreclosure of the mortgage lien with a sale of the described property. Appellant filed no written pleading in the justice court, where the cause was tried before a jury which rendered a verdict in favor of appellee for the full sum evidenced by the notes, as well as attorney's fee. Nothing was done with reference to foreclosing the mortgage. The cause was then appealed to the district court, where appellant interposed a demurrer upon the ground that the justice court had no jurisdiction in the first instance of the subject-matter because the suit was one in equity over which that court had no jurisdiction, and that therefore the district court acquired none upon appeal. This demurrer was overrulled, and appellee thereafter filed an answer. The cause was tried, and judgment again rendered against the appellant for the full sum sued for, but no foreclosure of the mortgage lien was sought or granted. The correctness of the court's action in overruling the demurrer is the sole question presented upon this appeal.

[1] 1. The justice courts of this state possess no equitable jurisdiction. The exclusive, original equity jurisdiction is vested in the district courts of the state. Section 13, art. 6, Constitution. Justice courts are created by the Constitution with jurisdiction limited to actions for debt, where the sum involved is $200 or less. Section 26, art. 6, Constitution. By this constitutional provision, actions at law for the recovery of debt are contemplated. No equitable jurisdiction is thereby vested in the justice court. It is vested exclusively in the several district courts of the state.

[2] 2. So, if the cause of action was one in equity, manifestly the justice court had no jurisdiction to proceed with the trial, and the district court therefore acquired none by virtue of the appeal. It has been

held twice by this court that, if a justice court has no jurisdiction in the first instance of the subject-matter involved in a cause of action, the district court acquires none upon appeal, except perhaps to dismiss the cause and render judgment for costs. Pointer v. Lewis, 25 N. M. 260, 181 Pac. 428; Geren et al. v. Lawson, 25 N. M. 415, 184 Pac. 216. The appellee does not controvert these general principles, but contends that he abandoned his mortgage in the justice court so far as seeking the establishment or foreclosure of a lien was concerned and relied upon it only as a contract giving the right to accelerate the maturity of the second note in case default was made in payment of the first one, and as providing for attorney's fee. That he endeavored to so abandon the mortgage and to rely upon it for the two purposes mentioned is apparent, as no effort was made in either the justice court or the district court to secure a foreclosure or sale of the chattels. On the contrary, the cause was tried before a jury in the justice court and a verdict rendered for the sum in controversy, thus clearly indicating that it was there regarded as a case at law to recover a debt.

After the equitable feature of the case was abandoned, there remained in the complaint ample facts to constitute a cause of action at law upon the notes. Clearly the justice court was clothed with jurisdiction over this cause of action, unless by joining the equitable phase it became impossible for that court to entertain such jurisdiction even after the foreclosure was dismissed. Upon this, we think the abandonment of the equitable feature which eliminated everything of an equitable nature, left remaining facts constituting an action at law over which the justice court had and rightly exercised jurisdiction in the first instance, and that the district court acquired the same jurisdiction upon appeal. A case which is similar in principle to this one is Anderson v. Red Metal Mining Co., 36 Mont. 312, 93 Pac. 44. There the plaintiff sued in the justice court upon an account for labor which had been performed by one Frankovich, who had assigned the claim to the plaintiff. In the complaint, plaintiff

joined Paris Bros., a copartnership, as a party defendant, alleging that it claimed to hold an assignment of the same account, but that such assignment was a forgery, and prayed that it be canceled and annulled, thus clearly injecting into the cause relief cognizable solely in equity. Paris Bros. demurred, contending that the cause was one in equity, and that the justice court therefore had no jurisdiction. This demurrer was sustained, and the cause proceeded upon the law questions remaining. Upon appeal to the district court, a motion was made to dismiss because the court was without jurisdiction of the cause or of the appeal, which was denied. In passing upon the questions involved, the Supreme Court of Montana said:

"The contention is made that it is manifest from the complaint filed in the justice's court that the relief sought by the plaintiff is equitable in its nature, and that, since under the Constitution (art. 8, § 21) a justice's court has no equity jurisdiction, it had no power to proceed with the trial, hence the jurisdiction of the district court did not attach by virtue of the appeal, in that its jurisdiction on appeal is the same as that of the justice's court. It has frequently been held by this court that, if the justice's court has no jurisdiction of the subject-matter in a particular case, the district court on appeals acquires none, except to dismiss the appeal and render judgment for costs. Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240; Shea v. Regan, 29 Mont. 308, 74 Pac. 737; Oppenheimer v. Regan, 32 Mont. 110, 79 Pac. 695. It does not necessarily follow, however, that the character of an action is to be determined by particular allegations incorporated in the complaint. In a given case a party may assume that he is entitled to equitable relief, and proceed to formulate his pleadings accordingly. It may be apparent therefrom that he is not entitled to the relief he seeks, yet he will not for this reason be turned out of court, if upon any theory of his pleading he is entitled to other relief. Under the Constitution (art. 8, § 28) there is but one form of action in this state. Law and equity may be administered in the same case. A mistake as to the form in which the action should be brought, or as to the relief which may be demanded upon the statement of facts made, is of no moment. If equitable relief is demanded, but the facts do not warrant this character of relief, a complaint will be sustained for legal relief, if the facts warrant it. Donovan v. McDevitt, 36 Mont. 61, 92 Pac. 49. In this case the plaintiff made Frankovich and Paris Bros. parties. His counsel seem to have proceeded upon the assumption that by so doing he could secure the cancellation of the alleged forged assignment held by Paris Bros. In this they were in error. The court could not grant that character

of relief. This contention was made by Paris Bros.' demurrer. The justice, in sustaining this, sustained the contention of defendants that he was without equitable jurisdiction. He retained the action as between the plaintiff and the company, as he should have done. This condition left a simple legal question of the liability of the defendant company to the plaintiff, which the justice had jurisdiction to determine. (Code Civ. Proc. § 66.) As between these parties the action was one arising on a contract for the payment of money. So far, then, there can be no doubt that the action of the justice was correct. A judgment rendered settling the question of the liability of the company to the plaintiff would have been valid."

[3] The principles there declared are controlling here. There the justice court sustained a demurrer holding that it had no jurisdiction to grant equitable relief, but retained jurisdiction of the case to determine the issues of law remaining after the equitable feature had been eliminated. Here the plaintiff, conceiving that he had fallen into error in the belief that the justice court could grant him a foreclosure of his mortgage lien, abandoned that part of his case and proceeded with the law features remaining. The similarity in the two cases is that in each instance an equitable feature was originally injected into the case but afterwards eliminated and the cause retained to be tried upon the law features remaining; the only difference being in the method adopted to cast out the equitable feature. Here it was removed by the plaintiff's abandonment of it, while in the Montana case it was eliminated by the court's sustaining a demurrer. The justice court had jurisdiction to determine the issues at law which remained after the foreclosure feature was abandoned and ceased to be an issue. And the fact that the plaintiff prayed for a foreclosure of the mortgage and that prayer remained in the pleading does not detract from this conclusion, because the prayer is no part of a pleading, and cannot be considered to determine the nature of the cause of action nor the relief to which a party is entitled. Morgan v. Doughton, 24 N. M. 274, 171 Pac. 503; Beals v. Ares, 25 N. M. 459, 185 Pac. 780; Board of Education v. O'Bannon, 26 N. M. 606, 195 Pac. 801; Brown v. Heller, 227 Pac. 594, recently decided by this court and not yet officially reported.

[4] 3. As we have previously suggested, according to its face and tenor, the second note had not matured at the time the suit was filed or at the time judgment was rendered in the justice court. To accelerate its maturity, the appellee relied upon the following provision contained in the chattel mortgage:

"If all the conditions herein expressed shall be complied with this mortgage shall be void, but if the first party shall fail to pay any part of the indebtedness hereby secured when due, or shall fail to comply with the conditions herein expressed, or any of them, or if from any cause the holder thereof shall deem themselves insecure, then all the indebtedness hereby secured shall at the option of the holders thereof become due. * * *"

The authorities dealing with the effect of such a provision in a mortgage, securing a series of notes maturing at different times, are in hopeless conflict, as there may be found among them variant and divergent views. 8 C. J. p. 199; 3 R. C. L. § 436, p. 413. It is held by a very respectable array of courts that such a provision matures the then unmatured notes belonging to the series for the purpose of foreclosure and to exhaust the mortgage security only, and not for the purpose of securing a personal judgment; that the remedy of foreclosure alone is ripened upon such a default (McClelland v. Bishop, 42 Ohio St. 113; American National Bank v. American Wood Paper Co., 19 R. I. 149, 32 Atl. 29 L. R. A. 103, 61 Am. St. Rep. 746; Owings et al. v. McKenzie et al., 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154; Brinsmade v. Johnson, 192 Mo. App. 684, 179 S. W. 967; White v. Miller, 52 Minn. 367, 54 N. W. 736, 19 L. R. A. 673; Rasmussen et al. v. Levin, 28 Colo. 448, 65 Pac. 94; Alwood et al. v. Levin, 28 Colo. 448, 65 Pac. 94; Alwood et al. v. Harrison et al., 66 Okl. 203, 171 Pac. 325; Birken v. Hickey et al., 42 S. D. 472, 176 N. W. 137; Morton v. Rock Bottom Coal Co., 91 W. Va. 169, 112 S. E. 397), but, by what we consider to be the better reasoned cases, it is held that the notes and mortgage form parts of one and the same transaction and agreement, and should be construed together, so that default in the payment of any of them, under the terms of the

mortgage, matures the entire debt for all purposes, and entitles the holder thereof to a personal judgment as well as a decree of foreclosure. Indeed, they must be read and construed together in order to view the entire contract of the parties. To consider and construe them separately is to dissociate the instruments which the contracting parties united and made component parts of their entire agreement, and to some extent at least mutually dependent. This view is sustained by numerous authorities, including the distinguished Mr. Justice Brewer. First National Bank v. Peck et al., 8 Kan. 660; Darrow et al. v. Schullin, 19 Kan. 57; Evans v. Baker, 5 Kan. App. 68, 47 Pac. 314; Parks v. Cooke, 3 Bush. 168; Chambers et al. v. Marks, 93 Ala. 412, 9 South. 74; Williams v. Douglass, 47 La. Ann. 1277, 17 South. 805; Grand Island Savings & Loan Association v. Moore et al., 40 Neb. 686, 59 N. W. 115; Consterdine v. Moore et al., 65 Neb. 291, 91 N. W. 399, 96 N. W. 1021, 101 Am. St. Rep. 620; Swearingeh v. Lahner et al., 93 Iowa, 147, 61 N. W. 431, 26 L. R. A. 765, 57 Am. St. Rep. 261; Henry v. Hodge et al., 171 Ill. App. 10; Banzer v. Richter, 68 Misc. Rep. 192, 123 N. Y. Supp. 678; Fox v. Gray, 105 Iowa, 433, 75 N. W. 339; Gregory v. Marks, 8 Biss. 44, Fed. Cas. No. 5, 802; Wheeler & Wilson Manufacturing Co. v. Howard (C. C.) 28 Fed. 741; Brewer v. Penn. Mutual Life Insurance Co., 94 Fed. 347, 36 C. C. A. 289. Other cases upon both sides of this question may be found in the note appended to Myrick v. Purcell, 5 Ann. Cas. 148.

[5] 4. And the conclusion which we have reached with respect to the effect of a provision of this kind in a mortgage does not render such notes nonnegotiable. By the weight of authority, it does not deprive them of their negotiability. Holliday State Bank v. Hoffman, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912D, 1; Des Moines Savings Bank v. Arthur et al., 163 Iowa, 205, 143 N. W. 556, Ann. Cas. 1916C, 498; Lundean v. Hamilton et al., 159 N. W. 163, for new opinion, see 184 Iowa, 907, 169 N. W.

208; Westlake v. Cooper et al., 171 Pac. 859, L. R. A. 1918D, 522; Nickell v. Bradshaw et al., 94 Or. 580, 183 Pac. 12, 11 A. L. R. 623.

The judgment of the lower court being correct, should be affirmed, and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

(No. 2730, May 10, 1924. On Rehearing June 22, 1924).

STATE v. JEMEZ LAND CO.

SYLLABUS BY THE COURT.

1. Where an appellant has accepted the benefits of the judgment appealed from, and there is no possibility that the appeal may lead to a result whereby the appellant may recover less than has been received under the judgment, the right to appeal is unimpaired.

2. On an appeal, in 1919, by a taxpayer to the state tax commission from the valuation of one item of property, and in the absence of an appeal by the state as to other property of the taxpayer, the state tax commission was without jurisdiction to readjust the classification or valuation of the property not involved in or covered by the appeal.

3. The value of real estate which should be fixed for taxation purposes is the actual value of the estate as a whole, but the taxpayer is in no wise injured by having such value arrived at by a consideration and summing up of the several elements of value, so long as the total value thus obtained does not exceed the actual value of the real estate.

ON REHEARING.

4. An order of the state tax commission, made without jurisdiction, by which the commission undertakes to dispose of an appeal, is void and ineffectual, and leaves the appeal still pending.

5. Appeal dismissed on authority of State v. Fernandez Co., 28 N. M. 425, 213 Pac. 769.

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

Action by the State against the Jemez Land Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

John Venable, of Albuquerque, for the State.

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

OPINION OF THE COURT.

BOTTS, J. Following the action of the county assessor and board of equalization, appellee found its property, consisting of 110,308 acres of land, on the tax rolls for 1919 classified as 90,308 acres of grazing land, valued at $1.25 an acre, and 20,000 acres of timber land, valued at $12.50 an acre. Thereupon appellee appealed to the state tax commission from the valuation of said timber lands as excessive, but did not appeal from the classification or valuation of the grazing lands. Notwithstanding there was no appeal except as to the valuation of timber land, the state tax commission ordered the whole 110,308 acres to be valued and assessed at $1.50 per acre, and added thereto the valuation of 400,000,000 feet of stumpage at 40 cents a thousand feet. Appellee refused to pay the taxes so assessed, and, upon suit being brought for the recovery thereof under the provisions of chapter 133, Session Laws of 1921, defended on the ground that the tax commission was without jurisdiction to increase the valuation of the 90,308 acres of grazing land, as to which no appeal had been taken, and was without jurisdiction to levy an assessment on said 400,000,000 feet of stumpage, apart from the land, and that, if it should be mistaken as to the jurisdictional defenses, the action of the state tax commission resulted in an excessive valuation of its property and constituted a discrimination against the appellee. By its answer appellee alleged its readiness and willingness to pay taxes on said real estate at such reasonable value as the court might fix, and contended for a valuation of $1.25 an acre on the grazing land and $4 an acre on the timber land. The state demurred on the ground that the allegations of the answer were insufficient in law to authorize the granting of the relief asked for. The demurrer was overruled, and thereupon the state replied, denying generally the new matter in the answer. The court heard evidence and concluded, as a matter of law, that the state tax com-

mission had no power to ignore the appeal as to such 20,000 acres of timber land, and had no power, without appeal as to the 90,308 acres, to make a different classification or assessment, or pass on questions not brought up by appeal, and was without jurisdiction to assess the whole of the land separately at $1.50 an acre, and to assess separately the timber growing thereon. Judgment was rendered against the appellee for $3,423.70, and in connection therewith the court specifically found that the appellee had produced in court and tendered to the treasurer said sum of $3,423.70, which represented the amount of the taxes based on the 90,308 acres valued at $1.25 per acre, and the 20,000 acres of timber land valued at $4 per acre, being the classification and values contended for by appellee. As a part of the final judgment, the court ordered and directed the county treasurer to accept the amount of the judgment in full payment of the taxes for the year 1919, and to issue appellee a receipt in full for said taxes and mark the same paid and fully satisfied on the tax roll. The treasurer complied with this direction, as appears from an affidavit filed in this case upon which appellee now contends that this appeal should be dismissed as presenting only a moot question in that the appellant has accepted the benefits of the judgment.

[1] In State v. Fernandez Co., 28 N. M. 425, 213 Pac. 769, we applied to a similar situation the general rule that one cannot accept a benefit under a judgment and then appeal from it, where the effect of the appeal may be to annul the judgment, but called attention to an exception to the general rule that, where there is no possibility that the appeal may lead to a result whereby the appellant may recover less than has been received under the judgment appealed from, the right to appeal is unimpaired. In the Fernandez Co. Case the amount of the judgment appealed from was more than the amount conceded to be due by the defendant and less than the amount contended for by the plaintiff. In the present case appellee conceded that it owed the amount of taxes finally found to be due, and for which judgment was rendered by the

court. Thus it is seen that, if this case were to be reversed and sent back for a new trial, the appellant could not recover less than has been received under the judgment appealed from, and the case comes squarely within the exception. In re Clark's Estate (Cal. Sup.) 212 Pac. 622; Tyler v. Shea, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660. It follows that the appeal should not be dismissed.

[2] In the case of State v. South Spring Ranch & Cattle Co. (No. 2770) 226 Pac. 886, this day decided, we have reviewed the legislation in force in 1919 governing appeals to the state tax commission, and there held that on an appeal the state tax commission had jurisdiction to re-examine the valuation of the property so brought before it, and to make such order in the premises as it might deem just and proper, with a view to having all lands in the state assessed at the actual value thereof. The question now before us, depending upon a construction of the same statutes, is whether or not the state tax commission had jurisdiction, on an appeal by a taxpayer as to one item of property, to readjust the classification and valuation of other property of the same taxpayer not covered by the appeal. Bearing in mind that the property of appellee not covered by its appeal to the state tax commission was grazing land, appellant contends that the commission had authority and power to fix the value thereof under the proviso contained in section 4 of chapter 115 of the Session Laws of 1919, giving the state tax commission the original power and authority to classify and fix the valuation for purposes of taxation of all grazing lands within the state. An examination of the statutes relating to the state tax commission discloses that that body, in addition to its appellate jurisdiction, is given original jurisdiction with reference to certain specified matters, among them being the valuation of grazing land just mentioned. If the record did not disclose that the action complained of was taken by the commission on the appeal from the valuation of the timber land, we might assume, on the presumption of regularity, that the valuation by the commission of the 90,308 acres of grazing land

was in the exercise of its original jurisdiction; but the bill of exceptions discloses that, upon appellee's demand on appellant to produce the records of the appeal for 1919 and the action thereon, the appellant admitted that the appeal, as alleged in the answer, was taken to the state tax commission, and that the action of the state tax commission, as alleged, was had for the year 1919, and reference to the amended answer discloses the allegation that the action complained of was taken on appeal. Thus appellant's entire argument in support of the validity of the commission's action relative to the lands of appellee other than the 20,000 acres of timber land, based on the commission's original jurisdiction, necessarily falls.

As a general proposition, an appeal contemplates a review, and correction if found erroneous, of some action taken by a subordinate officer or tribunal with reference to the subject-matter brought before the appellate tribunal, and does not contemplate a general review of other subject-matters in which the appellant may be interested. In this case the subject-matter with reference to which action had been taken by the assessor and county board of equalization and sought to have reviewed and corrected was the valuation of appellee's 20,000 acres of timber land, and the fact that appellee also owned a large tract of grazing land, or possibly a mercantile establishment or other items of property, did not give the state tax commission jurisdiction to review the valuation previously fixed on them. Had the state desired a review of such other valuations, the statute gave the same right of appeal to the taxing officers as was given to the taxpayer. It follows that the order of the state tax commission increasing the valuation of 90,308 acres of grazing land from $1.25 an acre to $1.50 an acre was void as having been made without jurisdiction, and could not be enforced. The valuation of $1.25, as previously fixed, should stand, and the court was corrected in so holding.

Preliminary to a solution of the question of the correctness of the court's ruling with reference to the

400,000,000 feet of stumpage, it may be safely assumed that growing timber is a part of the real estate, and that, if the timber is owned separately from the land itself, it may be assessed separately as real estate. Globe Lumber Co. v. Lockett, 106 La. 414, 30 South. 902; Re Pine County v. Tozer, 56 Minn. 288, 57 N. W. 796; Freeman v. State, 115 Ala. 208, 22 South. 560; Fletcher v. Township of Alcona, 72 Mich. 18, 40 N. W. 36.

[3] Furthermore, while it would not be expected that an instance could be found where a taxpayer had claimed that the value of growing timber should not be taken into consideration by the taxing authorities in arriving at the taxable value of the land, as a matter of fact that very question was raised in French v. Town of Lyme, 77 N. H. 63, 86 Atl. 823, and, of course, it was held that the standing timber was a part of the realty for the purpose of taxation, and its value an element to be considered in ascertaining the true value of the land.

Growing timber is as much a part of the realty as are improvements, fixtures, or mineral rights. In some states we find that the taxation statutes require that improvements be valued separately from the land itself as a means of arriving at the true value of the entire estate (State v. Norsman, 168 Wis. 442, 169 N. W. 429), and the same rule has been applied where the statute was silent on the subject. From the case of County Commissioners v. Union Mining Co., 61 Md. 545, it appears that the statute required the value of improvements to be added to the surface value, but said nothing about adding the value of underlying veins of coal. The taxpayer in that case objected to the assessment as follows:

"* * * Third. Because as to part of the land of the appellee, the land was assessed, and then the coal underlying the land was assessed. * * * Seventh. That the land was assessed, and then the houses and improvements upon it."

After passing on other objections to the assessment, the court said:

"Nor is there any force in the objections that the land was assessed and then the value of the coal underlying it, or that the land was assessed and then the improvements upon it. The latter is the very method pointed out in the general assessment law, and the former is based upon the same principle."

In the case before us it seems that what the tax commission did was not to make a separate assessment of the stumpage, but to value the surface and timber separately as a means of arriving at the value of the 20,000 acres of timber land. It does not appear that there has been a double assessment, because the value of $1.50 an acre, fixed by the commission, is the same as that attempted to be fixed by it on the 90,308 acres not classed as timber land, so that the commission must not have intended that the surface valuation should include the total value of the real estate considering timber value as well as surface. Furthermore totaling the surface value with the value fixed on the stumpage results in a less value per acre on the 20,000 acres that the valuation appealed from, the latter being $12.50, while the acreage value as determined by the commission, based on the sum total of the separate valuations of surface and timber, amounts to $9.50. An inspection of a copy of the page from the tax roll, introduced as an exhibit at the trial, leads us to conclude that it was the intention and purpose of the state tax commission to arrive at the actual cash value of the 20,000 acres of timber by valuing separately the surface and the stumpage. It is quite true, as argued by appellee, that the value which should be fixed for taxation purposes is the actual value of the real estate as a whole, but the taxpayer is in no wise injured by having this value arrived at by a consideration and summing up of the several elements of value so long as the total value thus obtained does not exceed the actual value of the real estate. In Robertson v. Anderson, 57 Iowa, 165, 10 N. W. 341, it appears that the taxpayer was the owner of 80 acres of land upon which there was a stone quarry, a patent limekiln, and a railroad switch. The taxing officials, after various equalizations and appeals, had finally fixed a valuation on the property as $15 per acre on the land,

$500 on the railroad switch, and $400 on the limekiln. It was objected that on the appeal by the taxpayer an original assessment had been made on the limekiln and railroad switch as personal property, but the court held that while improvements on land, such as those in that case, should be taken into consideration in determining the value of the land for the purpose of assessment and taxation, yet it is wholly immaterial whether the valuations of the land are aggregated or stated separately.

The fact that there has been a separation of values in arriving at the actual value of the real estate does not mean that there has been a separate assessment. Dundy v. Commissioners of Richardson County, 8 Neb. 508, 1 N. W. 565; Palmer Vo. v. Police Jury, 142 La. 1076, 78 South. 122. While it is not necessary for us to go so far in this case, it has been held that, while a nursery stock is to be taxed as real estate, and not as personal property, the taxpayer is not damaged by a separate assessment of the land as real estate and of the nursery stock as personal property where the rate of assessment on each class of property is the same. Wilson v. Cass County, 69 Iowa, 147, 28 N. W. 483. We only hold that in this case there was not a separate assessment of the stumpage, but only a separate valuation as a means of arriving at the total and actual value of the real estate, and that the state tax commission had full power and jurisdiction so to do on appellee's appeal. It perhaps would have been more regular to have valued the 20,000 acres of timber land at $190,000 than to have valued the surface at $30,000 and the stumpage at $160,000, but the final result is the same.

Appellee's contention, which was sustained by the lower court, that the valuation, as finally fixed on the timber land was excessive and should be reduced to $4 an acre, must be overruled on authority of State v. Southspring Ranch & Cattle Co. (No. 2770) 226 Pac. 886, this day decided, where we held that overvaluation, standing alone and without grounds of equitable relief as a support, is not a defense to a suit for the collection of taxes, based on valuations which had be-

come final prior to the enactment of chapter 133 of the Session Laws of 1921.

The court erred, therefore, in concluding that the state tax commission was without jurisdiction to fix the value of the timber land in the manner employed, and in undertaking to reduce the valuation so fixed. The cause should be reversed and remanded, with directions to enter judgment for the state in an amount based on an assessment of appellee's property at a valuation of $1.25 an acre for the 90,308 acres, and a valuation of $190,000 for the 20,000 acres of timber land, giving credit for the payment already made; and it is so ordered.

PARKER, C. J., and BRATTON, J., concur.

ON REHEARING

BOTTS, J. [4] In our original opinion we based our conclusion with reference to the valuation and assessment of the 20,000 acres of timber land involved in the appeal to the state tax commission on our construction of the tax roll, as amended by direction of the tax commission following the appeal, copy of which was set out in the record, as disclosing that it was the intention of the commission to separately value the land and the timber growing thereon for the purpose of arriving at the final total valuation of the 20,000 acres. On motion for rehearing the appellee challenges the correctness of that construction and, after hearing argument, and, further considering the facts as disclosed by the record, we are agreed that we were in error in our first conclusion, and that what the tax commission attempted to do was to revalue the entire acreage, including the 90,308, as well as the 20,000 acres, and to make a separate valuation of 400,000,000 feet of growing timber without definitely locating that timber on the 20,000 acres. While the 20,000 acres constituted a part of the 110,308 acres which the commission undertook to value, we have no means of knowing what part of that value should be assigned to the former. But that was the only subject-matter before the commission for valuation. The order of the com-

mission, then, by direction of which the tax roll was amended, and by which the commission undertook to dispose of the appeal, deals wholly with a subject-matter not involved in the appeal, and the commission was without jurisdiction to make it. Since such order was made without jurisdiction, it is void, and did not and does not dispose of the appeal which was pending before the tax commission, and the appeal, being undisposed of, is still there pending. The result is that the valuation of $1.25 an acre on the 90,308 acres of grazing land stands for the reasons stated in our original opinion, and that no final valuation has yet been fixed on the 20,000 acres of timber land, and, until the state tax commission acts on the appeal now before it and fixes that valuation there can be no completed assessment of the 20,000 acres of timber land upon which a valid levy of taxes can be made.

The judgment of the court was correct to the extent that it was based upon the value of $1.25 an acre on the 90,308 acres, but in so far as it was based upon the valuation of $4 an acre on the 20,000 acres, which the court undertook to fix from the evidence of value before it, it was without jurisdiction and void, on authority of the recent South Spring Case cited in the original opinion. That portion of the judgment, therefore, cannot stand, and, since there has not yet been any completed assessment of the 20,000 acres of timber land made by the taxing authorities, we cannot direct and the trial court cannot render any judgment for taxes on that land.

The result which we have now reached necessitates a further modification of our former opinion. The judgment appealed from was based in part on the valuation and assessment of the 20,000 acres of timber land, and, as we have seen, was to that extent without jurisdiction and void. This results in a liability on the part of the appellee less in amount that the amount of the judgment, so that the case does not come within exception to the rule stated in State v. Fernandez Co., 28 N. M. 425, 213 Pac. 769, cited in the original opinion, and, the appellant having accepted the benefits of a judgment greater in amount than

that to which it was entitled, the appeal should be dismissed. That leaves the parties in this situation: The appellee has paid its taxes for the year 1919 on the 90,308 acres of grazing land based on a valid assessment thereof. There has been no completed assessment of the 20,000 acres of timber land, and the judgment of the court by which an assessment thereof is attempted to be made is void; but the appellee, in pursuance of that void judgment, has paid and the state has received a sum based on such invalid assessment at a valuation of $4 an acre. This payment, having been made and received as a payment of taxes for the year 1919, but not being based on any assessment, should be credited to the appellee on whatever valid assessment and levy may hereafter be made in pursuance of the appeal now pending before the state tax commission.

[5] Our former opinion and judgment will be modified to conform to what we have now said, and the appeal dismissed; and it is so ordered.

PARKER, C. J., and BRATTON, J., concur.

[No. 2808. May 31, 1924.]

STATE v. DASCENZO.

SYLLABUS BY THE COURT.

1. In a prosecution for the unlawful possession and sale of intoxicating liquor, it is not error to permit the jurors, in the presence of the court, the defendant, and counsel, to smell the liquor which has been received in evidence.

2. Evidence of liquor found in a restaurant adjoining the defendant's soft drink parlor is admissible under a count in an information charging unlawful possession for the purpose of sale, where the defendant's connection or control of such restaurant is an issue of fact in the case.

3. Instructions to the jury should be considered as a whole, and when, so considered, they fully protect the legal rights of defendant, he cannot complain.

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

Angelo Dascenzo was convicted of a violation of the prohibition law, and he appeals. Affirmed.

Crampton, Phillips & Darden, of Raton, for appellant.

Milton J. Helmick, Atty. Gen., and John W. Armstrong, Asst. Atty. Gen., for the State.

OPINION OF THE COURT.

BRATTON, J. The information filed by the district attorney contains six counts, each charging the appellant with a violation of the provisions of chapter 151, Laws 1919, commonly called the Prohibition Law. The first five counts charge him with sales of intoxicating liquor, and the sixth charges him with keeping the same for sale. Counts 4 and 5 were dismissed, and convictions had upon the remaining ones, following which a jail sentence was imposed, and this appeal taken.

[1] 1. During the trial the state introduced in evidence a bottle containing some of the liquor taken from the appellant's premises. Afterwards, and in the presence of the court, the appellant, and counsel, at least one of the jurors was permitted, over appellant's objections, to smell the contents of this bottle, and this is assigned as error. The question is one of original impression here, as it has never been previously presented to this court. It is one with respect to which the courts of other states are not altogether in harmony. Appellant relies upon decisions from Alabama, Kansas, and Texas, as well as the United States Circuit Court of Appeals of the Eighth Circuit, to sustain his contention. He cites Wadsworth v. Dunnam, 117 Ala. 661, 23 South 699; State v. Lindgrove, 1 Kan. App, 51, 41 Pac. 688; State v. Eldred, 8 Kan. App. 625, 56 Pac. 153; State v. Coggins, 10 Kan. App. 455, 62 Pac. 247; State v. Schmidt, 71 Kan. 862, 80 Pac. 948; and Callahan v. U. S., 298 Fed. —, recently decided by the United States Circuit Court of Appeals of the Eighth Circuit. He further relies upon Dane v. State, 36 Tex. Cr. R. 84, 35 S. W. 661, and Parker v. State, 75 S. W. 30, as declared the position of the Court of Criminal Appeals of Texas upon this

question. These cases, however, are not in harmony with the later cases from that court which hold that in a case like this, where the defendant denies altogether the sale of liquor, it is not error to allow the jury to smell the liquor after it has been received in evidence. Thompson v. State, 72 Tex. Cr. R. 6, 160 S. W. 685; Lerma v. State, 81 Tex. Cr. R. 109, 194 S. W. 167; Atwood v. State, 257 S. W. 563; and Cook v. State, 258 S. W. 1058. With this condition obtaining concerning the decisions from the Court of Criminal Appeals of Texas, appellant must needs rely upon the decisions from Alabama, Kansas, and the United States Circuit Court of Appeals to sustain him.

These cases proceed upon the theory that to permit jurors to smell liquor authorizes them to render a verdict upon private grounds of belief, without any way to determine whether the verdict is according to or against the evidence; that the intoxicating character of liquor is one of the material things incumbent upon the state to prove, and that this should be done by evidence, oral or written. We cannot concur in this view, as we believe these cases state the minority rule and are not founded upon logic or reason. No juror can receive evidence without the exercise of some of his senses. Jurors are permitted to exercise their sense of sight, in seeing the witnesses, including the defendant, as they testify, and of observing their demeanor; they are also permitted to exercise their sense of hearing, in listening to the tone, as well as the steadiness or unsteadiness, of the voice, all for the purpose of deciding whether or not such witnesses are testifying truthfully or falsely. When physical things are introduced in evidence, jurors are permitted to look at them, to decide what they think concerning them. When liquor is introduced in evidence, jurors are allowed to look at it, and to take into consideration its color and appearance in deciding what they think it is. Again, if a bullet is introduced in evidence in a homicide case, and it becomes material to determine its size, caliber, or anything else concerning its physical appearance, jurors are permitted to look at it, and frequently take it in their hands and feel it, in order

to determine what they think about it, and how its size and appearance harmonizes or conflicts with other evidence introduced in the case.

We can appreciate no distinction between these matters of common procedure and allowing jurors to smell liquor after it has been introduced in evidence. By so doing, the juror did not gain independent evidence upon which to reach his conclusion, but simply tested the evidence already introduced, in order to properly determine its truth or probative value. In deciding every case, jurors must necessarily take into consideration their knowledge and impressions founded upon experience in their everyday walks of life, and the fact that these things affect them in reaching their verdict cannot be reversible error, because, indeed, jurors without possessing such knowledge and impressions could not be had. After the liquor in this character of a case has been received in evidence, to deny jurors the right to look upon it, smell of it, and take into consideration its appearance and odor in determining what it is, results in closing their eyes against the acquisition of the truth. These views have been expressed by the great weight of authority throughout the several states which have had occasion to consider the question. Morse v. State, 10 Ga. App. 61, 72 S. E. 534; People v. Kinney, 124 Mich. 486, 83 N. W. 147; Schulenberg v. State, 79 Neb. 65, 112 N. W. 304, 16 Ann. Cas. 217; Weinandt v. State, 80 Neb. 161, 113 N. W. 1040; Reed v. Terr. 1 Okla. Cr. 481, 98 Pac. 583, 129 Am. St. Rep. 861; State v. Baker, 67 Wash. 595, 122 Pac. 335; Enyart v. People, 70 Colo. 362, 201 Pac. 564; State v. Simmons, 183 N. C. 684, 110 S. E. 591; Troutner v. Commonwealth, 135 Va. 750, 115 S. E. 693.

[2] 2. Appellant vigorously complains of the action of the trial court in permitting the witness Thacker, who was a deputy sheriff, to testify that he assisted in making a raid of appellant's soft drink parlor, called "Over the Top," during which he found a bottle of corn whisky in a restaurant adjoining the soft drink parlor referred to. There is testimony that the soft drink parlor, the restaurant, and a tailor shop are

all in one building, but separated by partition walls, with doors opening from one to the other; that the appellant was in charge, and had the keys to various rooms that the officers wanted to enter, and said he was in charge of the business. It further appears that there were found in this soft drink parlor referred to many whisky glasses, empty jugs, and empty glass bottles and jars, all of which smelled of having contained corn whisky, and, furthermore, there is positive proof of several sales of corn whisky at the rate of 50 cents per drink. The appellant testified that he had rented the entire building, and had verably sublet the restaurant portion to one John Accomonda, who conducted the restaurant business. Whether the appellant had in fact sublet that portion of the building, or just what connection he bore to it, was a matter for the jury to decide. If they disbelieve that he had sublet it, and concluded that he was in possession of it, the testimony concerning this bottle of corn whisky found therein was plainly admissible, in connection with all the other facts in the case, to determine his guilt under the sixth count of the information, which charged him with possessing liquor for the purpose of sale.

[3] 3. In paragraph 6 of the court's instruction this language was used:

"If the facts above stated, as to any one of the four counts, to wit, 1, 2, 3, and 6, contained in the information, are proved to your satisfaction and beyond a reasonable doubt, by evidence in this case, it will then be your duty to find the defendant guilty in manner and form as charged in the information. But if such facts are not so proven, or if you have a reasonable doubt of the defendant's guilt, it will then be your duty to find the defendant not guilty."

Appellant excepted to this instruction upon many grounds, among them being that it authorized the jury to consider all of the evidence in determining his guilt upon any one of the counts; that it authorized his conviction upon all of the counts, if the jury found him guilty upon any one of them; and that it failed to

authorize his conviction upon a part of them, and his acquittal upon the others. If this instruction stood alone and independent of the remaining ones, it might well bear the interpretation contended for; but, when it is considered in connection with the remainder of the instructions, we think it is not subject to the criticism counsel directed against it. By the second, third, fourth and fifth paragraphs, the guilt or innocence of the defendant upon the four counts remaining in the information after the dismissal of counts numbered 4 and 5, were separately explained to the jury in clear and unmistakable language. To illustrate: Paragraph 2 submitted his guilt upon the first count of the information in this language:

"The defendant is presumed to be innocent, and before you would be justified in finding him guilty, it devolves upon the state to prove to your satisfaction and beyond a reasonable doubt, upon the first count, that on or about the 4th day of April, 1922, at the county of Colfax and state of New Mexico, the said defendant did unlawfully sell unto one W. P. Walkup intoxicating liquor containing alcohol, said intoxicating liquor not being then and there denatured or wood alcohol or grain alcohol intended and used for mechanical, medicinal, or scientific purposes only, nor wine intended and used for sacramental purposes only."

By paragraph 7 of the instruction, the jury was expressly told to consider each of said counts separately, and to determine the appellant's guilt or innocence upon each count separately. This instruction is in these words:

"Each one of said counts should be considered by you and passed upon separately, as to the guilt or innocence of the defendant as to such count. Verdicts of guilty and not guilty will be handed you, covering each one of the four counts above mentioned, and it will be your duty to pass upon and determine the guilt or innocence of the defendant as to each one of said four counts separately."

When the several portions of the instructions are considered together, it clearly appears that the jury could not have been misled in the manner complained of, as they must have understood the nature of the several charges, and that they must consider them separately and independently of each other. Under

the rule now firmly established in this jurisdiction, instructions must be considered as a whole, and when, so viewed, they fully protect the rights of the defendant, he cannot complain. Territory v. Gallegos, 17 N. M. 409, 130 Pac. 245; State v. Ellison, 19 N. M. 428, 144 Pac. 10; State v. Rodriquez, 23 N. M. 156, 167 Pac. 426, L. R. A. 1918A, 1016; State v. Crosby, 26 N. M. 318, 191 Pac. 1079.

4. What we have just said disposes of the fourth and last error assigned. By it the appellant contends that the eleventh instruction, which defines a reasonable doubt, is incorrect, because it fails to affirmatively direct the jury to consider each of the counts in the information separately, and to apply the reasonable doubt doctrine in that manner, giving to him its benefit in considering each of the charges, but, to the contrary, allows and directs them to consider the entire mass of evidence in passing upon the charge contained in each count; that it fails to advise them that, should they entertain a reasonable doubt concerning any one or more of such counts, he should be acquitted as to them. We have reveiwed the several paragraphs of the charge which must be taken into consideration in passing upon this contention, and we think it is apparent that the several offenses were separately submitted, and the jury expressly told to consider them in that manner. The authorities hereinbefore cited, declaring the rule that the instructions must be considered as a whole, are applicable and controlling here.

The judgment of the lower court, being without error, should be affirmed; and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

[No. 2805. June 23, 1924.]

STATE v. SNYDER.

SYLLABUS BY THE COURT.

1. Two separate counts in an information, each charging the unlawful sale of intoxicating liquor to the same person on the same day, do not necessarily charge the same offense, as such offenses are not continuous in their nature,

and both could be committed on the same day, and each be punishable as a separate offense.

2. The proof in a criminal case need not conform to the exact date laid in the information or indictment, it being sufficient to prove the commission of the offense at any time prior to the filing of the information or the return of the indictment and within the limitation period.

3. The intoxicating character of liquor need not be established by a chemical analysis, but may be proven by testimony of persons who have had experience in tasting and drinking it and who know its effect.

4. A motion to strike testimony which has been received without objection is addressed to the discretion of the trial court, and is not reviewable upon appeal, except to determine whether such discretion has been abused.

5. Testimony of a witness that at the time he committed two burglaries he was intoxicated upon liquor purchased from the defendant is admissible to establish a general charge of keeping intoxicating liquor for sale.

6. Evidence of other sales of intoxicating liquor than those specifically charged in the information is relevant to establish a general charge of the unlawful possession of such liquor for the purpose of sale, and should not be considered by the jury as bearing upon the specific sales charged, and it is error to refuse such an instruction, as the defendant is entitled to have the purpose of such evidence explained, and the jury directed to consider it for such purpose only.

7. Where a penal statute contains an exception which is so incorporated or interwoven in the language defining such offense as to become a constituent or necessary part of the offense, and so essentially descriptive of it that its ingredients cannot be accurately and clearly defined if the exception is omitted, it is necessary that an indictment or information drawn thereunder negative such exception.

8. If the language defining such offense is so separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without reference to the exception, an indictment or information need not negative such exception.

9. The exception contained in section 1, c. 151, Laws 1919, is not a necessary or constituent part of the offense therein defined, nor necessarily descriptive thereof, and therefore need not be negatived in an indictment or information drawn threunder.

10. The term "offense" as used in section 4, c, 151, Laws 1919, means an offense which has been legally ascertained and adjudicated to be so by a court of competent jurisdiction, that is, by conviction, and until a person has been once convicted under the statute there can be no subsequent offense thereunder.

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

C. W. Snyder was convicted of violating the prohibition law, and he appeals. Reversed and remanded, with directions.

H. A. Kiker, of Raton, for appellant.

M. J. Helmick, Atty. Gen., and J. W. Armstrong, Asst. Atty. Gen., for the state.

OPINION OF THE COURT.

BRATTON, J. The district attorney of the Eighth judicial district filed an information in this cause, charging the appellant with six separate violations of chapter 151, Laws 1919, known as the Prohibition Law; the first five counts charging him with the unlawful sale of intoxicating liquor, and the sixth charging him with the unlawful possession of the same for the purpose of sale. The third and fifth counts were dismissed, and appellant was convicted upon the remaining ones. From the sentence imposed he has perfected this appeal.

[**1**, **2**] 1. It is argued that counts numbered 1 and 2 charge but one offense, as the language used is identical; both charging the sale of intoxicating liquor to C. T. Lobb on April 4, 1922. A review of the record fails to show that any such contention was made in the trial court, or any such question presented there. On the contrary, appellant contended, in a motion to quash the information and in a motion to require the state to elect upon which count it would prosecute, that the first count charged a misdemeanor, and that each of the others charged a felony; they being separate and subsequent offenses. This question must have been presented to the trial court in order to be reviewable here. The contention is not sustainable for the further reason that, while an indictment or information must charge the time the offense was committed, the proof need not be confined to that exact time, except in those cases where time is an ingredient or the essence of the offense, such as

burglary in the nighttime, or the violation of a Sunday law. Aside from these exceptions, if the proof shows a violation to have occurred at any time prior to the filing of the information or the return of the indictment, and within the statute of limitation covering the offense charged, it is sufficient and need not conform to the date laid in the pleading. 1 Bishop Cr. Proc. p. 246; 14 R. C. L. p. 180; State v. Fellers, 140 Mo. App. 723, 127 S. W. 95; State v. G. S., 1 Tyler (Vt.) 295, 4 Am. Dec. 724; Miller v. State, 33 Miss. 356, 69 Am. Dec. 351; Bennett v. State, 78 Tex. Cr. R. 231, 181 S. W. 197; State v. Freeman, 162 N. C. 594, 77 S. E. 780, 45 L. R. A. (N. S.) 977; State v. Dufour, 123 Minn. 451, 143 N. W. 1126, 49 L. R. A. (N. S.) 792, and the notes appended thereto.

The offenses charged in these two counts not being continuous in their nature, the appellant could be convicted upon each of them, where there is proof that separate sales were made, even though on the same day. The fact that the same date is laid in each of the counts is immaterial, where they are sustained by proof showing separate sales within the period of limitation, even though neither occurred on that day, or one then and the other on a different day or both on that day. State v. Freeman, supra. We have here an information charging three separate sales of intoxicating liquor made to Lobb, and the proof fully establishes three separate sales made to him, all prior to the filing of the information and within the limitation period. This is sufficient, and meets all the requirements of the law.

[3] 2. The sufficiency of the evidence to establish the intoxicating character of the liquor sold is seriously challenged, and this is the next question before us. The prosecuting witness, Lobb, testified that, prior to the time he purchased the liquor in question, he had 10 years' experience in tasting and drinking intoxicating liquors; that he had drunk corn whisky, and knew what it was, and was familiar with its effect; that when he went into appellant's place of business he talked for a while with a stranger and then called

for a drink; that appellant looked at the stranger, who nodded his head to appellant, and that thereupon appellant served Lobb and the stranger, who became Lobb's guest in taking a social drink; that appellant kept the liquor in a bottle in his hip pocket, and served it by pouring it from the bottle into small whisky glasses, selling at 50 cents per drink; and that on one of the three occasions in question Lobb called for white whisky. Based upon this qualification, the witness testified that the liquor he bought from appellant was corn whisky and that it had an intoxicating effect upon him. Other evidence of an incriminating character was given by witnesses who testified they smelled Lobb's breath just before he went into appellant's place of business on one of these occasions, as well as just after he came out; that they could not detect the odor of liquor before he went in, but could upon his coming out. The proof, as a whole, is sufficient to establish that the liquor was intoxicating. It is the well-established rule, declared by the overwhelming weight of modern authority, that a chemical analysis is not necessary to prove that a certain liquor is intoxicating, but that it may be established by persons possessing experience in drinking it and who know its effect. A chemical analysis would doubtless be more reliable, and perhaps entitled to greater weight; but it is not necessary, and is not the only way of proving the required fact. Neither is it necessary for such a witness to be able to give the chemical contents of liquor, any more than it would be required of one testifying with reference to salt or sugar. Clearly the experience of this witness was sufficient to make his testimony admissible, and, if believed by the jury, would support a conviction. In Carson v. State, 69 Ala. 235, the following language, which was quoted with approval in the recent Texas case of Cathey v. State. 94 Tex. Cr. R. 599, 252 S. W. 534, was used:

"It was competent for the witness (Yarborough) to testify to his opinion as to the intoxicating properties of the bitters proved to have been sold by the defendant. This is a matter of common knowledge, where a witness is shown to have had an opportunity of personal observation, or of experience, such as to enable him to form a correct opin-

ion. It is not required that he should be a technical expert."

The Supreme Court of Georgia, in Wilcox v. State, 8 Ga. App. 536, 69 S. E. 1086, thus expressed its views upon this question:

"The plaintiff in error was convicted of selling intoxicating liquor. According to the state's evidence he was selling beer; also whisky. One of the main questions at issue in the trial court was as to whether the beer was intoxicating. A witness, who bought and drank some of the beer, testified that he did not know whether it was lager beer or not, and that he did not drink enough of it for it to make him drunk; but it produced a dizziness and a funny feeling, and he was of the opinion that, if a person should drink enough of it, he would become drunk. He also expressed what amounted to an opinion that it was lager beer. Another witness, who had drunk some of the same beer, said it tasted like lager beer; and his opinion as to its intoxicating qualities tallied in the main with that of the other witness. The accused moved to exclude the evidence of these witnesses as to the intoxicating quality of the beer, on the ground that it was opinion evidence and that the witnesses did not qualify as experts. The opinion of the witness was admissible. Each stated the facts on which his opinion was based; and the testimony disclosed a sufficient familiarity as to the facts involved to authorize the expression of an opinion. One who has drunk a considerable quantity of a liquor does not have to be an expert in order to form a reasonably trustworthy opinion as to whether it is intoxicating or not. There is something presageful about a drink of intoxicating liquor, even though it be too small to produce full intoxication. The less expert the taker of the drink is in the matter of drinking, the more accurate his opinion is likely to be."

The question came before the Supreme Court of Michigan in People v. Berridge, 212 Mich. 576, 180 N. W. 381, where this was said:

"The place of business of defendents had been searched under a search warrant, and numerous containers with their liquid contents had been taken. These containers were produced in court, identified by the police officer, and were marked as exhibits. This witness testified that he knew the taste of whisky. * * * From several of the other containers liquids were poured and given to witness to taste on the stand, and he testified that each was intoxicating liquor and what it was. During this proceeding and after some of it had taken place defendants' counsel objected to this manner of procedure. It is here urged that this course was itself a violation of the law, that an analysis of the contents should have been made by a chemist and that the proceedings had in the instant case would tend to bring the

law into disrespect, especially by the unthinking. Defendants' counsel is undoudtedly correct in insisting that the more orderly way of establishing the character of the contents would be by showing a chemical analysis, but the witness had qualified himself to speak on the subject and his testimony was not inadmissible."

The law in Missouri upon this question has been declared in the quite recent case of State v. Brownfield et al. (Mo. App.) 256 S. W. 143. We quote therefrom:

"It is charged, also, that the trial court erred in allowing Chief of Police Rector and Policeman Quint to testify that the property seized was intoxicating liquor, or whisky. The record shows that both these witnesses testified they were acquainted with intoxicating liquor and could identify it as such, and that the liquor they seized from defendants was intoxicating whisky. The law does not go so far as to require the testimony of experts, or analysts, in the identification of intoxicating liquor."

And the views of the Supreme Court of Colorado are reflected in Enyart v. People, 70 Colo. 362, 201 Pac. 564, wherein it was said:

"A witness was permitted to testify that he had smelled and tasted the liquor which the accused sold, and that it was whisky. It is objected that such evidence was improper. It was proper. It is objected that the witness was not shown to be qualified to judge. Such testimony is not expert testimony any more than that of one who has tasted salt or sugar, and testifies to what it is. Of his qualifications the trial court must decide."

See, also, Gurski v. State, 93 Tex. Cr. R. 612, 248 S. W. 353; Farley v. State, 94 Tex. Cr. R. 106, 249 S. W. 491; Latson v. State (Tex. Cr. App.) 254 S. W. 982.

The record in this case, containing evidence that the liquor in question was intoxicating obviates the necessity of passing upon whether or not courts will take judicial notice that corn whisky is intoxicating. It has been recently held by the Supreme Court of Oregon that "moonshine" whisky, which is doubtless the same as "corn" whisky, is intoxicating, and that courts will take judicial notice of that fact. State v. Edwards, 106 Or. 58, 210 Pac. 1079.

[4] 3. A witness for the state testified upon his

direct examination that he had been directed to the appellant's place of business as a place where he could get a drink. A motion to strike the testimony was denied. This is now assigned as error. Much as we may regret it, we cannot review the question, because no objection was made until after the witness had answered. Under such circumstances, a motion to strike is addressed to the discretion of the trial court. In State v. Lazarovich, 27 N. M. 282, 200 Pac. 422, this court said:

> "It is contended by counsel for appellant that it was error to admit the testimony of the sheriff that he served a subpoena 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."

To the same effect are State v. Kidd, 24 N. M. 572, 175 Pac. 772; State v. Alford, 26 N. M. 1, 187 Pac. 720; and State v. Anaya, 28 N. M. 283, 210 Pac. 567.

The record fails to show any abuse of this discretion. Of course, if a witness answers before counsel has time to object, then inadmissible testimony should be stricken upon a proper motion made immediately thereafter. This record fails to show that counsel did not have ample time to interpose an objection before the answer was made. Under the established law, the question is not reviewable.

[5] 4. During the cross-examination of James McLane, a witness for the state, it was developed that he had recently pleaded guilty to two charges of burglary and was then confined in jail on that account. Upon redirect examination the witness testified that at the time he committed those offenses he was under the influence of liquor that he had purchased from the appellant. It is argued that this testimony tended to prejudice appellant before the jury by creating the impression that the witness was then suffering punishment for crimes committed while intoxicated upon

liquor purchased from appellant. The testimony was clearly admissible and relevant, not to establish a detail in connection with the burglaries, either in mitigation of the offenses on the part of the witness or to involve the appellant, but to establish an entirely different and independent fact, namely, that the witness was intoxicated upon liquor purchased from the appellant, which was clearly admissible under the sixth count of the information, charging the unlawful possession of liquor for the purpose of sale.

[6] 5. Appellant requested the court to give to the jury the following instruction, which was refused, to which action a proper exception was seasonably taken.

"You are instructed that proof of sales of intoxicating liquor containing alcohol to any persons other than C. T. Lobb and W. R. Walkup, by defendant, is no proof of the guilt of the defendant of unlawfully selling intoxicating liquor containing alcohol; and such testimony is only material, and can be considered by you only for the purpose of determining whether or not the defendant unlawfully kept liquor for sale as charged in count 6 of the information."

In this we think the court fell into error. The state introduced evidence tending to show a number of sales of liquor to James McLane and others. The information contained no charge of unlawful sales to these persons, and the evidence was clearly intended to prove guilt under the sixth count, which charged the unlawful possession for the purpose of sale, but the court nowhere explained to the jury what purpose this evidence served, nor for what purpose it might be considered. Appellant was entitled to have the law applicable to the consideration of such evidence explained, so that the jury might know wherein it was relevant, and for what they might consider it. We are not unmindful of the fact that the instruction is not, strictly speaking, correct, because it authorizes the jury to consider the evidence of sales made to W. R. Walkup in passing upon the counts charging specific sales made to C. T. Lobb. In this it was less favorable to appellant than he was entitled to, as he had the legal

right to have this evidence also limited to a consideration of the sixth count, as it could serve no other purpose after the counts charging sales made to Walkup were dismissed. Thereafter such evidence was relevant upon a consideration of that count, but for no other purpose. So obviously the instruction was less favorable to appellant than he was entitled to.

In State v. Nield, 4 Kan. App. 626, 45 Pac. 623, the information contained five counts, the first four charging the defendant with illegal sales of intoxicating liquor on certain named dates, while the fifth charged him with maintaining a nuisance, by keeping a certain place where intoxicating liquors were kept for sale and sold in violation of the laws. The defendant there requested the court to instruct the jury that the evidence concerning various sales other than those specifically charged in the information could not be considered in determining his guilt or innocence upon the charges of particular sales. The requested instruction was refused, and the appellate court reversed the case on that account, and in doing so said:

"Upon the trial of the case upon its merits, the testimony of numerous witnesses was admitted, tending to show various unlawful sales of intoxicating liquors other than those upon which the state, by direction of the court, elected to rely for conviction. The defendant requested the court to instruct the jury not to take into consideration the evidence as to such other sales, in determining the guilt or innocence of the defendant as to the particular sales upon which the state elected to rely. This the court refused, and nothing upon the subject was given in the general instructions. In this we think the court erred. While it is proper, in the first place, for the state to introduce evidence concerning any unlawful sales made by the defendant, yet, when an election has been made of a particular transaction upon which the state relies for conviction, the evidence as to other illegal sales is practically eliminated from the case. It cannot be used or referred to merely for the purpose of bolstering up and strengthening the case made by the state upon the elected transaction, and the defendant is entitled to have the jury so instructed. There are cases in which the evidence as to other transactions is admissible for certain purposes, as in State v. Coulter, 40 Kan. 87, 19 Pac. 368, and State v. Marshall (recently decided by this court) 44 Pac. 49, in which it was held that the evidence as to other sales might be considered for the purpose of showing that the liquor sold by the defendant was intoxi-

cating. But even then such evidence should be limited to that special purpose. Under the facts of this case, we think the instruction asked should have been given."

The tendered instruction there went no further than to forbid the jury to consider the evidence establishing other unlawful sales than those charged in the information in passing upon the guilt or innocence of the defendant upon the specifically charged sales. The instruction here so advised the jury and went beyond that by affirmatively informing them upon what branch of the case it could be considered. The appellant was entitled to have the jury so instructed and the court erred in refusing it.

[**7**, **9**] 6. The sufficiency of the sixth count of the information is challenged because it fails to negative the exception contained in section 1, chapter 151, Laws of 1919; that being the penal act under which it is drawn. The statute in question provides:

"It shall be unlawful for any person, association or corporation within this state to manufacture for sale, barter or gift any ardent spirits, ale, beer, alcohol, wine, or liquor of any kind whatsoever containing alcohol, or for any person, association, or corporation to import into this state any such liquors or beverages for sale, barter or gift, or to sell or barter, or keep for sale or barter any of such liquors or beverages, or offer any such liquors or beverages for sale, barter or trade; provided, nothing in this section shall be held to apply to denatured or wood alcohol or grain alcohol when intended and used for medicinal, mechanical or scientific purposes only, or to wine, when intended and used for sacramental purposes only."

Perhaps few questions can be suggested upon which more has been said by jurists having occasion to deal with them. A citation or discussion of all the cases dealing with various phases of this question would unduly lengthen this opinion. We shall cite only a limited number of them. No doubt there is, in legal contemplation, a technical distinction between an exception and a proviso, in the sense we are now discussing them, but they are usually used interchangeably and without any separate distinctive signification. U. S. v. Cook, 84 U. S. (17 Wall.) 168, 21 L. Ed. 538; State v. Rosasco, 103 Or. 343, 205 Pac. 290. With

this understanding, we shall approach a consideration of the contention made. In doing so, there are two rules equally well and firmly established by the courts and text-writers. The first is that, where a statute defining and denouncing an offense contains an exception which is so incorporated or interwoven in the language defining such offense as to become a constituent or necessary part of the offense, and so essentially descriptive of it that its ingredients cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment or information drawn thereunder must negative the existence of the exception. The second rule is that, if the language defining the offense is so separable from the exception that the ingredients constituting the offense may be accurately and clearly defined and described without reference to the exception, the indictment or information need not negative the exception. Or, to otherwise express it, where the exception or proviso is not made a constituent or necessary part or ingredient of the offense itself, and is not necessarily descriptive of it, it may be omitted from a criminal pleading drawn thereunder. In such an instance, it becomes a matter of defense for the accused to show that he falls within the terms of the exception.

The second rule controls here. The exception is in no proper sense either a constituent or necessary part of the offense, nor descriptive of it, but instead merely declares certain exemptions from the operation of the statute. The offense denounced by the law is manufacturing, importing, or keeping certain described liquors for sale, barter, or gift, as well as selling or bartering them. The provisions of the exception are no part whatever of the description of such an offense, nor a constituent part or ingredient thereof, but simply limit the operation of the statute by declaring that it shall not apply in certain instances. It was therefore unnecessary for the information to negative the exception. 2 Woollen & Thornton, Intoxicating Liquors, § 880; Joyce, Intoxicating Liquors, § 663; 1 Wharton, Cr. Proc. § 288; 31 C. J. p. 720; 14 R. C. L. p. 188; U. S. v. Cook, supra; State v. Rosasco, supra; State

v. Tamler, 19 Or. 528, 25 Pac. 71, 9 L. R. A. 853; State v. Roy, 152 La. 933, 94 South. 703; State v. Nordstrom, 146 Minn. 136, 178 N. W. 164; State v. Turner, 118 S. C. 383, 110 S. E. 525; State v. Hicks, 179 N. C. 733, 102 S. E. 388; Lowrey v. State, 79 Tex. Cr. R. 382, 185 S. W. 7; Smythe v. State, 2 Okl. Cr. 286, 101 Pac. 611, 139 Am. St. Rep. 918; Smith v. People, 51 Colo. 270, 117 Pac. 613, 36 L. R. A. (N.S.) 158; State v. Snodgrass, 96 Kan. 604, 152 Pac. 624; State v. Wood, 53 Mont. 566, 165 Pac. 592; State v. Hopkins, 54 Mont. 52, 166 Pac. 304, Ann. Cas. 1918D, 956; People v. Spagnoli, 58 Cal. App. 154, 208 Pac. 185; People v. Cencevich (Cal. App.) 220 Pac. 448.

[**10**] 7. It is lastly urged that the court erred in denying appellant's contention, repeatedly made during various stages of the proceedings, that he could not be prosecuted upon an information for but one offense, because, by the terms of the statute, all subsequent offenses are made felonies, and that a prosecution therefor could be maintained by indictment only. The statute (section 4, chapter 151, Laws 1919) provides:

"Any person voilating any of the provisions of the preceding sections shall, for the first offense be imprisoned in the county jail for a period of not less than ninety days nor more than six months, and for the second and any subsequent offense shall be imprisoned in the state penitentiary for not less than two nor more than five years, and the district court, or the judge thereof, shall have no power to suspend the imposition or execution of any sentence required by this act to be imposed for violation hereof.

"Upon any conviction for a violation of the provisions of this act, it is hereby made the duty of the prosecuting officer of the state, prosecuting the said cause, to file with the trial judge a sworn affidavit in writing in the manner provided by law, praying for the immediate issuing of a search warrant, to the end that any liquors had or held by the defendant may be discovered and subjected to the provisions of this law; and it shall thereupon be the duty of the trial judge to forthwith issue such search warrant, addressed to the proper officer, commanding him to forthwith proceed and search the permises named and described in said warrant and to seize any liquors that may there be found and to bring and produce the same before the court, and such liquors so seized and produced before the court

shall be subject to such disposition as the court may direct."

If one count in the information charged a misdemeanor, and all the others charged felonies, the position would be sound, because it is expressly provided in section 14 of article 2 of the Constitution that all felonies must be prosecuted by indictment, unless that right is expressly waived. The fallacy of the argument, however, lies in an erroneous interpretation of the term 'offense'' as used in the statute. The use of the word as there made means an offense which has been legally ascertained and adjudicated to be so by a court of competent jurisdiction; that is to say, by conviction in such a court. In the case of In re Buddington, 29 Mich. 472, the same conclusion was reached. We quote the following therefrom:

"The objection that the mittimus does not show that the offense charged was one authorizing the sentence, for the reason that it does not fairly import that the prisoner had been twice before convicted of a similar offense, is not well taken. The word 'offense' and the expression 'third offense' are so used in the statute in different connections as to signify that what is intended is an 'offense' or the 'third offense' which has been legally ascertained and determined, in which sense the term 'third offense' is equivalent in meaning to the term third conviction for a similar offense; and the justice cannot be required to be any more technically accurate in the use of terms than the statute itself."

A similar question arose in Carey v. State, 70 Ohio St. 121, 70 N. E. 955, wherein the Supreme Court of Ohio said:

"4. **The Demand for a Jury.** This demand was made upon the claim that, as there were three counts in the affidavit, there were three separate offenses charged, and, inasmuch as a party on conviction of a third offense may be imprisoned as part of the sentence, he would be entitled to be tried by a jury. This claim rests upon a misconception of the statute. The term 'offense' in the statute embraces the entire charge, though there may be a number of counts. The provision as to punishment is that the convicted party shall 'be fined not more than two hundred dollars nor less than fifty dollars for the first offense, and shall for a second offense be fined not more than five hundred dollars nor less than one hundred dollars, and

for any subsequent offense be fined not less than two hundred dollars and be imprisoned not more than sixty days and not less than ten days.' The manifest purpose is to increase the penalty for offenses after the first because the party has persisted in violating the law. With this purpose in mind, it seems clear that the term 'second offense' means second conviction. Hence, as this was the first trial for the violation of the law, there could be no imprisonment as part of the sentence, and the party was not, therefore, entitled to a jury."

And a somewhat kindred question was involved in People v. Bergman, 176 App. Div. 319, 162 N. Y. Supp. 443, wherein the following language was used:

"The verdict upon the two counts was simultaneous. The mere fact that the sentence with respect to the first count was pronounced in a breath before that relating to the second count did not make the defendant a second offender at the time of the sentence upon the latter count."

Having determined that the word "offense," as used, means conviction, it becomes obvious that the contention is not well founded, because the appellant had not been previously convicted under the terms of the statute, and it is only in the event of a second or subsequent conviction thereunder that such offense becomes a felony.

Some other questions are discussed in the briefs, but they present no reversible error. For the reasons stated, the judgment is reversed, and the cause remanded, with directions to award a new trial; and

It is so ordered.

PARKER, C. J., and BOTTS, J., concur.

[No. 2813. June 23, 1924.]

STATE v. McKINLEY.

SYLLABUS BY THE COURT.

1. Where property is stolen in one county, and, while the larcenous intent continues, is carried or driven into or through another county, a fresh and complete crime of larceny is committed in the latter county, upon which a prosecution may be maintained.

2. An intent to steal is an element which must be inferred by the jury from the facts and circumstances es-

tablished upon the trial. Such an inference may be drawn from facts showing that property is taken in one county and driven through several others and kept for ten or twelve days before it is found and retaken by its owner.

3. A motion to quash an indictment reaches only such defects or irregularities as appear upon the face of the record and not extraneous facts or matters dehors the record, as these must be presented by a plea in abatement.

4. A penal statute which makes it criminal to do a certain thing in different ways charges but one offense, and an indictment in a single count may charge that such crime was committed in each of the specified ways, so long as they are not repugnant and where the conjunctive "and" is used in place of the disjunctive "or" in the statute, and the proof is sufficient, if it establishes the commission of the crime in any one or more of the specified methods.

5. A indictment charging larceny of live stock need not affirmatively charge the nonconsent of the owner, although such must be proven either directly or circumstantially.

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

Lester McKinley was convicted of the larceny of horses, and he appeals. Affirmed.

W. C. Heacock, D. Jackson Melton, and Dennis Chavez, all of Albuquerque, for appellant.

M. J. Helmick, Atty. Gen., and J. W. Armstrong, Asst. Atty. Gen., for the State.

OPINION OF THE COURT.

BRATTON, J. Appellant was convicted upon an indictment charging him with the larceny of six head of horses belonging to M. A. Bullington. He received a sentence of not less than three nor more than three and one-half years in the penitentiary, from which he prosecutes this appeal.

[1] 1. The sufficiency of the evidence to establish venue is drawn in question, it being contended that there is no evidence which directly or circumstantially proves that the offense occurred in Valencia county. The evidence establishes that the horses ranged in a large pasture belonging to one Yeast, the northern portion of which lay in Valencia county and the south-

ern portion in Socorro county. By witnesses who tracked these animals it was positively shown that they were taken out of this pasture by being driven through the northern part of it and out through a gate which was situated in Valencia county. Assuming, therefore, that the horses were originally taken in Socorro county, yet when they were driven into and through Valencia county, with the felonious intent to steal still existing, a fresh and complete crime of larceny occurred there, upon which a prosecution could be predicated, as under the law, where property is stolen in one county and is taken or driven into and through other counties, with the larcenous intent still existing, a new and complete larceny is committed in each and all of said counties. In Territory v. Harrington, 17 N. M. 62, 121 Pac. 613, this court, through Justice Hanna, said:

> "We are clearly of the opinion that where the original taking of the thing, upon which the charge of larceny is predicated, was at a place without the jurisdiction of the trial court, but within the state, and the thing was brought into the county within its jurisdiction, the intent to steal continuing, the thief carrying away the goods becomes guilty of a complete larceny in every county or locality into which he takes them while his intent to steal continues."

Governed by this rule, the evidence, affirmatively showing that the place at which the animals in question were driven out of the pasture where they had ranged was in Valencia county, sufficiently established the venue.

[2] 2. It is next argued that there is no evidence establishing an intent to steal these horses. This is an element which must, of necessity, be proven by circumstantial evidence, as it is a mental process which is incapable of direct proof, but must be inferred from the facts and circumstances established. The facts here are that these horses were taken from their pasture in Valencia county; that they were driven through Bernalillo, Sandoval, Santa Fe, and Rio Arriba counties, and finally into a pasture situated in Taos county belonging to appellant's brother, where

they were found by their owner some ten or twelve days after they were missed. A guilty intent is a matter of inference, the existence of which is a matter for the jury to determine. State v. Blacklock, 23 N. M. 251, 167 Pac. 714. These facts and circumstances were clearly sufficient to warrant the jury in finding that such intent accompanied the taking of these animals.

[3] 3. Appellant interposed a motion to quash the indictment upon the theory that he had been indicted in another case then pending upon the docket of the trial court, charging him with the larceny of some horses belonging to P. A. Yeast, which the state contended were taken at the same time and as a part of the same transaction as the theft of the horses in question, and that, by so proceeding, the state was attempting to place him twice in jeopardy for the same offense and to punish him twice for one and the same violation of law. A stenographic transcript of the evidence taken at the preliminary hearing was attached to this motion for the purpose of establishing the state's contention that all of the horses, that, is, those belonging to Bullington and those belonging to Yeast, were taken at the same time. Without discussing the merits of these questions, it is sufficient to say that they cannot be presented by a motion to quash. Such a motion can raise only such defects or irregularities as are apparent upon the face of the record and not extraneous facts or matters dehors the record, as these must be presented by a plea in abatement. State v. Davisson, 28 N. M. 653, 217 Pac. 240.

[4] 4. In the motion to quash, the indictment was further attacked as being duplicitous. It was drawn under chapter 123, Laws 1921, and, omitting the formal parts, it charged:

"That Lester McKinley, late of the county of Valencia, in the state of New Mexico on the twenty-first day of May in the year of our Lord one thousand nine hundred twenty-two at the county of Valencia in the state of New Mexico, aforesaid, six head of horses of the property, goods, and chattels of M. A. Bullington, then and there being, did

unlawfully, knowingly, and feloniously steal, take, lead, drive and carry away, and did then and there, thereby, deprive the said owner of the immediate possession of said horses contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of New Mexico."

We are unable to share the view urged by counsel for appellant, as we see no objection to the manner in which the offense is charged. Where a penal statute makes it criminal to do a certain thing in different ways, an indictment based thereon may charge in a single count that the defendant did the forbidden thing by all of the specified means, so long as the means are not repugnant and where the conjunctive "and" is used where the statute uses "or", and such a count is not duplicitous, and the proof at the trial may establish any of the means charged. This form of indictment has been universally adopted in this state, and has been approved during territorial days, as well as since statehood. Territory v. Eaton, 13 N. M. 79, 79 Pac. 713; Territory v. Harrington, 17 N. M. 62, 121 Pac. 613. See, also, Territory v. McGrath, 16 N. M. 202, 114 Pac. 364.

[5] 5. It is lastly contended that the indictment is defective because it fails to charge that the animals were taken without the consent of the owner. The nonconsent of the owner is not required by the terms of the statute. This is true, because the words "steal drive, lead, and ride away" necessarily imply that such was done without the consent of the owner. At common law the nonconsent of the owner was not a matter to be expressly charged in the indictment, but was one of defense. Indeed, the proof should show, either directly or by circumstances, the nonconsent of the owner in order to support a conviction, because otherwise no larceny would be proven. This is a matter of proof, however, and need not be affirmatively charged in the indictment. In State v. Parry, 26 N. M. 469, 194 Pac. 864, the contention was made that it was necessary for an indictment which charged the killing of neat cattle to expressly charge the nonconsent of the owner. The statute then in force was section 1613,

Code 1915, of which the statute now in force, and under which the indictment in question was drawn (chapter 123, Laws 1921), is amendatory, the language in this respect, however, being unchanged, and it was there held to be unnecessary for the indictment to affirmatively allege such nonconsent. We quote the following from that decision:

"It appears that nonconsent of the owner to the killing of an animal is not, in terms, required by the statute. The offense, by the terms of the statute, consists in knowingly killing the animal of another. There is, however, a necessary implication that the killing must be done without the owner's consent, because otherwise the act would be entirely lawful. The lack of consent is what renders the act unlawful under the statute. In this respect the offense is identical with larceny at common law.

"At common law the consent of the owner to the taking was a matter of defense, and nonconsent need neither be pleaded nor proved. 3 Bish. New Crim. Pro. (2d Ed.) § 752A. This was necessarily so because the words 'take, steal and carry away,' which characterized larceny, necessarily imply a taking without the consent of the owner. In showing the taking, stealing, and carrying away, evidence was always forthcoming to establish, at least circumstantially. the nonconsent of the owner. But a showing of nonconsent of the owner has always been necessary in order to convict of larceny, because otherwise no larceny would be established."

What was said there is controlling here, and forecloses the question against appellant's contention.

There is no error in the record, and the judgment should therefore be affirmed, and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

[No. 2882. June 23, 1924. Rehearing Denied July 8, 1924]

STATE v. ABEYTA et al.

SYLLABUS BY THE COURT.

1. A verdict that is supported by substantial evidence will not be disturbed on appeal.

2. Evidence reviewed and **held** that the verdict is supported by substantial evidence.

3. The admissibility of evidence, which is admitted

and considered against one defendant only, cannot be challenged by other defendants against whom it is not considered, as they are not affected by it.

4. It is not error to refuse a requested instruction which merely states, in a different form, the substance of that which the court has declared in its instructions.

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

Agapito Abeyta, Augustine Hinojos, and another were convicted of the larceny of two saddles, and the named defendants appeal. Affirmed.

F. Faircloth of Santa Rosa for appellants.

M. J. Helmick, Atty. Gen., and J. W. Armstrong, Asst. Atty Gen., for appellee.

OPINION OF THE COURT.

BRATTON, J. Agapito Abeyta, Augustine Hinojos, and Pablo Olona were jointly charged with the larceny of two saddles belonging to C. M. Benton and one belonging to Henry Bledsoe. They were tried together and all found guilty. Abeyta and Hinojos alone appealed; Olona having taken no steps to perfect an appeal so far as he was concerned.

[1, 2] 1. It is contended by the appellants that the verdict of the jury is not supported by substantial evidence. With care we have read the record, and are unable to share in this view, as we think the facts and circumstances proven, if believed by the jury, as they seemingly were, support the verdict. Such a verdict will not be disturbed on appeal. No rule of law is more firmly established in this jurisdiction. State v. Ancheta, 20 N. M. 19, 145 Pac. 1086.

[3] 2. Much is said in the briefs concerning the evidence proving certain admissions made by Pablo Olona; it being urged that they were not freely and voluntarily made, and that they were not admissible as against these appellants. The trial court controlled the evidence by giving to the jury the following instruction:

"I further charge you, gentlemen of the jury, that there has been introduced in evidence before you certain statements purported to have been made by the defendant, Pablo Olona, at the time and place testified to by the witnesses. 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, beyond a reasonable doubt, that such statements were made, you may not consider them as having any bearing on the guilt or innocence of the other defendants, but only as to the guilt or innocence of the defendant Pablo Olona."

After being so limited, the lack of such statements being free and voluntary could not possibly affect these appellants, because the evidence was not considered in determining their guilt. Whether such admissions were free and voluntary in character could in no wise concern any of the defendants except Olona, and, as we have previously said, he makes no complaint. That testimony of this character is admissible against the defendant making the statements, and that other defendants against whom the evidence is not considered are not affected thereby and cannot complain, is a rule of law too plain to merit discussion. It is universally recognized.

[4] 3. Appellants assign error upon the refusal of the court to give their requested instruction as follows:

"The court instructs you that, before the defendants, or any or either of them, can be found guilty of the crime charged in the indictment, it must be established to your satisfaction and beyond a reasonable doubt by the evidence introduced in this case that, with intent to steal, they took and carried away the property mentioned in the indictment and unless the evidence establishes to your satisfaction and beyond a reasonable doubt that the defendants succeeded in actually taking the said property mentioned in the indictment into their possession, or into the possession of one or more of them, with the assistance of the others and carrying it away, they cannot be found guilty of the crime charged in the indictment returned and filed in this case."

The law covering this feature of the case was fully and accurately stated in the court's instructions given to the jury. This court has many times held that it is

not error to refuse a requested instruction which merely states, in a different form, the substance of that which the court has declared in its instructions, and which is therefore merely cumulative. State v. Goodrich, 24 N. M. 660, 176 Pac. 813; State v. Ulibarri, 28 N. M. 107, 206 Pac. 510; State v. Vaisa, 28 N. M. 418, 213 Pac. 1038.

Other questions are discussed in appellants' brief, but we find no merit in them. The judgment should therefore be affirmed, and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

[No. 2640. Dec. 27, 1922. On Rehearing Jan. Term, 1924]

SMITH v. BORRADAILE, et al.

SYLLABUS BY THE COURT

1. When evidence tending to establish adverse possession is conflicting, and there is substantial evidence to warrant the trial court in reaching its conclusion, that conclusion will not be set aside on appeal.

2. The duty arising between tenants in common, as to the common title, is based upon the principle of the unity of right of possession which exists as to each, and whether through common devise or grant or otherwise. One tenant in common, although in possession claiming adversely to his cotenant, cannot, by purchase of an outstanding tax certificate, issued upon taxes levied before he became interested in and in possession of the land, assert title to the whole, as against his cotenant, under the tax deed issued to him after his purchase of the certificate and at the close of the three-year period of redemption. The purchase of the certificate under such circumstances constitutes payment of the taxes by one whose duty it is to pay them, and such payment is for the benefit of all, subject to right of contribution. Case of Bradford v. Armijo (N. M.) 210 Pac. 1070, distinguished.

3. Rejection of proferred evidence on subject of laches **held** harmless.

4. Record examined and defense of laches **held** not established.

5. On appeal, the case will be considered upon the pleadings and issues as framed below.

6. Offers to prove certain facts made upon the trial

of the case, which offers state mere conclusions, are too general and were properly rejected.

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

Suit to quiet title to real estate by James C. Smith against Dolores A. Borradaile, Anita A. Otero, and others. From a judgment awarding title to undivided one-half interest in the premises to the plaintiff and to the defendant Otero, respectively, plaintiff appeals. Affirmed.

Simms & Botts, of Albuquerque, for appellant.

The tax title is conclusive in favor of the plaintiff. State ex rel Old v. Romero, 181 Pac. 435; Pace v. Wight, 181 Pac. 430. This is not a case where one co-tenant, refusing to pay the taxes which he should pay, has sought to acquire a title against another co-tenant through a tax deed, but a case in which Smith, claiming the whole title in possession and desiring to strengthen his title, has bought the tax title. 26 R. C. L. 'Taxation," pars. 371 and 373; Bannon v. Brandon (Pa.), 75 Am. Dec. 655; 37 Cyc. p. 1347, note 41; Oswald v. Wolff, 129 Ill. 200, 21 N. E. 839; Griffin v. Turner, 75 Ia. 250, 39 N. W. 294; Lybrand v. Haney, 31 Wis. 230; Collier v. Smith (Ark.), 200 S. W. 1008; Welner v. Stearns, 40 Utah 185, 120 Pac. 490.

One co-tenant may become an adverse possessor against his co-tenant. Neher v. Armijo, 9 N. M. 325; Probst v. Trustees, 129 U. S. 182; 1 R. C. L. "Adverse Possession", par. 62; Smith v. Barrick, 182 Pac. 56.

The plea of laches against the cross bill is alone sufficient to determine this case in favor of the appellant. Patterson v. Hewitt, 11 N. M. 1; Haywood v. National Bank, 96 U. S. 611; Smith v. Clay, Amb. (English) 645; Harwood v. Railroad Co., 17 Wallace 79; Sullivan v. Portland etc., Ry Co., 94 U. S. 806; Galliher v. Cadwell, 145 U. S. 368; Penn. Mutual Life Ins. Co. v. Austin, 168 U. S. 685.

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

Plaintiff's tax deed is illegal and void. The land in question was not assessed to the owners for the year 1903 as required by section 4026 of the Compiled Laws of 1897, but was assessed to Perfecto Armijo, the owner of but one-tenth interest in said land. Cooper v. Hills, 23 N. M. 696.

The territorial rate, as shown by stipulation on file in this case, was .01751, and the total assessed value $500. The total amount of tax for territorial purposes under said levy was $8.75, while the actual levy collected for territorial purposes was $17.78, or $9.03 in excess of the legal amount. The legality of such a tax was settled by the case of the Liberty Bell, 23 Fed. 843, and by the following authorities: Loan Association v. Topeka, 20 Wall. 655; 2 Dillon Municipal Corporations, 4th ed., sec. 914; Judson on Taxation, sec. 341.

In the case of Pace v. Wight, 25 N. M. 276, this court held that the curative provisions of Chap. 22 of the Laws of 1899 relative to tax sales do not apply to jurisdictional defects and that the fact that the property was sold for delinquent taxes is jurisdictional. It must be obvious, also, that a valid tax is jurisdictional.

The law is settled by the highest authority that a tax illegal in part is illegal in toto, and it must necessarily follow that without an illegal tax there can be no legal sale. Cooley's Constitutional Limitations, star p. 521, Black on Tax Titles, sec. 230; Drew v. Davis, 10 Vt. 506; Elwell v. Shaw, 1 Me. 339; Buttrick v. Nashua Iron Co., 59 N. H. 392; Bangs v. Snow, 1 Mass. 188; Thurston v. Little, 3 Mass. 429; Dillingham v. Snow, 5 Mass. 547; Stetson v. Kempton, 13 Mass. 283; Haydon v. Foster, 13 Pick. 492; Torrey v. Millbury, 21 Pick. 70; Alvord v. Collin, 20 Pick. 418; Libby v. Burnham, 15 Mass. 144; Young v. Joslin, 13 R. I. 675; People v. Hagadorn, 36 Hun. 610; Dogan v. Griffin, 51 Miss. 782; Beard v. Green, 51 Miss. 856; Gamble v. Witty, 55 Miss. 26; Shattuck v. Daniel, 52 Miss. 834; Patterson v. Kittredge, 65 Miss. 33, 3 So. 65; Rougelot v. Quick, 34

Law. Ann. 123; Kemper v. McClellan, 19 Ohio 324; Younglove v. Hackman, 43 Ohio St. 69; 1 N. E. 230; Doe v. McQuilkin, 8 Blackf. 335; Noble v. Indianapolis, 16 Ind. 506; McLaughlin v. Thompson, 55 Ill. 249; Lacey v. Davis, 4 Mich. 140; Hammontree v. Lott, 40 Mich. 190; Wills v. Austin, 53 Cal. 152; Hardenburgh v. Kidd, 10 Cal. 402; McGann v. Merriam, 11 Neb. 241, 9 N. W. 96; Gage v. Pumpelly, 155 U. S. 454, 462.

There was no authority vested in the treasurer to sell the tax certificate issued to the County of Bernalillo. Pace v. Wight, 25 N. M. 276; Cooper v. Hills, 23 N. M. 696; Sutherland on Statutory Construction, sec. 463 and cases cited; 35 Cyc. p. 1208; Leette v. St. Louis State Bank, 115 Mo. 184, 21 S. W. 788.

The possession of Perfecto Armijo was not adverse in character, but was presumed to be the possession of all of his brothers and sisters who were tenants in common. 38 Cyc. pp. 21 to 23; Long v. Grant, 163 Ala. 507, 50 So. 914; Sumner v. Hill, 157 Ala. 230, 47 So. 565; Inglis v. Webb, 117 Ala. 387, 23 So. 125; McNeil v. First Congregational Society, 66 Cal. 105, 4 Pac. 1096; Thompson v. Saunders, 113 Ga. 1024, 39 S. E. 419; Blackaby v. Blackaby, 185 Ill. 94, 56 N. E. 1053; Ball v. Palmer, 81 Ill. 370; Elliott v. Frakes, 90 Ind. 389; Patterson v. Nixon, 79 Ind. 251; Weare v. Van Meter, 42 Ia. 128; Schoonover v. Tyner, 72 Kan. 475, 84 Pac. 124; Vermilion v. Nichol (Ky.), 114 S. W. 270; Bloom v. Sawyer, 121 Ky. 308, 98 S. W. 204; Thornton v. York Bank, 45 Me. 158; Whitney v. Dewey, 15 Pick. 428; Nowlen v. Hall, 128 Mich. 274, 87 N. W. 222; Lindley v. Groff, 37 Minn. 338, 34 N. W. 26; Ller v. Routh (Miss.), 3 How. 276; Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924; Southmayd v. Southmayd, 4 Mont. 100, 5 Pac. 318; Blake v. Milliken, 14 N. H. 213; Mott v. Carolina Land Co., 146 N. C. 425, 60 S. E. 423; Hogg v. Beerman, 41 O. S. 81; Moss v. Rose, 27 Ore. 595, 41 Pac. 666; Stull v. Stull, 197 Pa. St. 243; Richardson v. Day, 20 S. C. 412; Marr v. Gilliam (Tenn.), 1 Coldw. 488; Myers v. Frey, 102 Tex. 527, 119 S. W. 1142; Avery v. Hall, 50 Vt. 11; Cedar Mt. Consol.

Min. Co. v. Yarwood, 27 Wash. 271, 67 Pac. 749; Parker v. Brast, 45 W. Va. 399, 32 S. E. 269; Beinecker v. Miller, 40 Mo. 473; Thornton v. York Bank, 45 Me. 158; Mellon v. Reid, 114 Pa. St. 646, 8 Atl. 327; Phillips v. Wilmarth, 98 Ia. 32, 66 N. W. 1053; 38 Cyc. 27, 32 and cases cited.

That the exclusive receipt of rents and profits does not amount to an ouster, see: Morgan v. Mitchell, 104 Ga. 596, 30 S. E. 792; Carpenter v. Fletcher, 239 Ill. 440, 88 N. E. 162; Todd v. Todd, 117 Ill. 92, 7 N. E. 583; Higbee v. Rice, 5 Mass. 344; Rodney v. McLaughlin, 97 Mo. 426, 9 S. W. 726; Warfield v. Lindell, 30 Mo. 272; Lewitzky v. Szotoloff, 224 Pa. St. 610, 73 Atl. 936; Volton v. Hamilton, 2 Watts & S. 294; McGee v. Hall, 26 S. C. 179, 1 S. E. 711; Alexander v. Kennedy, 19 Tex. 488, 70 Am. Dec. 358.

Mere lapse of time or mere delay on the part of a tenant in common not in possession in failing to demand admission to joint possession or a share of the rents and profits is not sufficient to evidence an adverse holding by one in possession. Plass v. Plass, 121 Cal. 131; Bryan v. Atwater (Conn.), 5 Day 181; Milbourn v. David (Del.), 7 Houst. 209, 30 Atl. 971; Ball v. Palmer, 81 Ill. 370; Peden v. Cavine, 134 Ind. 494, 34 N. E. 7; Bader v. Dyer, 106 Ia. 715, 77 N. W. 469; Chambers v. Pleak (Ky.), 6 Dana 426; Lafavour v. Homan, 3 Allen 354; LaFountain v. Dee, 110 Mich. 347, 68 N. W. 220; Warfield v. Lindell, 38 Mo. 561; Abrams v. Rhoner, 44 Hun 507; Mott v. Carolina Land Co., 146 N. C. 525, 60 S. E. 423; Rider v. Maul, 46 Pa. St. 376; Villard v. Robert (S. C.), 1 Strobh. Eq. 393; Marr v. Gilliam (Tenn.), 1 Coldw. 488; Gray v. Kauffman, 82 Tex. 65, 17 S. W. 513; Purcell v. Wilson (Va.), 4 Gratt. 16; Reed v. Bachman, 61 W. Va. 452, 57 S. E. 769; Sydnor v. Palmer, 29 Wis. 226.

Courts manifest the utmost leniency when it appears that the delay is due to the intimate personal relations existing between the parties and the high degree of confidence reposed by one in another. 10 R. C. L. "Equity", sec. 149 and cases in note 11.

Plaintiff could acquire no right under a tax title as against his co-tenants. Black on Tax Titles, secs. 282 and 317 and cases cited; Flynn v. McKinley, 44 Ia. 68; Tyce v. Darbey (Ia.), 13 N. W. 301; Catron v. Laughlin, 11 N. M. 604 at p. 643; 7 R. C. L. p. 857, par. 51.

One cannot bring the owner of a legal title into equity and then cut off his legal right by pleading laches. Kelly v. Boettcher, 85 Fed. 62; Galway v. Metropolitan Elevated Ry. Co., 128 N. Y. 132, 28 N. E. 479 at p. 484.

The findings and decree of the court in favor of the defendant Anita A. Otero as to the undivided one-half interest in the real estate in question were based upon substantial evidence and are unassailable under the well known principle established by this court that where there is substantial evidence to support a decree the judgment of the court will not be disturbed. Territory v. West, 14 N. M. 546; Sherman v. Hicks, 14 N. M. 439; Richardson v. Pierce, 14 N. M. 334; Hancock v. Boazley, 14 N. M. 239; Territory v. Netherland, 13 N. M. 491; Candelaria v. Miera, 13 N. M. 360; Cunningham v. Springer, 13 N. M. 259; Ortiz v. Bank, 12 N. M. 519; Marquez v. Land Grant Co., 12 N. M. 445; Carpenter v. Lindauer, 12 N. M. 388; Green v. Brown & Manzanares Co., 11 N. M. 658; Rush v. Fletcher, 11 N. M. 555; Romero v. Boleman, 11 N. M. 535; Territory v. Gonzales, 11 N. M. 301; Gale & Farr v. Salas, 11 N. M. 211; Robinson v. Palatine Ins. Co. 11 N. M. 162; Patterson v. Hewitt, 11 N. M. 1; Badaracco v. Badaracco, 10 N. M. 761; Land & Irrigation Co. v. Gutierrez, 10 N. M. 177; Pueblo of Nambe v. Romero, 10 N. M. 58; Ford v. Springer Land Assoc., 8 N. M. 37; Territory v. Hicks, 6 N. M. 596; Torlina v. Trolicht, 6 N. M. 54; Lucy v. Woodward, 5 N. M. 583; Newcomb v. White, 5 N. M. 435; Romero v. Desmairias, 5 N. M. 142; Clark v. Carlisle Gold Mining Co., 5 N. M. 323; Rodey v. Traveler's Ins. Co., 3 N. M. 543; Zanz v. Stover, 2 N. M. 29.

Only the ultimate facts are to be found, and re-

quests of the trial court to contradict its findings of ultimate facts are not justified.

It is well settled that the findings required by statute are the ultimate facts. Burr v. Des Moines Co., 1 Wallace 102; McClure v. U. S., 116 U. S. 151; Luna v. R. R. Co., 16 N. M. 71; Texas Bank & Trust Co. v. Cavin (N. M.), 192 Pac. 367.

OPINION OF THE COURT.

BARNES, J. This is a suit to quiet title to certain real estate situate in Bernalillo county, and known as the Poblanos ranch, brought by the plaintiff, James C. Smith, against defendants Dolores Borradaile, Josefa A. Heyn, Ambrosio Armijo, Anita A. Otero, and all unknown claimants of interests in the premises adverse to the plaintiff. Anita A. Otero answered, denying that plaintiff was the owner of the entire title to the real estate, admitted that plaintiff owned an undivided one-half interest therein, and alleged that she owned the remaining undivided one-half interest, title to which she prayed might be quieted in her as against the plaintiff. The plaintiff replied, denying the claim of Mrs. Otero, setting up adverse possession since the year 1884 by plea of the statute of limitations of 10 years, and alleged that the plaintiff was a bona fide purchaser of the entire premises for value without notice of the claims of Mrs. Otero and her predecessors in title and illeging that she and her predecessors in title had been guilty of laches.

In order to understand some of the contentions advanced by plaintiff, it should be stated that the record discloses that the defendant Josefa Heyn was personally served with summons and copy of complaint on August 22, 1917, and a certificate of default as to her was issued on the 12th of September, 1917. Defendant Ambrosio Armijo was personally served with a copy of summons on the 11th day of August, 1917, by delivering to and leaving with him in the county of Maricopa, state of Arizona, copy of summons with a copy of the complaint attached. Upon such service a certificate of default was issued on December 4, 1917.

Defendant Borradaile was served with summons with copy of complaint attached on the 27th day of August, 1917, by personally delivering to and leaving with her such summons at the county of Alameda, in the state of California, and the certificate of default upon such service issued as to her on October 26, 1917. On the 4th day of September, 1917, defendant Anita Otero acquired by conveyance all the interest of Ambrosio Armijo in the premises in question, and on the 15th day of September, 1917, Mrs. Otero acquired by conveyance from Dolores Borradaile and Josefa Heyn all of their interest in said property. Mrs. Otero also claimed to have inherited a one-tenth interest in the property in question from her father upon his death in 1882, and a like one-tenth interest through the death of her sister, Rosalia Armijo. These two-tenths so gained by her through inheritance, together with the three-tenths acquired by conveyance from Ambrosio, Dolores, and Josefa, make up the undivided one-half interest in the premises which she claims in her answer.

No default judgment has ever been entered against any of the defendants upon the certificates of default.

It appears that Ambrosio Armijo, the father of Mrs. Otero, died April 10, 1882, in Bernalillo county, leaving him surviving ten children—Perfecto, Jesus, Teresa, Mariano, Elias, Dolores, Rosalia, Josefa, Anita, and Ambrosio. At the time of his death, five of his children were minors, namely: Dolores, age 15; Rosalia, age 13; Josefa, age 12; Ambrosio, age nine; and Anita, age 5. The deceased left a will which was duly probated giving to each of his ten children, among other things a one-tenth interest in the land in controversy. The widow of the deceased and his oldest son, Perfecto, were joint executors. Perfecto Armijo, the oldest son, went into possession of the land in question about the year 1882, and in the year 1912 conveyed it by warranty deed to Neil B. Field. From the year 1889 to 1912, Perfecto returned the land for taxation in his own name. In 1887 he leased the land to one Jones, who occupied it during the term of his lease. In 1890 he leased the land to one Standlee, who

occupied it during the term of his lease. In 1899 he mortgaged an interest in the land to one Harry Lee, which mortgage was afterward paid off. In 1911 he leased the land to James C. Smith, the plaintiff. Perfecto kept all of the proceeds of the land, and at various times during the years mentioned he lived on the land, farmed it, and kept the income. At the time Field bought the land in 1912, Smith was on it, and December 24, 1915, Field and his wife sold the land to Smith, who is this plaintiff, and conveyed the land to him by warranty deed. Smith made improvements on the land, built a house on it, costing approximately $1,400, and leveled some of the land and put it in cultivation. The land lies on the North Fourth street road out of Albuquerque, about 4 1-2 miles from town, and said highway has been greatly improved and paved with concrete by state and federal aid since Smith purchased the land.

The land was assessed for taxes to Perfecto Armijo for the year 1903. The taxes were not paid, and on the 3d day of October, 1904, the ranch was sold at tax sale to the county of Bernalillo. The certificate of said sale was held by said county until the 20th day of July, 1917, when it was sold to the plaintiff, and on the same day recorded. On the 22d day of September, 1920, Smith received a tax deed to the land.

Before Field bought the land in the year 1912, Perfecto had acquired, in addition to his one-tenth interest, the one-tenth interests each of his brothers, Jesus, Mariano, and Elias, and on August 1, 1917, the plaintiff Smith acquired from Teresa A. Pratt, formerly Armijo, and one of the heirs of Ambrosio Armijo, by a quitclaim deed, her one-tenth interest.

The plaintiff claims by adverse possession under the provisions of the act of February 1, 1858, which, for the purpose of reference, may be found as section 2938, C. L. 1897. As originally adopted, this section did not require the person in adverse possession to have color of title, but in 1899 (Laws 1899, c. 63) the Legislature amended the section so as to require color of title, and in 1905 (Laws 1905, c. 139) the

original section was further amended by adding a definition of adverse possession. There are two statutes of adverse possession in this state, one of which is the section referred to, and the other of which, for convenience of discussion in this opinion, may be referred to as section 2937, C. L. 1897. The latter section applies to grants derived from the governments of Spain and Mexico.

It is admitted in the record that the premises in question were originally part of the Elena de Gallegos land grant, known as a Spanish grant, but, without determining at this time under which of the sections mentioned above the adverse possession of the plaintiff could ripen into a legal right, the court will, for the purpose of the opinion, adopt the contention of the plaintiff, summarized as follows: That Perfecto Armijo entered into adverse possession of the premises in 1885 (1882 in the testimony); that such possession was open, visible, notorious, adverse, exclusive, and uninterrupted after such entry for 10 years; that no color of title was required to ripen such possession; and that the rights of the adverse claimant had fully accrued under the provisions of section 2938 before the act of 1899 had required color of title as an element of adverse possession.

Turning to the transcript in the case it is fairly deducible therefrom: That the property was at the time of the death of the ancestor a large and well-known farm or hacienda, improved by a dwelling which is described in Mr. Field's testimony as being a 'show place'' at the time he first knew it, and having cultivated fields. That in 1882 Perfecto, who was one of the executors of his father's will, moved onto the premises and lived there for various periods down to the year 1911, when he leased the premises to the plaintiff. That during all those years he retained the possession and management of the property, returning it for taxation in his own name from the year 1889, and paid the taxes on it, excepting for the year 1903, and unquestionably exercised full dominion over the entire property until such time as he delivered a con-

veyance of the whole thereof to Mr. Field. He received the rents, issues, and profits of the fields while he lived on the place, and never accounted to his coheirs therefor, nor paid them any part thereof, and the three of the heirs who testified in the case admitted that they never demanded an accounting, nor received anything on account of the product of the land. In 1887 he leased the entire premises to one Jones, and in 1890 he leased to one Standlee, and in 1911 he leased the premises to the plaintiff, and if there were any profits arising under any of these leases they were appropriated by Perfecto to his own uses. In 1899 Perfecto and wife executed a mortgage to Harry F. Lee. This mortgage described and covered certain property not in question in this case and also "all of their right, title, and interest in and to that certain property * * * commonly known and called the Las Poblanos ranch, and being the same property on which parties of the first part now reside."

Mr. Field testified: That in the fall of 1885, or the spring of 1886, Perfecto Armijo was living on this ranch. "I can't be certain of the date—any more certain than that—and claimed to be the owner of it, offered to sell it to me at that time," and "stated that he had become the owner of it by reason of the fact that he had made advances to the extent of several thousand dollars for the heirs in the prosecution of certain Indian depredation claims. That the claim by Perfecto Armijo was well known to and acquiesced in by his adult brothers and sisters." Upon objection of the defendant, the statement of Mr. Field that the claim was well known to and acquiesced in by Perfecto's adult brothers and sisters was stricken out.

The plaintiff also introduced in evidence the record in a suit for partition, No. 3187, Bernalillo county district court, which was a suit brought by Mr. Field for Perfecto Armijo and the heirs Dolores, Rosalia, and Teresa for themselves, and Abundia Garcia de Barela, Josefa, Ambrosio, and Anita, the last three being infants, all as tenants in common of certain property in the petition described, all situate in the town of Albu-

querque, and praying partition of such Albuquerque property. A decree of partition was entered as to such property, and the purpose of plaintiff in introducing the record is to show a condition under which it is to be presumed that the Las Poblanos ranch was treated and considered at the time the suit was filed in 1891 as the settled and separate property of Perfecto.

The pleadings in this case referred only to Albuquerque city property, which they prayed to have partitioned. The complaint alleges that the Armijo heirs have no other source of income than this city property and in the proofs some of the heirs admitted they are satisfied with the shares in their father's estate as apportioned to them by the proposed decree, which afterward became final. The minor heirs appeared by a guardian ad litem, who filed the usual plea requiring full proof of the allegations of the complaint.

Mr. Field also testified that Perfecto sold a portion of the Poblanos ranch to a man named Garcia who, with his subsequent grantees, have been in possession ever since the sale.

On the other hand for the defendants, Josefa Heyn, one of the defendants, testified: That she was the daughter of Ambrosio Armijo, born in 1870; knew that her brother lived on the ranch; heard at the time that he sold it to Mr. Field and went with Mrs. Borradaile to her brother's house to claim their share, and her brother said: "We didn't have any share in it." This was shortly after the property had been sold to Mr. Field; Mrs. Borradaile did the talking. She said: "What about Las Poblanos ranch—I heard that you sold it." He said: "Yes," and she said: "Well, where is our share?" He answered: "I only sold mine; I didn't sell yours." That Perfecto never at any time prior to that claimed that he was the sole owner; never heard he so claimed; never was any conversation in the presence of herself and Mr. Field that Perfecto claimed to own the whole ranch; never heard of Perfecto's claim on account of prosecuting Indian claims. On cross-examination she admitted she never

returned the property for taxation or paid taxes. Her husband was assessor of the county for four years and paid no attention to taxes on the property; did not consider that ranch was Perfecto's or that she had no interest in it; knew Perfecto was leasing it and never got any money; always thought that she had an interest, and if Perfecto sold he would give us our share; did not object to his selling and expected to get her part of the money; never brought any suit after the sale to Mr. Field. On redirect examination she testifies that Perfecto and the rest of the children were always on good terms; was no reason why she did not demand part of the income or rents from Perfecto; was no understanding about taxes—"We just thought if he lived there he ought to pay the taxes."

The deposition of Dolores A. Borradaile stated: That she was 50 years of age and the daughter of Ambrosio Armijo. Lives in Berkeley, Cal., where she went in June, 1914; very familiar with the ranch; her brother took possession of it immediately after her father's death; lived there off and on from 1882 to 1912, and when not on the place he rented it. Prior to 1912 never told her he claimed to be the owner of the entire ranch; never told her prior to 1912 that she had lost her interest therein, or had no interest therein. He never asked her to contribute towards payment of taxes or repairs or improvements. Didn't ask him to pay over her part of rents because he was living on the place part of the time, and he paid the taxes and made the improvements, and felt he was entitled to keep the rents in repayment. No one ever told her prior to 1912 that her brother claimed to be sole owner.

"After the ranch was sold, when I claimed my interest, I claimed from my brother my interest in the money obtained from the sale, and it was then for the first time that my brother Perfecto ever disputed my interest and claim in the property. I asked him for my share of the selling price, and he said that I had no right in the property—that he lived on it for 25 years or over and that he had paid the taxes and repaired it, and that I had lost my claim in it. The conversation ended there, as I didn't at

that time wish to have any quarrel with my brother about the matter. I didn't, however, agree that his claim was correct."

Upon cross-interrogatories she answered that it was not within her knowledge that the partition suit was brought for the purpose of partioning all the real estate in Bernalillo county. The ranch in question was not included in the suit for the reason—

"My brother was living on the place at the time and I thought as long as he lived in the place it would not be divided, but when it was sold, the proceeds could be divided amongst us."

There was no agreement made by her with Perfecto Armijo, or with any other person, that the receipt of the lots (in the partition suit) was in full of her share of the real property of her father's estate. She did not set up claim to the ranch in the partition suit because she did not desire to disturb her brother then living on the ranch, and because the ranch was not mentioned in suit, nor brought up, nor discussed.

Anita A. Otero testified by deposition that she was 42 years of age, lives in Berkeley, Cal., daughter of Ambrosio Armijo; is familiar with the Las Poblanos ranch; doesn't know who was in possession immediately after her mother's death, as she was only five years old. Her brother remained in possession until 1912; never told her he claimed to own the entire ranch, and never told her prior to 1912 that she had lost her interest therein. He never asked her to contribute to payment of taxes or improvements. He received the rents, but she never asked him for any portion of them because he was her brother, and she thought he would do the right thing by her in the end. Prior to 1912 she never received information from any source leading her to believe her brother claimed her interest in the land, when—

"I wrote him a letter demanding my interest in the ranch, he answered that if I claimed an interest to go ahead and fence in whatever were my rights in the land."

On cross-examination she admits: That Perfecto rented the ranch to Jones; didn't know of lease to Standlee, nor mortgage to Lee, nor lease to Smith in 1912. Never received any rent under those leases. Never made any contribution for taxes as her brother received rents from ranch, and she didn't think it was necessary for her to contribute; heard of sale to Field and made inquiries through her agent in Albuquerque. Perfecto gave her no part in the purchase price. Made no demands upon Field or Smith as she didn't understand Field or Smith ever owned the ranch as she always claimed her interest. Perfecto owed her money in 1912. There are several other matters he never settled with her.

The defendant also offered in evidence the records of deeds, first, from Mariano Armijo and wife to Perfecto Armijo, dated December 15, 1884, conveying for the consideration of $500 all of the interest of the grantors in Las Poblanos ranch, and second, the deed of Jesus B. Armijo to Perfecto Armijo, dated December 15, 1884, conveying for the consideration of $500 his interest in the Las Poblanos ranch, described as "his whole one-fifth interest."

The judgment of the court below awarded title to undivided one-half interests in the premises to the plaintiff and the defendant Anita A. Otero, respectively.

[1] 1. Before considering the effect of the proofs offered, it may be well to state the rule as to entry, possession, and ouster, or adverse possession, as between tenants in common. The language of Judge Story in Clymer's Lessee v. Dawkins, 3 How. 674--689 (11 L. Ed. 778), which was a suit arising upon a tenancy in common, is a correct statement of the rule:

> "It is true that the entry and possession of one tenant in common, of and into the land held in common, is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all, until some notorious act of ouster or adverse possession by the party so entering into possession, is brought home to the knowledge or notice of the others."

It is clear that there was no physical act of ouster on the part of Perfecto as against his coheirs and cotenants prior to the year 1912, when he conveyed the whole property to Field. This conveyance and the subsequent possession of Field and his grantee, Smith, constituted an ouster as to any other person claiming an interest in the premises. Neher v. Armijo, 9 N. M. 325, 54 Pac. 236. The question then remains, was there anything in the circumstances of his possession that would give notice to his cotenants that such possession was hostile, adverse, and under claim of right? The mere possession itself and payment of taxes is presumed to be for the benefit of all, and appropriation of rents and profits does not constitute adverse possession. Tiedeman, Real Prop. § 498; 45 Cent. Digest, par. 2665; Tiffany, Real Prop, par. 2014; 7 R. C. L. Cotenancy, pars. 43 and 47; Warfield v. Lindell, 30 Mo. 272, 77 Am. Dec. 614, and note; Bolton v. Hamilton, 2 Watts & S. (Pa.) 294, 37 Am. Dec. 509, and note. Pillow v. S. W. Va. Imp. Co., 92 Va 144, 23 S. E. 32, 53 m. St. Rep. 804; Gillaspie v. Osburn, 3 A. K. Marsh. (Ky.) 77, 13 Am. Dec. 136, and note. Nor does appropriation of rent for a long term of years raise a conclusive presumption of adverse possession. Warfield v. Lindell, supra—26 years; Bolton v. Hamilton, supra—50 years. And the presumption is for the jury. Id. and Freeman, Cotenancy and Partition, § 238.

The mortgage executed to Lee covered only the interest of the mortgagor and his wife in the ranch, and therefore fails to raise even a presumption of adverse claim as to his cotenants. The execution and recording of a mortgage upon the whole property, standing as a solitary evidentiary fact, would not have constituted notice of adverse possession. Leach v. Beattie, 33 Vt. 195.

It is urged in plaintiff's brief that, under the proofs, something resembling a family settlement was had, under which the right of Perfecto to the entirety of the premises in question was recognized and acquiesced in. This situation, if it existed, could

arise only by virtue of the consideration or claim arising out of the advances testified to by Mr. Field as made by Perfecto, in prosecuting for the benefit of the family certain Indian depredation claims. There is no other basis for assuming that such a family settlement was reached, supported by any consideration or thing of value advanced by Perfecto, and there is no direct proof that such an arrangement was ever entered into. As against the presumption of the family arrangement, appear the facts that Perfecto's entry into possession in 1882 was peaceable and not adverse; that on August 26, 1883, he signed and filed in the probate court a document setting aside the "higuelas," or land interests in this ranch, to the heirs; that on December 15, 1884, he bought, from two of his adult brothers for the consideration of $500 paid to each, their respective interests in the ranch; that in 1899, in order to secure a loan of $363, he pledged by a mortgage, along with other property, his right, title, and interest in the ranch at a time when under the contentions of the plaintiff, his title to the entire ranch had ripened by adverse possession; that in 1917 Ambrosio Armijo, 2d, executed to Anita A. Otero a warranty deed for his interest in the ranch, conveying to her all of the ranch; that the three heirs, in testifying as witnesses, denied any family agreement or knowledge of his claim to the entirety of the property under the Indian depredation advances, or else denied in general terms that they had entered into any agrement under which Perfecto was to hold the ranch as his own. It is true it appears from the undisputed testimony that Perfecto sold a portion of the ranch to one Garcia, and that Garcia and his successors in title have held possession of the tract they so acquired ever since the sale. But it does not appear when this sale was made, for what consideration, or what the value or extent of the tract sold was. This testimony, standing as it does as to the Garcia tract, is too vague to add weight to the plaintiffs contentions.

The whole question of adverse possession under the law referred to as section 2938, or under the law

referred to as section 2937, is a matter of controversy and dispute under the testimony in the case, and there is substantial evidence in the record to warrant the trial court in reaching its conclusion that the plaintiff had failed to establish adverse possession as against the defendant. Under the authority of many cases decided in this court, the finding and judgment of the trial court will not be set aside under such circumstances. Woodward v. Libbey, 27 N. M. 683, 205 Pac. 524.

The court property held adversely to the plaintiff upon his claim of adverse possession under section 2938 and in favor of defendant Otero. Can the plaintiff sustain his title as superior to the Otero title under section 2937? Clearly not, as his earliest deed of conveyance, grant, or other assurance, which could be color of title as against the Otero interests, is the deed to Field executed five years before suit.

[2] 2. Plaintiff offered in evidence a tax deed, acquired in 1920, shortly before the trial of this case below, and claims title thereunder in fee simple to the entirety. His complaint is in the usual form in suits to quit title, and advises defendants of nothing other than that he claims the premises as the owner thereof. Defendant's objections to the offer of the tax deed, and the tax certificate and record on which it was founded are not based upon the fact that the instruments and records show a title, if any, acquired by plaintiff since the beginning of his action, but are based upon technical objections to the tax levy and the power of the county treasurer to assign the tax certificate, and upon the proposition that plaintiff was a tenant in common at the time the tax certificate was purchased, and that such purchase constituted a payment of the taxes and inured to the benefit of his cotenants, and therefore did not aid plaintiff in his suit. This case is to be distinguished from the case of Bradford v. Armijo (N. M.) 210 Pac. 1070, because, in the latter case, plaintiff expressly disclaimed any other purpose in offering his tax deed excepting as

establishing color of title under the adverse possession statutes.

It will be seen that plaintiff here, under the state of the pleadings and issues as made at the trial of the case, can maintain his tax title to the entire premises, unless defendant's objections to such title are well founded. As shown by and summarized from the record, plaintiff's position in regard to this tax title is as follows: Field took from Perfecto Armijo in 1912 by warranty deed, conveying the whole, and thereafter Field and his successors in interest were under an open an divisible act of ouster continuously in adverse possession of the entire premises within the definition of adverse possession as given by the statute of this state (section 3365, Code 1915); in 1904 Perfecto Armijo, then being in possession of the whole premises and a tenant in common with defendant and those from whom she deraigns title, returned such premises for taxation. The taxes remained unpaid and in 1905 they were struck off to Bernalillo county at a tax sale. The plaintiff bought Field's title in 1915 and in 1917 bought a tax sale certificate from Bernalillo county based upon the unpaid taxes of 1904, and in 1920 obtained a tax deed upon such certificate for the whole of the premises.

The first question, independently of any defects that may be urged against the tax levy and sale is, can the plaintiff under the circumstances of this case maintain title under this tax deed? The general proposition, which the cases from our state support, is that the tenant in common cannot acquire an outstanding tax title and maintain it to the exclusion of his cotenants, as the transaction amounts only to the payment of taxes for which the payor is entitled to contribution from his fellow tenants. Freeman, Cotenancy and Partition, § 158; Black, Tax Titles, § 141; Ruling Case Law, vol. 7, p. 863, § 57, and note; Catron v. Laughlin, 11 N. M. 604, 72 Pac. 26. This principle of the law of tenancy in common is supported on two theories, one being the duty developing upon every owner of property, and therefore upon each

tenant in common, to pay to the state the taxes thereon, and the other being the confidential relation existing between tenants in common, by reason of their their mutual relations towards each other and towards the common property and title therein. This is amply illustrated and supported by the language of the cases cited and the text of the section from 7 R. C. L., supra, and cases cited in note to Hoyt v. Lightbody, 116 Am. St. Rep. 367. In said note, citing, inter alia, Venable v. Beauchamp, 3 Dana (33 Ky.) 321, 28 Am. Dec. 74, the reason for the rule is given as follows:

"The rule inhibiting the assertion of an adverse tax title by one cotenant against another is said to be based upon a community of interest in the common title between persons having a common possession, and a common interest in the safety of the possession of each, whereby such a relation of trust and confidence is created between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other in reference to tax titles to the property so situated."

This language is quoted with approval by Mr. Black in his work on Tax Titles on page 350. The books show many exceptions to this rule. Those exceptions are gathered in a note to Hoyt v. Lightbody, supra, and a note to the same case to be found in 8 Ann. Cas. beginning on page 988. One of the exceptions is where the tax title has become complete and perfected in a stranger before the cotenant claiming thereunder had acquired the same, but this exception is manifestly outside the facts in the present case. Another exception is where the tax title has been purchasd by a cotenant holding adversely to his co-owners. Another exception is where there has been a separate taxation of the interests and no general duty devolves upon one cotenant to protect the interest of another with regard to the discharge of the taxes. Another is where the titles derived by cotenants came from different sources, where it is said that the condition establishing a confidential relation between them with reference to the title, that is to say, a fiduciary or trust relation, does not exist.

Under these conflicting decisions it is apparently necessary to discuss only the first, second, and fourth class of cases, and it would seem that a general and controlling principle may be evolved if we determine what are the duties of tenants in common towards each other and when and how those duties arise. Mr. Freeman, in his work on Cotenancy, says, in paragraph 86:

"It is a sufficient description of tenants in common to say that they are 'persons who hold by unity of possession. It is not necessary that there should be either unity of tenure in the different portions of the land, or unity of estate in the several owners thereof, to constitute a tenancy in common. Unity of right of possession is merely all that is required'."

Bearing in mind this definition of the principle essential to support a tenancy in common, the question as to the duty existing between tenants in common towards one another under such unity of possession becomes the essential factor. In Texas, among other states, the fourth exception to the general rule mentioned above has been settled by the decisions of the courts as well founded, and has become the law of property in that state. But in Fielding v. White (Tex. Civ. App.) 32 S. W. 1054, Mr. Chief Justice Fisher said that, if the question were an open one, he would be inclined to rule differently and in accord with what he conceived to be the decided weight of authority, and further said:

"The unity of possession, or the right of joint possession, was the principal factor that created the relationship of tenants in common at common law. Their rights were acquired by several and distinct titles, or by the same title but at different periods; and the grand incident of such estates was the unity of possession, or the present right of possession, co-extensive with the entire estate. And in my view of the law, when such relationship is once ascertained, or such estates are found to exist, eo instante there springs into existence a reciprocal and mutual obligation and duty resting upon each co-owner, in dealing with the common estate, to observe the right of each other, and to abstain from acts in which benefit and profit may result to one of the injury of the other, although there be an absence of facts tending to show special circumstances creating trust relationship."

This would appear to be a clear and indisputable statement of the duty existing between tenants in common and of the basis on which that duty rests. Other duties may arise through contract or by force of circumstances, but the common duty as above defined fully supports the general rule as to the conduct of the co-owner towards the common property and title. Some of the cases seem to impose a superior duty to protect the common title upon the cotenant in possession. These cases are decided almost without exception under taxing acts that, by their terms, impose a prior obligation to pay the taxes upon the person in the actual possession and occupancy of the land, or upon the theory that one in possession and enjoyment of the rents and profits is bound by such conditions to a higher duty towards the cotenant out of possession. Possession and occupancy of real property in New Mexico raise no special obligation to pay the taxes thereon. The receipt by a cotenant in possession of the rents and profits of the common estate creates no other liability than that of accounting to those jointly interested with him; but it would seem that from the opinions in the cases of the two classes last referred to there has arisen a misconception of the basis of duty to pay the taxes on the common property. This court considers that duty to arise from the unity of possession and to arise as and when such unity is cast upon the holder of a title to the moiety. From this view of the cases it becomes immaterial whether the taxes were levied before or after the plaintiff bought into the estate, or whether he was, at the time the tax certificate was acquired and the tax deed issued to him, holding adversely to defendant or not, or whether his title in fact came from a different source than that of the defendant, or arose through a common devise or grant.

In Cecil v. Clark, 44 W. Va. 659—683, 30 S. E. 216, 225, the court, in a carefully considered opinion, says

"Therefore I say that when one person, who in law is a cotenant, purchases another title to the land, he purchases for the benefit of all. He may claim that he is the

sole owner, but if, in fact, the law will hold him to be not sole owner, but a tenant in common with others, that purchase is for the common benefit of all. The test is, does the law adjudge him to be a tenant in common."

See, also, Hoyt v. Lightbody, 116 Am. St. Rep. 367, where the tax title based upon taxes levied before the title holder had come into the cotenancy was denied. See, also, Lomax v. Grindele, 117 Ill. 527, 7 N. E. 483. See, also, note in 19 L. R. A. (N. S.) to Jackson v. Baird, p. 591, where a large number of cases are collected.

Many cases have considered the duty or obligation as to the common estate existing between tenants in common from the standpoint of a sort of confidential relation said to arise by reason of their common ownership, and have denied that such confidential relation exists where the several cotenants derive their title from different sources. But as this confidential relation arises by operation of law upon the arising of the unity of possession, these cases would appear to confuse effect for cause and to deny the distinguishing feature of tenancies of this character as defined by the books. Freeman, Cotenancy and Partition, § 86. There is also a class of cases sustaining tax titles bought by one tenant in common and asserted by the purchaser adversely to the interests of his cotenants, where the tax title, under the local statutes, had ripened in a complete title before the purchasing cotenant had acquired the same. These cases go on the theory, as stated in the case of Boynton v. Veldman, 131 Mich. 555, 91 N. W. 1022, that no duty to pay the taxes rested upon the purchaser of the tax title, or upon the theory, which is based upon a mere substantial principle of law, that the tenancy in common had been ended by the vesting of title to the entirety in the person of the original owner of the tax title, this being the reasoning of the Pennsylvania cases followed in the courts of some of the other states. As the facts in the case at bar present a different situation from those in the cases just referred to, we expressly reserve a decision upon those principles.

38 Cyc. at pages 50, 51, lays down the bald principle that one owning an undivided interest in land, adversely claiming title to the whole and being in actual possession thereof, may purchase a tax title without its inuring to the benefit of his alleged cotenant. The two cases cited in support of this proposition do not, we submit, bear out this statement. Willcuts v. Rollins, 85 Iowa, 247 N. W. 199, turns primarily upon the question of five years' possession and also discloses in the opinion facts in themselves sufficient to defeat the claimant under the tax title. In Alexander v. Sully, 50 Iowa, 192, it appears from the opinion that the superior title had been vested in a stranger for two years, but the former joint owner purchased it, and, as the court said, the question was whether the joint ownership previously existing was not dissolved by this superior title, and said:

"If the superior title did not in and of itself, amount to an ouster and eviction, we think the principle, under the circumstances, must be the same as if it did have that effect. As neither of the joint owners was in possession, the outstanding title was not purchased to protect the possession or any other right either of the former joint owners then had."

Upon the second exception to the rule it may be said: The plaintiff in this case deraigns title and possession through that of his grantor, Field, whose deed, under which he took possession, and whose possession were adverse to the tenancy in common from 1912. This adverse possession had not ripened into a title under the statute as against co-owners in the estate at the time plaintiff brought this action. A number of cases hold in effect that a tenant in common, entering and claiming and holding all the premises adversely to the other cotenants, is not barred by virtue of the existence of cotenancy, as a condition imposed by law, from acquiring and asserting for himself an outstanding tax title. The case of Wright v. Sperry, 21 Wis. 336, would appear to support this doctrine, but an examination of the facts in that case, as shown in the opinion, reveals that the case is slight authority for sustaining this plaintiff's title under

his tax deed. In the Wisconsin case the tax title to all of the land had vested and become paramount before doctrine the tenancy in common had terminated. The Wisconsin case also supports its reasoning under which it approves the tax deed purchased by one tenant in Wright purchased it, and under the Pennsylvania common by a wrong analogy, saying:

"Certainly it is not unreasonable so to hold, if he may, without such outstanding title, by merely entering into possession of and claiming the whole land, acquire by adverse possession a perfect title to the whole, unless his cotenants within 20 years commence an action against him."

Freeman, in his treatise on Cotenancy and Partition, section 153, says of the rule that a cotenant cannot assail the common title, and, speaking of adverse possession by a cotenant:

"This though apparently an exception, is, upon close examination, found not to involve any violation of the general rule. for one cotenant who defends an action brought by another, on the ground that the latter is barred by this statute, concedes the title of the cotenant and seeks to avoid it for not being asserted in proper time."

Does the fact of adverse possession in the plaintiff in this case, although known to defendant, place him in any better or superior position as to his tax title, before such adverse possession had continued for the period of ten years necessary to constitute a defensive right under our statute? We think not. Whether all the cotenants, or part, or none, are in possession does not affect the rule, and to hold that one cotenant may, by his own act of ouster, abrogate the rule and by an adverse and hostile claim, continued for a day, or week, or any period less than that fixed by the statute of limitations, gain a right to pay the common taxes and then deny the common duty, is to abridge the spirit, if not the letter, of the rule, and to open the door to overreaching and fraud. To establish the rule of duty between tenants in common, as to the common title, upon the existence of the unity of right of possession alone will not by any reasoning

reconcile the reported cases, but it should distinguish many of the inappropriate analogies referred to in such cases, tend to settle the true rule by whcih such duty is to be determined, and cast no new or unreasonable burden upon such tenancies.

The exact question being undetermined in this state, and this court believing that the correct basis of the duty of one cotenant to his fellow rests upon the principle of unity of possession or unity of right of possession, as it may be better expressed, and such unity having been in existence, as between plaintiff and defendant at the time plaintiff bought the tax certificate, we hold that such purchase was a mere payment of the taxes and redemption of the property from the tax lien by one charged with the duty to pay the taxes, and therefore such payment and redemption inured to the benefit of the defendant and her grantors, all tenants in common with the plaintiff, and that the plaintiff gained nothing through the delivery to him of the tax deed issued upon such certificate of tax sale, beyond the right of contribution from the other tenant in common. Having reached this conclusion as to the effect of the tax deed, it is unnecessary to consider defendant's further objections to it.

[3, 4] 3, 4. One of the defenses urged by plaintiff to the cross-complaint of defendant is that defendant and her grantors are guilty of laches and should not be permitted to recover in this equitable action. Plaintiff says that he bought the land in suit in good faith for a valuable consideration, without knowledge of defendant's claim; and that he and his predecessors in title have been in actual, exclusive, hostile, and adverse possession of all the land since 1884, claiming to own it in fee, and in good faith have made valuable improvements thereon, all as was well known to defendant and her predecessors in title; and that she and they have been guilty of laches in that they have not asserted their rights for over 30 years, and their demand is stale, and the position of

the parties is now such that it would be inequitable and unconscionable to permit her to recover any part of the land. These allegations are contained in plaintiff's reply to defendant's cross-complaint, and constitute an answer to the cross-complaint setting forth new matter. Defendant failed to file any demurrer or answer to such new matter, but on the trial below it was considered as denied, and it will be so considered here. The trial court evidently failed to give consideration to this defensive plea, for it limited the evidence introduced by plaintiff so that it could not be considered under this issue and excluded offered evidence. However, upon the examination and cross-examination of plaintiff, all of the evidence on this issue, with one exception to be later noted, is in fact fully developed in the record. Therefore the condition of the record works no hardship on the plaintiff on appeal, unless the exception noted was harmful. Plaintiff relies on 30 years' lapse of time during which he says defendant failed to assert her rights. The analysis heretofore made of the evidence introduced upon the issue of adverse possession shows a sufficient reason for such nonassertion of right on the part of plaintiff and her grantors as against Perfecto. It is said:

> "Courts manifest the utmost leniency when it appears that the delay is due to the intimate personal relations subsisting between the parties and the high degree of confidence reposed by one in another." 10 R. C. L. Equity, § 149, and cases in note 11.

This condition of intimate personal relation and high degree of confidence existed between defendant and her elder brother Perfecto up to the time he sold to Field in 1912. The element of waiting in silence for a possible speculative increase in value of the property is entirely absent, and defendant may be presumed under the proof to have lost rather than to have gained by her silence up to the time of the sale in 1912. A new condition then arose. Plaintiff says he bought the whole of the land in good faith and without knowledge of defendant's claim. In view

of the fact that the interests now claimed by defendant arise under a will shown to have been duly admitted to probate in the court of record of the county where the property is situate, which records are the only ones required by law with reference to title arising by inheritance or devise, and that such records are commonly consulted in ascertaining the condition of ancient realty titles, plaintiff's allegations of good faith and of ignorance are entitled to little weight in his behalf, and that is particularly so when his own testimony shows that he asked John Borradaile, husband of one of the Armijo heirs, about this title just before he bought in 1912. The testimony is as follows:

"A. Well, Mr. Borrodaile and I had a little conversation. I asked him about title; that is what you want to know, is it?

"Mr. Simms: Yes.

"A. It was good.

"Q. Title to what? A. Title to this Perfecto Armijo Poblanos property.

'Q. All right; go ahead. A. He says I consider it as perfectly good. He says the title is good.

"Q. What else did he say? Give the whole conversation. A. He says, 'Well some of the heirs have never been settled for. We don't figure that we have got any interest.' He said, 'Perfecto just simply beat us out of it—stole it from us.' "

If Smith relied upon Borradaile's opinion of the title, he did so at his peril and can hardly convince the court of the good faith of a purchase ventured on the contradictory statements which formed and shaded such opinion. Smith stands charged by his own admissions with making inquiries as to the title at a time when he was about to buy, and of a person who had no interest in the land, and of a total failure to inquire of those whose interest might be adverse to Field's title. In other words, he knew of dormant claimants, but feared speech with them might vitalize both claimants and their claims. Shortly after the purchase by plaintiff in 1915, he built a house costing $1,400 to $1,500, built sheds and corrals, and leveled land at a cost not to exceed $900, all before he brought suit. Other improvements made by him since suit are shown, but their value is not material to the issue here.

A state highway passing by the land was built since the suit, which plaintiff claims has, to an undisclosed degree, appreciated the value of the land. Defendant never notified plaintiff that she claimed an interest in the land, or brought any suit until the filing of her cross-complaint herein. Do these facts state a case where it would be inequitable and unconscionable to award defendant the interest she claims? We think not. Plaintiff and his predecessers in 1912 were in possession of the land and enjoying the income therefrom. His improvements were only such as aid the beneficial use of the land for cultivation and residence, and, even should he lose one-half their value, he can hardly be found on the wrong side of the balance sheet as to his whole enjoyment of the premises. It is true he loses in speculative gain on a purchase based on Borradaile's opinion that Perfecto's title was a robber's title, though such loss can hardly be urged in equity.

This brings us to the proofs excluded on this issue. Plaintiff offered to prove that he paid Field in 1915 $50 per acre for the 126 acres of land—$6,300 for the whole estate then delivered to his possession—and that it had greatly appreciated in value at the time of trial. This offer was denied. Did this denial constitute harmful error. We think not. Plaintiff's offer did not show the extent of the increase in value or disclose that the possession of such increase was such as he was entitled to rely upon. It is true that, in the anxiety and pressure of a critical moment in a trial before a court, whose rulings are adverse, something should be allowed to counsel in considering on appeal the manner in which the record is made below. But in this particular instance the proffered proofs were either greatly probative or immaterial upon the issue at stake, and the burden and duty were on counsel to submit his proofs fully so that they might be fairly weighed and considered by the courts. In this he failed. But, waiving the question as to the form and sufficiency of plaintiff's offer, it may be said there is sufficient in the record so that the purpose and effect of the offered

evidence can be understood and fairly considered. The description, extent, and value of the improvements and the times when they were placed on the property are shown in the record, and no increase in value such as would shock the conscience or present a grave inequity based upon the five years' silence and inactivity of defendant regarding her claim to an interest can be presented. The principles on which Patterson v. Hewitt, 11 N. M. 1, 66 Pac. 522, 55 L. R. A. 658, was decided are absent here. There is no speculative element of loss through costly mine development, or of disproportionate gain through fortuitous discovery of great mineral wealth, such as effected the conscience of the court in that case. One of the inequitable features arising under the assertion of stale claims is the disappearance through lapse of time of witnesses to essential facts, and all other forms of proofs necessary to establish the truth concerning the facts in litigation. That was a moving ground for the decision in the Patterson v. Hewitt case, and the precedents are there cited. But in the instant case no such condition is shown, and no complaint based on such a feature is made. It is true that Perfecto, in whose breast all knowledge and in whose person all initiative appear to have been centered, died between the time of the execution to the deed to Field and the purchase by plaintiff, but he died only a few months after he conveyed to Field, and defendant can scarcely be charged with unconscionable delay because she failed to bring suit on her claim before Perfecto's death.

Upon the foregoing reasoning we find plaintiff sufferred no wrong through the rulings of the trial court on the proofs offered by him to sustain his defense of laches, and that such defense cannot be maintained.

[5] 5. Defendant Anita A. Otero in her answer and cross-complaint set up title to an undivided one-half interest in the litigated premises. She filed her answer and cross-complaint in due time. Defendants Borradaile, Heyn, and Ambrosio Armijo failed to an-

swer, and certificates of default were entered against them, but no default judgments were taken. It appears that defendant Otero acquired the interests of her codefendants pendente lite by conveyances dater later than the filing of the suit. Counsel for plaintiff appears to have elected to try the case on the pleadings as they stood at the time of trial, and the evidence discloses that the defendant Otero had acquired and laid claim to an undivided one-half interest in the property. The objections that Mrs. Otero obtained the interests of her codefendants pendente lite and as a gift and without consideration are immaterial. This court will take the case as formed and concluded before the trial court.

[6] 6. Plaintiff, by his assignments of errors Nos. 35 and 37, alleges error on the part of the trial court in the exclusion of certain testimony offered. These exceptions are based upon offers of plaintiff's counsel to prove certain facts by witnesses then under examination. The offers are too general to advise the trial court of this court as to what the testimony to be elicited would be, and are offers merely of conclusions from undisclosed facts which may be presumed to have been in the mind of the attorney then examining the witnesses. The assignments of error are without merit. Williams v. Williams, 259 Mo. 242, 168 S. W. 616; United S. H. F. Co. v. Blue, 52 South, 604; Muntz v. Whitcomb, 40 Pa. Super. Ct. 553, 9 Enc. Ev. 162; Palatine Ins. Co. v. Santa Fe Merc. Co., 13 N. M. 241, 82 Pac. 363.

We have examined the other assignments of error and find nothing for consideration. Most of them relate to the refusal of the court to make certain findings of fact and conclusions of law offered by the plaintiff. The court in its judgment found the material and ultimate facts essential to support such judgment. Nothing further was required in the case.

For the reason stated, the judgment of the lower court will be affirmed, and it is so ordered.

PARKER, C. J., concurs.

On Rehearing.

RYAN, District Judge. The argument of appellant on rehearing is devoted mainly to upholding the contention that the tax title on which he relies should be held effective, because, being in possession and holding adversely to the cotenants after ouster, he could build up a new and independent title by the purchase of the tax deed, which was founded upon a sale of the taxes antedating the acquisition of his interest in the land. This same matter was urged before, and is given thorough consideration in the very able opinion heretofore written by Mr. Justice BARNES. We have examined the cases upon which appellant relies, namely: Oswald v. Wolf, 129 Ill. 200, 21 N. E. 839; Sands v. Davis, 40 Mich. 14; Allen v. Dayton Hotel Co., 95 Tenn. 480, 32 S. W. 962; Lybrand v. Haney, 31 Wis. 230; Griffin v. Turner, 75 Iowa 250, 39 N. W. 294; Collier v Smith, 132 Ark 309, 200 S. W. 1008; Welner v. Stearns, 40 Utah, 185, 120 Pac. 490, Ann Cas. 1914C, 1175; Niday v. Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027; Stubblefield v. Hanson (Tex. Civ. App.) 94 S. W. 406; Boynton v. Veldman, 131 Mich. 555, 91 N. W. 1022; Olmstead v. Tracy, 145 Mich. 299, 108 N. W. 649, 116 Am. St. Rep. 299; Webster v. Webster, 55 Ill. 325; Stoll v. Griffith, 41 Wash. 37, 82 Pac. 1025.

We refrain from a prolix analysis of these cases; all were cited and considered by this court heretofore, and many carefully criticized in the previous opinion. We observe this, however, in regard to them, that they display a remarkable obscurity in the statement of basic doctrine and a looseness of expression which, in our opinion, is attributable to the fact that they confuse two distinct principles and apply them to distinct sets of facts indiscriminately. The first principle is this:

"It is the rule in most jurisdictions that the owner of the land cannot add to or strengthen his title by buying in at a tax sale." 3 Cooley on Taxation (4th Ed.) 2852; 1 Blackwell's Tax Titles, § 566; 46 L. R. A. (N. S.) 209; 26 L. R. A. (N. S.) 1167; Black on Tax Titles (2d. Ed.) 338.

The second is:

"Where land is owned by joint tenants, coparceners,

or tenants in common, and taxes are assessed upon it as a whole and it is sold for nonpayment of the same, neither of the cotenants can purchase a title at the sale which shall be paramount to that of his companions, or operate to dissolve the relationship. His payment is regarded as simply discharging the assessment, and it will inure to the benefit of all. He acquires no other or greater interest than he held before, except that he has a claim upon the others for reimbursement according to their respective shares." Black on Tax Titles, § 282.

See, also, 38 Cyc. 48, 78 R. C. L. 363; 3 Cooley on Taxation (4th Ed.) 2864.

Of the cases cited by appellant, supra, the following are concerned with the application of the first proposition, and not with the rule or with the exception to it where a purchaser is a tenant in common, viz.: Oswald v. Wolf, 129 Ill. 200, 21 N. E. 839; Lybrand v. Haney, 31 Wis. 230; Griffin v. Turner, 75 Iowa, 250, 39 N. W. 294; Collier v. Smith, 132 Ark. 309, 200 S. W. 1008; Welner v. Stearns, 40 Utah, 185, 120 Pac. 490, Ann. Cas. 1914C, 1175.

Under the first proposition the purchaser is unable to establish a tax title by the purchase of a tax deed by reason of his relationship to the land by way of possession and title. Under the second proposition he is estopped from asserting an independent title growing out of a tax sale purchase because of his relationship to others who have an interest in the land. It is apparent that the two principles are essentially different; yet it is deserving of notice that Oswald v. Wolf, which is authority only for the first proposition, is almost uniformly cited in the above cases as authority for an exception to the rule as to the equitable estoppel against cotenants asserting title derogatory to the title of the cotenancy.

The remaining cases, which have to do with an exception to the rule in regard to the purchase of a tax title by a cotenant, do not deserve any further attention than that expressed in the previous opinion. Some consider the matter upon the fact that a stranger purchased the tax title, which was a paramount title and

destructive of the cotenancy. Sands v. Davis, supra. Others are concerned with the right as between mortgagee and mortgagor. Allen v. Dayton Hotel Co., supra. Others are affected by the doctrine that the rule does not apply unless the tenancy is under the same instrument of title. Niday v. Cochran, supra; Boynton v. Veldman. In Olmstead v. Tracy, it was specifically announced that there was no tenancy in common. Stoll v. Griffith was upon the facts which clearly distinguished it from this case, in that the question arose upon the claim that the purchaser, whose title was defective because of an insufficient power of attorney from the grantor, became thereby a tenant in common; and Wright v. Sperry could have been determined solely upon the question of the estoppel as between mortgagor and mortgagee.

However unconvincing these cases may be as authority, the language employed by them is in support of the contention urged by appellant. With this contention, however, as it is applicable to the facts in this case, we do not agree. That one tenant may oust his cotenants is clearly the law in this jurisdiction, and, after ouster, certainly he may establish a title by adverse possession. It does not follow from this, however, that, even after ouster, he may rest his title upon the purchase of a tax certificate, as was done in this case, during the existence of a cotenancy. Equity and sound public policy forbid his so doing, since to hold the contrary would offer too great facility for an intriguing cotenant to convey by warranty deed to a stranger, thus ousting the cotenants, and immediately collude with his grantee to purchase an outstanding tax lien and thereon build up a paramount tax title. The lapse of time necessary for the establishment of the title by adverse possession is a protection to the cotenants that is entirely lacking, should the ability to rely successfully upon a tax title, as is contended in this case, be granted.

We adhere to the former opinion.

PARKER, C. J., and BRATTON, J., concur.

[No. 2883. July 7, 1924.]

In re HANNA et al

SYLLABUS BY THE COURT

An attorney, who participates in a public meeting, held for the purpose of influencing public sentiment with respect to the merits of a cause then pending in the courts, is guilty of such unprofessional conduct as to merit discipline.

Certified Questions from San Miguel County.

Proceedings in the matter of Richard H. Hanna and another, charging unprofessional conduct. The questions arising on a finding of a special committee were certified. Judgment rendered.

E. R. Wright, J. O. Seth, and Francis C. Wilson, all of Santa Fe, for respondents.

O. O. Askren, of East Las Vegas, and Clarence J. Roberts, of Santa Fe, for informants.

OPINION OF THE COURT

BOTTS, J. These proceedings grew out of an information, filed by members of the bar in the district court of the Fourth judicial district, against the respondent Hanna, charging him with unprofessional conduct in certain particulars, and resulting in his suspension from practice in that court until such time as this court should otherwise direct. The whole matter was then certified to us for such action as should seem proper in the premises, with respect to both respondents. This court referred the matter to a special committee of the bar, composed of three of the leading members of the profession, who also constituted the state board of bar examiners, with directions to hear evidence on the charges and make a report to this court of their findings, conclusions, and recommendations. In pursuance of that direction, the committee, on due notice to respondents, met and heard all the evidence offered, at which meeting the respondents and the informants were present. In further pursuance of the direction of the court, the committee in due time made

its report, to which informants have filed certain exceptions.

The committee found that the conduct of the respondent Fred E. Wilson was not such as to justify any charge or disciplinary action, and recommended that all proceedings against him be dismissed and disregarded. After a careful consideration of the report and the evidence upon which it is based, and of the exceptions filed by the informants, we concur with the recommendation of the committee in respect to the charges against said respondent, and they will therefore be dismissed.

As to the charges against the respondent Richard H. Hanna we shall notice only those upon which the committee has recommended disciplinary action, and those as to which we believe the exceptions to the report should be sustained wholly or in part. These charges grow out of said respondent's participation in public meetings called for the purpose of discussing the subject-matter of certain causes then pending in the courts wherein the respondent was representing one of the parties to the litigation. At all of these meetings the client of respondent participated in the discussions wherein his virtues and the worthiness of his causes were extolled, and the conduct of the judge before whom the matters were pending severely criticized. Said respondent likewise participated in each of these meetings by speaking in behalf of his client and in criticism of the course and conduct of the proceedings against him. These meetings were called and held for the avowed purpose of creating wide public sentiment in favor of respondent's client and were calculated thereby to influence the tribunal, before which the several causes were pending, favorable to said client, and to pervert the regular course of justice. With the merits of those several causes we are in no wise concerned. Suffice it to say that some of them resulted in the sentence of respondent's client to terms of imprisonment, and that, while appeals were taken to this court for the correction of alleged errors occurring

at the trials, such appeals were abandoned and respondent applied for and obtained a pardon for his client from the executive department.

The several meetings which were so attended and participated in were (1) a banquet at the Meadows Hotel in Las Vegas, N. M.; (2) a public meeting in the high school building at Albuquerque, N. M.; (3) a public meeting in the armory at Albuquerque; and (4- a public meeting in the Duncan Opera House at Las Vegas.

With respect to those meetings, the committee reported and recommended:

"I. As to the first charge the committee finds that there is no stenographic report of the remarks of respondent Hanna at the banquet held in the Meadows Hotel in Las Vegas, and there is no evidence before the committee upon which it could find any improper action by respondent Hanna on that occasion, and the committee therefore concludes that this charge is not sustained and recommends that it be dismissed and disregarded.

"II. As to the remarks of respondent Hanna at the high school in the city of Albuquerque, at a public meeting in the course of a public speech which he made on that occasion, the committee finds that respondent Hanna in the excitement of the occasion overstepped the bounds of propriety and indulged in remarks, which are fully set forth in the record which accompanies this report, which were made in the course of a discussion by him of a pending cause in the Fourth judicial district before Judge Leahy at Las Vegas, and in which respondent Hanna was counsel, and such remarks were improper and in the opinion of the committee merit reprimand. It is also our opinion that respondent Hanna was not justified in making the statements contained in his speech, and that he should be admonished by the court of the impropriety of such remarks, to the end that the bar of the state of New Mexico may have before it a guide and rule to govern their conduct on such occasions, and further that respondent and all members of the bar of the state of New Mexico shall be by this court solemnly admonished that the public discussion of pending causes is subject to reprimand and cannot be tolerated by this court, and that the only proper forum in which to try and discuss those causes is the court in which they are then pending.

"III. The committee finds that the construction placed by the informants in the subject of respondent Hanna's speech at the armory in the city of Albuquerque is rather

more severe than the facts justify, and, although respondent Hanna on that occasion acted in questionable taste, yet his remarks were not such as to subject him to discipline, nor did they in the opinion of this committee constitute professional misconduct, and the committee therefore recommends that the said charge be by the court dismissed and disregarded.

"IV. The committee finds that as to the public speech made by respondent Hanna in the Duncan Opera House at Las Vegas, that that part of his address wherein he referred to the fact that he might go to jail on the following day was not proper and constitute conduct for which he should be reprimanded by the court, and as a matter of law constituted conduct that merits a moderate measure of disciplinary action by the court."

We agree with the committee that the remarks to which they call attention were improper, but we go further and hold that the respondent was guilty of impropriety and unprofessional conduct by his mere approval of and participation in these meetings and each of them, which, as stated before, were confessedly held for the purpose of creating public sentiment in favor of his client in respect to the cases which were then pending in court. We do not agree with the committee, therefore, that the charge based upon the meeting held at the Madows Hotel should be dismissed and disregarded simply for the reason that there is no stenagrophic report of respondent's remarks there made; nor do we agree that there is no evidence upon which it can be found that there was any improper action by respondent on that occasion. It is plain that he was giving encouragement to his client, and to those of his sympathizers there assembled, in their improper conduct, and that of itself is behavior which is unbecoming a lawyer, and cannot be overlooked when called to the attention of the court.

And so with the conduct of respondent at the armory in Albuquerque. It may be, as the committee says, that the construction placed by the informants on respondent's speech made at that time is rather more severe than the facts justified, yet it is plain that respondent did speak in behalf of his client and his causes, and

thereby gave encouragement to the improper objects and purposes of the meeting.

In Wilhelm's Case, 269 Pa. 416, 112 Atl. 560, it appears that the respondent, Wilhelm, has been employed to represent one Maginnis, against whom disbarment proceedings were pending. During the pendency of that matter Wilhelm by invitation made an impassioned speech to a gathering of some 300 men at Girardville, wherein he took strong ground in favor of Maginnis, said they were trying to crucify him, referred to the disbarment proceedings against the latter as a conspiracy, urged the appointment of a committee, the raising of funds, and, in effect, the taking of such action political and otherwise as might be helpful to Maginnis. After the speech he took a vote of his audience, which favored Maginnis with practical unanimity. There is a striking similarity between the procedure followed at the Maginnis meeting and that disclosed by the record now under consideration. On these facts the trial court ordered Wilhelm disbarred, and he appealed. The Supreme Court said:

"The address delivered at Girardville was such unprofessional conduct as justified the action of the trial court. The rule for the disbarment of Maginnis was then pending, and we must assume that respondent intended the natural result of his act, which was to embarrass the judges in the performance of their duty in that particular case by inciting popular feeling against them. This a lawyer may not do while the litigation is pending (Works v. Merritt, 105 Cal. 467, 38 Pac. 1109; Ex parte Cole, 1 McCrary, 405, Fed. Cas. No. 2,973; and see Smith's Appeal, 179 Pa. 14; 2 R. C. L. § 185, P. 1095); but when a case is finished courts are subject to the same criticism as other people (Patterson v. Colo., 205 U. S. 454, 463, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689), and by the lawyer as well as by the layman. The suggestion of privileged communication is untenable. An improper attempt to influence judicial action is never privileged."

See, also, Cobb v. U. S., 172 Fed. 644, 96 C. C. A. 477; State Bar Commission v. Sullivan, 35 Okl. 745, 131 Pac. 703, L. R. A. 1915D, 1218; In re Hilton, 48 Utah, 172, 158 Pac. 691, Ann. Cas. 1918A, 271; U. S. v. Markewich (D. C.) 261 Fed. 537; State v. Kirby, 36 S. D. 188, 154

N. W. 284; Queen v. Skipworth, 9 Queen's Bench Cases, 230.

Whatever may have been the personal feeling of respondent's client toward the judge, who heard the causes out of which these charges directly grew, his conduct was not only a personal attack on the judge, but a direct attack on the court as an institution, a fact that respondent could not have failed to appreciate.

And so we conclude that respondent's conduct at each of these meetings calls for disciplinary action on the part of this court. The result which was calculated to follow any one or all of the meetings was to taint the source of justice and to obtain a result of legal proceedings other and different from that which would follow in the ordinary course. The respondent is a member of the bar of long standing, who has held high office in this state, and his training and experience have been such that he could not have failed to know that his conduct was improper and most unbecoming, and, while there might be some excuse for such conduct on the part of a layman not trained in the history and traditions of our legal system as respondent is, there can be no justification or excuse for him. The rights of litigants at all times must be determined in accordance with law and the orderly course of procedure prescribed by the law, and not by appeals to public passion, nor by attempts to influence the tribunal before which a cause is pending, whether by censure, threat, or flattery. The law is a human product and therefore necessarily imperfect, but, with all its imperfections, it does prescribe orderly methods for the correction of such imperfections in so far as humanly possible. A breaking down of the usual course of law and order and an attempt to obtain or administer justice by disorderly methods is the forerunner of confusion, if not of anarchy. No one is more familiar with these fundamental principles than is the lawyer, and no one owes a more scrupulous allegiance to the law and its due administration than he.

Whatever be the method employed or sanctioned or acquiesced in by an attorney to influence the decision of a cause pending in the courts, other than in the regular course, it is wrong, and, to the extent of its effect, whether on the tribunal or on the public is an undermining of the very foundation of the government which he has sworn to uphold.

The committee recommends that the respondent be reprimanded, and though we see more gravity in the offense than does the committee, with this permanent record of our thorough disapproval of respondent's conduct as an everpresent reminder of his wrongdoing. we believe a reprimand and censure, togther with the period of suspension from practice in the district court which he has already suffered, will be sufficient punishment to satisfy the ends of justice.

It is therefore the order of the court that the respondent Richard H. Hanna be, and he is hereby, reprimanded and severely censured, and that the charges against the respondent Fred E. Wilson be, and they are hereby, dismissed, as are also like charges against respondent Hanna which are not noticed in the opinion. It is further ordered that the suspension of the respondent Hanna from practice in the district of the Fourth judicial district be and it is hereby terminated.

BRATTON, J., and HOLLOMAN, District Judge, concur.

(No. 2451, June 25, 1921. Rehearing Denied Aug. 6, 1924.)

STATE v. TRUJILLO et al.

SYLLABUS BY THE COURT

1. Evidence reviewed, and **held** to sustain the conviction of the appellants upon the grounds that all of them were principals in the commission of the homicide.

2. Where a witness for the state testifies in the state's case in chief to the effect that, during the fight in which

the deceased was killed by appellants, he was shot in the leg by one of the appellants, and the defense in making its case attempts to show that such witness was not shot, but that his leg was torn in getting through a wire fence, it is proper for the state on rebuttal to exhibit the scar or wound on the leg to the jury to enable the jury to determine whether the wound was made by barbed wire or a bullet.

3. Where the only objection interposed to a question is that it is incompetent, irrevelant, and immaterial, it is not error to overrule the objection, as it is the duty of counsel to specifically point out why such question is incompetent, irrelevant, and immaterial.

4. It is a matter entirely within the discretion of the trial court as to what facts shall be permitted to go to the jury in rebuttal, and this discretion will not be disturbed except for gross abuse.

5. Where the introductory part of the indictment part of the indictment shows the style of the court, the name of the county and state, the time and place of meeting of the court, the names of the parties, and is followed by a statement that the grand jurors of Taos County, State of New Mexico, taken from the body of good and lawful men of the county of Taos aforesaid, duly selected, sworn and charged at the term aforesaid, etc., it is sufficiently made to appear that the indictment was found by a legal grand jury when the record shows that the indictment was returned in open court by such jury.

6. An objection that the grand jury was not lawfully constituted must be raised either by a motion to quash the indictment, or by a plea in abatement, and after the verdict it is too late to raise this objection.

7. Where the record shows "Be it further remembered that on the 5th day of June, 1918, at the court and term aforesaid there was filed an indictment, endorsed, to-wit: "and this is followed by the title of the case, and "A true bill, Thos. Jenkins Foreman of the Grand Jury," this by the names of the witnesses, and "Filed, June 5, 1918, Lauriano Mares, County Clerk," and this recital is followed by the indictment itself signed by the district attorney, these facts are sufficient to justify the presumption in the absence of a showing to the contrary, that the indictment was duly returned in open court, notwithstanding the fact that no entry was made on the minutes of journal of the court.

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

Benjamin Trujillo, and others, were convicted of murder in the second degree, and they appeal. Affirmed.

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

H. S. Bowman, Atty. Gen., for the State.

OPINION OF THE COURT

ROBERTS, C. J. The three appellants, Benjamin Trujillo, Virgilio Trujillo and Lucario Fresquez, together with the two defendants, Pedro Mondragon and Max Vigil, were all indicted at the June, 1918, term of the district court of Taos county, for the murder of Jose C. Fresquez. The case was not tried until the June, 1919, term of the said court, before which time Pedro Mondragon and Max Vigil died. The trial resulted in a verdict of murder in the second degree against the three appellants above named. From the judgment of the court sentencing the appellants to the penitentiary, they appealed.

The first point relied upon for a reversal is that there was no substantial evidence in the record to sustain a conviction of the three appellant's for the crime of murder in the second degree, and espcially as to the two appellants Lucario Fresquez and Virgilio Trujillo. The facts established at the trial, if the evidence for the state is to be believed, were substantially as follows:

[1] On the evening of the 23d day of February, 1918, at the home of Ramon Sanchez, near the village of Llano, in the county of Taos, a meeting was held, which was attended by the five defendants named in the indictment, and the deceased, together with many others. The five defendants left the meeting about 11:30 p. m. of the said day, and were followed by the deceased and Venceslado Fresquez, Candido Fresquez, and Jose Severino Muniz. The defendants, mounted on horses, proceeded to a small bridge across a ditch about a mile and a half from where the meeting was held, where they were met by the deceased and his party, and, all of the defendants having crossed the bridge, the deceased and his party started to cross and

the deceased was across the bridge, and some of his companions, when a fight ensued, resulting in the death of Jose C. Fresquez and the wounding in the leg of Venceslado Fresquez. The three members of the deceased's party testified that as they were crossing the bridge the five in the party of the appellant dismounted and one of them struck at the deceased, pulled a pistol and shot two or three times, killing deceased; that the other three in the deceased's party hastily retreated and that bullets were fired at them, resulting in the wounding of Venceslado Fresquez. The action of the appellants and those in their party was preceded by a vile epithet applied by one of their number to the party and the deceased.

The defendants' testimony was to the effect that the deceased had called some of those in the party of appellants a vile name just as he crossed the bridge, drew a pistol and fired one shot, at which all of those in the party of appellants dismounted, and one of their number grappled with the deceased, attempted to take the pistol from him that he had fired, and in the course of the struggle two other shots were fired; that he finally succeeded in wresting the pistol from the hands of the deceased, and that just as he did so the fourth shot was fired. There were three bullet wounds in the body of the deceased; one in the cheek just a little below and in front of the ear, one in the back of the head, and one in the middle of the back between the kidneys.

Venceslado Fresquez, a member of the deceased's party, testified that Virgilio Trujillo jumped upon and struck the deceased and then shot him; that some other members of the party then grappled with the witness and held him until he broke away from them and ran; than these members of the party also struck at him several times.

Jose Severino Muniz testified that all of the defendants surrounded the deceased during the affray, and that one of the defendants, but he could not say which one, fired the shot which killed the deceased.

This testimony is sufficient, if believed by the jury, to show a concerted act or plan to act together sufficient to sustain the conviction of the appellants upon the ground that all of them were principals in the act resulting in the homicide, and amply sustained the verdict of the jury.

It is insisted that the court erred in sustaining the state's objection to the question asked the witness Venceslado Fresquez as to whether he had not pleaded guilty to a charge of assault with a deadly weapon. Counsel for the appellants states that the court rejected the testimony of the witness that he had pleaded guilty to an indictment charging him with assault with a deadly weapon in a case having no connection with the one at bar. The record, however, does not bear out the assertion. It shows that in the cross-examination of this witness he was asked if he had been convicted of a felony at the last term of court, and replied in the affirmative. He was then asked if he had ever been punished for the crime, and his answer was again in the affirmative. When asked what the punishment was, he answered that his indictment was passed, and then, when asked if he had paid any fine, objection was interposed by the state and sustained to that question only. The facts that the witness had been indicted and pleaded guilty to the indictment and had been punished had all been permitted to go to the jury. Counsel for appellants in their brief cite several cases to sustain their contention that it was proper cross-examination to interrogate the witness regarding any acts of misconduct during his past life. This is well sustained by the authorities, which will be found collected in the case of State v. Perkins, 21 N. M. 144, 153 Pac. 258, but the record shows there was no denial of this right; consequently there was no error committed.

[2] The third error assigned is that the court permitted the witness Fresquez to exhibit his wounded leg to the jury, and in permitting the state to introduce evidence concerning the same. The witness, Venceslado Fresquez, testified in the case in chief that he had been

shot in the leg during the affray. Appellants contend that they admit that shots were fired and did not deny that Fresquez had been hit; that thereafter the state in rebuttal over objection permitted Fresquez to exhibit his wounded leg to the jury. Counsel evidently overlooked the fact that the attorney for the defendants undertook to show that the wound in the leg of the witness had been inflicted by reason of the witness having impaled himself on a barbed wire fence in his attempt to escape from the vicinity where the shot was fired. In view of the attempt on the part of the appellants to show that the witness had not been wounded by a bullet in the leg, the exhibition of the wound to the jury was proper to show that is was a bullet wound. This evidence was designed to meet and refute the attempt on the part of the appellants to show that a shot had not been fired at the witness during the affray which had struck him, and it was certainly competent to exhibit the wound or scar to the jury to enable them to determine whether it had been made by a tear by barbed wire, or by a bullet.

[3] It is further to be noted that the only objection to the testimony was, first, that it was not proper rebuttal, and, second, that it was incompetent, irrelevant, and immaterial. No reasons were given by counsel as to why it was incompetent, irrelevant, and immaterial, and, even if the objection to the same might have been proper, it was not error to overrule the objection because of the failure of counsel to state his reasons. 3 C. J. 818; McKenzie v. King, 14 N. M. 375, 93 Pac. 703.

[4] As to the objection on the ground that is was not proper rebuttal, the courts have held that what shall be permitted to go to the jury as rebuttal testimony is a matter entirely within the discretion of the trial court, and this discretion will not be disturbed except for gross abuse. 1 Chamberlayne on Evidence, § 379; State v. Carabajal, 26 N. M. 384, 193 Pac. 406, 17A. L. R. 1098.

The appellants, after a verdict, filed a motion in

arrest of judgment based upon the ground that the indictment was not found by a lawful grand jury. This motion was predicated upon the fact that the record did not show the organization of the grand jury. The transcript does not state in so many words that the grand jury was impaneled, but there is sufficient in the transcript to show that the grand jury was legally impaneled. The report of the grand jury to the court begins with the words, "The grand jury duly impaneled, charged, and sworn at the term aforesaid." Later in the report is it shown that they returned nine true bills, and this is followed by the case entitled State of New Mexico v. Appellants. The indictment, as it is set out in the transcript, shows that it was filed in court on the 5th day of June, 1915, and it begins:

> "The grand jury for the state of New Mexico, taken from the body of the good and lawful men of the county of Taos aforesaid, duly selected, impaneled, sworn and charged at the term aforesaid to inquire," etc.

The authorities establish the proposition that, where the introductory part of an indictment shows the style of the court, the name of the county and state, the time and place of meeting of the court, the names of the parties, and is followed by a statement that the grand jurors of Taos county, state of New Mexico, taken from the body of the good and lawful men of the county of Taos, aforesaid, duly selected, impaneled, sworn and charged at the term aforesaid, etc., it sufficiently appears that the indictment was found by a legal grand jury when the record shows that the indictment was returned in open court by such jury. See Bailey v. State, 39 Ind. 438; Powers v. State, 87 Ind. 145; Stout v. State, 93 Ind. 150, and cases cited in the cases referred to. In Joyce on Indictments, § 68, the author says:

> "But where it does not affirmatively appear that the grand jury is an unlawful body, any irregularity in selecting and impaneling it should in general be raised before plea, by challenging the array, and not by a motion in arrest of judgment. And where the record shows that the grand jury is organized under the supervision of the court

and nothing affirmatively appears thereon, to the contrary, it will be presumed that the grand jury was legally organized. The burden of showing irregularities in the organization of a grand jury rests upon the defendant, and the state is not required in the first instance to establish a compliance with the law."

See, also, Easterling v. State. 35 Miss. 210.

But there is another reason why this objection is not available to appellants, and that is that appellants did not raise the objection to the constitution of the grand jury until after the verdict. An objection that the grand jury was not lawfully constituted must be raised by either a motion to quash the indictment, or by a plea in abatement, and after verdict it is too late to raise this objection; Bish New Crim. Proc. §§ 822 to 887, inclusive. See, also, Straughan v. State, 16 Ark. 37; State v. Ostrander, 18 Iowa 435; People v. Hidden, 32 Cal. 445.

Appellants last contention is that the record fails to show that the indictment upon which the appellants were tried was returned in open court, and it is urged that the record must affirmatively show this fact. In our judgment the transcript of the record sufficiently shows that the indictment was returned in open court. The record shows "Be it further remembered that on the 5th day of June, 1918, at the court and term aforesaid there was filed an indictment, indorsed, to wit," and this is followed by the title of the case and "A true bill. Thos. Jenkins, Foreman of the Grand Jury," this by the names of the witnesses, and "Filed June 5, 1918. Laureano Mares, County Clerk," and this recital is followed by the indictment itself, signed by the district attorney. It has been repeatedly held that the foregoing facts are sufficient to justify the presumption, in the absence of a showing to the contrary, that the indictment was duly returned in open court, notwithstanding the fact that no entry was made on the minutes or journal of the court.

In the case of State v. Crilly, 69 Kan. 802, 77 Pac. 701, the court held that where an indictment recites

that it presented by the grand jury and is properly signed by the prosecuting attorney, indorsed a true bill by the foreman, and filed by the clerk, it will be presumed, in the absence of a showing to the contrary, that it was duly returned in open court, notwithstanding no entry of the fact was made upon the minutes or journals of the court. See also to the same effect People v. Lee, 2 Utah, 441; Miller v. State, 40 Ark 488; State v. Onnmacht, 10 La. Ann. 198; State v. Beebe, 17 Minn. 241 (Gil. 218); State v. Lord, 118 Mo. 1, 23 S. W. 764; State v. Weaver, 104 N. C. 758, 10 S. E. 486. The authorities on the proposition will be found collected in a note to the case of Renegar v. U. S., 26 L. R. A. (N. S.) 683. The cases to the contrary are, in our judgment, ultra technical, and should not be followed.

From the foregoing it follows that the record sufficiently showed that the indictment was returned in open court.

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

RAYNOLDS and PARKER, JJ., concur.

On Motion for Rehearing.

PARKER, C. J. On June 25, 1921, we handed down an opinion affirming the judgment in this case. In that opinion we held that, while the record was technically defective in failing to show clearly and affirmatively that the indictment was returned in open court by the grand jury, and that the grand jury had been duly selected, impaneled, sworn, and charged, there was sufficient in the record to justify the presumption that such was the case, and we refused to reverse the case on these grounds. A motion for rehearing was filed, and is still pending. In the meantime, upon application of the state, the record in the court below has been amended, so as to clearly and affirmatively show that the indictment was returned in open court by the grand jury, and that the grand jury was duly selected, impaneled, sworn and charged.

This situation renders unnecessary the discussion in the opinion relating to this subject, and that portion of the opinion will be withdrawn. The opinion otherwise, discussing other features of the case, is entirely satisfactory, and will be adhered to. It follows that the motion for rehearing should be denied; and

It is so ordered.

BRATTON and BOTTS, JJ., concur.

(No. 2815, July 25, 1924)

STATE v. WARD et al.

SYLLABUS BY THE COURT

1. Where two or more persons are jointly charged with a crime which is not necessarily joint in its nature, the jury should be instructed that a part of them may be convicted and the others acquitted.

2. Questions other than jurisdictional ones must be presented to the trial court, and cannot be raised for the first time on appeal.

3. A motion to strike out testimony admitted without objection is addressed to the discretion of the trial court, as counsel cannot sit by and allow such testimony to be given and then predicate error upon a denial of a motion to strike out.

Appeal from District Court, Union County; Leib, Judge.

Frank Q. Ward and another were convicted of manslaughter, and they appeal. Reversed and remanded, with directions.

O. P. Easterwood, of Clayton, for appellants.

M. J. Helmick, Atty. Gen., and John W. Armstrong, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

BRATTON, J. Appellants were jointly indicted, charged with the murder of S. S. Leach. They were tried together, and each found guilty of voluntary manslaughter. From such conviction they have appealed.

[1] 1. As worded, each of the several instructions

given the jury required that they find the defendants guilty or not guilty together, as the case might be, and nowhere were they ever told that they might convict one defendant and acquit the other, if the evidence warranted that action. The instruction submitting the several kinds of verdicts for use by the jury was as follows:

"When you retire to your jury room, you will first select a foreman. Four forms of verdict will be given you: One finding the defendants guilty of murder in the first degree; one finding the defendants guilty of murder in the second degree; one finding the defendants guilty of voluntary manslaughter; and one finding the defendants not guilty. The verdict you agree upon your foreman will sign, and you will all return it into court."

There is nothing to be found anywhere in the instructions which expressly informed the jury or even inferentially indicated that they had the right to convict one defendant and acquit the other. To the contrary, the several instructions, when considered separatly or as a whole, required that they consider the case against both defendants together, and nowhere allowed them to separate the charge and treat it individually as to each of the accused. This may not be required in that class of cases which are essentially joint in their nature, such as conspiracy, unlawful assembly, fornication, or adultery, but in a case of this character, where the crime is not necessarily a joint one, the charge must be treated as a separate one against each person accused thereof, and each is entitled to have his guilt or innocence determined by the rules applicable to him, particularly so in a case of this kind where intent, motive, and condition of the mind are necessary elements to be considered by the jury. While it may be true that they are both guilty, they were entitled to have the jury determine that question, and, in doing so, to have the jury advised that one might be acquitted, even though the other was found guilty. It is no answer to say that under the facts proven they were necessarily both guilty or both innocent, because that was a matter for the consideration of the jury. Neither is it any answer to the contention to say that the case was tried upon the

theory that they were both guilty or both innocent, because the prosecution may have so regarded the case, but the jury may have entertained an entirely different view of it.

In this particular case the jury may have found that one of the defendants provoked the difficulty, and without justification began firing upon the deceased, and thereby became guilty of involuntary manslaughter. They may have further believed that after said defendant had so provoked the difficulty, and, after the deceased returned the attack by firing upon both defendants, the other defendant for the first time shot the deceased, and was justified in so doing, and indeed there is evidence which, if believed, will create this belief, and yet, under the instructions of the court, the jury was compelled to convict both or acquit both. Each of the defendants had the right to have his guilt or innocence determined by the jury unbiased and without being influenced by the evidence respecting the guilt or innocence of his codefendant. This could not be done under the instructions given. State v. Vaughan et al., 200 Mo. 1, 98, S. W. 2; State v. James et al., 216 Mo. 394, 115 S. W. 994; Sizemore et al. v. Commonwealth 195 Ky. 621, 242 S. W. 842; Hampton v. State, 45 Tex. 154; Abbata et al v. State, 51 Tex. Cr. R. 510, 102 S. W. 1125; Maloney et al. v. State, 57 Tex. Cr. R. 435, 125 S. W. 36; Sellers et al, v. State, 61 Tex. Cr. R. 140, 134 S. W. 348; State v. Daniels et al., 115 La. 59, 38 South, 894; Abrams et al. v. State, 121 Ga. 170, 48 S. E. 965; Davis. v. State, 75 Miss. 637, 23 South. 770, 941; State v. Harvey, et al., 130 Iowa, 394, 106 N. W. 938; State v. Clouse et al., 113 Kan. 388, 214 Pac. 103. This rule is so well discussed by the Chief Justice of the Supreme Court of Missouri, in the case of State v. Vaughan et al., supra, that we quote the following therefrom:

"It is insisted that instruction No. 2 asked by defendants should have been given, and a separate finding or verdict as to each one, because each of them had the right to have his case passed upon by the jury, as if he alone were upon trial. As the case went to the jury, this phase of it was not sub-

mitted to them, in the absence of which the jury may have believed that it was their duty under the evidence and instructions to find the defendants all guilty or to acquit them all. While it may be true that they were all alike guilty, were they not entitled to have the jury instructed that they were at liberty to find one or more of them guilty and others not guilty, as they might believe from the evidence? We think they were. It is no answer to this suggestion to say that under the evidence they were all alike guilty, for that question was for the consideration of the jury, and it was their province, if so inclined, to have acquitted either one or all of them, or to have acquitted some of them and found the others guilty, or guilty of a less degree of crime than that charged, notwithstanding the evidence to the contrary. State v. Orstrander, 30 Mo. 13, was a prosecution under an indictment charging murder in the first degree, and although no instructions were given bearing upon murder in the second degree, and the evidence clearly showed the defendant to be guilty of murder in the first degree, a verdict returned by the jury finding the defendant guilty of murder in the second degree was held to be responsive to the indictment, and that the trial court was bound to receive it. Each one had a right to have the jury pass upon his guilt or innocence, and the evidence considered by the jury in regard to his particular case, unbiased or uninfluenced by the evidence in respect to the guilt of his codefendants. In the case at bar the jury might have convicted a part of the defendants, and disagreed as to the others, or have acquitted a part of them and convicted or failed to agree as to the others, had they been so instructed. 1 Bishop's New Criminal Prac. § 1036; State v. Kaiser, 124 Mo. 651, 28 S. W. 182. In Abrams v. State, 121 Ga. 170, 48 S. E. 965. Abrams and one Osborn were jointly indicted for grand larceny. They were tried together, and both were convicted. The point was made in the motion for a new trial that the court failed to instruct the jury distinctly that the might acquit one of the accused even though the other was convicted. The Supreme Court held that it was erroneous under the peculiar facts of the case to fail to instruct the jury distinctly, though one of the accused were found guilty, the other might nevertheless be acquitted. In State v. Daniels et al., 115 La. 59, 38 South, 894, it is held that, where three persons are being prosecuted at the same time under the same indictment, the jury ought to be instructed that one or two may be convicted or acquitted without the conviction or acquittal of the other or others. Our conclusion is that this instruction or one or similar import should have been given, in view of the first instruction on the part of the state."

The state attempts to surmount this difficulty by contending that the exception to the instructions which sought to present this error to the trial court was insufficient to direct its attention thereto, and therefore the question is not reviewable here. While such exception

may be said to be rather incomplete, yet we think it was entirely sufficient to draw the attention of the court to the error into which it was falling, and this is all that is required.

[2] 2. During the fatal difficulty the horse then ridden by the appellant Starkey was shot through the head and killed. There was considerable contention about the kind and character of this wound, as bearing upon whether it was shot by the deceased or by Starkey. On rebuttal Robert L. Reid testified that he was at the scene of the homicide on the day it occurred, and that he then examined the animal's head, and that he again examined it some six or eight days thereafter. It is now urged that the testimony with respect to the subsequent examination was inadmissible, because it did not affirmatively appear that it was the same horse's head, and that it was not shown to be in the same condition as at the time of the shooting. As previously stated, the witness stated that he made an examination of the animal's head on the day of the difficulty, and that he made a further examination of it later. This clearly showed that it was the same head. With reference to the contention that the head was not shown to be in the same condition at the time he made the second examination as it was at the time of the homicide, it is sufficient to say that no such question was presented to the trial court by objection, exception, or otherwise. That is cannot now be reviewed here has been too often decided to require a citation of the authorities.

[3] 3. It is also contended that the court erred in refusing to strike out the testimony of the witness John Sullivan with reference to an examination he made of the animals head and the wounds found thereon. The testimony was first challenged by a motion to strike it out, as no objection was interposed before its admission. Under the well settled rule declared by several decisions from this court, such a motion is addressed to the discretion of the trial court, as counsel cannot sit by and

allow a witness to give testimony and then predicate error upon a denial of a motion to strike it out. State v. Kidd, 24 N. M. 572, 175 Pac. 772; State v. Alford, 26 N. M. 1, 187 Pac. 720; State v. Lazarovich, 27 N. M. 282, 200 Pac. 422; State v. Anaya, 28 N. M. 283, 210 Pac. 567; and State v. Snyder, 30 N. M. 40, 227 Pac. 613.

4. The last contention made which we think merits discussion is the attack upon the sufficiency of the evidence to support the verdict. This may be disposed of with the statement that we have carefully read the entire record, and there is no absence of substantial evidence upon which the verdict is founded. It is present, and under such circumstances the verdict of a jury will not be disturbed on appeal. This is a rule so well established that we shall not cite the many cases to that effect.

Counsel for appellants has discussed some other questions in his brief without citing any authorities to sustain them. We have examined them, and find no merit in any of them.

On account of the error hereinbefore referred to, the judgment must be reversed and the cause remanded, with directions to award appellants a new trial; and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

(No. 2731, July 18, 1924. Rehearing Denied Aug. 20, 1924.)

LIBBEY v. VAN BRUGGEN.

SYLLABUS BY THE COURT.

1. A license to flow water through a ditch constructed by the licensee over the land of the licensor may be revoked for violation of the conditions upon which the license was granted.

2. Injunction is a proper remedy by a licensor to prevent a licensee from further use of an irrigation ditch across licensor's land, which license has been revoked for violation of the conditions of the license.

Appeal frm District Court, Colfax County; Leib, Judge.

Action by Wallace Libbey against William Van Bruggen. From a decree for plaintiff, defendant appeals. Affirmed.

H. L. Bickley and H. A. Kiker, both of Raton, for appellant.

Morrow, Merriau & Sadler, of Raton, for appellee.

OPINION OF THE COURT

PARKER, C. J. Appellee, hereinafter called plaintiff brought action against appellant, hereinafter styled defendant, to enjoin him from having and maintaining a ditch over plaintiff's land, wherewith defendant irrigated his adjoining lands. The court awarded a permanent injunction from which judgment defendant has appealed.

It appears that in the spring of 1916 defendant applied to plaintiff for leave to construct an irrigating ditch across plaintiff's lands, which leave was verbally granted, without consideration to plaintiff, and upon condition that the ditch should be located, constructed, and maintained as to do plaintiff the least possible damage. An engineer located the line of the ditch, and defendant commenced the construction of the same without the knowledge of the plaintiff. When the construction of the ditch was well under way and nearly completed, the plaintiff learned of the fact, and, while he failed to make positive objection to the location of the ditch, he did not give assent to the same. Shortly after water was put in the ditch one of plaintiff's valuable cows became mired in the ditch and suffered injuries from which she never recovered.

Plaintiff is a cattle raiser and uses his land entirely for pasture for his animals. The ditch has a fall of 100 feet in the distance of 2 miles over which it traverses plaintiff's land. The soil is loose and loamy and very susceptible to erosion. At the instance of the

plaintiff, defendant installed 11 checks or drops to control the flow and prevent erosion. Said checks were improperly constructed, installed, and maintained, were insufficient in number to control the flow of water and prevent erosion, all causing deep holes to be eroded in the bottom of the ditch at various places along its course, especially just below the checks or drops. Plaintiff complained to defendant of the location and manner of maintenance of said ditch, requesting the placing of numerous other drops or checks in the ditch, which request was unheeded. The condition of the ditch is such the same being unfenced except for a few rods where it enters plaintiff's land, the court found, as to be a constant menace to plaintiff's animals, on account of danger of bogging in the deeper portions thereof caused by erosion. Plaintiff elected to revoke the license and to bring this action as before stated.

It is apparent that the parties never came to an understanding in regard to the location of the ditch or the manner of its construction and maintenance. It may be that plaintiff might be held to have waived the point as to the location of the ditch because he did not, after learning of its location and partial construction, forbid its completion and use. But he never has consented to the operation and maintenance of the ditch as it has been operated and maintained, and, on the other hand, his more or less constant requests for change in the same have been refused or at least neglected by defendant.

Counsel for plaintiff argues that the license, under the circumstances is revocable, while counsel for the defendant, on the other hand, argues that all of the elements of an irrecovable license are present and that, consequently, this action cannot be maintained.

[1] 1. It will not be necessary in this case to undertake to state all of the considerations governing the determination of when and when not a license is revokable. In fact the cases are in great confusion and

are not to be reconciled upon recognized legal principles. But in this case, even assuming that the license would be irrevocable if the parties had come to an agreement as to the manner of maintenance of the ditch, from the findings of the court it appears that the defendant has, more or less constantly, violated the conditions imposed by the plaintiff, and has maintained the ditch in such manner as that it is a constant danger to the animals of the plaintiff ranging over the land where the ditch runs. The defendant put this question directly in issue in his pleadings and proofs, and the court found against him. He made no offer to correct his delinquencies in regard to the maintenance of the ditch but took the position that the ditch, as maintained by him, was in accordance with the understanding. Under such circumstances it certainly could not be maintained that defendant could indefinitely continue to violate the terms of the license and maintain his ditch to the constant and continuing injury of the plaintiff. Opon this subject see 17 R. C. L. "Licenses," § 99; 2 Tiffany, Real Estate (2d Ed.) § 349f; 19 C. J. "Easements," § 155; Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405; Pratt v. Ogden, 34 N. Y. 20; Mumford v. Whitney, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60; Henneky v. Stark (Sup.) 128 N. Y. Supp. 761. In the latter case a privilege to flood land had been granted upon condition that the licensee should grade a certain lane approaching a bridge over which the licensor was compelled to travel in reaching portions of his land. This the licensee failed to do. The licensor declared the license forfeited. The court said:

"On the other hand the defendant's engagement to grade the lane to the height of the bridge was something more than a mere independent covenant. It was a condition, the performance of which would materially effect the character of the servitude imposed upon plaintiff's land, for it would make tolerable a privilege which otherwise would result in a very serious inconvenience. To flow the land without the grading of the lane to the required height would and did compel the plaintiff to drive or walk through the water in going from one part of his farm to the other. I do not forget that forfeitures are not favored, and that where there is doubt as

to whether the engagement of a grantee should be considered as a mere collateral covenant with a right of damages for a breach thereof, or as a condition upon the breach of which a forfeiture may be declared, the law resolves the doubt in favor of the continuance of the estate granted. But, in this case, is seems to me the engagement of the defendant to grade the lane was a condition upon the performance of which, in good time and in a reasonable manner, his right to continue to flow the lands necessarily depended."

Just so in the case at bar. The defendant, according to the findings of the court, has continued to violate the condition upon which the license was granted, and his continued maintenance of the ditch in such manner as to be a constant annoyance and danger to the plaintiff authorizes a forfeiture of the license.

[2] 2. It was strenuously urged by defendant throughout the proceeding that plaintiff had mistaken his remedy in proceeding in equity for injunction. It was asserted there, and is likewise claimed here, that plaintiff had an adequate remedy at law by way of ejectment, or forcible entry and detainer, or for damages in trespass. It is argued that, although a licensee or the owner of an easement has no such interest or estate or right to possession as is required to maintain ejectment, the converse of the proposition is not true, and that the owner of the fee may maintain these actions against a defendant claiming such rights. This is vigoruosly contested by plaintiff, he contending that ejectment or forcible entry and detainer are not maintainable in these circumstances.

An understanding of the nature of the rights of the parties would seem to be sufficient to determine the question. In the first place, it may be stated generally that the right of a licensee or easement owner is ordinarily not in any sense adverse to the owner of the fee in cases like the present. The defendant's right as claimed is merely a right to run water through the ditch. He claims, and can claim, no right to the exclusive or adverse possession of the soil. The plaintiff's cattle are free to travel over the land the same as if the ditch was not there, and the plaintiff

has in no way been excluded from his possession of the soil. An easement or license of this kind differs from one where, from the nature of the use of the land by the licensee, the owner of the fee is excluded from his possession, as, for example, where some structure of a permanent character so occupies the land as to exclude the owner, or where the public have such right to the use of a street as to necessarily exclude any personal possession of the soil by the owner. And in this case, if the defendant had fenced the ditch so as to exclude the plaintiff and his cattle, and was claiming the exclusive right to the possession of the land fenced, it may be that ejectment or forcible entry and detainer might be maintained by the plaintiff, but such is not the fact.

There is no claim of exclusive adverse possession by defendant, and it would seem clear that the plaintiff, under the circumstances, has no remedy at law. His remedy is in equity for an injunction, which is the one he has pursued. Upon this subject, see Hicks v. City of Bluefield, 86 W. Va. 367, 103 S. E. 323; Pinkum v. City of Eau Claire, 81 Wis. 301, 51 N. W. 550; Le Blond v. Town of Peshtigo, 140 Wis. 604, 123 N. W. 157, 25 L. R. A. (N. S.) 511; Henneky v. Stark (Sup.) 128 N. Y. Supp. 761. And see, also, generally, as to the availability of injunction to prevent continuing trespasses, and to avoid a multiplicity of suits, Stroup v. Hubbell Co., 27 N. M. 35, 192 Pac. 519; Hales v. Atlantic Coast Line R. Co., 172 N. C. 104, 90 S. E. 11; Mendelson v. McCabe,, 144 Cal. 230, 77 Pac. 915, 103 Am. St. Rep. 78; Rhoades v. McNamara, 135 Mich. 644, 98 N. W. 392. And see, also, 19 C. J. "Easements," § 247; 14 R. C. L. "Injunctions," §§ 156-158.

Some other considerations are presented to the effect that the pleadings made out a case for ejectment, which ousted the equitable jurisdiction. An analysis of the pleadings, however, shows that the case was to determine the right to use the ditch under the license and we have determined that a court of equity is the proper forum. It is also argued that the decree is in-

quitable because the defendant, relying upon the license, had abandoned another means of taking and conveying the water. However this may be, if defendant violated the conditions upon which the license was granted, as the court found, he must abide by the consequences.

It follows from all of the foregoing that the decree of the court below is correct and should be affirmed; and it is so ordered.

BRATTON and BOTTS, JJ., concur.

(No. 2866, July 25, 1924. Rehearing Denied Aug. 20, 1924.)

STATE v. SMELCER et al.

SYLLABUS BY THE COURT

1. Instructions examined, and held to correctly state the law.

2. A killing by a person while he is engaged in the commission of a felony is murder in the first degree, both on his part and on the part of his companion, who is present, aiding and abetting the commission of the felony, whether the killing is intentional or only accidental, under the provisions of section 1459, Code 1915, which provides that all murder "which is committed in the perpetration of or attempt to perpetrate any felony, * * * shall be deemed murder in the first degree."

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

Charles H. Smelcer and another were convicted of murder in the first degree, and they appeal. Affirmed.

E. P. Davis, of Santa Fe, for appellants.

M. J. Helmick, Atty. Gen., and J. W. Armstrong, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

PARKER, C. J. The appellants were traveling through Lincoln county, and stole two saddles and blankets and bridles, and were apprehended by Deputy Sheriff A. S. McCamant, and taken before a justice of

the peace at Corona, where they were bound over to await the action of the grand jury for said larceny. In default of bail, they were committed to the county jail by the justice of the peace. They gave fictitious names to the justice of the peace. The said deputy sheriff, with a warrant of commitment, and in company with one Graciano Yriat, a Frenchman, started with the appellants in an automobile to the county jail at Carrizozo. When within about 15 miles of Carrizozo, appellants overpowered the deputy sheriff and the Frenchman, robbed them of a six-shooter and a Winchester, and amunition for the same, and robbed them of some money and clothing. They thereupon took the automobile and drove toward Alamogordo, stopping on the way at Carrizozo, and purchasing cartridges for the Winchester.

The deputy sheriff and the Frenchman, after about four hours, reached Carrizozo, communicated the facts to the sheriff's office at that place, from which office the information was telephoned to the sheriff at Alamogordo. Appellants drove into Alamogordo in the stolen car and were accosted by W. L. Rutherford, sheriff of the county, who attempted to arrest them. They refused to stop the automobile, and the sheriff jumped on the running board of the machine, whereupon one of the appellants pointed the loaded Winchester at him and ordered him to get off the running board. The Winchester was cocked, and the sheriff grabbed the barrel of the gun, and the appellant testifies that the sheriff pulled the Winchester through his hands, and that it was accidentally discharged, killing the sheriff. The other of the appellants was sitting on the front seat of the car, at the wheel, armed with the six-shooter, with which he threatened the sheriff. The sheriff fell off of the running board of the car when he was shot, and the appellants drove rapidly out of Alamogordo toward El Paso. Near Oro Grande, on the road to El Paso, the appellants were so closely pursued by a posse that they were compelled to abandon the car and took to the hills on foot. The posse overtook them, and they

there resisted arrest and shot into the posse with both the Winchester and the six-shooter, wounding one of the party. They were finally arrested and conveyed to the jail in Alamogordo. Shortly thereafter they were indicted and put upon trial, and convicted of murder in the first degree, and sentenced to be hanged, from which judgment this appeal has been perfected.

This is a very unusual case. Both of the appellants were under 21 years of age, and theretofore had had no criminal record. The parents of at least one of them are shown to have been Salvation Army people. Numerous persons in Amarillo, Tex., where the appellants had previously resided, testified to their previous good character. How two young men could so suddenly turn from a correct life to such criminal actions as are shown by this record is hard to understand. Criminal tendencies and attitudes are more usually the result of gradual growth, and very seldom is a disposition or willingness to commit the highest crimes known to the law so suddenly and radically manifested.

Appellants were shown throughout the trial by the court and district attorney the utmost consideration, and their rights were most carefully guarded. After their conviction, they being without funds, the court prepared and certified the record in the case at public expense. In this court we appointed counsel for the appellants, and he has briefed and argued the case as best he could. Appellants both wrote letters to their parents in Amarillo, giving an account of their doings, which established their guilt beyond any reasonable doubt.

[1] 1. Counsel for appellants argues that the instructions of the court are faulty as to the appellant Smelcer, in not requiring the state to prove beyond a reasonable doubt a conspiracy by the appellants to murder the sheriff, before Smelcer, who did not shoot, could be convicted. The argument is based upon instruction No. 2, in which the court undertook to define the material allegations of the indictment, which must

be established to the satisfaction of the jury beyond reasonable doubt. In the instruction, the court said:

"The material allegations of the indictment, necessary to be proved to your satisfaction beyond a reasonable doubt, are as follows: (1) That the said W. L. Rutherford was killed. (2) That he was killed by the defendants, Charles H. Smelcer and William G. Le Favers, or either of them. (3) * * *"

It is apparent that this was a general instruction, and was not intended by the court as a specific application of the law to each of the appellants, but was intended merely as a general statement of the scope of the charge contained in the indictment. As to the appellant who actually killed the sheriff no complaint can be made of the instruction, and as to the appellant who did not do the actual killing no complaint can be made, as the instruction does not include him within its terms. The court followed this instruction with application of the charge to the specific facts shown in the evidence, and instructed the jury to find the appellant who did the actual killing guilty as charged, if they were satisfied beyond a reasonable doubt of the facts recited in the instruction. This was followed by instructions fully explaining the law in regard to aiding and abetting the commission of crime, and authorizing the conviction of the appellant who did not do the shooting, the same as the other appellant, in case the facts recited in the instruction were true. It thus appears that the whole ground was thoroughly and correctly covered by the court, and the argument of counsel is untenable.

[2] 2. Counsel for appellants presents the proposition that the facts required the submission to the jury of the question of the guilt of the appellants of involuntary manslaughter. As before stated, one of appellants was sitting on the back seat of the car, and when the sheriff got on the running board he drew the Winchester on the sheriff and ordered him off the car. The appellant testified that the sheriff grabbed the gun barrel and pulled it through the appellant's hands, and that the same was accidentally discharged,

without design on his part to shoot the sheriff. It may be said generally that the sheriff was well within his right and duty to attempt to arrest appellants. It was their duty to submit to the arrest without resistance on their part. They had committed two or more felonies, and were still carrying the same out, and were attempting to escape arrest. The drawing of the Winchester on the sheriff was an assault with a deadly weapon, as was the drawing of the six-shooter by the other appellant, and both were felonies. The resistance of the sheriff was itself a felony. Section 1666, Code 1915. It thus appears that, the appellants being engaged in the commission of a felony, there was no occasion to submit involuntary manslaughter to the jury. That a killing under these circumstances is murder in the first degree, see section 1459, Code 1915; 29 C. J. "Homicide," § 70; 13 R. C. L. "Homicide," §§ 147, 148; Moynihan v. State, 70 Ind. 126, 36 Am. Rep. 178; Buel v. People, 78 N. Y. 492, 34 Am. Rep. 555; People v. Milton, 145 Cal. 169, 78 Pac. 549; Cox v. People, 19 Hun (N. Y.) 430; State v. Hopkirk, 84 Mo. 278; People v. Olsen, 80 Cal. 122, 22 Pac. 125; State v. Sexton, 147 Mo. 89, 48 S. W. 452; State v. King, 24 Utah, 482, 68 Pac. 418, 91 Am. St. Rep. 808; Allen v. State, 16 Okl. Cr. 136, 180 Pac. 564; Morgan v. State, 51 Neb. 672, 71 N. W. 788; Com. v. Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306; Johnson v. State, 66 Ohio St. 59, 63 N. E. 607, 61 L. R. A. 277, 90 Am St. Rep. 564, and note; People v. Sullivan, 173 N. Y. 122, 65 N. E. 989, 63 L. R. A. 353, and note, 93 Am. St. Rep. 582.

The foregoing covers the scope of the argument of counsel in behalf of appellants. We have carefully examined the record, and feel compelled to affirm judgment, and the day of execution of the appellants is fixed at Friday, the 22d day of August, 1924; and it is so ordered.

BRATTON and BOTTS, JJ., concur.

(No. 2898, Aug. 16, 1924)

BALDUINI v. ULIBARRI et al.

SYLLABUS BY THE COURT

1. Findings of fact that are supported by substantial evidence will not be disturbed on appeal.

2. Record reviewed, and held that the trial court's finding that the gift and deeds, through which appellants deraign title, conveyed a different tract from that claimed by the appellee is supported by substantial evidence.

3. Record reviewed, and held, no error in the trial court refusing to make certain requested findings of fact.

4. Testimony with reference to statements made in the course of negotiations for compromise is not admissible, unless it is a statement of an independent fact which is separate or separable from the concession involved.

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

Action by Julia Catelani Balduini against Gregoria Badaracco de Ulibarri and husband and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Geo. S. Klock and M. J. McGuinness, both of Albuquerque, for appellants.

J. F. Simms, of Albuquerque, for appellee.

OPINION OF THE COURT

BRATTON, J. This controversy involves the title to a strip of land 2 feet wide by 150 feet long. The appellee, plaintiff below, instituted the suit to quiet title to lots A and B of the Ambrosio Garcia estate in the city of Albuquerque, contending that the disputed strip constituted a part of said land. The appellants, defendants below, denied this, and by cross-complaint, pleaded their title to the strip in controversy, and prayed for a decree quieting the same.

[1] 1. The trial court found that the land conveyed by the gift and deeds, through which the appellants deraign their title, does not lap over onto, or form any part of lot A aforesaid; that it lies entirely within the

limits of what is now North Fifth street in said city of Albuquerque, and, hence, appellants have no title whatever to the tract in litigation. We have carefully reviewed the entire record, and think this finding is supported by substantial evidence. It will not, therefore, be disturbed on appeal.

[2] Before departing from this subject, appellants lay much stress upon the finding of the court that, prior to his death, Ambrosio Garcia gave his daughter, Maria Garcia, a certain tract of land 16 feet wide by 44 feet long, and that thereafter, Maria Garcia conveyed the same deed to G. Badaracco. We fail to see any inconsistency between this finding and the general one that no part of the land thus conveyed lies within what is now lot A above referred to. Appellants can, therefore, gain nothing under the finding of fact referred to, because of the ultimate fact that the land so conveyed lies within the public street and, therefore, is no part of the tract claimed by the appellee.

[3] 2. Appellants complain that the lower court improperly refused to find that, prior to the commencement of this action, the appellee, through her agent, Angelo Viviani, disavowed any claim to the land involved here, and that he recognized the title of G. Badaracco. The requested findings upon this phase of the case were founded upon the testimony that the city authorities demanded that Viviani build a sidewalk along this strip; that he refused to do so, and at one time referred to Badaracco as the owner. No demand of this kind was ever made upon the appellee personally, and the one made upon Viviani was not made as agent of the appellee but, so far as the evidence discloses, was made upon him individually. Although he acted as agent of the appellee with respect to renting lots A and B, there is nothing in the record tending to show that, in making the statement referred to, or in assuming such attitude with reference to the sidewalk, he was acting as the appellee's agent. He never stated that appellee did not own the property. At

most, he said he did not own it, and referred at one time to Badaracco as its owner. Under these facts, we cannot say that the trial court was in duty bound to make the requested findings.

Furthermore, if the appellee actually owned the controverted strip, merely making the statement referred to, whether made personally or through a duly authorized agent, could not serve to divest her of such title, nor to vest the same in the appellants. It could merely operate as an admission of title in her adversary, and this could only be considered along with the other evidence in the case in the final determination of that legal question. Hoskins v. Talley (N. M.) 220 Pac. 1007. However, no such statement was made.

[4] 3. It is urged that the court erred in striking out the testimony of Orlando Ulibarri with reference to a statement appellee made to him that she wanted to see his wife; that she did not want their controversy concerning this strip of land to get into court, but desired to know how it could be otherwise settled. That this testimony tended to establish negotiations looking to a settlement of their differences, if it can be said that it established any pertinent fact, is too plain for further discussion. All authorities hold that parties may freely and with immunity negotiate upon terms of compromise without being prejudiced by having their statements made during such negotiations proven against them. Otherwise, compromise and settlement would seldom occur. Courts favor these, and are uniform in holding that statements made in their course are not admissible in evidence. 22 C. J. § 347, p. 308; 2 Jones on Evidence, § 291, p. 592. There is a well defined exception to this general doctrine, viz. that, where an independant fact is stated during such negotiations, which is separated and separable from the concession involved, it is admissible even though the object of the conversation was to compromise an existing controversy. 22 C. J. p. 314, and the cases there cited. The

admission sought to be proved here, however, fails to fall within this exception.

Other questions are discussed, but they present no reversible error. The judgment will therefore be affirmed; and it is so ordered.

PARKER, C. J., and HOLLOMAN, District Judge, concur.

(No. 2974, Aug. 6, 1924.)

HAMMOND et al. v. DISTRICT COURT OF EIGHTH JUDICIAL DISTRICT OF NEW MEXICO et al.

SYLLABUS BY THE COURT.

1. The summons prescribed by section 2214, Code 1915, to be served in a proceeding supplemental to execution. must be returnable not less than 10 days from its issuance and service.

2. Such a summons which is returnable in a less period of time is void, and confers no jurisdiction over the person of the defendant.

3. A proceeding supplemental to execution is auxiliary to and a part of the original action in the sense that it takes the same number on the docket, but it is essentially a new and independent action in the sense that it involves the determination of new and different issues, all of which are foreign to those involved in the original case.

4. Jurisdiction over the person of the defendant is not retained for the purpose of a hearing supplemental to execution by reason of the original process, but a new summons issued in terms of the statute is necessary to confer such jurisdiction.

5. Any action on the part of a defendant, except to object to the jurisdiction over his person, which recognizes the case as in court, amounts to a general appearance, and gives the same jurisdiction as though process had been regularly served in the manner and form, and for the length of time prescribed by law.

6. The expression "which recognizes the case as in court," means that it is recognized as pending with jurisdiction of the subject-matter and of the parties.

7. A writ of prohibition is not a writ of right, but instead is one of sound judicial discretion that is cautiously issued or withheld according to the circumstances of each particular case. It is never issued unless it is plain that the

court, officer, or person against whom it is sought is about to exercise some judicial or quasi judicial power that is clearly unauthorized by law, and will result in injury for which there is no adequate remedy at law.

8. The writ will not be necessarily denied because of the remedy by appeal where it appears that such remedy is not adequate.

Original proceeding by Herbert J. Hammond, Sr., and others, against the District Court of the Eighth Judicial District of the State of New Mexico, within and for the County of Union, and Thomas D. Leib, as Judge thereof, for writ of prohibition. Writ granted.

C. J. Roberts, of Santa Fe, O. O. Asken, of East Las Vegas, and D. K. Sadler, of Raton, for petitioners.

Crampton & Darden, of Raton, and Hugh B. Woodward and O. P. Easterwood, both of Clayton, for respondents.

OPINION OF THE COURT

BRATTON, J. On May 27, 1924, D. W. Priestly, as receiver of the Union Trust & Savings Bank of Clayton, recovered a judgment in the district court of Union county against H. J. Hammond, Herbert J. Hammond, Jr., and Fulgencio C. De Baca. Thereafter and on the same day, an execution was issued, delivered to the sheriff of Union county, and by him returned nulla bona, and an affidavit filed seeking the issuance of a summons provided in section 2214, Code 1915, requiring the judgment debtors, H. J. Hammond and Herbert J. Hammond, Jr., to appear before Hon. Thos. D. Leib, judge of said court, and submit themselves to an examination regarding any property they owned that could be applied to the satisfaction of such judgment, and to abide the orders of the court made with reference thereto. Upon this affidavit being filed, a summons was issued, dated May 27, 1924, commanding the two judgment debtors referred to to appear before the court on the following day at 9 o'clock a. m., and submit to such examination. A motion to quash this summons was interposed, presenting many questions, among them being that it did not comply with the

provisions of the statute referred to, in this: The statute requires the return day of such process to be not less than 10 days after its issuance and service, while the process in question was made returnable in less than 24 hours. This motion was overruled.

On May 28th a subpoena duces tecum was issued and served, requiring the defendants Hammond to appear at 10 o'clock on that day with certain enumerated writings and books. The hearing was had, during which a petition was filed by the plaintiff in said cause, seeking to have each and all of the petitioners herein adjudged in contempt of court, and punished therefor. As the acts constituting such contempt, it was specifically pleaded that, after the summons and subpoena duces tecum had been served, the petitioners entered into a conspiracy and confederation to evade and violate the orders of the court by removing and transporting certain papers, instruments, documents, and property of the defendants Hammond from the jurisdiction of the court. An order was entered in the cause requiring each and all of the petitioners herein to appear before said court on May 30th, then and there to show cause why they should not be held and adjudged in contempt. The hearing upon the contempt proceeding was not held on that day because of the required absence of the judge, but was postponed to be held at a later date upon 5 day's notice to counsel for petitioners, and they were granted bond to appear at such time as the court might fix. Thereafter the petitioners H. J. Hammond, Herbert J. Hammond, Jr., Mattie L. Hammond, and Corneil Hammond, instituted this proceeding to secure a writ of prohibition against the respondent Thos. D. Leib, judge of said court, from proceeding further to punish them for such alleged contempt. We granted an alternative writ, and the pleadings necessitate the determination of several questions.

[1] 1. It is strenuously insisted by the petitioners that the summons in question was defective, and consequently gave the court no jurisdiction over their person, because it was returnable at a shorter time than pre-

scribed by law. Section 2214, Code 1915, authorizes the proceedings supplemental to execution and prescribes the procedure to be followed, including the summons to be issued. It is in this language:

"In all cases where any person shall have a valid and subsisting judgment in any district court against any person, upon which judgment execution has been issued and returned not satisfied, the owner of said judgment shall have the right to file his affidavit in the court where said judgement is of record, setting forth the facts regarding the rendition of said judgment and the return of said execution. On the filing of said affidavit, the clerk of the district court, if said affidavit is filed in the distrct court, shall issue summons thereon commanding said judgment defendant to appear within ten days and submit to an examination regarding any property that he may have and shall abide the order of the court regarding the applying of any property that he may have on said judgment in satisfaction thereof. When said affidavit is filed said proceedings may be referred to a referee on the petition of either party, and the referee appointed to hear the same shall proceed to hear said matter and report the evidence taken therein, to the court. The court trying and determining said proceedings shall have the right to enforce the appearance of the said judgment defendant and all necessary witnesses and to enforce all orders made therein by attachment. And in case any judgment defendant shall fail or refuse to appear or answer all lawful and proper questions put to him in said proceedings or shall fail or refuse to comply with the order of the court made in said proceedings said party shall be liable to a fine and imprisonment for contempt in such amount or for such time as the court may determine."

This controversy revolves around the construction to be placed upon this language found in the statute, "commanding the defendant to appear within 10 days and submit to an examination," etc. It is urged that such language means that the summons shall be returnable not less than 10 days after its issuance and service, and with this contention we are in accord. In order to arrive at the correct construction of a statute, the language used, the purpose in view, and the object sought to be accomplished by the Legislature must always be kept in mind. With these rules in view, we think it is clearly intended by the statute that, after the affidavit is filed, a summons shall issue, which shall inform the judgment debtor of the question involved, and that it is desired to examine him, and that he shall then have time to prepare for the hear-

ing by securing counsel, reviewing his records, and such other matters of a similar nature as might properly enable him to accurately testify concerning the condition of his financial affairs, as well as the property that he might or might not own, subject to the payment of the judgment in question. Any other construction would leave it optional with the clerk to make the summons returnable at any time less than 10 days from its issuance and service, and would even allow it to be made returnable instanter. This was never intended by the Legislature. The words 'within 10 days'' clearly mean ''not less than 10 days.'' This view is neither new nor unsupported. In U. S. v. Sena, 15 N. M. 187, 106 Pac. 383, it was held that the portion of section 896, C. L. 1897, which provided that the bill of exceptions in all criminal cases should be signed, sealed, and settled within 20 days before the first day of the term of the Supreme Court in which said cause should be docketed, meant not less than 20 days before the first day of said term. Justice Pope said:

> ''We agree with the appellant's counsel in his designation of the word, 'within,' above used, as 'a legislative pleonasm,' used by the Legislature doubtless in repetition of the more intelligible language of the pre-existing statute of 1880, supra, requiring settling 'within 30 days after the judgement.' We agree further with the view of counsel for the government that the words 'at any time within 20 days' are to be construed as meaning at any time in not less than 20 days, and that this portion of the statute thus requires preparation and presentation of the bill of exceptions to the trial judge at least 20 days before the first day of the term of this court to which the case is returnable.''

This case was cited and followed in the recent case of Royal Grocery Co. v. Oliver, 57 Cal. App. 278, 207 Pac. 61, where a lease contract was involved which contained an optional renewal clause providing that such option should not be valid unless a written notice of the lessee's election to exercise it was given ''within 90 days prior to the expiration of this lease.'' The notice was given on the 79th day before the expiration of the lease, and the court held that the language ''within 90 days'' meant ''at any time not less than 90 days.'' Other cases declaring a similar doctrine could

be cited, but we consider it unnecessary, as it seems clear to us that the statute in question requires the return day, upon a summons issued under its provisions, to be not less than 10 days from and after its service, as that period of time was intended to be given the judgment debtor to prepare for the hearing. The summons in question was therefore invalid, as it failed to comply with the law authorizing its issuance and prescribing its return day.

[**2**] 2. Having determined that the summons was defective in the manner hereinbefore pointed out, it becomes necessary to decide what results therefrom; that is, whether such defect rendered the process void, and, consequently, gave the court no jurisdiction over the person of the defendants, or whether it merely rendered such process voidable, and therefore brought the defendants within the jurisdiction of the court, with the privilege on their part of taking advantage of such defect by a motion to quash. The authorities upon this question are not harmonious. In fact, they are in hopeless conflict; but we think the better reasoned cases support the view that such process is void and confers no jurisdiction whatever over the person of the defendants. For the various cases discussing the subject and arriving at their divergent views, see the notes appended to Lockway v. Modern Woodmen of the World, Ann. Cas. 1913A, 555, and Flannery v. Kusha, 6 A. L. R. 838.

[**3,4**] 3. The respondents say that even though the summons in the supplemental proceeding was void, yet the court had jurisdiction over the person of the defendants by reason of the original summons upon which the judgment was rendered. This argument proceeds upon the theory that such proceeding supplemental to execution is not a new or independent proceeding, but a continuation of the original action, and that, for such purpose, the court retains jurisdiction over the person of the defendant, by virtue of its original process bringing him before the court.

The remedy, which is designed to afford a simple and expedient method of inquiring into the affairs of the debtor, and which takes the place of the common-law proceeding of a creditor's bill in equity, is auxiliary to and a part of the original action in the sense that it proceeds out of and takes the same number on the docket as the original cause, but it is essentially a new and independent action in the sense that its very gravamen involves the determination of new and different issues of fact and law, and may even involve the rights of third parties. The issue in the original action is the ascertainment of the debt due, and the rendition of a proper judgment therefor, while the issue in the supplemental proceeding is an inquiry into the affairs of the judgment debtor and the ascertainment that he owns certain property which may be applied in payment. The range of such inquiry may involve transactions with third parties, and, upon proper averments, their rights may become the subject of decision. Such proceeding has all the attributes of a civil action comprehending various issues for determination, all of which are foreign to the issues in the original action and cannot possibly effect the original judgment. Harper et al. v. Pehagg, 14 Ind. App. 427, 42 N. E. 1116; Hobbs v. Town of Eaton, 38 Ind. App. 628, 78 N. E. 333; McKenzie v. Hill, 9 Cal. App. 78, 98 Pac. 55. It cannot therefore be said that the court retains jurisdiction over the person of a defendant for such an inquiry, by reason of the original summons issued and served before the judgment is rendered.

[5] 4. After the hearing in the proceeding supplemental to execution in the case hereinbefore referred to was ready to begin, the court consolidated that case with another one on its docket, wherein the state had recovered a judgment against H. J. Hammond, Herbert J. Hammond, Jr., Fulgencio C. De Baca et al., for the purpose of conducting such examination in the two cases in consolidated form. To this action the defendants Hammond and De Baca objected upon various

legal grounds, and it is now contended by the respondent that this constituted a general appearance and gave the court jurisdiction over the person of the defendants. In an unbroken line of decisions this court has said generally that any action on the part of a defendant, except to object to the jurisdiction over his person, which recognizes the case as in court, amounts to a general appearance, and gives the court the same jurisdiction as though process had been regularly served in the manner and form, and for the length of time prescribed by law. Fowler v. Continental Casualty Co., 17 N. M. 188, 124 Pac. 479; Dailey v. Foster, 17 N. M. 377, 128 Pac. 71; Crowell v. Kopp, 26 N. M. 146, 189 Pac. 652; and Board of Com'rs v. District Court (N. M.) 223 Pac. 517.

[6] The expression "which recognizes the case as in court," as used in some if not all of these several cases, means that it recognizes the case as pending in court, with jurisdiction of the subject-matter and of the parties. In order to do this, the defendant must seek some affirmative relief at the hands of the court, or he must ask a favorable decision upon some matter of a substantive character, or endeavor to secure a continuance or postponement. The reason underlying the doctrine is that no such action can be taken without the court possesses jurisdiction over his person, and he is not entitled to any such affirmative relief or favorable ruling unless the court possesses jurisdiction over his person, and when he seeks such relief, he necessarily assumes the attitude that such jurisdiction has been acquired, and having taken that position, he is bound thereby, and will not be heard afterwards to say otherwise. No such relief was sought by the defendants in making the objection referred to. They merely presented legal objections to an action then being taken by the court without their request or solicitation. So it cannot be said that the defendants entered a general appearance, thereby cutting themselves off from the right to present this question here.

[7] 5. We recognize the oft-repeated rule that a writ of prohibition is not a writ of right, but instead, is one of sound judicial discretion that is issued or withheld according to the circumstances of each particular case, and which is used with great caution in the furtherance of justice, where it is plain that the court, officer, or person against whom it is sought is about to exercise some judicial or quasi judicial power; the exercise of which is clearly unauthorized by law and will result in injury for which no other adequate remedy exists. State ex rel. Harvey v. Medler, 19 N. M. 252, 142 Pac. 376; Crist v. Abbott, 22 N. M. 417, 163 Pac. 1085; and State ex rel. Parks v. Ryan, 24 N. M. 176, 173 Pac. 858.

[8] All of these elements, however, are present in this case. As we have previously determined, the trial court was proceeding in a judicial capacity without jurisdiction; the injury that petitioners might suffer was the imposition of a fine or a jail sentence for contempt; it appears that an appeal from such a judgment and sentence would necessarily involve a great expense, as a large amount of testimony has already been taken with a very large number of written exhibits introduced, and there would make the cost of appeal almost prohibitive. Under such circumstances, the remedy by appeal is not an adequate one. In Crist v. Abbott, supra, Judge Parker, speaking for the court, said:

> "In this case, however, taking into consideration the fact that an election contest necessarily involves a long trial, the taking of a large amount of testimony at a great expense to the parties, and where, as we hold, it is plain that the district court has absolutely no jurisdiction of the contest proceeding, the remedy by appeal is not such an adequate remedy as should move our discretion to refuse the writ of prohibition."

The language there used is peculiarly applicable here, and, for the reasons stated, we think our discretion should be exercised in favor of the issuance of the writ.

For the reasons stated, the writ will be made absolute; and it is so ordered.

PARKER, C. J., and Holloman, District Judge, concur.

(No. 2796, Aug. 22, 1924.)

ROMERO v. HERRERRA et al.

SYLLABUS BY THE COURT

1. Where all parties at the close of a jury trial move the court for a directed verdict, they are deemed to have waived their right to a trial by jury, and to have agreed that the court shall pass upon the facts.

2. Under such circumstances, findings of fact made by the trial court will not be disturbed on appeal, if they are supported by substantial evidence.

3. A decision on a prior appeal becomes the law of the case upon a subsequent appeal, and is binding upon the litigants.

4. The erroneous admission of evidence in a trial before the court without a jury is not reversible error unless it affirmatively appears that the court took such evidence into consideration in deciding the case.

5. In a case in ejectment where prior possession is the controlling issue, witnesses may not express their opinion as to who had such possession, as that invides the province of the court or jury, as the case may be. They should only testify to facts from which the question may be determined.

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

Suit by Andres Romero against Felipe Herrera and others. From a judgment for defendants, plaintiff appeals. Affirmed.

N. B. Field and M. J. Helmick, both of Albuquerque, for appellant.

Marron & Wood, of Albuquerque, for appellees.

OPINION OF THE COURT

BRATTON, J. This is a suit in ejectment instituted

by the appellant to recover possession of a described tract of land situated in Bernalillo county 187 yards wide by 1,500 yards long. This is the second time the case has been before this court. The opinion rendered on the former appeal may be found at 27 N. M. 559, 203 Pac. 243. The facts are fully stated there, and it is needless to repeat them here. At the conclusion of the second trial, all parties moved the court for an instructed verdict. The appellant's motion was denied; the appellees' motion was granted; an instructed verdict in their favor was returned, upon which judgment was rendered. The appellant has appealed.

[1] 1. Appellant contends that he affirmatively established a legal title under the following facts proven by him, viz.: That more than 30 years prior to the institution of this suit, Venceslao Chaves fenced the land in question, claiming to own the same; that the trustees of the Atrisco grant failed to take any legal steps to question such action on Chaves' part; that later, and for a valuable consideration, Chaves executed a mortgage upan said land to Pedro Perea, and that, subsequent thereto, Chaves and his wife conveyed the same by deed to Perea; that thereafter Perea conveyed it by deed to the appellant; that this deed was lost, and many years thereafter Perea's heirs executed a substitute or lieu deed conveying the same to appellant, in which the loss of the original was full recited; that during all of said times, and up to the time appellees dispossessed him, appellant and his predecessors in interest had possession of the land in question. Under these facts, it is contended that he proved a good title in himself. These grounds were incorporated in appellant's motion for a directed verdict. That there was an issue of fact with reference to the kind, character, and duration, as well as the existence of possession by the appellant and his predecessors in interest, is plainly to be seen from the statement of facts appearing in the opinion upon the former appeal, and it is admitted by counsel for both parties in their respec-

tive briefs, that the evidence upon this question on the subsequent trial was not materially different from that given on the previous one. This court expressly held, in such former opinion, that an issue of fact was presented with reference to the possession of the land, and that holding is the law of the case upon this appeal, and is binding upon this court, as well as the litigants. Davisson v. Citizens' National Bank, 16 N. M. 689, 120 Pac. 304; McBee v. O'Connell, 19 N. M. 565, 145 Pac. 123; State ex rel. Garcia v. Board of Commissioners, 22 N. M. 562, 166 Pac. 906, 1 A. L. R. 720; First National Bank v. Cavin, 28 N. M. 468, 214 Pac. 325. Possession under this claim of ownership being essential, and there being an issue of fact with reference thereto, the motion of all parties for a directed verdict operated to waive their right to a trial by jury, and to constitute the trial court as the trier of the facts. In other words, the parties deemed to have waived their right to a jury trial, and are bound by the findings, if supported by substantial evidence. Home Savings Bank v. Woodruff, 14 N. M. 502, 95 Pac. 957; De Burg v. Armenta, 22 N. M. 433, 164 Pac. 838. We follow these cases, which are clearly in harmony with the decided weight of authority throughout American jurisprudence. This may be readily seen by refering to the many cases cited in the note to Manska v. San Benito Land Co., 18 A. L. R. 1430 (1433). So we have this situation—by the law of the case declared on the former appeal, an issue of fact existed with reference to the possession of the disputed land on the part of the appellant and his predecessors in interest. It was clearly essential that he establish this phase of his case in order to recover. Section 3364, Code 1915; Manby v. Voorhees, 27 N. M. 511, 203 Pac. 543; Hoskins v. Talley et al. 29 N. M. 173, 220 Pac. 1007. By their motions for a directed verdict, the parties are presumed to have waived their right to have the jury determine the issues of fact, and elected to agree upon the trial judge to pass upon them. The finding of the court, being supported by substantial evidence, will not be disturbed on appeal—

a rule too well established to require or even merit the citation of authorities.

[2] 2. Appellant strongly urges that, at the time the common lands located within the Atrisco grant were conveyed to the corporation, he owned and was in possession of the land involved here; that it being privately owned land, the corporation acquired the legal title thereto as a naked trustee only, and that it held such legal title for his use and benefit as the actual owner. He relies upon Williams v. Lusk et ux., 28 N. M. 146, 207 Pac. 576, where this general doctrine was declared; but the bar to appellant's prevailing under it is that the trial court found against him upon the issue of his possession. Without possession he could acquire no title, as the muniments under which he claims could serve only as color of title under which he might acquire the land by adverse possession. Without possession, he could acquire no title.

[3] 3. Appellant further asserts that, aside from his legal title, he was entitled to recover upon his prior possession alone. He asserts in this connection that the appellees were naked trespassers, and that, in ejectment cases where no legal title is shown in either party, the one showing prior possession will be held to have the better right, and hence, entitled to recover. With this statement of abstract law we are in accord; but the difficulty with appellant's position is its application to this case. As we have previously seen, the trial court found against him upon his issue of prior possession, and, for the reasons we have previously suggested, he is bound by that finding. For this reason, he is cut off from recovering upon this theory.

[4] 4. It is next urged that the court erred in admitting in evidence the deeds from the trustees of the Atrisco grant to certain of the appellees. From what we have said, the trial of this case finally resolved itself into one before the court without a jury. In such cases, the erroneous admission of evidence is not reversible error, unless it affirmatively appears that the

court took such evidence into consideration in deciding the case. Radcliffe v. Chaves, 15 N. M. 258, 119 Pac. 699; Halford Ditch Co. v. Independent Ditch Co., 22 N. M. 173, 159 Pac. 861; Crawford v. Gurley, 23 N. M. 659, 170 Pac. 736; Grissom v. Grissom, 25 N. M. 518, 185 Pac. 64; Espy v. Union Trust & Savings Bank 29 N. M. 225, 222 Pac. 200. It does not appear that the trial court took this evidence into consideration in deciding the case. Hence, there is no reversible error shown. The admission of certain other evidence is assigned as error. What we have said here disposes of that matter.

[5] 5. Appellant's counsel asked several witnesses, who had actual possession of the land at specific times, explaining that what he meant by possession was "possessio pedis"—having his feet on the ground. To each of these questions, the trial court sustained an objection upon the theory that the answer involved a mixed question of law and fact; that it was a question for the jury; and that to admit such evidence would invade the province of the jury. Obviously, the court was correct. Possession of the land was an important, if not the controlling, fact in the case, and was the principal question to be decided by the jury. In such a case, it is certainly not one for witnesses to express their opinion upon, but instead they should testify to the various facts from which the jury may reach its conclusion. To permit witnesses to testify is simply to allow them to invade the province of the jury. They may testify to any independent fact, which will throw light upon the question of possession, such as who built fences upon the land, cultivated it, erected other improvements, grazed their stock thereon, and other kindred facts, from which the jury might decide who had possession. Had possession not been one of the direct issues in the case for final determination by the jury, but merely an incidental one, perhaps the objection would not have been tenable, but in this kind of a case, it is for the jury and not witnesses to say who had possession during the material times.

From what we have said, it follows that the judgment should be affirmed, and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

(No. 2816, Aug. 22, 1924.)

GUNBY et al. v. DOUGHTON

(SYLLABUS BY THE COURT.)

A mortgagor of real estate is not entitled to retain possession of the property after the confirmation of the sale thereof, under decree of foreclosure.

Appeal from District Court, Curry County, Bratton, Judge.

Action by Hazel M. Gunby and others against C. F. Doughton. From a judgment for defendant, plaintiffs appeal. Affirmed.

Walter W. Mayes, of Clovis, for appellants.

Statutes giving a right of redemption after foreclosure sales are to be construed liberally; while their terms are not to be extended by implication beyond what the legislature has authorized, the construction in any case of doubt or ambiguity should be in favor of the right to redeem. 27 Cyc. p. 1800, Sec. 2; Whitehead v. Hall, 148 Ill. 253, 35 N. E. 871; Thornley v. Moore, 106 Ill. 496; Schuck v. Garlach, 101 Ill. 338; North Cent. R. Co. v. Hering, 93 Md. 164, 48 Atl. 461; Lightbody v. Sammers, 98 Minn. 203, 108 N. W. 846; Bruschke v. Wright, 166 Ill. 183, 46 N. E. 813; Frink v. Murphy, 21 Cal. 108; 81 Am. Dec. 149; 19 R. C. L. 638. See also Stearne Roger Co. v. Aztec G. M. & M. Co., 93 Pac. 706.

A mortgagor of real estate is entitled to retain possession of the property after the confirmation of the sale thereof under decree of foreclosure. 19 R. C. L. pp. 627 and 630; 27 Cyc. pp. 1738, 1743 (Sec. 9), 1744 (Sec. B.), and 1745 (sub-Sec. D); Stevens v. Hadfield (Ill.), 52 N. E. 875; Haigh v. Carrol, 209 Ill. 576, 71

N. E. 317; Rawson v. Bethseda Baptist Church, 6 L. R. A. (N. S.) 448 and notes; Essex Savings Bank v. Meridian Fire Ins. Co., 4 L. R. A. 759; Stephens v. Ill. Mutual Fire Ins. Co., 11 A. L. R. 1309 and annotations; Orr v. Bennett, 4 A. L .R. 1398; Dolan v. Midland Blast Fur. Co. (Ia.), 100 N. W. 45; Pioneer S. & L. Co. v. Farnham (Minn.), 52 N. W. 897; Mich. Trust Co. v. Lansing (Mich.), 61 N. W. 668; Amer. Ins. Co. v. Farrar (Ia.), 54 N. W. 361; Ray v. Henderson (Ill.), 71 N. E. 579; Standish v. Musgrave (Ill.), 79 N. E. 161; Schaeppi v. Bartholomae, 75 N. E. 447, 1 L. R. A. (N. S.) 1079; Stout v. Keyes, 43 Am. Dec. 465; Loy v. Home Ins. Co., 31 Am. Rep. 347; Purser v. Cady (Cal.), 52 Pac. 489; Hibernia Sav. & Loan Co. v. Brittain (Cal.), 129 Pac. 797; Cochran v. Cochran (Wash.), 195 Pac. 225; Traer v. Fowler, 144 Fed. 810; Costigan v. Truesdale, 83 S. W. 98, 115 A. S. R. 341; Elmira Mech. Society v. Stanchfield (Colo.), 160 Fed. 813; Jones on Mortgages, 7th Ed., Vol. 2, par. 1051B; Sutherland v. Long, 112 N. E. 660.

W. A. Havener, of Clovis, for appellee.

The purchaser at a foreclosure sale is entitled to the possession of the property sold. Maddin v. Robertson, 133 Pac. 1128; Cooley's Blackstone, Third Edition, Vol. 1, pp. 420, 421, 422 and notes; Dow v. Railroad Co., 20 Fed. 260; Words and Phrases, Vol. 4, pp. 220, 221; 13 Cyc. 572; 19 R. C. L. Sec. 454; 27 Cyc. 1737; Babcock v. Kennedy, 18 Am. Dec. 695; Lanier v. McIntosh, 38 A. S. R. 676; Benton Land Co. v. Zeiler, 81 S. W. 193; Allen v. Ranson, 100 Am. Dec. 282; Lacy v. Gibboney, 88 Am. Dec. 145; Danehower v. Dawson, 44 L. R. A. 193; Kibbe v. Ditto, 93 U. S. 674; 23 L. Ed. 1005; Beall v. Hardwood, 3 Am. Dec. 432; Kitchum v. Robertson, 12 N. W. 377; Lowery v. Tillery, 18 N. W. 452; Rodriguez v. Haynes, 13 S. W. 296; Las Vegas Power Co. v. Trust Co., 126 Pac. 1009; 19 R. C. L. pp. 314, 316, 317; Edwards v. Woodbury, 3 Fed. 14; Kitchen v. Schuster, 14 N. M. 164, 89 Pac. 261.

OPINION OF THE COURT

PARKER, C. J. The question involved in this appeal

is whether a mortgagor of real estate retains the right to possession after sale under a decree of foreclosure, and until the nine months' period of redemption has expired, or whether the purchaser at the sale is entitled to be let into possession immediately upon the confirmation of the sale. The subject is not specifically regulated by statute as it is in some states. These statutes provide that a certificate of sale, only, shall be delivered to the purchaser, but that deeds shall be delivered only after the redemption period has expired. In such case, of course, the mortgagor may retain possession during the redemption period, for his title, until that time, has not been passed to the purchaser. But in this jurisdiction, we have a different situation. In this connection it is to be remembered that by a decree of foreclosure, and a decree of confirmation of sale thereunder, all of the right of the parties are merged and passed to the purchaser. The mortgagee no longer has any mortgage lien, and the mortgagor no longer has any title to the property. The sole right remaining to the mortgagor is the right to redeem, a right, which does not arise out of the mortgage or the decree, but a right which is extended to him by statute, whereby he may defeat the title of the purchaser. One section of the forcible entry and detainer statute bears upon this question and it is the fourth subdivision of section 2384, Code 1915, which provides:

> "When the defendant continues in possession after a sale by foreclosure of mortgage, or on execution, unless he claims by a title paramount to the mortgage by virtue of which the sale was made, or by title derived from the purchaser at the sale."

It is to be seen that this section puts foreclosure sales and execution sales upon the same basis. If an execution defendant is not entitled to possession during the redemption period of one year, a mortgagor is not entitled to possession after confirmation of the sale. To hold that either are so entitled, would be to nullify this statute. Counsel relies upon Section 571, Code 1915, which provides that in the absence of a stipulation to the contrary, the mortgagor has the right to

possession. This statute evidently refers to the time prior to foreclosure and sale, and has no application to the present consideration.

It follows that the action of the court in issuing a writ of assistance and putting the purchaser into possession was correct, and should be affirmed; and it is so ordered.

BOTTS, J., concurs.

BRATTON, J., having tried the case below, did not participate in this decision.

[No. 2849. Aug. 22, 1924]

CHAMPION COPPER v. PEYER et al.

SYLLABUS BY THE COURT

1. Findings, supported by substantial evidence, will not be disturbed by this court.

2. Unless expenditures for machinery bear some direct relation to mining operations, they are not available as annual expenditure required by the federal statute.

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

Proceeding by the Champion Copper Company against J. J. Peyer and others. From a judgment for defendants, plaintiff appeals. Affirmed.

E. P. Davies, of Santa Fé, for appellant.

Wilson & Perry, of Santa Fé, and W. McKean, of Taos, for appellees.

PARKER, C. J. Appellees filed an application for patent in the United States land office at Santa Fé, for the Lilac No. 1 lode mining claim, and began publication of the required notice. Appellant in due time filed its adverse claim in the land office, and brought this action in Taos county in support thereof, claiming a portion of the ground as the Lithia lode

mining claim. A trial was held before the court, without a jury, resulting in a judgment in favor of appellees, and the case is here upon appeal. The court found against appellant upon two grounds.

[1] 1. The court found that there had never been a valid location of the ground embraced within the Lithia claim, for the reason that no sufficient location work had ever been done, and the boundaries had never been marked on the ground with monuments so that they could be readily traced, as required by law. Upon each of these points the evidence was conflicting, and the court saw and heard the witnesses. Under the settled doctrine of this court, a finding which is supported by substantial evidence, as in this case, will not be disturbed.

[2] 2. The court found that appellant had failed in its annual assessment for the year 1918. The Lithia claim was located in 1916. In 1917, appellant took advantage of the federal legislation (joint resolution of October 5, 1917, Fed. Stat. Ann. Supp. 1918, p. 461, 40 Stat. 343), and filed its notice of desire to hold the claim. In 1918 no such notice was filed, and no assessment work was done within the exterior boundaries of the claim. Counsel, however, argues that the annual assessment was performed for 1918 by means of expenditure made for machinery and property which it intended to use in mining on the claim. The position of counsel is made plain by reference to his requested finding No. 7, as follows:

"That for all the years since 1916 the annual assessment of $100 per year was either actually done or performed or legally executed by congressional legislation; that the only question raised during the trial of the said cause as to the assessment work was with respect to the year 1918, and the court finds that for said year the said annual assessment work was done by the plaintiff which consisted of the acquisition by the plaintiff, of the Glenwoody power proposition on the Rio Grande river, about 6 or 7 miles from the said Lithia lode mining claim which was purchased by the plaintiff at a cost of more than $3,000, and the plaintiff, after so acquiring the said power proposition, undertook to equip the said power plant so as to generate

electricity for use in operating machinery and apparatus for the extracting of ore from the ground on the said Lithia lode mining claim; that the said plaintiff was prevented from perfecting the said power plant by action of the capital issues commission; that the said expenditure did in fact reasonably tend to promote, and would have tended to reasonably promote, had it been completed, the extraction of mineral from the ground on the said mining claim, and consequently the said expenditure constituted sufficient legal assessment work for the year 1918."

We have, then, the question whether, under the circumstances above outlined, there was annual expenditure upon appellant's claim within the requirements of the federal statute. It is to be noted that what was done was to buy an old gristmill, located some 6 or 7 miles away from the claim. It was out of repair, and bore no relation whatever to the mine, and never had. Appellant claimed that it intended to reconstruct the plant, manufacture electrical energy, and convey the same to the mine, and there use the same in mining operations, but that is was unable to do so on account of the conditions arising out of the war legislation. The plant was never reconstructed; no electrical current was ever generated; no wires were ever strung; nothing whatever was done. It would seem clear that the purchase of the old plant was not annual expenditure on the mine. We have recently examined this question in Golden Giant Mining Co. v. Hill, 27 N. M. 124, 198 Pac. 276, 14 A. L. R. 1450. While the facts were different in that case, the general doctrine there announced is applicable here. Whether such an expenditure under any circumstances would be available as annual assessment we do not decide, but it is clear that some direct relation between such an expenditure and actual mining must be established before such expenditure is available.

Some other questions are presented in the briefs, but they need not be considered. 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.

BRATTON and BOTTS, JJ., concur.

[No. 2841, Aug. 25, 1924.]

GRAFE v. DELGADO, Sheriff.

SYLLABUS BY THE COURT

1. Under the rule of construction—ejusdem generis—general words in a statute which follow a designation or enumeration of particular subjects, objects, things, or classes of persons, will ordinarily be presumed to embrace like things or persons with those specified.

2. All of the games enumerated and specified in section 1, c. 86, Laws 1921, are not necessarily and essentially "banking" or "percentage" games, so that the general words following such designated list cannot be restricted to include games of that kind only.

3. The game of solo, being played with cards for something of value, is made an offense by the general language embraced in said statute.

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

Habeas corpus by Sam Grafe against Tomas Delgado, as Sheriff of Santa Fé County. The application was denied, and petitioner remanded, and he appeals. Affirmed.

R. P. Barnes, of Albuquerque, for appellant.

M. J. Helmick, Atty. Gen., and J. J. Kenney, Asst. Dist. Atty., of Santa Fé, for appellee.

OPINION OF THE COURT.

BRATTON, J. An information was filed in the district court of Santa Fé county, charging appellant with violation of section 1, c. 86, Laws 1921, by playing a game of solo. A warrant was issued upon which the sheriff of Santa Fé county took him into custody. This proceeding in habeas corpus was immediately instituted. The cause was submitted to the lower court upon an agreed statement of facts, as follows:

"That solo is a game played wtih cards, in which at least two and not more than four persons can play; that as played by petitioner, the game consisted of four players, each having one hundred and twenty markers, which

represented nothing of value, but merely served to keep the record of the state of the game between the players; that the cards were dealt by one of the players alternately to the other players in the game, and each hand was played until one of the players had lost the markers given him when the game began; that the result of the play depended upon the chance of the cards, as well as upon the skill of the players; that each of the players at said game received from the proprietor of the premises in which the game was played, a trade check of the value of twelve and one-half cents (12½c) in trade, or a cigar, or a soft drink, and the loser at said game of solo paid for each and all of the said trade checks, cigars, or soft drinks so given or distributed at said game; that such trade check, cigar, or drink is a thing of value, but that no bet, stake, money, or thing of value, other than as stated, was permitted or passed between the players; that no fund or money or bank of credit, or other thing of value is furnished by the proprietor, other than as heretofore stated, of the place where the game was played for starting or continuing the game, or by the petitioner, or by any of the players who participated in the game, and that the drinks sold are what are known as 'soft drinks,' which are not sold in violation of any law."

The application was denied, and the petitioner remanded to the custody of the sheriff. The case is here on appeal.

1. The statute, which it is claimed was violated (chapter 86, § 1, Laws 1921), is in the following language:

"It shall hereafter be unlawful to play at, run or operate any games of chance such as keno, faro, monte, passfore, passmonte, twenty-one, roulette, chuck-a-luck, hazard, fan tan, poker, stud poker, red and black, high and low, craps, blackjack or any other game or games of chance played with dice, cards, punch boards, slot machines or any other gaming device by whatsoever name known, for money or anything of value, in the state of New Mexico."

Appellant's contention is that solo is not one of the enumerated games denounced by the statute, and that it does not fall within the general language, "or any other game or games of chance played with dice, cards, punch boards, slot machines or any other gaming device by whatsoever name known, for money or anything of value, in the state of New Mexico," because such general language follows a list of enumerated

games, all of which are "banking" or "percentage" games, and consequently, the general language embraces only games of that character, and that this is not that kind of a game.

[1] The well known and universally recognized rule of statutory construction; ejusdem generis—is, that general words in a statute, which follow a designation or enumeration of particular subjects, objects, things, or classes of persons, will ordinarily be presumed to be restricted so as to embrace only subjects, objects, things, or classes of the same general character, sort or kind, to the exclusion of all others. This is merely a rule of construction, and, like all other rules, is resorted to merely as an aid to ascertain the legislative intent. It arists from the presumtion that, having enumerated a list of things or persons, the Legislature must have had in mind no other kind. 25 R. C. L. "Statutes," § 240; 2 Lewis, Suth. Stat. Constr. § 422; State ex rel, Beach v. Board Loan Commissioners, 19 N. M. 266, 142 Pac. 152; State v. Collins, 28 N. M. 230, 210 Pac. 569.

[2] The entire statute (chapter 86, Laws 1921) is complete and very comprehensive. It was intended to avoid the evils flowing from gambling. It makes those who play, as well as those who operate or conduct a game, liable. It also prescribes a penalty for those who allow their premises to be used for such purposes. It is made the duty of district attorneys and the Attorney General to institute and prosecute causes to close up places habitually used or resorted to for such purposes, and gives to the district courts power to close them. It is made the duty of the several district courts to specifically charge the grand jury concerning the provisions of the law, and it goes to the extreme of requiring that all equipment, paraphernalia, or devices used at gambling houses be destroyed. With this broad and comprehensive scope of the act, appellant cannot escape its general language now under consideration, unless his contention with reference to

its proper construction and interpretation is well founded. The entire argument, however, is founded upon an erroneous premise. It proceeds upon the assumption that each and all of the games specifically named in the statute are "banking"' or "percentage" games and that, consequently, the general language embraces nothing but games of like kind and class. In this he is wrong, and his premise being erroneous, the entire argument builded thereon is without merit. For instance, poker, stud poker, and craps are in the list of specified games. While we admit with great frankness that we are not experts in the art or science of gambling, and that it may have depths to which we have not gone and concerning which we have no personal knowledge, yet we think it will not be seriously contended that poker, stud poker, and craps are necessarily and essentially "banking" or "percentage" games. To the contrary, perhaps, a majority of these games have no "banking" or "percentage" elements. This being true, we cannot say, by adopting the rule of construction contended for, that the Legislature intended to include in the statute nothing but "banking" or "percentage" games.

[3] The game in question is covered by the general language of the law. It is one played with cards. It is played for something of value in this way—at the outset the proprietor of the premises gives to each player a trade check of the trade value of 12½ cents, with which cigars or soft drinks are paid for. The loser at the game pays for all of these checks, and each winner receives cigars or soft drinks, or their equivalent, without paying for them. These are the winnings of the game. So the general language of the law was intended to cover just such devices, and it fits this offense like a well-tailored suit.

The judgment of the lower court was correct, and should be affirmed; and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

[No. 2824. Aug. 29, 1924.]

EL PASO CATTLE LOAN CO. OF EL PASO, TEX., v. STEPHENS & GARDNER et al.

SYLLABUS BY THE COURT

1. A promise by the husband to give a mortgage on community real estate, in which the wife does not join, furnishes no basis upon which an equitable mortgage can be declared.

2. Issues or questions not presented to the lower court will not ordinarily be considered here.

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

Action by the El Paso Cattle Loan Company of El Paso, Tex., against Stephens & Gardner and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Croom, Goldestein & Croom and E. L. Medler, all of El Paso, Texas., for appellant.

Lee R. York, of Abilene, Tex., and E. R. Wright, of Santa Fe, for appellees.

OPINION OF THE COURT

PARKER, C. J. Appellant brought action to have declared in its favor an equitable lien or mortgage upon the real estate of the appellees John C. Stephens and Joseph R. Gardner, and to have the same foreclosed and established as a prior lien to the mortgage of appellee the First State Bank of Cloudcroft and the deed to appellee D. S. Stephens both executed by said John C. Stephens and Joseph R. Gardner and their respective wives. The proceeding was prosecuted upon the theory that the said J. C. Stephens and Joseph R. Gardner, at the time they procured a large loan from appellant, and in addition to the giving of a chattel mortgage on cattle as security for the loan, promised to execute and deliver to the appellant a mortgage on the real estate described in the complaint, and which they had refused to do. The lands

were community property, and the respective wives of the owners had not joined in the promise to execute the mortgage, if such promise was in fact made. At the close of appellant's case appellees demurred to the evidence on the ground that it failed to establish a cause of action, which motion was sustained, and the complaint of appellant dismissed.

[1] 1. The question, then, is whether an equitable mortgage may be declared under these circumstances. It is to be noted that the property is community property. The respective wives made no promise to appellants. While community property is subject to the payment of communty debts, created by the husband alone, the mortgage of community real estate is expressly prohibited by chapter 84, Laws 1915, except where the mortgage is executed by both husband and wife. If the husband alone cannot mortgage community real estate, then he certainly cannot make a valid contract to do so, which would be a sufficient basis upon which to declare an equitable mortgage. The whole doctrine of equitable mortgage rests upon the equitable maxim that equity regards that as done which ought to be done. If the promise and the necessary accompanying circumstances are sufficient to establish the right, then, in legal contemplation, a mortgage in fact exists the same as if it had been formally executed. But by this statute both the actual and the fictional mortgage are prohibited. We recently considered this statute in Terry v. Humphreys, 27 N. M. 564, 203 Pac. 539, and Adams v. Blumenshine, 27 N. M. 643, 204 Pac. 66, 20 A. L. R. 369. Our present conclusion in this case is in accordance with the principles announced in those cases.

2. Appellant argues that error was committed against it in dismissing its complaint upon the ground that the facts pleaded by it entitled it to relief as a general creditor, under the provisions of sections 274-280, Code 1915. Section 274 provides that every sale, mortgage, or assignment in contemplation of insolvency and with design to prefer one creditor over another

shall operate as an assignment for the benefit of all creditors. It is alleged in the complaint that the mortgage to the bank and the deed to D. L. Stephens, were so made, and were made without present consideration and, upon information and belief, without any consideration. This allegation fairly follows the section. Section 276 requires the plaintiff to set out the amount of debts of the defendant, so far as known, and the court is required to summon all creditors, and provides for process for that purpose. Appellant failed to follow this section, but contented itself by alleging that the appellees owed debts other than the one due it. Section 277 provides for the appointment of a receiver to administer and close out the estate, and authorize the court to compel a fraudulent transferee to turn over to the receiver all of his property not exempt, and to disclose the amount of his debts and the names and addresses of his creditors. This section was not followed. A receiver was asked for, but not the kind of a receiver contemplated by the statute. A receiver to take charge of the real estate so that it might be used for the care and pasturage of the cattle, together with an injunction against the bank and D. L. Stephens restraining them from interfering with the possession of the receiver for such purposes, was all that was claimed or asked for. The appellant wished the estate preserved until it could establish its equitable mortgage and obtain a decree of foreclosure of the same, and nothing more. The action was in its own interest only, and not in the interest of all creditors of the debtors.

[2] It thus appears that to allow appellant, after failing to establish its equitable mortgage, which was the original object of the action, to shift its ground and claim that the action was under the statute, the terms of which were in no sense followed, would be going to lengths not allowable. The question whether the complaint stated such a cause of action was not presented to the court below, and could not be here decided without making a new case, involving new issues, requiring new parties and new and different

procedure. This will not do. See Cadwell v. Higginbotham, 20 N. M. 482, 151 Pac. 315; Park v. Milligan, 27 N. M. 96, 196 Pac. 178.

Counsel complain of the action of the court in awarding foreclosure of the mortgage to the bank upon its cross-complaint. Just how appellant has any interest in this part of the judgment we are unable to see. Appellant has lost its case as to its equitable mortgage, and has no specific claim or lien upon the property. It was not entitled to be heard as to the foreclosure.

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

BRATTON and BOTTS, JJ., concur.

[No. 2814. Sept. 8, 1924]

EL PASO CATTLE LOAN CO. OF EL PASO, TEX., v. HUNT et al.

SYLLABUS BY THE COURT

1. Section 20 of chapter 65, Laws 1917, affords no lien to an agistor.

Appeal from District Court, Dona Ana County; Ed Mechem, Judge.

Action by the El Paso Cattle Loan Company of El Paso, Texas, against Stewart Hunt and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Wade & Wade, of Las Cruces, for appellants.

E. L. Medler, of El Paso, Tex., for appellee.

PARKER, C. J. The question in this case is whether a person who takes cattle to pasture has a lien on them for the value of the pasturage under the provisions of section 20 of chapter 65, Laws 1917, which is as follows:

"Innkeepers and livery stable keepers, and those who board others for pay, or furnish feed or shelter for the property and stock of others, shall have a lien on the property and stock of such guest or guests, or of those to whom feed or shelter has been furnished until the same is paid."

The section was originally enacted in 1884 (Laws 1884, c. 17) in its present form, except that originally the words "while the same is in their possession" were inserted following the word "furnished." These words were omitted from the later statute by reason of the provisions of section 22 of the Act of 1917, which dispenses with the necessity of retaining possession. Counsel for appellee argues that we have held in Roswell Trading Co. v. Long, 26 N. M. 349, 192 Pac. 482, that there is no agistor's lien under this statute. In the first place, the facts were different in that case from those in this one. There, the goods were sold on open account and the owner of the cattle retained the possession of the same and fed the cattle the feed purchased on open account. We simply held in that case that the merchant, never having had possession of the livestock, never acquired a lien under the statute.

Not so in this case. Here, the agistors had possession of the cattle and grazed them upon their property and cared for them. The question then recurs as to the true interpretation of the statute.

In this case, it is to be noted that at common law, in the absence of an agreement, an agistor has no lien upon animals which he takes into his custody to care for and pasture or feed. 3 C. J., "Animals," § 57. Statutes have been passed in many of the states extending a lien to agistors. These statutes, being in derogation of the common law, are to be strictly construed. 3 C. J., "Animals," § 59; Lord v. Collins, 76 Me. 443; Ingalls v. Vance, 61 Vt. 582, 18 Atl. 452; Thomas v. Mann, 22 Wyo. 99, 135 Pac. 1088.

[1] It is to be noted that our statute names inkeepers and livery stable keepers only. The next

clause refers to others who board persons for pay. This evidently would include keepers of boarding houses, and similar places, where food is dispensed; the business being of the same nature as that of innkeepers. The next clause refers to the furnishing of shelter and feed for the property and stock of others. This clause evidently refers to innkeepers and the like as to the property of guests, and to livery stable keepers as to the stock of others. Otherwise, there is nothing in the statute pointing out the circumstances under which livery stable keepers could have a lien. The next clause clearly refers to innkeepers and the like, because the word "guest" is used. The last clause must refer to livery stable keepers, because otherwise they are not granted a lien at all.

Counsel for appellants argue that this statute, properly viewed, provides a lien for livery stable keepers and others who furnish feed for stock, and that furnishing pasturage is furnishing feed within the meaning of the statute. It is to be conceded that the business of an agistor closely resembles that of a livery stable keeper. They may receive or refuse to receive the stock of others into their possession for the purpose of feeding and caring for the same. In this they differ from innkeepers, who must receive all applicants. Each may reserve a lien by contract if they so elect and thus protect themselves. Hence they are not favored as to liens and must be able to point to a statute or a contract before a lien can be allowed. 1 R. C. L., "Animals," § 21; 17 R. C. L., "Livery Stable Keepers," § 3.

Assuming, however, that the statute might give the lien to others than livery stable keepers who furnish feed for stock, is the pasturing of stock a furnishing of feed within the meaning of the statute? It is argued that standing grass is food, food is feed, and pasturage is food, citing many definitions from dictionaries. But we think the word "feed" is used in a narrower sense in this statute. A livery stable keeper or a wagon

yard keeper furnishes feed in a cured and prepared form for animals to use for food. An agistor, on the other hand, who takes cattle to pasture, furnishes pasture land upon which the cattle graze and feed themselves. Bouv. Law Dic. "Pastures." This distinction, while it may seem narrow and technical, is no doubt sound. The agistor having the means at hand to always protect himself by contract, there is no reason to award him a lien unless the statute unequivocally so provides. In this connection, it is to be noted that an agistor's lien is now provided by statute. Chapter 24, Laws 1923.

Some other considerations are presented by counsel for appellee as standing in the way of the lien in this particular case, but they need not be considered.

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

BRATTON and BOTTS, JJ., concur.

[No. 2834. Sept. 9, 1924].

JENNINGS v. H. LUTZ & SON.

SYLLABUS BY THE COURT

1. Findings of the court below, when sustained by substantial evidence, will not be disturbed.

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

Action by Mrs. Sophia Jennings against H. Lutz & Son. From a judgment for defendants, plaintiff appeals. Affirmed.

G. W. Prichard, of Santa Fe, for appellant.

Geo. B. Barber, of Carrizozo, for appellee.

PARKER, C. J. The parties disagreed as to whether appellant was employed as housekeeper for a definite

term, or was employed from month to month. The case was tried by the court, and he found the issues for appellees. The evidence was conflicting, but the court's finding is supported by substantial evidence. Under such circumstances, the finding will not be disturbed.

It follows that the judgment of the court below is correct and should be affirmed, and it is so ordered.

BRATTON and BOTTS, JJ., concur.

[No. 2837. Sept. 9, 1924]

READ, State Bank Examiner and Ex Officio Superintendent of Insurance, v. OCCIDENTAL LIFE INS. Co.

SYLLABUS BY THE COURT

Section 2, chapter 194, Laws of 1921, grants an exemption to domestic insurance companies from the tax therein mentioned.

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

Action by J. B. Read, State Bank Examiner and Ex Officio Superintendent of Insurance, against the Occidental Life Insurance Company. From a judgment for the latter the former appeals. Affirmed.

M. J. Helmick, Atty. Gen., for appellant.

A. B. McMillen and L. F. Lee, both of Albuquerque, for appellee.

OPINION OF THE COURT

PARKER, C. J. Appellee recovered judgment against appellant for money which it had paid, under protest, as a tax on premiums collected by it on life insurance. Appellee claimed exemption from the tax under the provisions of section 2, chapter 194, Laws 1921, which claim was allowed by the court. This section is as follows:

"Every insurance company, partnership and association transacting business in this state, except domestic, mutual, co-operative or assessment associations, annually, before the first day of March of each year, shall pay to the state bank examiner two per cent. on the gross amount of premiums received or contracted for by it from business in this state for the last preceding year ending December 31st, less returned premiums and reinsurance in admitted companies, and no other tax shall be laid upon or collected from such companies, partnerships or associations, except for real estate held by them."

The interpretation of the section would seem to be plain. The first clause provides that every insurance "company, except domestic, mutual, co-operative, or assessment associations, shall pay the tax. The word "domestic" clearly refers to "company, partnership, and association." Then follows the other class of insurance companies, viz. "mutual, co-operative, or assessment associations." In other words, all domestic companies, partnerships, and associations are exempt from the tax. Then follows another class which is exempted, viz. "mutual, co-operative, or assessment associations." Whether the word "mutual" is used in such a broad sense as to include such mutual companies as the New York Life, the New York Mutual, and others, would seem to be doubtful; but this we need not decide, as it is not involved. The whole theory of these exemptions to domestic companies is that they bring money into the state, while foreign companies take money out of the state.

The Attorney General argued that there is a plain and well-recognized distinction between insurance "companies" and insurance "associations," and that the word "domestic" refers to the words "mutual, co-operate, or assessment associations," and not to companies named in the first part of the section. We cannot follow the arguments, as it antagonizes the whole theory of the exempton above outlined. We are not unmindful of the rule that exemptions from taxation are not favored, and that the exemption, in order to be available, must be clearly granted. We deem the section, however, sufficiently plain to extend the exemption to domestic insurance companies.

It follows that the judgment of the court below was correct and should be affirmed, and it is so ordered.

BRATTON and BOTTS, JJ., concur.

[No. 2996. Oct. 1, 1924]

BACA v. BOARD OF COM'RS OF SOCORRO COUNTY et al.

SYLLABUS BY THE COURT.

1. Where, for the purpose of fixing the salaries of county officers, the several counties of the state are classified by the Legislature upon the basis of the final full assessed valuation of the property therein as shown by the tax rolls of a given year, and it is provided that such classification shall continue until a specified date, and that the counties shall then, and each four years thereafter, be reclassified upon the basis of the assessed valuation as finally fixed for the preceding year, the fact that such valuations are reduced between the dates or reclassification so fixed, by reason of the creation of a new county by the Legislature from the territorial limits of a county so classified, does not operate to change the classification of such county, in the absence of a general law so providing.

2. Section 1 of chapter 16 of the Laws of 1919. providing for the levy by boards of county commissioners of "a tax sufficient to pay the salaries and expenses of county officers whose emoluments and expenses have heretofore been paid out of the salary fund as created by chapter 12 of the 1915 Session Laws of New Mexico," merely substitutes the sum so to be levied for the "eight per centum" of all taxes and licenses collected each year, which was by section 13 of this act required to be turned into the county salary fund.

3. Section 15 of the County Salary Act of 1915 is not repealed or amended in any way by chapter 16 of the Laws of 1919, except as to the disposition of the surplus remaining in the county salary fund at the end of the calendar year.

4. Under the decision in James v. Board of County Commissioners of Socorro County, 24 N. M. 509, 174 P. 1001, the provisions of the Bateman Act were not repealed by chapter 16 of the Acts of 1919 providing for the payment of salaries of county officials.

5. The county commissioners of Socorro county have no authority to include in the budget for 1925 an amount to reimburse a deficiency in the salaries of county officers due in 1923, caused by the fact that through an erroneous classification of Socorro as a second-class county, instead

of a first-class county, at the time of levying taxes in 1922, an inadequate amount was levied to pay the salaries of the county officers upon the basis of its classification as a first-class county.

Appeal from District Court, Socorro County; Owen, Judge.

Action by J. S. Baca against the Board of County Commissioners of Socorro County and another. From a judgment for plaintiff, defendants appeal. Reserved, and remanded, with instruction.

Summers Burkhart, of Albuquerque, for appellants.

M. C. Spicer, of Socorro, for appellee.

OPINION OF THE COURT

FORT, J. On June 26, 1924, there was issued by the clerk of the district court of Socorro county, an amended writ of mandamus upon the information of J. S. Baca, relator, against the board of county commissioners of Socorro county and the state tax commission of the state of New Mexico. The writ recites in substance that the relator has, since January 1, 1923, been the duly elected, qualified, and acting sheriff of Socorro county; that Socorro county was classified by the County Salary Act (Laws 1915, c. 12) as a county of the first class, and in 1921 was classified by the state auditor as a county of the first class under the provisions of section 19 of this act; that it was the duty of the county commissioners, in 1922, to have prepared, and of the state tax commission to have approved, budget estimates sufficient to raise the sum of approximately $25,500 from the face of the tax rolls of Socorro county for the salary fund for the year 1923; that instead of making and approving such estimates, the state tax commission pretended to reclassify Socorro county, among other counties, and by such reclassification designated it as a county of the second class, and ordered the commissioners to make budget estimates for the salaries of county officers for the year 1923 in the amount of $18,464.91, which was thereafter approved; that the

sum so fixed was only sufficient to pay the salaries of such officers on the basis of officers of a county of the second class, and insufficient to pay such salaries on the basis of officers of counties of the first class, and that there is due to the relator and other county officers of Socorro county for the last quarter of the year 1923 the sum of $5,726,36, by reason of the failure of the defendants to perform their duty as provided by law, and the county officers have therefore been unable to receive their salaries in full for the year 1923; that the board of county commissioners failed in 1923 to submit to the state tax commission, and the state tax commission failed to approve, a budget providing for the payment of the sums so due the county officers of Socorro county for 1923, and threaten not to do so in the year 1924.

The board of county commissioners are directed to include in the budget estimate for 1924 an additional levy to cover such deficiency in salaries for 1923, over and above the amount necessary for the current expenses of Socorro county for 1925, which, with other tax levies, shall not exceed the 5-mill limit provided by law for county purposes. The county filed no answer, but the state tax commission filed its answer admitting the substantial allegations as to the failure to levy the tax, but denying that Socorro county was a first-class county, because, by the creation of Catron county, by chapter 28, Laws 1921, the assessed valuation of property in Socorro county was reduced below $14,000,000. They further answered that in the event insufficient money to pay the salaries in full was collected in 1923, under the levies made for that purpose in 1922, they are entitled to receive in full payment of such salaries only their pro rata share, with other creditors of the county, of the money collected under the levies for salary purposes and for the general county funds during that year.

The case was submitted upon the pleading and upon the following stipulation:

"It is hereby stipulated between said relator and said de-

fendant, the state tax commission, by their respective attorneys, subject to the objections hereinafter set forth:

"(1) That the tax rolls of Socorro county for the years 1920, 1921, 1922, and 1923 show that the assessed valuation of said county for said years, and that the assessed valuation of the property segregated by the creation of Catron county and that the budget estimates approved by the state tax commission and the tax levies on the tax rolls for the years 1922 and 1923 for the current expenses of said county for 1923 and 1924 are all as set forth in the answer of said defendant state tax commission to the amended writ herein:

"(2) That no legal proceeding was instituted by said relator or any of the officers of Socorro county to compel the distribution of the moneys raised by said tax levies for 1922 and 1923 upon the basis of a larger proportionate share thereof for salaries than that shown by the budget estimates to pay the salaries of said county officers;

"(3) That the records of the county commissioners of said county show no demand by said relators or any of said officers for a larger proportionate share for salaries of the revenue raised by said tax levies than the amount of the budget estimates. The said relators, however, object to the introduction in evidence of said facts, on the ground that the same is irrelevant and immaterial to the issues herein.

"It is further stipulated by said parties that the budget estimates made in 1922 of the amount necessary to pay the salaries of county officers of said county for the year 1923 was made by the county commissioners upon instructions from and under the direction of the state tax commission. The state tax commission, however, objects to the introduction of the evidence of said facts on the ground that the same is immaterial and irrelevant upon the issues herein."

The court entered judgment in favor of the relator, finding the facts as stated in the stipulation, and directed that a peremptory writ of mandamus issue against the defendants, commanding the board of county commissioners to include in its budget estimates for county purposes for the year 1925 the sum of $5,726.35 over and above the amount necessary for the current expenses of Socorro county for the year 1925, and to certify such budget estimate to the state tax commission for approval, as now provided by law; and at its October, 1924, meeting to make and order a special levy on all taxable property of Socorro county as shown by the tax rolls of said county for such year sufficient to raise said sum of $5,726.35, on the face of the tax roll, and that such levy be kept within the 5-mill limitation provided by law for county pur-

poses; and commanding the state tax commission to approve such budget estimates, and to certify such approval to the proper officers of Socorro county as provided by law. The case is now before this court upon the appeal of the state tax commission from this judgment.

[1] 1. Under the provisions of the Salary Act of 1915 (chapter 12, Laws 1915) Socorro county came within the classification of first-class counties, and under the provisions of section 19 of that act was also classified as a first-class county by the state auditor in 1921. Acting upon the resolution of the state tax commission, set out in full in the case of Love v. Dunaway, 28 N. M. 557, at pages 560, 561, 215 P. 822, of the opinion in that case, the budget estimates of salaries for Socorro county was fixed upon the basis of such salaries for a second-class county. Under the decision in this case Socorro county was entitled to be classified as a first-class county, and in changing the basis of salary levies the board of county commissioners acted without authority. It is conceded by the appellants that the change in classification by this order was erroneous, but they contend that because the creation of Catron county from the territorial limits embraced within Socorro county by the Legislature in 1921 reduced the valuation of taxable property in Socorro county below $14,000,000, the minimum valuation for first-class counties under the Salary Act of 1915, the classification of Socorro county was automatically reduced from that of a county of the first class to that of a county of the second class. Catron county was created by chapter 28, Laws 1921, which is entitled "An act creating the county of Catron and providing for the government thereof, and the payment of its indebtedness." While Catron county is by the seventh section of that act classed as a fourth-class county, nowhere is any reference made to a change of classification of Socorro county. As no such reclassification was made by this act, it is unnecessary to consider whether, if it had been, the legis-

lation would have been special, and in conflict with article 4, section 24, Constitution of New Mexico. The manner in which counties were to be reclassified was at that time specifically provided for by section 19 of the County Salary Act of 1915, and there is nothing to indicate any legislative intent to repeal, modify, or amend this section. It is a rule of statutory construction that repeals by implication are not to be favored, and that where two statutes can be construed together, and preserve the objects to be obtained by each, they should be so construed. James v. Board of County Commissioners of Socorro County, 24 N. M. 509, 174 P. 1001. This question is very fully discussed in the James Case, and needs no elaboration here. We do not think that, under the principles laid down in that case, there is anything to indicate any intention on the part of the Legislature to repeal, amend, or modify the County Salary Act of 1915 as to the manner of classifying counties, as therein provided.

[2-5] 2-5. Appellants contend that, under the provisions of the Bateman Act (sections 1227-1233, inclusive, Code 1915), the board of county commissioners of Socorro county have no authority in 1924 to levy a tax to make up a deficiency in salaries for the year of 1923. The application of the Bateman Act to this and similar questions has been before this court in several cases since the passage of the Salary Act of 1915.

In the case of James v. Board of County Commissioners, *supra*, the sheriff of Socorro county had instituted an action against the board of county commissioners for a balance due for the salaries of himself and deputies from a previous year. It was contended that the Bateman Act was repealed by the County Salary Act of 1915, provided for the payment of salaries of county officers. The provision of the Act of 1915, which was considered in the James Case, was section 15, which is as follows:

"Should the county salary fund at any time be insufficient to pay the salaries and expenses provided for to be paid

therefrom, or any part thereof, the deficiency shall be paid from the current expense fund, which fund shall be reimbursed to the extent of any deficiency so paid as soon thereafter as funds shall be available in the county salary fund. Any surplus remaining in said county salary fund at the end of any calendar year may be transferred to the credit of the county road fund or current expense fund upon order by the county commissioners."

In considering this question Mr. Justice Roberts, at page 517 (174 P. 1004) of the opinion said:

"By this section we think it is apparent that the Legislature recognized that thehe might be temporary deficiencies in the county salary fund, and simply provided that in such cases, if there was any money in the current expense fund, the deficiency should be paid out of the current expense fund, subject to reimbursement from the salary fund upon moneys becoming available therein. A large portion of the salary fund was made up from fees earned by officers under existing laws. These necessarily would come in irregular amounts. But the fact that the county treasurer was authorized to pay the deficiency in county salaries for any quarter out of the current expense fund does not, in our judgment, tend to indicate an intention on the part of the Legislature to repeal the Bateman Act. Under the Bateman Act the county officer was entitled to pro rate with the creditors of the county in the moneys collected for the current year, and the mere fact that the Legislature had created a salary fund, made up of certain moneys, and provided that in the event of a deficiency money should be transferred to such fund from the current expense fund, would not indicate an intention on the part of the Legislautre to pay the salaries of the county officers, regardless of the moneys collected during the current year. We think such officers would still be entitled to pro rate with the creditors of the county in the moneys collected for the current year, and the mere fact that the Legislature had created a salary fund, made up of certain moneys, and provided that in the event of a deficiency money should be transferred to such fund from the current expense fund, would not indicate an intention on the part of the Legislature to pay the salaries of the county officers, regardless of the moneys collected during the current year. We think such officers would still be entitled to pro rate with the creditors of the county for the current year, as authorized by the Bateman Act. There is no inconsistency between the provisions of the two acts in this regard."

In the case of Sena v. Board of Commissioners of Guadalupe County, 27 N. M. 461, 202 P. 984, it was decided that:

"(1) The indebtedness incurred by a county for the publication of the delinquent tax list, under Laws 1917, c. 80,

§§ 1 and 17, and Laws 1919, c. 43, § 3, is within the provisions and limitations of the Bateman Act."

In Santa Fe Water & Light Co. v. Santa Fe County et al., 29 N. M. 538, 224 P. 402, it was held that the limitation against the payment of unpaid debts provided by the Bateman Act (sections 1227-1233, Code of 1915) applies to debts created for necessities such as water and lights for the use of a courthouse, or others which may be arbitrarily placed against the county, or the municipality, with the same force as to those that may be voluntarily created by such county or municipality. In the opinion in that case, at page 545 (224 Pac. 405,) it was said:

"The duty to publish the delinquent tax list with the incidental cost thereof was not a matter resting within the judgment or discretion of the county commissioners, or other county officials. They had nothing to say with respect to whether such a debt should be created. It was arbitrarily made their duty to publish it and the county to pay the cost thereof, and certainly such a proceeding is necessary to the successful conduct of the business of the county. We think the purpose served by the act in question is to force the enumerated municipal corporations to keep within their income, in order to prevent the creation of excessive obligations which cannot be currently paid, but lap over from year to year with the result that creditors are long delayed in the collection of their just debts and the municipality is peoned in its effort to pay. * * Had it been intended by the Legislature that only such debts as are voluntarily created by a county or other municipality are excluded from its operation, the natural and logical thing would have been to say so in clear and unambiguous language."

See, also, Johnston v. Board of County Commissioners of Bernalillo County, 12 N. M. 237, 78 P. 43; Optic Publishing Co. v. Board of County Commissioners of San Miguel County, 27 N. M. 371, 202 P. 124.

It is contended by the appellee that chapter 16, Laws of 1919, was intended to provide for the payment of the salaries of county officers in full, and to take such salaries out of the operation of the Bateman Act. Prior to the enactment of the law of 1919 relative to salaries of county officers, the county salary fund, as provided in chapter 12 of the Laws of 1915, was made up, among other things, of fees, com-

missions, mileage and per diem collected by the several officers, and 8 per centum upon the amount of all taxes and licenses collected from all sources; and section 15 provided that should the county salary fund at any time be insufficient to pay the salaries and expenses of county officers, or any part thereof, the deficiency shall be paid from the current expense fund, which fund shall be reimbursed to the extent of any deficiency so paid as soon thereafter as funds shall be available in the county salary fund. Any surplus remaining in such salary fund at the end of any calendar year may be transferred to the credit of the county road fund or current expense fund upon order by the county commissioners. This was the law appliciable to the salaries of county officers at the time of the decision in James v. County Commissioners, supra.

The title of chapter 16, Laws of 1919, is "An act providing for the payment of salaries of county officers and repealing section 13 of chapter 12 of the 1915 Session Laws of New Mexico." Sections 1, 2, 3, and 4 of that act provide as follows:

"Section 1. That the boards of county commissioners shall hereafter levy a tax sufficient to pay the salaries and expenses of county officers whose emoluments and expenses have heretofore been paid out of the salary fund as created by chapter 12, of the 1915 Session Laws of New Mexico.

"Sec. 2. That such tax, when collected, shall be covered into the county salary fund, and together with the fees, commissions, mileage, and per diem collected under the provisions of section 8, chapter 12, of the 1915 Session Laws of New Mexico, shall constitute the county salary fund of the county in which the same is collected, and no warrant shall be drawn upon, nor paid from, said county salary fund, except for the salaries and expenses by law payable therefrom.

"Sec. 3. That no surplue arising in said county salary fund shall be transferred to any other fund, but such surplus shall be transferred to, and become a part of, the county salary fund for the year following the arising of such surplus fund.

"Sec. 4. The provisions of section 13, chapter 12, 1915 Session Laws of New Mexico shall not apply to taxes levied and assessed for the eighth fiscal year of the state of New Mexico and the fiscal years thereafter following."

It clearly appears that the purpose of section 1

of this act was to substitute the tax therein required to be levied for the 8 per centum of all taxes and licenses collected from all sources, required by section 13 of the Salary Act of 1915 to be covered into the county salary fund. Section 2 of the act of 1919 expressly provides that this tax, with the fees, commissions, mileage, and per diem collected under the provisions of the County Salary Act of 1915, shall constitute the county salary fund which, prior to the passage of this act, was made up of such fees and the 8 per centum above referred to. Section 4 of the Act of 1919 expressly repeals section 13 of chapter 12 of the Laws of 1915, and section 3 of the Act of 1919 provides that the surplus from the salary fund shall remain therein, but has no effect upon the provisions of section 15 except to provide that the surplus from the salary fund shall remain therein, instead of being transferred to the credit of the county road fund or current expense fund. There is no change in the law relative to the payment of salaries quarterly, nor to the use of the current expense fund temporarily for this purpose, nor to the method of supplying any deficiency. The mere fact that the law of 1919 substitutes a definite item of taxation to be levied for county salaries for the indefinite item of 8 per centum of all taxes to be collected under the law of 1915, and that it requires any surplus to be retained, instead of being paid into the county road fund or current expense fund, does not change the law relative to the payment of any deficiencies from county salaries which may remain after the funds provided therefor in any year have been exhausted, and in that respect it remains the same as when the James Case was decided.

It is argued by appellee that this case stands upon the same basis as that of Capital City Bank v. Commissioners of Santa Fe County, 27 N. M. 541, 203 P. 535, where it is held that:

"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."

The facts in that case disclose that the Legislature, at its special session in 1917, passed an act permitting a levy of one mill for the years 1917 and 1918, to raise funds for county highways, and to permit counties to anticipate the collection of the taxes by the issue and sale of certificates of indebtedness. A levy was made in Santa Fe county for this purpose, and certificates of indebtedness to the amount of 2,000 were issued. The levy brought more than enough money into the fund to pay the certificates, but only one was paid. The balance of the money was diverted by the county authorities for other purposes. A judgment was obtained against the county for the unpaid certificates, and a special levy was ordered to pay the judgment. This court upheld the decision of the lower court that the Bateman Act had no application to such a situation, and in the opinion in that case the court said:

"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 to other uses, and then say, when the certificates are presented, that they cannot be paid for lack of available funds. Such a contention does not appeal to a sense of justice."

It is argued that the same principle is involved in this case, and that the County Salary Act of 1919 created a special fund for a special purpose, as in that case; and that the funds which should have been raised for the county salary fund for Socorro county for the year 1923 were, by their failure to provide for the same, diverted by the county commissioners and state tax commission to other funds in plain violation of law. It is admitted that the funds were not collected and then diverted, as in the Bank Case, but it is contended that the funds were diverted by a reduced budget estimate and levy; that the Legislature provided for the salaries and expenses of county of-

ficers just as it did for the levy of the one-mill tax, and a failure to levy a tax sufficient to pay such salaries was just as much of a diversion of the funds as if the money had been collected and then diverted. If a sufficient amount had been collected in the county salary fund to pay such salaries, and it had been diverted to other purposes, a case more nearly similar to that of the Bank Case would be presented; but no such facts appear in the instant case.

The real distinction to be drawn between the present case and that of the Capital City Bank v. County Commissioners, lies in the fact that the decision in the Bank Case is bottomed on the proposition that the claim there involved was payable out of a special fund only and was not entitled to share in the general funds of the county for any deficiency in the amount collected, while we hold in this case that claims for salaries of county officers are entitled to participate in the general fund as to any balance due after the exhaustion of the salary fund, to the same extent as under the law construed in the James Case. There may be other points of distinction which have not been argued, and are not, therefore, further noticed.

We are of the opinion that the ruling in the James Case is controlling here, and that the county commissioners of Socorro county had no right to include in its budget for the year 1925 a tax levy to pay for the deficiency in the county salaries in 1923 occasioned by the erroneous levy therefor in 1922.

The judgment of the district court is therefore reversed, and the cause remanded, with instructions to dismiss the writ of mandamus, and it is so ordered.

BOTTS, J., concurs.

PARKER, C. J., not having heard the oral argument in this case, did not participate in the opinion.

[No. 2934, 2935. Oct. 14, 1924]

CLARK v. ROSENWALD et al.

SYLLABUS BY THE COURT

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, neither the parties to the appeal or writ of error nor the parties omitted from the appeal or writ of error, can, by petition, motion, or otherwise, be made parties to the cause in the Supreme Court after the time which an appeal may be prosecuted from the judgment in the court below has expired.

Appeal from District Court, San Miguel County; Leahy, Judge.

Suit by Lucian Rosenwald and another against the Rosenwald Realty Company, in which John S. Clark, as trustee in bankruptcy of the estates of E. Rosenwald & Son, and others, intervened. Petition of intervention and answers stricken, judgment for plaintiff, and the intervener brings error. On objections to petition of the Rosenwald Realty Company, original defendant in writ, to be joined as party plaintiff in such writ of error, and on motion of plaintiff in error that such company be compelled to become defendant to such writ. Petition dismissed, and motion overruled.

C. W. G. Ward, of East Las Vegas, for plaintiff in error.

C. J. Roberts, of Santa Fe, for defendants in error.

OPINION OF THE COURT

FORT, J. A draft of this opinion, substantially in the following form, was prepared by Mr. Justice BRATTON prior to his resignation, and delivered to the undersigned, to be presented to the court after suggested corrections were made. Having been so submitted and duly adopted by the court, it is herewith set forth as follows:

Lucian Rosenwald and Emma Rosenwald instituted a suit against the Rosenwald Realty Company to re-

cover a personal judgment upon several promissory notes. John S. Clark, as trustee in bankruptcy of the estates of E. Rosenwald & Son, Cecilio Rosenwald, Gilbert E. Rosenwald, and David E. Rosenwald, intervened and pleaded certain defenses to each and all of said notes. On August 18, 1923, his petition in intervention and the answers filed by him were stricken from the files. On September 1, 1923, a judgment by default, dated August 19th, was filed. On February 15, 1924, John S. Clark, trustee as aforesaid, filed his application for a writ of error to review such judgment. The writ immediately issued. On May 12, 1924, Rosenwald Realty Company, the original defendant in the suit, filed its petition for leave to join as a party plaintiff in such writ of error, and on June 5, 1924, the plaintiff in error filed a motion that the Rosenwald Realty Company be compelled to become a party defendant to such writ. Objections to the petition and the motion were filed, upon the ground, among others, that the time for appeal had expired before these proceedings were instituted in this court, and the case is before us upon the issues thus raised.

1. It is apparent that the petition of the Rosenwald Realty Company to become a party plaintiff in error, and the motion of the plaintiff in error that it be compelled to become a party defendant in error, were both filed after the time allowed by law within which a writ of error could have been sued out, or an appeal have been taken. Section 1, c. 43, Laws 1917. The question presented is whether or not omitted parties may be brought before the court by either of these methods after the time allowed by law for suing out a writ of error from the judgment in the district court has expired. Plaintiff in error, in support of his right to have new parties made in the Supreme Court, upon the petition and motion filed herein, relies upon section 14, c. 43, Laws 1917, which provides:

"Persons may be substituted as parties or compelled to become parties in cases pending in the Supreme Court in like

time and manner and with like effect, as provided for in original suits in district courts."

Three cases were discussed in the argument in this court upon the question now under consideration, and in support of the contention of plaintiff in error. Watters v. Treasure Mining Co. et al., 21 N. M. 275, 153 P. 615, Baca v. Board of Commissioners, 21 N. M. 713, 158 P. 642, and Baca v. Coury, 27 N. M. 275, 199 P. 1015. It was conceded that in the Baca Case the application to add new parties in this court was made after the time allowed by law to appear from the judgment in the district court had expired, and that in the other two cases the application was made prior to the expiration of such time. While this is true as to the Baca Case, it will appear from an examination of that decision that the question here presented was neither considered nor decided in that case, and for this reason that decision has no real bearing upon the point now before the court. Under these decisions, there is no question of the right to bring in new parties in the Supreme Court, upon appeal in a proper case and in due time. Section 1, c. 43, Laws 1917, provides the time within which any party to a final judgment in the district court may appeal therefrom to the Supreme Court, and in this respect writs of error are similar to appeals. Section 4, c. 43, Laws 1917. As to parties omitted in the original appeal, the proceeding is an entirely new appeal, and proper steps must be taken to bring such parties before the appellate court wthin the time allowed by law for appeal, as otherwise the statute limiting the time within which an appeal may be taken would be nullified. The following rule, laid down in Elliott on Appellate Proc. § 162, is approved and adopted by this court as the correct rule in such cases:

"It is not consistent with principle, nor with the rules essential to the orderly and effective administration of justice, that one who prosecutes an appeal should be permitted to negligently delay the bringing in of necessary parties until after the expiration of the time designated by law as that within which the right to appeal exists. ***Where a right is given to a party upon the condition that he exercise it

within a fixed time, he must exercise it within that time, or it will be lost. It is therefore correctly held that all necessary parties must be brought in within the time fixed by law, or the appeal will be dismissed."

This rule is supported by the following authorities: 2 R. C. L. p. 66; Cornell v. Franklin 40 Fla. 149, 23 So. 589, 74 Am. St. Rep. 131; National Bank of Lancaster v. Newheart, 41 Fla. 470, 27 So. 297; Queen v. Lipinskey, 17 Ind. App. 700, 45 N. E. 617; Bridge v. Main Street Hotel Co., 62 Kan. 866, 61 P. 754; Daughters v. German-American Insurance Co., 10 Kan. App. 458, 62 P. 428; Smith v. Craft (Ky.) 58 S. W. 500; Andres v. Kridler, 42 Neb. 784, 60 N. W. 1014; Hight v. Batley, 32 Wash. 165, 72 P. 1034, 98 Am. St. Rep. 851; Sanders v. Hart, 35 Okl. 212, 130 P. 284.

For the reasons stated above, the objections to the petition of defendant to be made a party plaintiff in error, and to the motion of plaintiff in error that the defendant be made a party defendant in error, are sustained, and said petition is dismissed and said motion overruled; and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

[No. 2804. Oct. 25, 1924]

STATE v. MARTINEZ.

SYLLABUS BY THE COURT

1. The instructions of the court to the jury in a criminal case should cover the whole case; and a defendant, upon proper written request, is entitled to have an instruction given upon his theory of the case, and to have the law declared in reference to the facts which he contends establish such defense when there is any competent evidence reasonably tending to support such facts.

2. Where, on a trial for homicide, the defendant, a woman, claims that she killed the deceased to protect herself from an attempted rape and an assault with intent to commit such rape, and presents proper written requests to the court to apply the law of justifiable homicide to the facts constituting such defense as testified to by her, it is the duty of the court to give such requested charges, or equivalent ones in language of his own choosing; and it is not sufficient merely to charge in general terms the law of justifiable homi-

cide as applicable to the defense of one's person from death or great personal injury without any further reference to the nature of such apprehended injury.

3. The admission in evidence of a purported confession of a defendant is to be determined by the fact of whether the same was made freely and without hope of benefit to his case; and when such confession is offered the trial judge should, in the absence of the jury, inquire into the circumstances under which the confession was alleged to have been made and determine from such evidence whether or not such confession was in fact voluntary, before admitting the same in evidence.

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

Hilaria Martinez was convicted of voluntary manslaughter, and she appeals. Reversed and remanded.

H. A. Kiker and H. L. Bickley, both of Raton, for appellant.

Milton J. Helmick, Atty. Gen., and J. W. Armstrong, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

FORT, J. Hilaria Martinez was indicted in Taos county for the murder of Andres Lopez, and upon the trial was found guilty of voluntary manslaughter. This appeal is from the judgment and sentence entered upon the verdict so returned.

The evidence for the state tended to show that the deceased, shortly after noon on February 16, 1921, was proceeding by a trail leading from the place where he was staying, to a cabin which he was building, some distance away, and near the home of the defendant and her husband, with his axe on his shoulder, accompanied by his little son eight years old; that he met the defendant, Hilaria Martinez, washing near a mill between the hill upon which the deceased was staying and the hill upon which she and her family resided; that the defendant said to the deceased, "You have gotten me into trouble," and deceased asked her, "Who told you?" and on being informed that "Aloyho" had informed her, deceased said, "Aloyho

is a liar, and you are a liar;" that the defendant thereupon said, "Get away from here," and deceased said, "Well, I will get away," and started away, when defendant fired twice at him with a 22-caliber rifle, one bullet striking him in the back of the head; that the deceased fell forward and threw his axe in front of him.

The evidence of the defendant tended to show that she was a married woman living with her husband; that the deceased had, in December, 1920, purchased a plot of ground from her husband near their home, upon which he was building a dwelling house; that some time in January, 1921, deceased came to her house, during her husband's absence, at the noon hour, about the time of their noonday meal, and at her invitation ate dinner with the defendant and her family; that after dinner deceased made an effort to grab defendant, and she went out of the house and told him to go away, and that she was going to tell her husband; that the deceased left the premises, and on the following day returned shortly after she had finished her noonday meal, while she was washing dishes, her husband being still absent; that the house of defendant consisted of a kitchen and bedroom, she being in the kitchen; that deceased grabbed her and tried to take her to the room, and she got away from him and started to take a rifle and told him that if he did not get away she would fire, whereupon he left; that her husband returned that night, and she told him what had occurred; that the deceased, shortly thereafter, returned to her premises while her husband was at home to get a wagon which he had left, and that her husband, in the presence of a neighbor, asked the deceased why he was bothering defendant, and told him to get away from the house, and that he did not want him at his house any more, and not to come within his property or his wife's friendship; that deceased did not afterwards return to her house, but, while working on his little house a short distance away, would wave at her and whistle to her when he saw her; that he only did this while her husband was

away and while she was alone; that on the 16th day of February, during her husband's absence from home, she, in company with her children, went to the mill about 9 o'clock to do her washing and took a rifle with her to protect herself from the deceased; that at the noon hour, she and her children went to her house for dinner, taking the rifle with her, and about 1 o'clock returned to her washing at the mill, again accompanied by her children and carrying the rifle; that shortly thereafter the deceased came up behind her, while she was rubbing clothes and the first she knew of his presence was that he put his arm around her and hugged her; that she got away and told him to get away, and that he said he would not do so; that she jumped and took the rifle and again directed him to leave, and he told her he would not, but raised his axe in a threatening position, and when she saw him with the axe she again told him to get away, and again he said he would not, and she fired without placing her rifle to her shoulder; that he was facing her when she fired the first time, but she does not know what his position was when she fired the second shot, because she "was in anger and in fear at the same time"; that she shot rapidly, and after the second shot he was lying down, and she went and reported to the justice of the peace what had happened; that the justice of the peace told her to go home, and she did so; that she had no conversation with the deceased until he grabbed her.

[1] 1. The first error assigned by the defendant is the refusal of the court to give to the jury the following requested instruction:

"You are instructed the defense of one's person may, in the case of a woman, as well include the protection of her chastity as her body from injury of any other kind; and if a woman be attacked under certain circumstances, as viewed from the standpoint at the time of said attack, as will lead her to reasonably apprehend that said attack would result in the sexual abuse of her person, then such woman would be justified in using such force as necessary, even to the extent of taking the life of her assailant, to protect her honor and chastity and her body from sexual abuse."

The instructions given by the court covering the question of self-defense were as follows:

"In this case the defendant sets up the ground of self-defense. Under the laws of the state homicide is justifiable when committed in the lawful defense of one's own person, when the person assaulted shall have reasonable ground to apprehend a design upon the part of her assailant to kill her or to do her some great personal injury, and there shall be imminent danger of such design being accomplished.

"If you believe from the evidence, to the extent of raising in your mind a reasonable doubt of the defendant's guilt, that at the time the defendant shot the deceased, the deceased was attempting to kill the defendant or to do her some great personal injury, or that the defendant had reasonable grounds to apprehend, and did apprehend, that the deceased was then and there about to kill her or to do her some great personal injury, and that the defendant had reasonable grounds to believe and did believe that the danger of death or great personal injury being inflicted upon her by the deceased was then and there imminent and impending, and that the defendant had reasonable cause to believe and did believe that it was necessary for her to shoot the defendant in order to avoid such impending danger to her, you will then find the defendant not guilty."

The defendant excepted to the refusal of the court to give the requested instruction, "for the reason that the same explains to the jury the meaning of the term 'great personal injury' as used by the court in his instructions and as applied under the evidence in this case, in that the same shows to the jury that the right of protection extends to, or the right to kill if necessary to protect the chastity of a woman," and because the court nowhere in his charge gives an instruction covering that subject, and the evidence requires such instruction. The exception urged to the instruction given is that "the same limits the right of self-defense to reasonable apprehension on the part of the defendant of death or great personal injury at the hands of the deceased, without defining or attempting to define to the jury what may be meant by the term 'great personal injury,' for the reason that under the evidence in this case there is necessity for a definition of the term 'great injury,' that the same may not be construed by the jury only to wounding or externally injuring the defendant," and because

nowhere in the charge of the court was such definition given.

Appellant contends that it is the duty of the court to instruct the jury upon all the law of the case; and, where there are several elements of justification, the court must instruct as to each element, and should not select one or more and omit others. By section 2794 of the Code of 1915, it is "made the duty of the court in all cases, whether civil or criminal, to instruct the jury as to the law in the case, and a failure or refusal so to do shall be sufficient ground for a reversal of the judgment by the Supreme Court upon appeal or writ of error." Since the adoption of the Code of Civil Procedure, the court is under no obligation in a civil case to instruct the jury unless requested. Palatine Insurance Co. v. Santa Fe Mercantile Co., 13 N. M. 241, 82 P. 363. In a criminal case, however, it is still his duty so to do. Faulkner v. Territory, 6 N. M. 464, 30 P. 905; Aguilar v. Territory, 8 N. M. 496, 46 P. 342; Territory v. Baca, 11 N. M. 559 (2), 71 P. 460; Territory v. Guillen, 11 N. M. 194, 66 P. 527. While this is true, it is the duty of counsel for defendant to request the court to give such instructions as he thinks should be given, or to except to the instructions as given, because of their failure to cover the issues involved. State v. Padilla, 18 N. M. 573, 139 P. 143; State v. Johnson, 21 N. M. 432, 434, 155 P. 721; State v. Lucero, 24 N. M. 343, 171 P. 785. Upon proper request, the defendant in a criminal case is entitled to have instructions given upon every material issue raised by the evidence presented. As was said in Reed v. State, 3 Okl. Cr. 16, 103 P. 1070, 24 L. R. A. (N. S.) 268:

> "The instructions should cover the whole case. The defendant is entitled to an instruction defining the law as applicable to his defense, if there is any competent evidence reasonably tending to substantiate that defense."

See, also, 14 R. C. L. pp. 793, 794, § 55.

The defendant is also entitled to have instructions given at his request upon his theory of the case, and

to have the law declared in reference to the facts which he contends the evidence reasonably tends to show, and to an instruction defining the law as applicable to his defense, if there is any competent evidence reasonably tending to establish it. 14 R. C. L. pp. 797-800, §58. And this is true in prosecutions for homicide, 13 R. C. L. p. 935, § 236. Where self-defense is involved in a criminal case, and there is any evidence, although slight, to establish the same, it is proper for, as well as the duty of, the court to instruct the jury fully and clearly on all phases of the law of self-defense that are warranted by the evidence, even though such defense is supported only by the defendant's own testimony. 30 C. J. pp. 367, 368, § 618, and numerous cases cited in note 11; 13 R. C. L. pp. 933-935, §§ 235, 236; State v. Finkelstein, 269 Mo. 612, 191 S. W. 1002. It is a general rule that where the court has fairly presented the issues to the jury, generally, this is sufficient, unless an instruction upon a particular phase of the case is requested. But where one defense is mainly relied upon, and evidence is introduced to sustain it, it is error to omit to call the jury's attention thereto if properly requested. 16 C. J. pp. 1056, 1057. While it is a duty to give an instruction upon a particular phase of the case, the statute in this state authorizes the court to modify such instructions (section 2797, Code 1915) and if the instructions of the court fully cover the subject of requested instructions, it is not error to refuse such requests. Territory v. Kimmick, 15 N. M. 178, 106 P. 381.

"It is elementary, and thoroughly well settled in homicide cases as well as others that the court must charge on every issue or theory having any support in the evidence. The instructions should distinctly set forth the law applicable not alone to the case as made by the evidence for the prosecution, but the case as made by all the evidence, and especially the law applicable to any favorable evidence comprising defensive matter in behalf of the accused." 13 R. C. L. pp. 933, 934, § 235.

Since the charge of the court as given correctly covered, in a general way, the issues of self-defense and

justifiable homicide presented in this case, and correctly stated the law in regard thereto, the right of the defendant to have the requested charge given by the court must depend upon whether there was sufficient evidence to cover the particular phase of self-defense thereby presented, and whether the charge as given correctly stated the specific elements constituting such phase, and the law applicable thereto. The evidence of the defendant in this case tended to show that on one occasion, in January, prior to the killing on February 16th, the deceased had at her home, and while her husband was absent, thrown his arms around her, and had only desisted when she told him to go away and that she was going to tell her husband, and that on the following day he returned to her home while her husband was absent and while she was washing the dinner dishes, and grabbed her and tried to take her to the bedroom, and only desisted when she started to take her rifle and told him if he did not get away she would fire; that upon the return of her husband she told him of the conduct of the deceased, and her husband ordered the deceased not to come upon his premises any more, and forbade him the friendship of the defendant; that between these dates and the day of the killing the deceased had, at times while her husband was away, waved at her and whistled to her when he would see her; that on the day of the killing, fearing an attack from the deceased, she took her children and her rifle to the washing place near the mill between the premises temporarily occupied by the deceased and her home, in order to protect herself from any attack of the deceased while she was washing her clothes; that when she went home at the noon hour she took the rifle, and upon her return in the afternoon to finish her washing she again took her children and her rifle to protect herself against the deceased; that shortly after her return to the mill, and while bending over her washtub in the act of washing her clothes, the deceased approached her from behind, and the first knowledge she had of his presence was when he grabbed her and hugged her; that

she told him to get away and he said he would not; that she jumped and took the rifle and told him to get away, that he again told her he would not, and raised an axe which he had upon his shoulder in a threatening position; that when she saw him with the axe in that position she again told him to get away, and he said he would not, and then she fired twice in rapid succession; that he was facing her when she fired the first shot, but that she did not know in what position he was when she fired the last shot, because she "was in anger and in fear, at the same time."

It will thus be seen that, according to the defendant's testimony, at the time of the shooting the deceased had an axe drawn upon her in a threatening position, and that at the same time he was refusing to go away and desist from whatever intention he may have had in mind at the time he assaulted her by placing his arm around her and hugging her. The defendant could well have inferred from this assault, when taken in connection with the two former assaults, that the purpose of the deceased was to commit a rape upon her, and she might have concluded, from the conduct of the deceased in raising his axe in a threatening position, that he intended to strike her therewith, or to frighten her in order to accomplish his design to rape her. The charge of the court merely stated that the defendant would be justified in killing the deceased when the killing was done in the lawful defense of her own person, or when she had reasonable ground to apprehend a design upon the part of her assailant to kill her or to do her some great personal injury. There was nothing in the evidence to indicate an intent to kill, except such as might have been deduced from the threatening position of the axe, and the jury might have inferred that this charge of the court only had reference to such injuries as the defendant apprehended the deceased intended to inflict upon her with his axe. It is, however, rather to be inferred from the testimony of the defendant that she claimed to have killed the deceased to protect herself against his assault with intent to rape, and that the

deceased was using the axe to compel her to submit to his purpose through fear, rather than with any intent on his part to kill her or wound her therewith in an independent assault. While this testimony may have authorized the court to submit the charge as given, certainly the defendant had a right to have submitted to the jury her theory of the case, that she was seeking to defend herself from an attempted rape, and to have the facts relative thereto stated with sufficient clearness in the charge to distinctly present this phase of her defense to the jury. See 2 Michie on Homicide, p. 1397, § 283 (2); 2 Thompson on Trials, § 2347; Powell v. State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277; Pinder v. State, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 83; Price v. State, 18 Tex. App. 474, 51 Am. St. Rep. 322; Osborne v. State, 140 Ala. 84, 37 So. 105; Scott v. State, 46 Tex. Cr. R. 85, 79 S. W. 543; Bonner v. State, 29 Tex. App. 223, 15 S. W. 821; People v. Williamson, 6 Cal. App. 336, 92 P. 313.

We therefore conclude that, if the charge as requested was correct in the application of the law of justifiable homicide to the facts as presented in the defense of the defendant, it was justified by the evidence, and should have been given. In considering the correctness of the requested charge, it should be remembered that the purpose of this request was, not to define any elements of crime against a defendant, but merely to present correctly certain facts and circumstances constituting a special defense, and to apply the law thereto. We think that the defense of one's person in case of a woman includes the protection of her chastity, as well as the protection of her body from an assault with a deadly weapon. While it might have been more accurate to state that such right of defense included her right to protect herself from an assault with intent to rape, under the facts in this case we do not think that the use of the word "chastity" in this connection could have misled the jury. From its use they must necessarily have understood that "the protection of her chastity" meant the pro-

tection of her person from an assault by the deceased with intent to have illicit and forcible sexual intercourse with the defendant. The word "chasity" is defined in the Standard Dictionary as: "The state or quality of being chaste; sexual purity." And this requested instruction in effect informed the jury that a woman has the right to protect her sexual purity against an attack, which, under the circumstances as viewed by her, would lead her to reasonably apprehend that such attack would result in the sexual abuse of her person. If this requested charge had been directed to the definition of the offense of rape, against an accused, the use of the words "sexual abuse," instead of the more technical words of the statute of "an act of sexual intercourse with a female * * * when her resistance is forcibly overcome," as defined in section 2, chap. 110, Laws 1923, might be subject to criticism. The fourth definition of the verb "abuse" given in the Standard Dictionary is, "To violate; to ravish," and the fifth definition of the noun "abuse" given in the same work is, "Violation; rape." Since the purpose of this charge was to acquaint a jury, not presumed to be skilled in technical legal definitions, with the defense of this defendant that she killed the deceased to prevent his attempt at forcible sexual intercourse, we think that it would, if given have sufficiently accomplished this purpose, and that its lack of technical accuracy, under the circumstances of this case, affords no justification for the court's refusal to give this or some equivalent charge.

For these reasons, we are of the opinion that the objections of the state's counsel that the requested instruction was vague and indefinite and unsupported by evidence are not well taken. Had the court preferred a more technical and less rhetorical statement of this phase of her defense, it was his right under the law to have conveyed its purport in language of his own choice. But it was his duty either to give the charge as requested, or a sufficient substitute in its place. This he failed to do. The theory of the state seems to have been that the defendant killed the de-

ceased, not in self-defense, but from anger and resentment occasioned by the fact that she had heard that deceased had gotten her into trouble, when she met him and accused him, he stated that both she and her informant were liars. The court very fully presented this theory of the state in the following charge:

"The law of self-defense however does not imply the right to attack nor will it permit acts done in retaliation nor for revenge and if you believe from the evidence, beyond a reasonable doubt, that the defendant sought, brought on, or voluntarily entered into a controversy with the deceased for the purpose of wreaking vengeance upon him for some real or fancied injury, then the defendant cannot avail herself of the law of self-defense, and you should not acquit her on that ground. It is for you to determine from all the evidence whether the claim of the defendant that she killed the deceased in self-defense is made in good faith or is a mere pretense."

The fact that the court made a specific application of the law to the facts constituting the state's theory of the case accentuates his duty to have given a charge likewise specifically applying the law to the facts constituting the defendant's defense. We think that the exceptions of the defendant to the charge of the court as given, and to his refusal to give the requested charge, were sufficient, and that the court's failure to give this or some equivalent charge was substantial error.

[2] 2. The second exception of the appellant is to the refusal of the court to give her requested instruction No. 3, which is as follows:

"The court instructs the jury that in viewing the evidence in this case the jury should put themselves in the place of the defendant at the time of the alleged assault, and if you believe from the evidence that on two other occasions prior to the time of the death of the deceased, that the deceased attempted to assault the defendant, and at the time of the homicide the deceased had said or done some act that would lead the defendant to reasonably believe that he was about to again assault and try to ravish her, that the defendant need not wait until the deceased had actually attempted to ravish her, but she had the right to protect herself and her honor even to the taking of the life of the deceased if necessary."

The difference in this request and the one treated of in the previous division of this opinion is that the former presents the right of the defendant to defend herself by the taking of human life, if necessary to prevent an impending rape; while the instruction here considered relates to the right of the defendant to defend herself from an assault with intent to rape. This instruction is to the effect that if the previous conduct of the deceased was sufficient to lead the defendant to reasonably believe that he was about to attack her with intent to have forcible sexual intercourse with her, then that the defendant need not wait until the actual assault had been made, but could defend herself if, from the apparent acts and circumstances, there was reasonable ground to believe that the deceased was again about to make an assault with such intentions. The second subdivision of section 1471, Code 1915, defines "homicide" as justifiable "when committed in lawful defense of such person, * * * when there shall be reasonable ground to apprehend a design to commit a felony, or do some great personal injury, and there shall be imminent danger of such design being accomplished."

An assault is sometimes defined as "an attempt to commit a violent injury on the person of another." Georgia Penal Code, § 95; Words and Phrases, Assault. The resulting battery is not a necessary constitutent element of the offense of assault. 2 R. C. L. p. 525. Section 1480 of the Code of 1915 makes an assault with intent to commit rape a felony, and the right of self-defense would arise if there was imminent danger of the accomplishment of such assault with such design. And the defendant here did not have to wait until such actual assault had been accomplished after the clear intent appeared and the imminent danger of its accomplishment existed, and expose herself to the added danger of the actual accomplishment of the intended rape. This is true for the reason that an assault with intent to rape is a felony as well as the offense of rape itself. This theory of defendant's defense should have been submitted to

the jury by the trial court. If the charge requested in the previous division of this opinion, or an equivalent charge presenting the application of the law to the facts of defendant's defense as testified to by her, had been given, it might have been sufficiently inclusive to have covered the charge here requested. But in any event either the one or the other should have been given.

[3] 3. Another error alleged was to the admission of certain evidence in the nature of a confession alleged to have been made by the defendant to one Jose U. Ortega. When asked whether he was present when the defendant made any statement about the killing, the witness stated that he was present when the defendant made such a statement. The district attorney then asked the witness, "Did she make a statement voluntarily?" to which he replied, "Yes, sir." He then asked, "What did she say with reference to the killing of Andres Lopez?" This question was objected to on the ground, among others, that no sufficient foundation had been laid for the statement offered, there being nothing upon which to predicate it except the conclusion of the witness to the exclusion of all the facts that the statement was made voluntarily. The court overruled this objection, and in answer to the question, "Just tell us what she said," the witness stated:

> "She said, when it was asked of the other witnesses as to some relation or remarks stated by Veneriana, that he was not guilty, that she had killed Andres Lopez of her premeditation, of her own will, and that her husband had nothing to do with it; that he hadn't advised her; that he had nothing to do with it; and that she had done it."

A motion to strike this testimony was made after its admission on the same ground that had been urged to its admission, which was overruled by the court. The question presented is whether this assertion of the witness, in answer to an inquiry whether the statement was voluntary, that it was, was sufficient proof of that fact to authorize its admission. When a

confession is sought to be introduced by the state, it is the duty of the judge to make a preliminary inquiry to determine whether the same was voluntary. A very proper practice in such cases is to inquire into the circumstances under which the confession was alleged to have been made, in the absence of the jury, and for the court to determine from such evidence whether the confession was voluntary. Warton's Cr. Ev. (10th. Ed.) § 622h. It is necessary for the state, when offering the confession, to show that it was voluntary before it can be admitted, and the burden of proof is upon the state to show that no improper inducement existed when the confession was made. Wharton's Cr. Ev. (10th Ed.) § 6221. The voluntary character of such evidence should be affirmatively shown before it is admitted. Wharton's Cr. Ev. (10th Ed.) § 622k. In the case of Territory v. Emilio, 14 N. M. 147, 89 P. 239, this question was discussed at page 155 et seq. It was there held that it was not error to admit the statement in the nature of a confession. In that case, however, all the circumstances leading up to and surrounding the making of the statement were in evidence, and the court held that there was nothing to indicate that the statement had not been voluntary made. In the case of State v. Armijo, 18 N. M. 262, 135 P. 555, the court held that the admission in evidence of a confession by the accused is to be determined by the fact of whether the same was made freely and without hope of benefit to this cause. In the opinion in that case, the court, at pages 267, 268 (135 P. 556), stated:

"The rule, in this regard, as enunciated by Mr. Bishop, in volume 1, New Crim. Proc. § 1220, meets with our * * * approval, and we believe it to be decisive upon the question. It is as follows: 'Sec. 1220. The judge, * * * and as a preliminary without which no confession can go to a jury, determines, on testimony laid before him, both for and against, whether or not to admit the particular one; the burden being on the prosecuting power that tenders the confession. His decision covers, besides the law, the fact, as to which it it not ordinarily to be disturbed or reviewed, and the jury can pass merely on the effect of the confession in evidence'."

While approving this rule, the court stated that—

"The statement appeared to be voluntary, positive evidence to that effect had been introduced and the appellant offered no evidence tending to challenge the voluntary characted of the alleged confession."

In the more recent case of State v. Archuleta, 29 N. M. 25, 217 P. 619, error was assigned upon the introduction of certain verbal admissions or confessions. Objection was interposed to the evidence on the ground that any statement that one of the defendants might have made at the time he was under arrest, without having been warned of its effect, was incompetent and irrelevant. It appears that the circumstances under which the statement was made were detailed by the witness, testifying to the admission or confession. In the opinion in that case, page 622, the court says:

"The objection was overruled and then the witness went on to detail the admission which Gonzales had made to him. It is to be observed that the objection made by counsel was not as to the voluntary character of the admission, but is based upon the naked proposition that, because the defendant was under arrest and was not warned of the effect his admission or confession might have, it was therefore incompetent. No attempt was made by counsel for appellants at the time to fully develop the circumstances surrounding the making of the admissions, nor did he later, on cross-examination of the sheriff, attempt to develop any facts to show that the admissions were not voluntary."

These three cases differ from the one at bar for the reason that here the circumstances under which the admissions were made, had not been brought out by the evidence, and specific objection was made prior to the introduction of the confession that no sufficient foundation had been laid for introducing the same, the only evidence thereof being the affirmative answer of the witness to the question of the district attorney, "Did she make a statement voluntarily?" Clearly, the statement of the witness that it was, was a more opinion or conclusion of the witness, and was not sufficient to show that the alleged confession was

voluntary. While it may be true that the subsequent statement by the witness of the circumstances under which this confession was made may have given sufficient details to authorize the court subsequently to determine that it was voluntary, yet, as a matter of proper practice, when the objection was made, the court should, before admitting this statement, have inquired into the circumstances under which it was made, and determined from them, and not from a mere conclusion or opinion of the witness, whether or not the same was voluntary. We think the practice, which is, as we understand it, very generally adopted, when a confession is offered, of requiring the jury to retire, and then make a full inquiry as to all the circumstances under which it was alleged to have been made, and from these determining its nature, whether voluntary or otherwise, is the proper and orderly method of inquiry, and it meets with our hearty approval.

Other exceptions of the defendant relate to the question of whether the corpus delicti has been proven and to the refusal of the court to give a requested instruction upon that subject. While it might have been well that the nature of the wound and its character should have been more fully inquired into, we think that the corpus delicti was sufficiently established, not only by circumstantial but also by direct evidence, to authorize the court in refusing to sustain the demurrer to the evidence upon this ground and to give the charge requested. Especially is this true where the defendant at no time claimed that she had not shot the deceased and upon the presentation of her defense, fully detailed such shooting and clearly established that she killed him.

For the errors above pointed out, the judgment of the lower court is reversed and this cause remanded, with instructions to grant a new trial, and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

[No. 2809. Sept. 8, 1924. Rehearing Denied Nov. 28, 1924]

CANDELARIA v. GUTIERREZ et al.

SYLLABUS BY THE COURT

1. Generally, propositions of law not presented to the trial court cannot be decided on appeal.

2. The three exceptions to this general doctrine are: That jurisdictional questions may be raised here for the first time: questions of a general public nature affecting the interests of the state at large may be determined without having been raised below; and we will determine questions not presented below, where it is necessary to do so, in order to protect the fundamental rights of a party.

3. The remoteness of damages does not come within either of these exceptions, and, consequently, must be properly raised below in order to be reviewable on appeal.

4. Assignments of error not argued in the briefs will be considered as abandoned.

5. An instruction that no person shall have a lien upon or the right to hold possession of any domestic animals on accout of any trespass by them, unless the lands trespassed upon be inclosed with a legal fence, is proper, where the defendants seeks to show in mitigation or justification that the difficulty, which resulted in personal injuries to the plaintiff, arose on account of the plaintiff seeking to separate and drive certain animals from a herd then being held by the defendants upon open and unfenced range to which they had the right of possession.

6. Record reviewed and judgment **held** not excessive.

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

Action by Luis Candelaria against Maximiano Gutierrez and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Rodey & Rodey, of Albuquerque, for appellants.

Renehan & Gilbert, of Santa Fe, for appellee.

OPINION OF THE COURT

BRATTON, J. This is an appeal from a judgment against the appellants in the sum of $5,143, following a verdict of the jury in that sum for damages suffered

as the result of personal injuries inflicted upon the appellee during a difficulty in which appellants beat, bruised, and wounded him by striking him several times on the head with pistols, and by shooting him through the right lung; the bullet entering just below the nipple, passing through the body, and being extracted just under the skin at the back. As elements of actual damages, he pleaded his pain, anguish, and suffering, his outlay of money for care and attention, and his permanent injury and partial incapacity, as well as loss of cattle by reason of their straying away and becoming lost as a consequence of his not being able to care for and attend to them. In addition to actual, he prayed for punitive, damages; the total sum sought being $15,000. A motion to dismiss the appeal was denied; the opinion thereon being reported at 28 N. M. 434, 213 Pac. 1037.

[1] 1. It is vigorously argued by the appellants that the court erred in admitting evidence tending to establish the loss of 18 head of cattle, and in submitting that issue to the jury, contending that such damages were not such as could have been reasonably contemplated by the appellants at the time of the difficulty in question, and hence were too remote. Unfortunately, the record is in such condition that we cannot determine this question upon its merits. The first time it was urged before the trial court was while the appellee was testifying. His counsel propounded to him the following question:

"How many cattle did you have under your control or in your possession at that time?"

The objection then urged by counsel for appellants was that the testimony was immaterial, and that the next question would be whether or not, as a consequence of his injury, he lost any of such cattle, such loss being too remote. This question alone could in no wise injure appellants and could afford no ground for any recovery against them. It was merely a preliminary one, and whether he had any cattle was, of

itself, an incidental and immaterial subject. It was the loss of those cattle, as a consequence of the injury, that affected the appellants injuriously and not the preliminary question with reference to the number he then had in his possession. And, of course, the objection with reference to what the next questoin would be was not well taken because the court could not anticipate what the succeeding question would be, and could not, in the very nature of things, have sustained this part of the objection. Nothing further was said with reference to this matter until after the appellee had detailed the number of cattle he had, the care he gave them prior to his injury, the time he lost on that account, and the number lost. The appellants' counsel objected to all of said testimony and moved to strike it out on account of its remoteness. This motion was addressed to the discretion of the trial court. We have several times held that counsel cannot sit by and allow testimony to be received and then predicate error upon the refusal of the court to strike it out. State v. Kidd, 24 N. M. 572, 175 Pac. 722; State v. Alford, 26 N. M. 1, 187 Pac. 720; State v. Lazarovich, 27 N. M. 282, 200 Pac. 422; State v. Anaya, 28 N. M. 283, 210 Pac. 567; State v. Snyder, 30 N. M. 40, 227 Pac. 613, and State v. Ward et al, 30 N. M. 111, 288 Pac. 180. The question was next presented by appellants' requested instruction No. 5, which is in the following language:

[3] "The court instructs you that the measure of damages for a wrongful assault and battery, if in fact one was committed without justification by the defendants, is a liability for all the natural and proximate consequences thereof, but the court further instructs you that the damages claimed by the plaintiff as to loss of cattle which he claims to have had at or prior to the time of the alleged assault, is in law too remote; there being no evidence in the case that the loss of such cattle was the natural and proximate consequence of the alleged assault."

[2] It will be observed that this instruction is twofold in character. In the first part, it undertakes to limit the damages recoverable to compensation for the natural and proximate consequences of the in-

juries—actual damages—and then to expressly remove from the consideration of the jury the loss of cattle as an element of such damages. The first part of the instruction was incorrect because it failed to include or permit the jury to consider the question of punitive damages. These were expressly sought upon the theory that the injuries were willfully and maliciously inflicted, and indeed the record contains evidence which strongly establishes this fact, and, consequently, the court had the right to submit that issue to the jury, which the requested instruction failed to do. There was therefore no error in denying it; so the error now complained of was never presented to the lower court in such form to be saved for review here, and it is such an error as must have been properly presented there. The general doctrine has been repeatedly declared that propositions of law not raised in the trial court cannot be considered here. Three specific exceptions to this rule have been announced, viz.: That jurisdictional questions may be raised for the first time here; that questions of a general public nature affecting the interests of the state at large may be determined upon appeal without having been raised in the lower court; and that we will determine propositions not raised below, where it is necessary to do so in order to protect the fundamental rights of a party. Sais v. City Electric Co., 26 N. M. 66, 188 Pac. 1110; Collins v. Unknown Heirs, 29 N. M. 140, 219 Pac. 491. Obviously, this is not one of the exceptions to the general doctrine, and, consequently, the question is not reviewable.

[4] 2. Assignments of error numbered 2 and 4 are not followed up and argued in appellants' brief, but are disposed of with the statement that they argue themselves. This will not do, as the settled rule here is that assignments of error not pursued and argued in the briefs will be considered as abandoned. Riverside Sand & Cement Mfg. 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 Ins. Co., 22 N. M. 368, 163 Pac. 371; Klasner v. Klasner, 23 N. M.

627, 170 Pac. 745; Makemson v. Dillon et al., 24 N. M. 302, 171 Pac. 673; Alvarado Min. & Mill Co. v. Warnock, 25 N. M. 694, 187 Pac. 542; Crawford v. Dillard, 26 N. M. 294, 191 Pac. 513; Walters v. Walters, 26 N. M. 22, 188 Pac. 1105; Hawkins v. Berlin, 27 N. M. 164, 201 Pac. 1105; Hawkins v. Berlin, 27 N. M. 164, 201 Pac. 108; Terry et ux. v. Humphreys et al., 27 N. M. 564, 203 Pac. 539.

[5] 3. Error is assigned upon the court's giving the following instruction to the jury;

"It is provided by statute of this state that no person shall have a lien upon, or right to retain possession of, any animals which may trespass upon his lands, unless such lands be inclosed by a fence of not less than four wires, well stretched and firmly fastened to posts; and this statute the defendants were presumed to have known at the time of the shooting."

This instruction was intended to state the substance of sections 2340-2342, Code 1915. The exception and the entire argument is that it injected a false issue into the case, as no lien was claimed upon any cattle. The entire evidence shows that the trouble between these parties, which resulted in the injuries to the appellee, arose when he undertook to cut out or separate an animal or some animals from a herd that the appellents then had in their custody upon a tract of land which one of them claimed to have the right of possession to. There is a conflict with reference to the animal or animals appellee was endeavoring to cut out. He and his witnesses claim he was endeavoring to cut out one head belonging to himself and one belonging to Natividad Gutierrez, for whom he was then working, while appellants and their witnesses say that he was endeavoring to cut out some belonging to Adolph Vohs. Much emphasis was laid by the appellant throughout the trial upon the fact that appellee rode into this herd and started cutting out this animal or these animals without first securing permission of the appellants to do so, thus endeavoring to leave the impression that he should have secured

permission before entering the herd. This contention was apparently made in mitigation or justification, and it was therefore proper for the court to inform the jury that appellants had no lien upon the cattle, appellee was trying to separate from the herd which entitled them to hold possession of such animals, and that, consequently, if said stock belonged to appellee or his employer, he had the right to cut them out and take possession of them, if he could do so peaceably. Otherwise, the jury might have believed appellants were entitled to hold possession of them by reason of some lien arising from their being upon land in the possession of appellants.

[**6**] 4. It is further said that the verdict of the jury and the judgment thereon are excessive. We are unable to agree with this. There is evidence showing that appellee was shot clear through the chest, the bullet passing entirely through the lung; that he can no longer resort to his former occupation, a cowboy; that he can ride horseback for a day, and then is sore and suffers with pain for several days; that he suffers from time to time with pains in his chest and in the region of his neck. It thus appearing that he is permanently injured and perhaps partially incapacitated for the remainder of his life, we are unable to say, as a matter of law, that the sum awarded him is excessive.

There is no reversible error in the record. The judgment must therefore be affirmed, and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

On Motion for Rehearing.

PARKER, C. J. A motion for rehearing has been filed, urging upon us the consideration that we were in error in holding that the question of remote damages was not properly raised in the court below, so as to be available here. The proposition was carefully considered in our opinion, and for that reason it need

not be again discussed. However, a brief restatement may not be amiss.

Counsel argues that the question was first presented by a motion to strike that portion of the complaint alleging damages for loss of cattle, which motion was embodied in the answer of appellants. This is not available for the reason that it was not called to the attention of the court below, and no ruling thereon was invoked, if, indeed, being embodied in the answer, it was not so out of place as to be unavailable in any event. The objection to the evidence in support of the allegation of loss of cattle was not in proper form; it being interposed to a preliminary question, and not renewed to the actual evidence when introduced. The motion to strike the evidence is not available because appellants had no absolute right to have it stricken, after allowing it to go in without objection. The request for instruction to the jury was erroneous, and was properly refused, and no exception was saved to the giving of the instruction in which the alleged erroneous measure of damages was submitted to the jury. Under such circumstances no error can be assigned here.

The errors assigned in the motion for a new trial for the first time are not available, where the errors were not saved during the trial. During the trial it appeared from the testimony of the appellee himself that he did not own the cattle, and consequently had no right to recover for their loss. No motion was made, however, to withdraw from the jury all of the evidence as to the loss of cattle, nor was the court requested to instruct the jury to that effect. The point is therefore not available.

We have thus, unnecessarily perhaps, again gone over the whole case, and find nothing calling for a departure from our former opinion. The motion for a rehearing should therefore be denied; and it is so ordered.

BOTTS and FORT, JJ., concur.

[No. 2637. Nov. 17, 1923]

STONEROAD et al. v. BECK et al.
ANTON CHICO LAND GRANT et al. v. BROWN et al.

SYLLABUS BY THE COURT

1. The presumption of regularity is not sufficient to overcome the assertion by appellee of want of notice of the time of settling and signing a bill of exceptions.

2. Notice of the time of the settling and signing of a bill of exceptions to one party is not sufficient to bind another party having a separate interest in the subject-matter of the litigation.

3. Some matters alleged to have misled counsel for appellants considered, and **held** not to excuse want of notice to an interested party.

4. A transcript on appeal, made up by agreement between appellant and one appellee, in which agreement another appellee did not participate, cannot be considered for the purpose of determining the rights of the latter.

Appeal from District Court, San Miguel County; Leahy, Judge.

Suit by George W. Stoneroad and others against William P. Beck and others, in which the Board of Trustees of the Anton Chico Land Grant, Fletcher A. Catron, and others intervene. From the decree rendered, the interveners appeal. On motion to strike transcript and bill of exceptions as to intervener Catron. Motion sustained.

Andrieus A. Jones, of East Las Vegas, for appellants.

S. B. Davies, Jr., of East Las Vegas, for Board of Trustees.

C. C. Catron, of Santa Fe, for intervener Catron.

OPINION OF THE COURT.

PARKER, C. J. On January 21, 1876, a suit in partition was filed in San Miguel county, to partition a land grant known as the Hacienda de San Juan Bautista del Ojito del Rio de las Gallinias, which is

hereinafter styled the Preston Beck grant. On June 18, 1907, the board of trustees of the Anton Chico land grant intervened in the cause, setting up a claim to a large portion of the land embraced within the exterior boundaries of the Preston Beck grant, and claiming that the two grants overlapped, but that the Anton Chico grant was prior in point of time and right to the Preston Beck grant. On October 5, 1920, Fletcher A. Catron intervened in the cause, setting up that he was interested in the matter in litigation, and had an interest in the success of the board of trustees of the Anton Chico grant, and he adopted and joined in the said intervention of the said board of trustees of the Anton Chico land grant, and adopted all of the allegations contained in its petition of intervention and its reply to the answer thereto. He further alleged that on May 15, 1918, in a suit to quiet title between the owners of the Anton Chico grant, a decree was entered in this court adjudging to one T. B. Catron a certain portion of the said Anton Chico grant, and that he by conveyance had succeeded thereto. He prayed that the court determine and adjudge that all of said tract of land in conflict between the Anton Chico grant and the Preston Beck grant, and known as the overlap between the said grants, be decreed to be a portion of the Anton Chico grant and not a portion of the Preston Beck grant, and that the title of the said board of trustees of the Anton Chico grant and of Fletcher A. Catron be quieted and set at rest, as against all other parties to the proceeding. He further prayed that the court adjudicate and decree that the said Fletcher A. Catron had acquired all of the said overlap except 36,500 acres, and that, with that exception, his title be quieted and set at rest as to any claims of any of the other parties to the proceeding.

A trial was had upon the issues in the case, and resulted in a final decree on March 18, 1921.

The court, among other things, found that the preston Beck grant and the Anton Chico grant, as sur-

veyed and patented, conflict or overlap to the extent of approximately 120,000 acres, such conflict being included within the exterior boundaries of each of said grants as surveyed and patented. It further found that all of the land in the said overlap or conflict between the said grants belongs to the town of Anton Chico, and to the board of trustees of the Anton Chico land grant, and that the claimants of the Preston Beck grant had no right, title, interest, claim, or demand therein or thereto. The court thereupon decreed that the title of the board of trustees of the Anton Chico land grant, as representatives of the town of Anton Chico, be established as against the adverse claims of all persons claiming under the Preston Beck grant, and that said parties be barred and forever estopped from having or claiming any right, title, or interest therein or thereto adverse to said board of trustees of the Anton Chico land grant, and that the latter's title be quieted and set at rest.

It is to be noted that the decree fails to establish the title of Fletcher A. Catron to a portion of the grant as against the claims of the board of trustees of the Anton Chico grant, as prayed by him in the second paragraph of his prayer. No exception was taken to the decree by Catron, and he did not appeal therefrom, relying, it is to be assumed, upon his allegation in his petition of intervention, which allegation was undenied by the board of trustees of the town of Anton Chico, that his title to his portion of the land was established by the decree of this court heretofore referred to. Claimants under the Preston Beck grant have brought the case here by appeal. The record on appeal, and the manner of its preparation, are the cause of all the controversy at this time. The record was prepared under a stipulation in the following terms:

"It is stipulated and agreed by and between the attorneys for the interveners, the board of trustees of the town of Anton Chico land grant and Fletcher A. Catron, and the attorney for the respondents in the above entitled cause that the following may constitute the record to be presented to the Su-

preme Court of the State of New Mexico in this case as the record in the case for whatever purpose it may be used in the Supreme Court of New Mexico, to wit."

Here follow the items of record and evidence which are to be embodeied in the record. The stipulation was signed by Andrieus A. Jones, attorney for respondents, and Stephen B. Davis, Jr., attorney for interveners, on April 2, 1921, and on the same day the judge of the district court, in pursuance of said stipulation, settled, signed, and sealed as a bill of exceptions, and as the record and bill of exceptions up on which the case might be heard in the Supreme Court, all the matters contained in the stipulation. On May 31, 1921, citation on appeal was issued and served upon attorneys for each intervener.

A praecipe was filed with the clerk for the record as thus made up, and the same was duly prepared and filed in this court. On February 17, 1922, Fletcher A. Catron, by his attorney Charles C. Catron, appeared and moved the court to strike from the transcript of record the bill of exceptions contained in the printed transcript on pages 71 to 225, upon the grounds that the same did not appear to have ever been filed in the office of the clerk of the district court as required by section 27, chapter 43, Laws of 1917; that the transcript fails to show that Fletcher A. Catron, or his attorney, ever received five days' notice, or any notice, of the application to the judge to sign and settle the bill, and that no such notice was in fact given; that the bill of exceptions was inadvertently and improvidently signed by the trial court under a pretended stipulation or agreement between counsel for plaintiff and counsel for the interveners, the board of trustees of the Anton Chico land grant, which stipulation was not entered into by the intervener, Fletcher A. Catron, or his counsel. Other grounds are assigned which need not be noticed. The motion further went to the entire transcript of record upon the ground that it was made up upon a stipulation of some of the parties to the case and not all, and that the same is not such a transcript as is required to be

prepared and filed by the appellate procedure act. Later the appellee Fletcher A. Catron filed a motion for a writ of certiorari, suggesting diminution of the record, which was granted. In response to the writ the court below certified up to this court an amended record which shows that neither Fletcher A. Catron nor his counsel appeared at the signing and settling of the bill of exceptions, nor did he or his counsel sign the stipulation under which the transcript upon appeal was prepared and certified by the judge. It thus appears that the appellee Fletcher A. Catron never appeared and waived notice of the time of settling the bill of exceptions and never participated in the stipulation whereby the transcript was formulated and certified by the court.

As the record stands, it appears that the appellants and one appellee met before the court, this one appellee waiving notice as required by law and waiving all objections, and procured the court to settle and sign the bill of exceptions without notice to Catron, the other appellee. It further appears that these same parties, on the same day, presented the stipulation for the record and bill of exceptions to the court, and procured his order certifying the same to this court as a true record on appeal, and the said Catron was not present and did not participate in the stipulation. While it does not affirmatively appear that Catron had not received notice, every reasonable intention is to that effect, as the action taken does not purport to be upon notice, but, on the contrary, purports to be taken by consent of the two parties, ignoring the appellee Catron.

[1] 1. Counsel for appellants presents several considerations in opposition ot the motion to strike the bill of exceptions. They say that there is a presumption, always to be indulged, that the lower court proceeded with jurisdiction, because otherwise it would not have proceeded at all. This will not do. All who are familiar with such matters know that the judge must, and does, rely upon the counsel in the

case for all of the procedural matters leading up to the signing and settling of the bill of exceptions. The court has a right to rely upon counsel for appellants to see to all jurisdictional matters, as it is to his interests to do so; and he may well leave such matters to the care and attention of the counsel. If counsel fails in this, it is his own fault, and his client must suffer the consequences. It is alleged in the motion to strike that no notice was had, and appellant has not attempted to make a showing that it was. It must be assumed, therefore, that notice is lacking. In this connection counsel relies upon the fact that the corrected record, certified up on certiorari, merely shows that appellee Catron was not present when the bill of exceptions was settled and signed, but does not show that he had no notice. Presumption of regularity is thereupon invoked in favor of the settling and signing of the bill. This will not do. In the face of the denial of notice, there must be some official evidence of the fact that the same was had. The court below did not certify either way on the subject, and this certificate must be present before we are authorized to determine that there was notice. No pretense is made by appellants that notice was in fact given. A word of caution to district courts, in this connection, might not be amiss. If they will, in the order settling a bill of exceptions, make a finding of fact and a recital on the subject, all difficulty will be avoided. It is a fact which the district courts are in a position to determine, and it should always be done. If an appellant fails to secure such a finding, he is derelict in his duty to both the lower court and this court, and he must suffer the consequences.

[**2**] 2. It is argued that notice was in fact given, or was not required. The argument is based upon the proposition that where there are several attorneys, even though they represent several interests, service upon one of them is all that is required. This proposition is so palpably unsound as to require no discussion. A bill of exceptions might be entirely

satisfactory to one party, and yet omit highly important matters necessary to the case of another party.

[3] 3. It is urged that counsel for appellants was misled into believing that S. B. Davis, Jr., counsel for the interveners, the Anton Chico grant commissioners, was also counsel for the intervener, Catron and there being no prejudice shown, and the time to correct the error having expired before the motion to strike was filed, Catron should not be heard to take advantage of the error. The proposition as to being misled is based upon previous conduct of Catron, counsel for the intervener Fletcher A. Catron. The conduct relied upon as a statement during the trial by C. C. Catron that he had forwarded the intervention of Fletcher A. Catron to S. B. Davis, Jr., with request to consider same and, if satisfactory, to file the same and serve copy on A. A. Jones, attorney for appellants. He stated that it was merely a matter of service of the copy by Davis, representing him, C. C. Catron. Sen. Jones makes an affidavit attached to the brief, in which he sets out some other facts which he says led him to believe that Davis represented both interveners. There are some matters in the record which tend to contradict the attitude taken by appellants. If counsel believed that Davis represented both intervners, it was not necessary to issue and serve on counsel for both interveners the citation, as was done; one service on Davis being sufficient under such circumstances. The proposition that the appellee Catron is not prejudiced seems to be contradicted by the record. There was introduced in evidence in his behalf a stipulation between him and counsel for appellants which does not appear in the transcript. Just what the stipulation covered, we, of course, do not know; but Catron asserts in his brief that this stipulation contained provisions which supplied all of the proofs required of him of the ownership of the land claimed by him, and that consequently he has suffered injustice accordingly. Appellants seek to avoid this consequence by pointing out

that Catron applied to the court to strike out or correct the certificate of the stenographer that the transcript contained all of the evidence, which the court refused to do, thereby holding, it is argued, that the stipulation was not introduced in evidence. But this conclusion does not follow. The bill of exceptions, as made up by the stenographer, shows that the stipulation was in fact introduced in evidence, and the certificate of the stenographer as to the completeness of the transcript is clearly in error. But the court, at the time this application was made, had no jurisdiction to settle a bill of exceptions. The cause was in this court, and the time for settling bills of exceptions had long since passed. The court was correct, therefore, in refusing to act in the premises, and his action in no sense reflected upon whether the bill of exceptions was complete or not.

[4] 4. Appellee Catron moved to strike the entire transcript. The motoin is based upon the theory that the transcript is not made up as required or authorized by any of the provisions of the statute. Chapter 43, Laws 1917, contains the provisions governing the matter. Section 23 provides what constitutes the record proper. Section 24 provides that either party may require the clerk to prepare a transcript of the record. This section evidently requires no notice and contemplates a transcript of the entire record. Appellants evidently did not proceed under this section, as the transcript does not purport to be complete. Section 32 provides for the making up of a partial record where some point or points, not involving all of the record, are sought to be reviewed. In such a case, however, a praecipe setting forth the questions to be reviewed, and calling for such portions of the record as are deemed necessary for such review, must be filed. This section was not followed by appellants, as their praecipe sets forth no question to be reviewed, and calls for a stipulation by the counsel for appellants and one of the appellees, the order of the court thereon making it a part of the

record, the notice of appeal, and proof of service of citation. Section 30 and 31 provides for the preparation of a transcript upon appeal by agreement in writing of the parties. These are the sections which were evidently relied on, but the trouble is that there was no agreement, in writing or otherwise, of one of the appellees, Catron. This paper, from which the transcript is made up, is, as to him, spurious and entirely lacking in the essential elements of a record upon which to review the case. If a record can thus be made up, two parties may make up a transcript, ignore a third party to the case, and defeat his rights, and he will be without redress. But it is said by counsel for appellants that it appears from what is here that the rights of appellee Catron are fully protected, and therefore the transcript should not be stricken. The answer to this proposition is simple. The certificate of the clerk does not show that the transcript is complete, but is to the effect, merely, that it contains the matter called for in the praecipe. The praecipe calls for the stipulation only, which may or may not contain all of the record necessary to the appellees' case, and, in fact, the stipulation itself shows that portions of the record were intentionally omitted. It is clear, therefore, that the transcript is incomplete, and there being no agreement on the part of Catron, there is nothing before the court upon which, in justice to him, his rights can be determined. The transcript is merely a transcript of a stipulation between two of the parties to the cause, to which the third part never agreed.

Much is said in the briefs to the effect that appellee Catron has in fact no judgment in his favor and, consequently, cannot be heard on his motion to strike; he having no interest. Be that as it may. Whatever there may be in the judgment, if anything, of value or importance to intervener, Catron, the same is now secure against modification or reversal on this appeal. As to the other appellee, in whose behalf no motion to strike has been filed, the cause will proceed to hearing on the merits.

It is indeed exceedingly regrettable to the court to reach such a result as we have in this case. A large amount of property is involved, and the case cannot be decided upon its merits as to all of the parties. But the court is powerless to avoid the plain statutory provisions in regard to transcripts on appeal, simply for the reason that it makes a hard case to turn the appellants out of court upon a procedural question.

It follows from all of the foregoing that the motion to strike the bill of exceptions and to strike the entire transcript, in so far as the rights of intervener Catron are concerned, must be sustained, and it is so ordered.

BOTTS and FORT, JJ., concur.

[No. 2874. July 16, 1924. Rehearing Denied Nov. 22, 1924.]

GALLAGHER v. LINWOOD.

SYLLABUS BY THE COURT

1. A paper is filed when it is delivered to the proper officer to be kept on file.

ON REHEARING

2. A reply in an election contest proceeding must be served by the sheriff, or, in case of his disqualification, by some one specially appointed to act.

Appeal from District Court, Colfax County; T. D. Leib, Judge.

Election contest by Manes Gallagher against William J. Linwood. From a judgment for defendant, plaintiff appeals. Affirmed.

D. K. Sadler, H. L. Bickley, and H. A. Kiker, all of Raton, for appellant.

Crampton and Darden, of Raton, for appellee.

OPINION OF THE COURT.

BOTTS, J. The appellant contested the election of the appellee for the office of sheriff of Colfax county. The court, on motion of appellee, struck appellant's reply, and then sustained appellee's motion for judgment on the pleadings. The motion to strike the reply was based on two grounds: First, that service of the reply had not been made as required by law; and, second, that the reply was not filed within the time required by law.

Service of the reply was not made by the sheriff or by some one specially appointed by the court to make service, but by a private individual, over the age of 18 years and not a party to the action, who made return by affidavit, from which it appears that he unsuccessfully endeavored to find the appellee at his usual place of abode and elsewhere, and thereupon served the reply on the appellee by securely tacking a copy thereof on the front door of his residence. Section 2076 of the Code of 1915 requires that "a copy of the notice of contest, answer and reply shall be served respectively in the same manner as process is now by law required to be served in an action at law." This section is a part of the act of January 14, 1876, prescribing the procedure for election contests; and it is argued by appellee that, by the language quoted, the law prescribing the manner in which process should be served, which was in force on January 14, 1876, was adopted as a part of the election contest statute, thereby requiring that service of the reply be made in the manner then prescribed rather than in the manner prescribed by the law in force at the time of making the service, and that the words "in the same manner" include, not only the method of service, but the qualification of the person by whom service is to be made. Appellant, on the other hand, argues that, even though it be conceded that the law prescribing the manner of service in force at the time of the passage of the election contest act is to be followed, yet he was not compelled to look to the law as

it then existed for the qualification of the officer or person by whom service should be made.

At the time service of the reply was made, section 4093 of the 1915 Code authorized the service of summons by any person not a party to the action, over the age of 18 years; but the statute in force at the time of the passage of the election contest statute did not authorize service by a private individual. We have been able to find but one case where the exact question has been passed on. The statutes of Minnesota (Gen. St. 1878, c. 81, § 5) required that, on foreclosure of a mortgage by advertisement, the copy of notice of sale "shall be served in like manner as summons in civil actions in the district court," and in the case of Kirkpatrick v. Lewis, 46 Minn. 164, 47 N. W. 970, 48 N. W. 783, the Supreme Court of Minnesota held that the language had reference merely to the mode of making service, and not to the persons by whom it might be made. The court said:

"Gen. St. 1878, c. 81, § 5, provides that 'such notices shall be served in like manner as summons in civil actions in the district court.' By reference to Gen. St. c. 66, we find that section 56 provides by whom summons in civil actions may be served, to wit, 'by the sheriff of the county where the defendant is found, or by any other person not a party to the action.' Also that section 59 provides how and on whom they shall be served, to wit, 'by delivering a copy thereof as follows: * * * Fourth. To the defendant, personally, or by leaving a copy at the house of his usual abode,' etc. We are clearly of the opinion that the words 'in like manner,' used in section 5, c. 81, refer only to the mode of service, and not to the persons by whom it may be made; and hence that the provisions of section 56, c. 66, have no application. Among the reasons aside from the literal and natural meaning of the language used, that lead us to the conclusion are the following: Works of practice and codes of procedure, as does chapter 66 of our statutes, invariably treat of the questions by whom service may be made, and the mode and manner of making it, as distinct subjects, thus indicating a general understanding that the latter does not include the former."

The reason given by the Minnesota court for its conclusion is applicable here, since the mode or manner of making service is treated by chapter 29 of the Revised Statutes and Laws of Territory of 1865, while the officers by whom service may be made are dealt

with in chapters 20 and 99 of the Revised Statutes of that year. These statutes were in force at the time the election contest law was adopted, as was also the Act of January 31, 1867 (Laws 1866-67, p. 106) providing for the service of process when there should be a vacancy in the office of sheriff, or when the sheriff should be a party to the suit, or otherwise disqualified. Section 4 of said chapter 20 is in the following language:

"Sec. 4. It shall be the duty of the clerk of the district court, in all causes not otherwise provided for, to issue all process to the sheriff of the county in which the trial or cause shall be commenced or presented, or in which final sentence shall be rendered; and it shall be the duty of the sheriff to execute faithfully such process, and return the same to the said court, as provided by law."

Section 2 of said chapter 99 is as follows:

"Sec. 2. All process issued by the clerks of the circuit court, and by the clerks of the perfects, shall be directed to the sheriff of their respective counties, who shall execute such process according to law, and shall attend upon such courts during their sittings."

Section 1 of chapter 29, under the subhead "How Process Served," is as follows:

"Section 1. That all original process from any of the courts in this territory shall be executed by the proper officer as follows: * * * Fourth. If no such person shall be found willing to accept a copy of the process as above provided for, then by posting the same in the most public part of the defendant's premises. * * ' "

It is observed that by said chapter 20 it is made the duty of the sheriff to execute process "as provided by law," and by chapter 99 it is made his duty to execute the process "according to law." The meaning of the sections would not have been changed in the least had they required in each instance that the sheriff executed process "in the manner required by law," and, in order to ascertain the manner of service which the law required, reference must be made to a widely separated chapter of the Revised Statutes, where the different methods or modes of making service are

prescribed. From this we conclude that, when the Legislature required service to be made "in the same manner as process is now by law required to be served in an acton at law," it was the intention to prescribe the method or mode of making service, without reference to the person or officer by whom such service should be made.

Appellee relies on Brunleve v. Cronan, 176 Ky. 818, 197 S. W. 498. While it appears therefrom that the Kentucky election contest statute requires the notice of contest to be "served in the same manner as a summons from the circuit court," the question now before us was not considered by the court. The particular question there was whether or not a sufficient showing had been made to secure the appointment of a special bailiff to make service. It is significant, however, that the Kentucky court in its discussion seemed to consider the manner of service and the person or persons by whom service might be made as two separate and distinct subjects, holding that the notice "must be served in the manner and at the time and by the persons or person as required by the statute." Nor are we aided by the Missouri case of State ex rel. Woodson v. Robinson, 270 Mo. 212, 192 S. W. 1001, likewise relied on by appellee. No language similar to that contained in our statute and now under consideration was before the court for construction in that case. The principle question was whether the notice of contest must be served by one authorized to serve process in civil actions, or could be served by one qualified under the statute to make service of ordinary notices. It was held that inasmuch as the notice was, in effect, the process by which the contestee was brought into court, it must be served by one qualified to make service of any other original process.

It becomes of no importance to determine whether or not the law prescribing the manner of service in effect at the time of the passage of the election contest act, or that in effect at the time service was had, is

to be followed, since the manner of service, as defined by us, is the same in both cases.

The only remaining question to be decided in determining the sufficiency of the service is whether or not sufficient effort had been made to find the appellee before posting copy of the notice on the front door of his residence. The principal argument advanced by appellee in this particular is that, while the person employed to make service had been to appellee's house twice, and each time had rung the doorbell without finding anyone, he did not ring the doorbell when he returned the third time for the purpose of posting the notice on the door. While it is true that the election contest statute prescribes a special procedure which must be strictly followed, as argued by appellee and as conceded by appellant, we believe it would be carrying the strictness entirely too far, and beyond all reason, to hold the service bad because the doorbell was not rung on the third trip. All three visits to appellee's residence were made on the same evening, each succeeding one being made very shortly after the next preceding. After failing to find any one upon whom service might be made on the second visit, the person in charge of making the service returned to the office of appellant's counsel for directions, and, immediately thereafter, made his third visit for the purpose of posting the notice. The motion to strike the reply, therefore, in so far as it is based on the ground of alleged insufficiency of service, was not well taken.

The other ground on which the motion is based depends on these facts: Late in the afternoon of the last day allowing by law for filing a reply, one of the attorneys for the contestant called the clerk on the telephone, and requested that she remain in the office beyond the usual closing hour, in order that he might file a paper, the preparation of which was then not quite complete. This request was granted, and later the attorney appeared at the clerk's office and presented the reply in this case, and the clerk put on

it the usual filing certificate. The attorney then asked permission to take the reply across the hall to the contestee's office, to see if he would accept and acknowledge service thereof. In a few minutes, he returned, advising the clerk that he had not found the contestee, and again asked her permission to take the reply with him. This request was also granted, and the attorney departed with the paper. The clerk made no record of the filing, and the attorney left no receipt. The next forenoon, after the time for filing a reply had expired, one of the attorneys for the contestee examined the files and records of the clerk's office, and found no reply and no record of one having been filed. He was told by the clerk what had taken place. The clerk then called contestant's attorney on the phone, and advised him of the inquiry. He returned the reply to the clerk's office, and the clerk entered a record in her docket of the filing as of the previous day. The question is whether the reply was filed in time.

[1] Hundreds of opinions are found dealing with the question of whether or not a paper has been filed, but they do little more than state a general rule, from which the courts determine whether or not there has been a filing under the particular facts and circumstances there under consideration. This general rule, on which all the courts seem to agree, is epitomized by Mr. Freeman in a note appearing at page 294 of 15 American State Reports. He says:

"The word 'file' is derived from the Latin filum, signifying a thread, and its present application is evidently drawn from the ancient practice of placing papers upon a thread or wire for safekeeping. The origin of the term clearly indicates that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the thread or wire; and, accordingly, under the modern practice, the filing of a document is now generally understood to consist in placing it in the proper official custody by the party charged with the duty of filing it, and the receiving of it by the officer, to be kept on file. Phillips v. Beene, 38 Ala. 248; Holman v. Chevaillier, 14 Tex. 337; Gorham v. Summers, 25 Minn. 81; Naylor v. Moody, 2 Blackf. 347. The most accurate definition of filing a paper is that it is its de-

livery to the proper officer, to be kept on file. County Commissioners v. State, 24 Fla. 55; 12 Am. St. Rep. 183; Peterson v. Taylor, 15 Ga. 483, 60 Am. Dec. 705; Powers v. State, 87 Ind. 148; King v. Penn., 43 Ohio St. 57.".

Contestant relies on three cases in support of his argument that the paper had been filed, viz., Pendrey v. Brennan, 31 Idaho, 54, 169 Pac. 174, Phillips, Coldsby & Blevins v. Beene's Administrator, 38 Ala. 248, and Bade v. Hibberd, 50 Or. 501, 93 Pac. 364. These cases do little more than state the general rule, and the first two hold, under the facts there involved, that there was no filing. However, the facts are so very dissimilar to those involved in the case now before us that they are of little value.

Contestee relies on Meridian National Bank v. Hoyt, 74 Miss. 221, 21 South. 12, 36 L. R. A. 796, 60 Am. St. Rep. 504, and Beal v. Alexander, 6 Tex. 531. The facts in those cases more nearly resemble the facts here. However, in the Mississippi case the rights of a third party were involved, as was also the situation in the case of Wilkinson v. Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158. In the Texas case the opposing parties were further misled by the silence of counsel, who knew of the filing, if any had been made, at a time when the existence of the paper in question was material to the action of the court. The cases cited by contestee strongly persuade us of the correctness of his position, but, on the whole, we have concluded that a proper application of the general rule to the facts of this particular case requires us to hold that the paper was filed at the time it was delivered by contestant's attorney, on the evening of the last day upon which it could have been filed under the law. The duty of the party desiring to file a paper is performed with its delivery to the proper officer, to be kept on file, and the failure of the officer to perform his duty does not prejudice the rights of the parties. Neither does the withdrawal of a paper after it has once been filed cancel or render ineffective the previous filing, and the fact that this paper was withdrawn immediately after its delivery to the clerk

is only evidence to be considered in determining the question of whether or not the paper was then filed. This is also true of the certifying by the clerk on the paper itself that it had been filed. That is not conclusive, but is only evidence to be considered along with other facts. Likewise, while the law requires the clerk to make a record of a paper when it is filed, the failure to so record the filing is only evidence to be considered in determining the intention. The evidence in this case, which has impelled us most strongly to the conclusion already announced, is the fact that counsel asked permission of the clerk to withdraw the paper, and the clerk granted that permssion. Had the paper not been filed, it would still have been in the control of the attorney, and the clerk's permission would have been wholly unnecessary. Whether the clerk is guilty of neglect of duty, and, if so, whether she has incurred any liability because thereof, are questions not now before us. The second ground of the motion to strike the reply is therefore likewise not well taken, and the court committed error in sustaining the motion.

This makes it unnecessary for us to consider the court's ruling on contestee's motion for judgment on the pleadings, because that motion was bottomed on the absence of any reply denying the allegations of the answer.

The case, therefore, must be reversed, and remanded with directions to the trial court to overrule contestee's motion to strike the reply, and it is so ordered.

PARKER, C. J., and BRATTON, J., concur.

On Rehearing.

BOTTS, J. By motion, brief, and argument on rehearing appellee urges that in our original opinion we have assumed, without actually deciding, that section 4093 of the 1915 Code may be looked to for the agency by whom the reply could be served in this case, and contends that, even granting the correctness of our construction of the words, "in the same manner

as process is now by law required to be served in an action at law" we must yet determine the question of the agency, and that a correct decision of that question requires service by the sheriff (or, in case of disqualification, by some one specially appointed.) We have become convinced that appellee is right in this contention.

[2] The election contest statute, in effect, makes the notice, answer, and reply process, but it is not a summons in a civil action, which seems to be the only form of process which said section 4093 authorizes to be served by a private individual. To be sure, a summons is process; but all process is not a summons. Both at common law and by statute process is required to be served by an officer, unless an exception be made such as that contained in section 4093. An election contest being a special proceeding, required to be strictly followed, such a statutory exception cannot be broadened by construction so as to cover a necessary step in the procedure, unless it be plainly apparent that it was so intended by the Legislature. In the present instance such intention does not appear. The attempted service of the reply, being unauthorized, was no service, and the trial court was correct in treating the issues as though there was no reply. This left undenied the new matter in the answer, from which, and from the allegations of the notice, it appeared that appellee received a clear majority of the legal votes cast at the election under consideration.

From the conclusion which we have now reached, it follows that our previous order should be set aside and the judgment of the lower court affirmed, and it is so ordered.

PARKER, C. J., and FORT, J., concur.

[No. 3012. Nov. 24, 1924]

STATE ex rel. DELGADO, Sheriff of San Miguel County, v. LEAHY, District Judge.

SYLLABUS BY THE COURT

1. Under the provisions of section 1860, Code 1915, the district court has power to determine when the district attorney is disqualified to act in a given case.

2. Under the provisions of chapter 80, Code 1915, a citation or order to an officer to show cause why he should not be suspended from office until final determination of a removel proceeding, is necessary before the court has power to proceed to hear the matter.

3. When anything remains to be done to give effect to a judgment of a court in a matter beyond its jurisdiction, the writ of prohibition is available, not only to prevent such further action, but also to undo what has already been done, if the same is necessary to render the writ effective.

Original application by the State, on the relation of Lorenzo Delgado, sheriff of San Miguel County, against D. J. Leahy, Judge of the District Court of the Fourth Judicial District within and for San Miguel County. Peremptory writ granted.

Hanna & Wilson, of Albuquerque, for relator.

O. O. Askren, of East Las Vegas, for respondent.

OPINION OF THE COURT.

PARKER, C. J. An alternative writ of prohibition issued herein, returnable on November 10, 1924. The writ was issued upon a petition setting up the following facts:

On October 25, 1924, there was filed in the district court of San Miguel county, by Thomas V. Truder, assistant district attorney, an accusation charging relator with misconduct in office, and praying that relator be removed from the office of sheriff of said county. On October 25, 1924, Luis E. Armijo, district attorney for said county, filed in said court a written nolle prosequi of said accusation, and a request to dismiss the same, which request the court afterwards denied. Upon the return day relator filed

his answer, denying the truth of each and every allegation of the accusation. After the court refused to dismiss the charge upon motion of the district attorney, relator objected to the court proceeding to hear the cause on the merits, either for his removal or suspension from office; as to the former, because no citation had been issued to relator requiring him to show cause why he should not be suspended from office pending final hearing of the cause for removal. Notwithstanding said objection of relator, the court proceeded to hear evidence touching the truth of the facts alleged in the accusation. The court took the matter under advisement until October 31, 1924, at which time the motion of the district attorney was formally overruled, an order suspending relator from office entered, an order appointing Henry Cifre to serve as sheriff, pending the final hearing on the accusation, and an order on relator to turn over all moneys, books, papers, and property belonging to his office to the said Cifre, were made.

Prior to the filing of the motion by the district attorney to dismiss the proceeding, the court had entered an order disqualifying him to act as such officer in the case, and to represent the state, appointing Thomas V. Truder, O. O. Askren, and William G. Hayden, members of the bar, to represent the state, and prosecute the accusation. Some other facts are brought into the case by the return of respondent, in which it is asserted, and not denied, that, prior to the application for an issuance of the alternative writ, the court having appointed Henry Cifre sheriff, and having required him to execute a bond, he had executed the same and the same had been approved by the court, and oath of office had been filed by said Cifre. It further appears from a stipulation on file by the parties that, on the same day Cifre was appointed, filed his bond and oath of office, he demanded and received from the jailers and deputies of relator the possession of the jail and prisoners of the county; that at this time relator was absent from the county, and in no way participated in such surrender, and

upon his return to the county he demanded the surrender of such jail and prisoners, which was refused; that all times relator has refused to obey said order of suspension, and has claimed to be the sheriff of the county; that no demand has been made on relator by said Cifre for the surrender of said office; and that he has possession of the office room of the sheriff in the courthouse, although said Cifre also has keys to the same, obtained when he was deputy under a former sheriff. Respondent demurred to the petition for the writ on the ground that the same failed to point out the further acts about to be performed by the court, and which should be prohibited, which demurrer was overruled. The return was then filed.

Relator filed a demurrer to the return, based upon the proposition that it shows that no citation had been served upon relator to show cause why he should not be suspended, and that consequently the court had no jurisdiction to make the order. Some other general grounds are stated in the demurrer, which are deemed sufficient to raise all of the questions presented. Subsequent to the argument, at the suggestion of the court, the stipulation of facts was filed, so that the court could at once determine the whole case.

[1] 1. At the threshold of the inquiry there is presented the question as to the power of the court to disqualify the district attorney. The matter seems to be controlled by section 1860, Code of 1915, which provides that the district attorney shall represent the state "except in cases * * * where the district attorney or his assistant may for some reason be disqualified or refuse to prosecute, in which case the court shall appoint a competent person to represent the county or state, who shall receive the fees herein provided."

This section gives the court power to appoint suitable and competent persons to represent the state when the district attorney is disqualified. This necessarily implies the power in the court to determine when the

district attorney is in fact disqualified, as was done in this case, and we see no reason to question his action.

This conclusion renders it unnecessary to consider the effect of the motion of the district attorney to dismiss the proceeding, as he had been disqualified by the court, and as other attorneys had been appointed to represent the state. He could no longer act in the premises, and his motion was of no avail.

[2] 2. As before seen, the citation served upon relator required him, simply, to answer the accusation. It contained no notice or intimation that any hearing would be had looking to his suspension from office pending a final hearing of the removal proceeding. Notwithstanding this fact, the court, over objection of relator, proceeded to hear evidence, and made the order of suspension, and appointed Cifre to act as sheriff. Herein lies the error in the whole proceeding.

The law governing the matter is contained in chapter 80, Code of 1915. This statute provides three methods of procedure. Section 3957, Code of 1915, provides for the presentment of the accusation by a grand jury, in which case notice must be served on the officer to come in and answer (section 3959), and, upon the filing of the answer, the cause stands for trial by jury (section 3966.) The accusation may be presented by the district attorney, in case there will be no grand jury in attendance for 20 days, as was done in this case. In such a case, citation is to be issued (section 3973), and thereafter the case shall proceed as if the accusation had been filed by the grand jury. Suspension from office, pending final hearing for removal, is, however, an entirely different matter. Sction 3974, Code of 1915, provides that where the accusation has been presented by the district attorney, and where citation has been issued as provided by section 3973, Code of 1915:

"The court, if it deems such action necessary, after ordering a citation to the defendant as provided in the next pre-

ceding section, may, on application of the district attorney, also order the defendant to appear at a time not less than 5 or more than 15 days after service of such order and at such place as may be mentioned in the order, to show cause why he should not be suspended from office until the matters and things alleged in the accusation have been judicially determined under the provisions of this chapter."

The section clearly points out that the proceeding for removal and that for suspension are separate and distinct, and each requires its own citation as a basis for jurisdiction, although the latter is auxiliary to the former. In the former, the answer of the officer raises an issue which is to be presented to a jury, while in the latter the officer is required to show cause before the judge why he should not be suspended.

We have had occasion to examine this statute with a view of determining its character and effect. In State v. Medler, 17 N. M. 644, 131 P. 976, Ann. Cas. 1915B, 1141, the act was examined, and it was held that, while the proceeding was in its nature civil, many if not all, of the safeguards thrown around a citizen by the rules of the criminal law were ingrafted upon the proceeding, and must be observed. While the judgment in such cases is not punishment for crime, the consquences to the officer are highly penal in character, and he should be protected against loose and irregular procedure. Among those safeguards are notice and opportunity to be heard upon a proceeding which is authorized by the terms of the statute. Without this citation there is no proceeding pending, and the court has no jurisdiction to proceed with the inquiry, nor of the person of the officer. This is the situation in regard to this suspension proceeding, and the judgment must be held to be void.

[3] 3. The question as to the availability of the remedy by prohibition remains for consideration. It is to be remembered in this connection, that, at the time of the application for said writ, the relator had been suspended; Cifre had been appointed to serve as sheriff pending final hearing on the removal proceeding, he had filed oath of office and bond, which

bond had been approved by the court. The facts of the filing of the oath of office, and the filing and approval of the bond, were not before us when we issued the alternative writ, but were brought in by the return. The appointee of the court, Cifre, has partial possession of the office, the jail and prisoners, but not complete possession, as the relator still resists the order, and keeps possession of the office room of the sheriff in the courthouse, and possession of the paraphernalia of the office. Has the matter so far proceeded, then, as to render unavailable the remedy by prohibition? It is universally recognized as the general rule that prohibition is a preventive rather than a corrective remedy, and it issues only to prevent a further act and not to undo an act already performed. High, Extraordinary Legal Remedies (3d Ed.) § 766; State v. Ryan, District Judge, 24 N. M. 176, 173 P. 858:

> "But when anything still remains to be done to or is contemplated to give effect to the judgment of the court in a matter beyond its jurisdiction, the writ may be granted to prevent such action. And in such cases the writ may not only prevent further action, but may undo what has already been done." High, Extraordinary Legal Remedies, § 766.

Upon the subject of the power in prohibition proceedings to undo what has been done, see 22 R. C. L. Prohibition, § 7; State v. Superior Court, 40 Wash. 555, 82 P. 877, 2 L. R. A. (N. S.) 395, 111 Am. St. Rep. 925, and extensive note at 929; Havenmeyer v. Superior Court, 84 Cal. 327, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; People v. District Court, 33 Colo. 293, 80 P. 908; State v. Rombauer, 105 Mo. 103, 16 S. W. 695; People v. District Court, 28 Colo. 161, 63 P. 321; State v. Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; St. Louis, K. & S. R. Co. v. Wear, Judge, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341; Fayerweather v. Monson, 61 Conn. 431, 23 A. 878; State v. Superior Court, 12 Wash. 677, 42 P. 123; People v. District Court, 23 Colo. 466, 48 P. 500; State v. St. Louis Court of Appeals, 97 Mo. 276, 10 S. W. 874. An examination of these cases

will show that the remedial character of a writ of prohibition is not confined merely to preventive measures, but where something remains to be done, and where it is necessary in order to effectuate the object of the writ, that which has already been done may be undone.

In this case relator has not surrendered his office. He still holds and claims to exercise the functions of the office, and is in possession of the paraphernalia thereof, and has demanded the return of the possession of the jail and prisoners. In order to effectuate the order of suspension and the order to turn over to the appointee, further action of the court is required. Such action has been stayed by the writ. In order, however, to render the writ efectual, what has been done must be undone; otherwise the whole controversy remains undetermined, and the vexatious condition to two sheriffs, both claiming office, remains to harass and disturb the public interests. Under such circumstances, the order of suspension and the order appointing Cifre should be vacated.

In this connection, we dsire to say that the judgment of this court in no way interferes with such action as may be regularly taken before the district court looking to the removal or suspension of relator, should such action be taken.

It follows from all of the foregoing that the order suspending the relator, and the order appointing Henry Cifre as sheriff and approving his bond, should be vacated and set aside by the respondent, and the writ should be made peremptory accordingly; and it is so ordered.

BOTTS and FORT, JJ., concur.

[No. 2764. Nov. 17, 1924.]

STATE v. STEWART.

SYLLABUS BY THE COURT

1. Ordinarily a general objection to the admission of evidence on the ground that it is immaterial, without more,

raises no question for review on appeal, where the immateriality is not clearly apparent.

2. A "dying declaration" is admissible in evidence only when it is shown that the declarant was conscious of the approach of death at the time the same was made; and, where the only evidence of such consciousness on the part of the declarant is the character of the wound, and the state of his illness, such a declaration cannot be admitted, where all the surrounding facts and circumstances indicate that no such consciousness existed.

3. Ambiguities in a written statement offered as a dying declaration, caused by interlineations made by the writer who prepared it, should be explained, if testimony for that purpose can be procured.

4. The admission in evidence of a dying declaration does not deprive a defendant of any constitutional right.

5. The refusal of the court to permit a witness to answer a question propounded in the trial of the case furnishes no ground for review on appeal, where the question fails to disclose the nature of the evidence sought to be elicited, and the court is not informed what the testimony of the court is expected to be.

6. It is error for the court to exclude preliminary proof, offered for the purpose of showing a similarity of conditions attending an alleged occurrence, and an experiment made to test the truth of testimony relative thereto.

7. Since there was no evidence of flight or concealment, there is no apparent error in the exclusion of testimony as to the defendant's whereabouts prior to his arrest.

8. The admission of testimony, which is subsequently withdrawn, with instructions to the jury not to consider it, furnishes no ground for appeal, in the absence of a motion for a mistrial, where no injury to the rights of the defendant is apparent.

9. It is not error for the court to refuse to permit an unnecessary repetition of testimony.

Appeal from District Court, Dona Ana County; Ed Mechem, Judge.

Wesley Stewart was convicted of murder in the second degree, and he appeals. Reversed and remanded for new trial.

Holt & Sutherland, of Las Cruces, for appellant.

Milton J. Helmick, Atty. Gen., John W. Armstrong, Asst. Atty. Gen., and J. Benson Newell, Dist. Atty., of Alamogordo, for the State.

OPINION OF THE COURT

FORT, J. Wesley Stewart was indicted for the murder of G. I. Maloy, which is alleged to have occurred on August 21, 1921, and at the trial was convicted of murder in the second degree, and from this conviction he appeals.

The appellant, Stewart, who will hereafter be referred to as the defendant, had an interest in lands in Dona Ana county, under the Picacho community ditch, the waters of which were distributed under the old community ditch system by a majordomo, who, at the date of the killing, and for some time prior thereto, was the deceased, G. I. Maloy. There was a difference between the owners of the water rights under this ditch as to the advisability of turning this ditch over to the United States Reclamation Service, and the defendant was the leading spirit of those favoring such change, and Maloy, the majordomo, and McElyea and Denny, the ditch commissioners, were leaders among those who opposed the change. Considerable ill feeling existed between the two factions and various threats, the one toward the other, were in evidence. The immediate controversy which resulted in the homicide arose from the alleged nonpayment by the defendant of a small disputed ditch assessment, of about $3. Maloy had threatened to cut off the defendant's water, unless this assessment was paid, and on the morning of August 12th the water was cut off, at his order. The defendant armed himself with a shotgun loaded with buckshot or BB shot, went to his headgate, opened it, and turned the water into his irrigating ditch, and seated himself nearby with his gun. Shortly thereafter, Maloy, the majordomo, came across the bridge near the point where the defendant's headgate was situated, and, after some words between them, the defendant shot Maloy at a distance of some 50 or 60 feet, one of the shots entering Maloy's abdomen, and several entered the fleshy part of his thigh. Maloy fell from the mule he was riding, and walked a short distance, falling into some weeds nearby. The only witness to the shooting were Maloy, J. O. Luther,

and the defendant. The witness Luther, at the time Maloy rode up, was engaged in cleaning out a lateral to the ditch with a shovel, with his back toward the scene of the difficulty, at a distance of approximately 800 feet from the place where Maloy was sitting on the mule, and testified that his attention was attracted by a remark of Maloy, who said to the defendant, "Come out of hiding, Stewart; don't be a damn coward; come and let's talk this thing over," to which some one, whose voice he could not identify, said in a lower tone, "Throw up your hands;" that he heard further talking, but could not distinguish the words, and then heard the report of the gun, but did not see who fired it; that the deceased, at the time of the shot, had his hands on the pommel of the saddle from which he fell. The shooting occurred between 7:30 and 8:30 o'clock in the morning, and Maloy died during the afternoon of the same day. An alleged dying declaration was admitted in evidence, which was in substantial accord with the statement of Luther as to what was said. The testimony of the state further sought to show that upon the approach of Maloy the defendant repaired to a cornfield nearby and concealed himself, from which point he fired the shot.

The defendant denied that he was in the cornfield, but asserted that he was seated on the ditch bank, and his account of what took place was substantially as follows: After he opened his headgate, he seated himself nearby on the ditch bank, with his shotgun on his lap, to watch his headgate and protect himself against a previously threatened violent attack by Maloy, and, while thus seated on the main road bounding his property, the deceased rode up on a mule to the north boundary fence, stopped near the gate, about 12 or 15 feet west of the main ditch, reached back to his hip, and said to the appellant, "You G—— d—— s—— of a b——, you move and I will kill you," that the defendant instantly fired to protect himself from Maloy's threatened assault; that the deceased dropped off the mule on his knees and hands, threw something toward the ditch, broke, and ran west about 30 feet,

and fell into the weeds near the side of the road. There was much evidence of bad feeling between the defendant, on the one side, and Maloy, McElyea, and Denny, on the other, and of previous threats, counter threats, and verbal assaults.

A number of errors are assigned, which will be considered in the general order set out in the appellant's brief.

[1] 1. Upon the trial of the case defendant's counsel asked the witness Luther this question:

"But there was some feeling between Maloy and Denny and McElyea, on one side, and Mr. Stewart, on the other—you knew that didn't you?"

To which the witness replied:

"I didn't know so much about it. I knew there was a little difference between Mr. Denny and McElyea, on one side, and Mr. Stewart, but I never heard Mr. Maloy's name brought into the argument at all."

Upon redirect examination, counsel for the state propounded this question to the witness:

"Mr. Sutherland has asked you whether or not you knew that ill feeling existed between Mr. Denny and Mr. Stewart. Did you ever hear that Wesley Stewart had threatened to kill Mr. Denny?"

To which the witness answered:

"I had heard rumors to that effect; nothing definite."

This question and the answer were objected to by the defendant as immaterial. No reason for its immateriality was suggested in the objection, nor in the brief in this court, and we are unable to determine the grounds upon which this objection is urged. No authority is cited; it being merely alleged that it was highly prejudicial to the rights of the appellant, without any suggestion as to how the defendant was prejudiced. In the brief, counsel state that it is unneces-

sary to cite authorities in support of the well-known and well-established rules of evidence upon which the objection is founded. Ordinarily, an objection, in general terms, to evidence on the ground that it is incompetent, irrelevant, and immaterial, without calling the attention of the court to the specific reason why such evidence is incompetent, irrevelant, and immaterial, is too general to base an exception to a ruling of the court overruling such objection. 3 C. J. 818, 819, § 733, and cases cited in note 26; McKenzie v. King, 14 N. M. 375, 93 P. 703; Noll v. Nolan, 135 Ga. 712, 70 S. E. 577.

[**2**] 2. Another excepton is to the admission of the following writing, signed by the deceased, and attested by two witnesses, purporting to be a dying declaration of the deceased, relative to the shooting:

"Friday
"Pichaco, August 12, 1921.
"As I was going to my work, I saw Mr. Stewart walk off
100
the bridge about Three yds. distance from where I was and disappear in the corn field near where I had a job to do. I rode up to the fence leanded over on my mule and called to him in a respectable manner to come out and talk the matter over with me and settle the matter like men. He answered saying throw up your hands or I will shoot you. I told him I would not throw up my hands to any man (as I had done nothing), and he then shot me without hesitation. I could not see him when shot me or any time afterwards. Mr. Stewart and I had always been on friendly terms prior to the time I had taken the job as ditch boss
"(Signed) George I. Maloy.
"T. C. Sexton. Oscar McElyea."

This statement was reduced to writing by McElyea, one of the witnesses. The admission of this paper in evidence was objected to by the defendant, upon the grounds, among others, that it was not shown that the declarant was without hope or expectation of recovery; that the instrument in its entirety was not sufficiently established; that certain interlineations therein were not sufficiently explained; and that its admission in evidence contravened the constitutional rights of the appellant.

Before a dying declaration is admissible in evidence, it must be shown that it was made under a sense of impending death, and without any hope of recovery on the part of the declarant. It should be admitted with scrupulous care, since it was in the absence of the defendant and not under the sanction of an oath, and the declarant was not subject to cross-examination, and was in no peril of prosecution for prejury, and there was grave danger of omissions or unintentional misrepresentations, both by the decedent and the person reducing the statement to writing. 30 C. J. 263, 1 R. C. L. p. 530, and cases cited; Underhill's Cr. Ev. (3d Ed.) §§ 170, 171. While it is indispensable, as a predicate to its admission in evidence, that it must be shown to the court that the declarant was possessed with a consciousness of impending death, the fact that it was made in such a state of mind may be proven, not only by the declaration of the decedent, but by other relevant evidence, and may be inferred, as well, from the surrounding circumstances, if these establish clearly that it was made under such a belief. See Harper v. State, 79 Miss. 575, 31 So. 195, 56 L. R. A. 372, and elaborate case note at pages 406 et seq.

"The statement of the accused (declarant) tending to show his knowledge or belief that he is dying, and that he entertains no hope of recovery, though a part of the declaration, is always admissible. It is perhaps the most satisfactory and convincing evidence of consciousness of approaching death in his mind but it is not the only evidence, nor is any particular form of words required of him." Underhill's Cr. Ev. (3d Ed.) § 172.

Any language indicating a brief, on the part of the declarant, that imminent death is inevitable, or any conduct evidencing such a state of mind, is sufficient to authorize the admission of such declaration. So, also, is a statement of the attending physician or others to such effect made to the deceased, apparently acquiesced in by him. Underhill's Cr. Ev. (3d Ed.) § 172.

In the case of Territory v. Eagle, 15 N. M. 609, 110

P. 862, 30 L. R. A. (N. S.) 391, Ann. Cas. 1912C, 81, this court held:

"Where a dying person makes no declaration that he knows his danger or is conscious of his impending death, and there is nothing in his conduct or that of those present, understandingly acquiesced in by him, from which consciousness of impending death may be ascertained; yet, where it is reasonably to be inferred from the terrible character of the wound and his state of illness that he was sensible of his danger and conscious of impending death, his statements, made under such circumstances, relative to the homicide, are properly admitted as a "dying declaration."

In Jones v. State, 130 Ga. 274, 60 S. E. 840, it is held:

"In the trial of a murder case, if at the time of making declarations the condition of the wounded party making them, the nature of his wounds, the length of time after making the declarations before he expired, and all the circumstances make a prima facie case that he was in the article of death and conscious of his condition when he made the declarations, and such declarations should be admitted in evidence by the court, under proper instructions to the jury."

See, also, Dumas v. State, 65 Ga. 471.

In the instant case the only evidence introduced relative to the dying declaration was that of the attending physician, Dr. C. T. Sexton, who also appears as a witness to the statement introduced. The testimony of Dr. Sexton was to the effect that he was called to see the wounded man at 9 o'clock a. m., on the date of the homicide, and found him suffering from a gunshot wound; that there was a wound in the abdomen, on the left side, near the edge of the ribs, about the anterior axillary line, and several shot in the thigh, two of which perforated the vessels, with quite a bit of subcutaneous hemorrhage. The patient was quite badly shocked, had no pulse, was cold and pallid, his skin was clammy, and he was vomiting and had severe pain in his abdomen: that he gave him a hypodermic to relieve the shock and stimulate his heart, and dressed the wounds; that at the time of his first visit he thought if the effects

of the shock could be relieved and his physical condition built up, that the patient might be relieved by a surgical operation, which would save his life; that, in a general way, he explained this situation to the patient, telling him that he was not then in a condition to be moved for an operation, but that he would have to build him up and restore him from the shock before an operation could be performed. The patient made no reply, but he assumed that he understood the situation; that he conveyed this information to the patient and to the bystanders, and this was the condition when he left the patient, about 10 o'clock, to town to get some additional tablets for hypodermic use, as his supply had been exhausted; that the patient said nothing to him as to his opinion of his physical condition after the doctor had explained to him the manner in which he proposed to handle his case, and offered no suggestions whatever, nor did he at any time say anything to him indicating that he expected to die, and he assumed that the patient understood what he told him as to his hope for a successful outcome by this treatment. He returned at 11:50 o'clock a. m., and found that the patient had not rallied, and left him again between 12 and one o'clock, at which time he had no hope for his recovery; that when he left the first time he still had hopes of Maloy's ultimate recovery, but that he did not have such hopes when he left the second time; that the statement was made shortly after he arrived on his first visit, at a time when the patient was quiet; that he was not vomiting constantly and persistently; that it came on in paroxysms; that he was not turning or twisting all the time, but had periods of quiet; that the statement was made during a quiet period; that the death of Maloy was caused by shock produced from gunshot wounds.

From the foregoing, it will be seen that the only evidence introduced to show that the deceased was conscious of approaching death, was that of the actual character of the wound and its seriousness, and of his physical condition resulting from the shock of the

gunshot wounds. The question before us is: was this evidence sufficient to establish prima facie that the declaration was made under the sense of impending death? On pages 618 of the opinion (110 P. 864) in the Eagle Case, supra, the court said:

"Under the foregoing evidence, it then became necessary to determine whether the dying declaration of Santiago Eteewa as made under the sense of impending death and therefore became admissible under the rule hereinbefore stated. There being no expression from Eteewa himself from which this can be determined and nothing in his conduct at the time the declaration was made from which it may be inferred that he was conscious of his condition, and no communications having been made to him by his medical adviser or friends which were assented to or understandingly acquiesced in by him, we must rely solely upon the terrible character and extent of the wound inflicted, in determining whether Eteewa was under the sense of impending death at the time he made the declaration admitted in evidence as a dying declaration."

So, in the present case, we must rely solely upon the character and extent of the wound, and the shock produced thereby, at the time the statement was made, to determine whether it was made when Maloy was under the sense of impending death. In ruling that the dying declaration in the Eagle Case was admissible, the court quotes as follows from 3 Wigmore on Evidence (2d Ed.) § 1442:

"We may avail ourselves of any means of inferring the existence of such knowledge; and, if in a given case the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained. Such is the settled judicial attitude."

On page 619 of the opinion in the Eagle Case (110 P. 865), the court further said:

"From his testimony (quoted supra) it appears that the wound was of such a terrible nature and character that his symptoms as to vomiting, internal bleeding, subnormal temperature, rapid pulse, distended abdomen, and later the excretions from the wounds, were of such a serious and dangerous nature that it must be inferred therefrom that Eteewa was conscious of his condition and under the sense of impending death at the time the statement was made."

After quoting from Anthony v. State, Meigs (Tenn.)

265, 33 Am. Dec. 146, in support of his conclusion the court, in the Eagle Case, again says, on page 620 (110 P. 865):

"The facts in this case therefore can lead but to one conclusion, viz., that the statement of Santiago Etweea was made under the sense of impending death and properly admitted as a dying declaration."

It appears from the evidence quoted in the Eagle Case that where the bullet entered the body there was a small puncture, but where it left the body there was a large gaping wound, from which there was bleeding, and from which there was, on the second day after the shooting, a discharge of intestinal contents; that he was conscious, but in a rather semi-conscious or dazed condition; and later developed almost incessant hiccough; that the doctor, when he first saw the wound knew that it would be fatal, and told his friends that he would die in a few days, although this fact was not indicated to Eteewa. It also appears that at the time the statement was written down, in the Eagle Case, a Mr. Allen stated to deceased that he would send for a notary to reduce the statement which had previously been made by Tteewa to writing, and that it was the opinion of this witness, from Eteewa's general condition, that he would die.

In the Jones Case, cited supra, it appeared that the declaration was made 15 minutes before his death, and a short time after he received the wounds which caused his death; that the deceased was found lying on the ground near his home a short time after pistol shots were heard, shot through the heart, and the words testified to were the only words he uttered after he was found. The court held that, though there was no direct testimony that the deceased was conscious of the fact that he was going to die, the evidence was sufficient to warrant the conclusion that he was aware of this fact when he made the statement. The statement in the Jones Case was admitted to the jury, upon an instruction that they should examine the

facts and circumstances under which it was made, and determine whether the same had been made voluntarily. In the Dumas Case, cited supra, the deceased was shot in the base of the brain, and stated that his head felt like it was about to burst open, and called upon a bystander to examine the wound, and shortly after this he swayed and leaned forward, but was afterwards unconscious, and died in a short time. It will thus be seen in the Eagle Case that the wound itself was of such a nature as to have convinced the doctor and also others who saw it, that it was necessarily fatal, and that the physical symptoms had so far progressed as to make a realization of this result a certainty. In the Jones Case the wound was in the heart, and the statement was made during the only conscious interval between its infliction and the death of the deceased. In the Dumas Case the circumstances were very similar. The wounds in all these cases were such as to have carried the conclusion to any reasonable man that they must necessarily have resulted in death at once, and it was upon this ground that they were admitted. There are decisions to the effect that, although the attending physician or surgeon may believe the wounded man to be progressing favorably, and even when such belief is expressed to the declarant, the dying declarations can be admitted, when it appears from other evidence that, in spite of such belief or of such expressions on the part of the physician, the declarant believed that death would necessarily result from the injury. People v. Simpson, 48 Mich. 474, 12 N. W. 662; State v. Bradley, 34 S. C. 136, 13 S. E. 315; Wheeler v. State, 112 Ga. 43, 37 S. E. 126; Stevens v. Commonwealth, 47 S. W. 229, 20 Ky. Law Rep. 544. But in each of these cases there is other and independent evidence that the deceased had indicated his settled belief of his approaching death, in spite of the statements or opinion of the physician that there was hope that he might recover. From our examination of the cases, supporting the proposition that the sense of impending death which a dying person must have had, in order to render a

dying declaration made by him admissible in evidence, may be inferred from the nature of the wound or the state of his illness, without any express declaration to show that he was sensible of impending death, we do not find any case which, upon its facts, goes further in support of this view than the Eagle Case of our own territorial court, and in all of them it appears to have been shown, either by the statements of the physician or of the wounded person, or by other compelling circumstances, that the nature of the wound was either fatal, or was believed by either the physician or the wounded person to be fatal, and such as to justify the finding of the court that the wounded person was aware of his approaching decease at the time the declaration was made.

But no such conclusion can be drawn from the evidence in this case. From the testimony of the physician here, it nowhere appears that he considered the wounds in and of themselves necessarily fatal; nor did the deceased die from the direct results of the wounds, but from the shock incident to his wounding. Apparently the physician had strong hopes that he would be able to overcome the effects of this shock at the time the declaration was made, and that the patient's condition, after the immediate effects of such shock were overcome, would be such that a successful operation might be performed; and it was the opinion of the physician that this impression was conveyed to the deceased, and apparently acquiesced in by him. So it will be seen in the present case that a knowledge or inference that the wound would result fatally was absent on the part of the physician at the time the statement was made; that this belief on his part was inferentially conveyed to the patient, who by no word or act indicated that he did not accept this conclusion as correct; and, if the skill of the physician was such as to justify confidence in his conclusion, this is a case in which the nature of the wound was such as to contraindicate that it would be fatal, and was not of such a nature that an inference of imminent death could be drawn therefrom. A citation

of cases supporting the doctrine of the Eagle Case will be found in the report of that case in Ann. Cas. 1912C, at page 85. While not reviewing all of those cases, we will refer to a few of them, and to the circumstances which differentiate such cases from the instant case. The case of Mattox v. U. S., 146 U. S. 140, 13 S. Ct. 50, 36 L. Ed. 917, is referred to in practically all of the text-books and cases which assert the application of the rule of evidence declared in the Eagle Case. In that case the attending physician regarded the recovery of the wounded man as hopeless, and, upon an inquiry from the wounded man as to his condition, the physician told him that the chances were all against him, and that he did not think there was any show for him at all, and this information had been imparted to the wounded man before the dying declaration was made. The declaration in that case was offered on behalf of the defendant, and the refusal to admit the declaration was declared by the court to be error. In the case of People v. Samario, 84 Cal. 484, 24 P. 283, the deceased, when encouraged with the statement to keep up his courage, that he was not going to die, and that he would probably get up to-morrow, answered: "Oh, no, I am going to die." In State v. Gray, 43 Or. 446, 74 P. 927, it appeared that the deceased, prior to his death, had been informed by his physician that he could not recover, and the physician had at that time suggested the making of a statement.

We therefore feel justified in saying that there are no cases which go further to establish the admissibility of such statements, from evidence of the nature of the wound alone, than the Dumas and Jones Cases from Georgia, cited supra, and the Eagle Case from New Mexico. Nor do we believe that the rule of evidence admitting such statements, where the only evidence of the conviction of impending death on the part of the wounded person is to be derived from the nature and extent of the wound, should be extended beyond the ruling in those cases.

While it appears that on the second visit of the physician he realized that there was no hope of Maloy's recovery, it does not appear that the statement was reiterated by Maloy after this situation was evidenced. The realization of approaching death must exist at the time the statement was made, unless it was afterwards reiterated with such consciousness on the part of declarant. Wigmore, in his work cited supra, in section 1439, lays down the rule as follows:

"This consciousness must, of course, have been at the time of making the declaration."

See note 1, citing R. v. Spilsbury, 7 C. & P. 190; Walker v. State, 52 Ala. 195; May v. State, 55 Ala. 41; Donnelly v. State, 26 N. J. Law, 618. This, we consider, is the correct rule, and the opinion of the physician formed at a visit subsequent to the one at which the declaration was made would furnish no basis for its admission.

In the present case there is an entire absence of any facts or circumstances which would support a finding by the court that Maloy believed that his wound was fatal when he signed the statement, nor can such a belief be inferred from the nature of the wound itself and the circumstances existing at the time the statement was made; and it is our conclusion that the court erred in admitting the dying declaration upon the evidence adduced.

[3] 3. In the first sentence of the dying declaration, there appears an interlineation of the figures "100" above the word "three," which followed by the abbreviation "yds.," and it does not clearly appear whether this means that the bridge was 100 yards or 300 yards distant. It also appears that there is a parenthetical expression introduced into the sentence, "I told him that I would not throw up my hands to any man (as I had done nothing), and he then shot me without hesitation," which, it is stated in the brief of appellant, appears as an interlineation in the

original paper. Mr. McElyea, who reduced the declaration to writing, and who propounded the questions, and who apparently made the interlineations, was not introduced as a witness, and only evidence in regard to them is a statement of the attending physician, who was busy with other matters at the time, that it is his recollection that the interlineations were made as corrections to the writing, when it was read to Maloy, and just before he signed it. The distance about which there is uncertainty may have been an important fact in the minds of the jury, in determining the guilt of the accused, and the ambiguity should have been explained, either by the witness who wrote it or by some one who understood its meaning, if such evidence was accessible. While we do not hold that, if the evidence had justified a finding by the court that Maloy was aware of his impending death, the declaration could not have been admitted on the testimony of Dr. Sexton as to the proof of its execution, yet we do think that any ambiguity therein, which could have been explained by other accessible witnesses, should have been cleared up at the time it was offered in evidence.

The declaration concludes with the following statement: "Mr. Stewart and I had always been on friendly terms prior to the time I had taken the job as ditch boss." Dying declarations are only admissible as to the circumstances attending the infliction of the mortal wound, in the nature of res gestae, and statements of other facts or conclusions on matters not directly relating to the infliction of the injury, though contained in such declaration, are not admissible. Underhill's Cr. Ev. (3d Ed.) § 177; 3 Wigmore on Ev. (2d Ed.) § 1434, and cases cited in note 1. However, no objecton was made to the admission of this portion of the dying declaration, for the reasons here indicated, and this question is not before us.

[4] 4. There is no merit in the objecton that the admission of the dying declaration involved a viola-

tion of the constitutional rights of the appellant under the Constitution, treaties, and laws of the United States.

"The admission of dying declarations does not violate the constutional provision that the accused in a criminal case shall be confronted by the witnesses against him. The constitutionality of such evidence has seldom been challenged by the bar or questioned by the judiciary. The fallacy of the objection consists in the supposition that the deceased person, whose dying declarations are proved, is the witness in the case. The witness by whom the accused has the right to be confronted is the one who testifies to the truth of the declarations. No proposition is plainer than that this clause of the several Constitutions was not designed to proclaim any novel principle. It is but the repetition of the ancient and well-established principle of the common law. It was never construed in England, whence, with our great system of common-law jurisprudence, it is derived, to exclude such evidence as was crystallized into that system, and recognized as a vital part of it, upon wise principles of policy, expediency, or necessity." 1 R. C. L. pp. 529, 530, § 71, and cases cited in note 3; Campbell v. State, 11 Ga. 353; Jones v. State, 130 Ga. 274, 60 S. E. 840.

See, also, cases assembled in note to Worthington v. State (92 Md. 222, 48 A. 355, 84 Am. St. Rep. 506), in the report of that case in 56 L. R. A. at page 357.

[5] 5. Error is alleged in the exclusion of certain testimony sought to be elicited from Manuel R. Chavez, a witness for the defendant. The following extract from the examination by defendant's counsel, taken from the transcript, shows how the queston arises:

"Q. Did you see Mr. Renn there that afternoon? A. I did.

"Q. What took place further than what you have told?

"Mr. Newell: We object to anything that took place between him and Renn.

"The Court: Sustained."

It does not appear that the defendant informed the court what he expected to show had taken place between Maloy and Renn. The question does not disclose the matter inquired about, nor was any tender of evidence made. We are wholly at loss to know what was expected to be proven. The testimony of Renn, taken

on a previous occasion, was introduced in evidence, which disclosed that, when Maloy ceased speaking to Stewart on this occasion, he ran off the steps and up against him, and started to speak, and said that Renn had been talking about him, whereupon Renn asked Maloy: "Who are you talking to?" And Maloy looked up, never said a word, closed his knife, got on his horse, and was gone. However, there is nothing to indicate, from the question propounded, that this was the subject of the inquiry. In the case of Diamond X Land & Cattle Co. v. Director General of Railroads et al., 27 N. M. 675, 205 P. 267, this court held:

"In the absence of an offer of proof, action of the trial court in excluding evidence cannot be attacked on appeal."

See, also, Territory v. Kelly, 2 N. M. 292, 306, 307; Insurance Co. v. Mercantile Co., 13 N. M. 241, 82 P. 263; State v. Goodrich, 24 N. M. 660, 176 P. 813; State v. Anderson, 24 N. M. 360, 174 P. 215.

We do not thnk that the decision in the case of State v. Ardoin, 28 N. M. 641, 216 P. 1048, has any application to the facts of the present case, for the reason that here there was no suggestion that the object of the inquiry was to show other specific acts of violence.

[**6**] 6. Another ground of error alleged is based upon the refusal of the court to admit certain preliminary testimony as the foundation of introducing other testimony relative to an experiment alleged to have been made during the trial by the defendant's counsel and others. J. O. Luther had testified that he was at work on a lateral to an irrigation ditch at a point about 800 feet south of where Maloy was killed and that from this distance he heard the conversation between Maloy and the defendant, which he stated had occurred immediately prior to the shooting. The purpose of this experiment was to test whether it was possible for one situated where Luther stated that he was to have heard such a conversation between

persons situated where Maloy and the defendant were alleged, by him, to have been. For this purpose, a party of five, composed of the defendant's counsel and others, divided themselves in two groups, the one of two persons, whom we will call the speaking group, and the other of three persons, whom we will call the listening group. The speaking group first took their position at the place where Maloy was shot, and spoke in a loud tone of voice to the listening group, stationed at the place where Luther was working at the time. The speaking group then changed their position to the place occupied by Luther, and the listening group to the place where Maloy was shot, and with this change of position repeated the experiment. It was claimed that the results of the experiment showed that it was impossible for Luther to have heard the conversation, as detailed by him, from the place at which he was standing. As preliminary to the tender of the evidence relative to the experiment, the defendant introduced as a witness, Albert S. Curry who was in charge of the substation of the United States Weather bureau at the State Agricultural College, about three miles distant, to show from the records of his office the direction of the wind, the temperature, the conditions as to sunlight, and the barometric pressure, on August 21, 1921, the date of the homicide, and on April 5, 1922, the date of the experiment. The court admitted the testimony as to these conditions on August 21, 1921, which showed that on this date the velocity of the wind was 7½ miles per hour; that the direction of the wind was from northwest to southeast; that the sun shone two minutes during the hour from 7:30 to 8:30 a. m.; that the temperature was 82 degrees, and the barometric pressure was 26.35. The defendant then offered to prove, by this witness, from the records of his office, that during the same hour on April 5, 1922, the velocity of the wind was 7¼ miles per hour; that the direction of the wind was, for three minutes, from south to north, and for the balance of the hour from southwest to northeast; that the sun shone

during the full hour; that the temperature was 68 degrees, and the barometric pressure was 25.97.

Counsel for the state objected to the introduction of any evidence as to the atmospheric conditions on the date of the experiment, upon the ground that the conditions on the date of the experiment, upon the ground that the conditions on the two dates in question were shown to be different, as the wind was in opposite directions. This objection was sustained. The defendant then made a tender of this proof by Curry as preliminary to the offer of evidence as to the experiment and its results. Counsel for the state contend in their brief that, as the velocity of the wind was approximately 7½ miles per hour on each date, and in different directions, there was an adverse wind condition of 15 miles per hour, being the sum of the two opposing velocities, and that this showed a great dissimilarity in conditions. While this is true, the evidence relative to the experiment showed that the talking group was first so situated that the direction of the wind was contrary to that upon the date of the homicide, but later they changed their position from north to south, so that the relative positions of the talking and listening groups were similar to those of Luther and the deceased on the date of the tragedy. However, the question of the admissibility of evidence relative to the experiment itself is not before us at this time. The court having excluded the testimony of the conditions under which the experiment was made, there is nothing from which a comparison could be made to determine whether the conditions under which the experiment was made were similar or dissimilar to those on the date of the homicide.

Experiments to test the truth of facts testified to by witnesses, when properly conducted, are often helpful in determining the truth of such testimony. Experiments, as to whether or not words spoken under similar conditions where the defendant and the deceased stood could have been heard by a witness at the point where he alleged that he stood, would be admissible, if the conditions when the experiment was

made were similar to those when the transaction took place. On the other hand, evidence of an experiment, for the purpose of testing the truth of testimony that a certain thing occurred, is not admissible, where the conditions attending the alleged occurrence and the experiment are not shown to be similar. 10 R. C. L. 1002, § 119. Since proof of the similarity of such conditions is a necessary preliminary to the introduction of evidence relative to such an experiment, it is always proper for a person offering proof of an experiment to make proof of the preliminary conditions existing at the date such experiment was made. As was said by the Supreme Court of Washington:

"The question of admissibility of proof of similarity of conditions attending an accident and experiments is not a matter of discretion with the court." Amsbury v. Grays Harbor R. & Light Co., 78 Wash. 379, 139 P. 46, 8 A. L. R. 1.

Until such proof was made, the court was unable to determine whether the evidence as to the experiment was admissible. This preliminary proof is somewhat similar to that required before a confession or a dying declaration can be offered in evidence, and it is from a comparison of the similarity of such conditions that the court is able to determine whether or not the evidence is admissible. See 10 R. C. L. pp. 1000-1003; Amsbary v. Grays Harbor R. & Light Co., supra; Kohlhagen v. Cardwell, 93 Or. 610, 184 P. 261, 8 A. L. R. 11, and case note at page 18 of 8 A. L. R.; State v. Ortiz, 25 N. M. 229, 180 P. 284; Smith v. State, 2 Ohio St. 512; Wilson v. State (Tex. Cr. App.) 36 S. W. 587; Byers v. N. C. & St. L. R. Co.; 94 Tenn. 345, 29 S. W. 128. The existence of a slight dissimilarity of conditions is not sufficient to exclude evidence of an experiment. As is said in 1 Wigmore on evidence §442.

"This similarity need not be precise in every detail. It need include only those circumstances or conditions which might conceivably have some influence in affecting the result in question."

In any view, the defendant here was clearly entitled to introduce this preliminary testimony, in order that his right to introduce evidence of the experiment might be determined. The court therefore erred in refusing to admit the excluded testimony of Albert S. Curry.

[7] 7. There was no error in excluding the testimony regarding the movements of the appellant following the shooting. The state did not attempt to show any flight on the part of the defendant; nor was there any contention upon the part of the state that the defendant sought in any way to conceal himself or prevent his arrest after the shooting. The testimony offered was therefore immaterial and inadmissible.

[8] 8. Another error assigned is to the admission of certain testimony as to a controversy alleged to have occurred between the defendant and one Juan M. Delgado some four or five years prior to the trial. This testimony was admitted, upon the statement by the state's counsel that it would be connected, but the effort so to connect it was abandoned, and upon motion of the defendant's counsel the testimony was withdrawn from the jury, and the judge instructed them to disregard it. The testimony was not, in our opinion, of such a nature as to prejudice the rights of the defendant to such an extent as to require a new trial, in view of its withdrawal from the jury and the instruction by the court to the jury that they should disregard the same. Defendant made no motion for a mistrial, and apparently acquiesced in the action of the court.

[9] 9. The error assigned in the admission of the rebuttal testimony of J. W. Denny is without merit. This testimony was in denial of certain testimony offered by the defendant, and was competent for that purpose. Nor was there any error in refusing to permit the defendant, upon cross-examination of the witness Denny, to show that Denny had said to the defendant: "Wesley Stewart, if you don't quit

monkeying and trying to turn this ditch over to the government, there is going to be the biggest killing that you ever heard of." The identical question had previously been fully answered without objection, and no harm could have come to the defendant from the court's refusal to permit its reiteration.

10. Since the cause is to be reversed upon other grounds, it is not necessary to consider the error alleged, upon the refusal of the court to declare a mistrial, because of the demonstration on the part of the wife of the deceased during the argument of the case before the jury.

For the errors hereinabove set out, the judgment of the trial court is reversed, and the cause remanded for a new trial in accordance with this opinion; and it is so ordered.

PARKER, C.J., and BOTTS, J., concur.

[No. 2847. Dec. 3, 1924]

GARCIA v. LEAL et al.

SYLLABUS BY THE COURT

1. A deed executed by using the hand of a person to make his mark thereon at the place of signature, is void, where the grantor does not consciously assent to the signature so made, nor afterwards ratify the same, and a certificate of acknowledgment placed thereon under such circumstances does not operate to render such conveyance valid.

2. The duties performed by an officer in taking an acknowledgment in this state are ministerial in character rather than judicial.

3. A certificate of acknowledgment duly executed as required by law is prima facie evidence of the execution of the instrument acknowledged, and should be impeached only by clear and convincing evidence; but a certificate of acknowledgment is not conclusive and may be contested, and where the evidence for the plaintiff to the effect that a deed had not been consciously executed by the grantor, and that the notary's certificate of acknowledgment thereon was false, if believed by the trial court, is clear and convincing, a judgment setting aside such deed will not be disturbed, although evidence on behalf of the defendants may be in direct conflict therewith.

4. The finding of the trial court that no consideration passed from the defendant to the plaintiff, or his intestate, for the conveyance sought to be set aside in this action, is supported by substantial evidence.

5. Where defendants desire to avail themselves of an estoppel in a suit to set aside a deed as a cloud upon plaintiff's title, and the complaint fully sets out the origin of such title, describes the deed sought to be set aside, and charges the acts of fraud alleged to have been committed in securing its execution, such estoppel must be especially pleaded.

6. The fact that a person sits quietly by while the signature of an unconscious person is placed to a deed, will not operate to estop him from attacking such deed where the grantees therein parted with no consideration therefor at the time of its execution, nor subsequent thereto, and did nothing to place themselves in a less advantageous position than they had been at the time of its execution.

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

Suit by Isaac Garcia, individually and as administrator, against Primitivo Leal and another. From a decree for plaintiff, defendants appeal. Affirmed.

O. A. Larrazolo, of Albuquerque, for appellants.

It is alleged that the grantor was not conscious at the time he signed the deed and it is incumbent upon the plaintiff, appellee herein, to establish that fact to the satisfaction of the court. Dicken v. Johnson, 7 Ga. 484; Howe v. Howe, 99 Mass. 88; Brown v. Brown, 39 Mich. 792; Chancellor v. Donnell, 95 Ala. 342; Gibbons v. Dunn, 46 Mich. 146; Kimball v. Cuddy, 117 Ind. 213; Titcomb v. Vantyle, 84 Ill. 371; Buckey v. Buckey, 38 W. Va. 168; Anderson v. Cranmer, 11 W. Va. 562; Jarrett v. Jarrett, 11 W. Va. 584; Doe, Guest v. Beeson, 2 Houst. (Del.) 246; Greenslade v. Dare, 20 Beav. 284, 24 L. J. Ch. N. S. 490; 1 Jur. N. S. 294; Achey v. Stephens, 8 Ind. 411; Odom v. Riddick, 104 N. C. 515, 7 L. R. A. 118; Cropp v. Cropp, 88 W. Va. 753; Pike v. Pike, 104 Ala. 642; Gates v. Cornett, 72 Mich. 435; Young v. Lamont, 56 Minn. 216; Dorchester v. Dorchester, 18 N. Y. S. 402; Swayze v. Swayze, 37 N. J. Eq. 180; Chicago West Div. R. Co. v. Mills, 91 Ill. 39;

Myatt v. Walker, 44 Ill. 485; Lilly v. Waggoner, 27 Ill. 395; Wall v. Hill, 1 B. Mon. 290, 36 Am. Dec. 578.

Fraud must be proved. Herring v. Wickham, 29 Gratt. 628; White v. Perry, 14 W. Va. 66; Thames v. Rembert, 63 Ala. 561; Morton v. Weaver, 99 Pa. 47; Mead v. Conroe, 5 Cent. Rep. 219, 113 Pa. 220; Babbitt v. Dotten, 14 Fed. Rep. 19; Ferguson v. Little Rock Trust Co., 137 S. W. 555; Mears v. Waples, 3 Houst. (Del.) 581; Ruby v. Jamison, 143 Ky. 486, 136 S. W. 909; Western Horse & Cattle Ins. Co. v. Putnam, 20 Neb. 331, 30 N. W. 246; Buchanan v. Buchanan, 73 N. J. Eq. 544, 68 Atl. 780, reversed on other grounds in 75 N. J. Eq. 274, 22 L. R. A. (N. S.) 454, 71 Atl. 745; Schultz v. Hoagland, 85 N. Y. 467; Wright v. Grover, 27 Ill. 426; Long v. West, 31 Kan. 298, 1 Pac. 545; Bailey v. Litten, 52 Ala. 282; Redpath Bros. v. Lawrence, 48 Mo. App. 427; Braddock v. Louchheim, 87 Fed. 287; Denoyer v. First Nat. Acci. Co., 145 Wis. 450, 130 N. W. 475; Wallace v. Mattice, 118 Ind. 59, 20 N. E. 497; Stewart v. English, 6 Ind. 176; Campau v. Lafferty, 50 Mich. 114, 15 N. W. 40; Bumpus v. Bumpus, 59 Mich. 95, 26 N. W. 410; U. S. v. The Maxwell Land Grant Co., 121 U. S. 325, 30 L. Ed. 949. etc.

In the following cases the courts have said that fraud should not be found when the facts and circumstances proven may as well consist with honesty of purpose. Smith v. Branch Bank, 21 Ala. 125; Alabama Life Ins. & T. Co. v. Pettway, 24 Ala. 544; Stiles v. Lightfoot, 26 Ala. 443; Thames v. Rembert, 63 Ala. 561; Cromelin v. McCauley, 67 Ala. 542; Phoenix Ins. Co. v. Moog, 81 Ala. 335, 1 So. 108; Lyman v. Cessford, 15 Iowa 229; Schofield v. Blind, 33 Iowa 175; Drummond v. Couse, 39 Iowa 442; Raymond v. Morrison, 59 Iowa 371, 13 N. W. 332; Ley v. Metropolitan Life Ins. Co., 120 Iowa 203, 94 N. W. 568; Connors v. Chingren, 111 Iowa 437, 82 N. W. 934; Pierce v. Pierce, 55 Mich. 629, 22 N. W. 81, 15 Mor. Min. Rep. 675; Morris v. Talcott, 96 N. Y. 100; Baird v. New York, 96 N. Y. 567; Postal v.

Cohn, 83 App. Div. 27, 81 N. Y. S. 1089; Roberts v. Washington Nat. Bank, 11 Wash. 559, 40 Pac. 225; State Sav. Bank v. Emge (Iowa), 108 N. W. 530; Alter v. Bank of Stockham, 53 Neb. 223, 37 N. W. 667.

Plaintiff should make good his case at least by a preponderance of evidence. Bauer Grocery Co. v. Sanders, 74 Mo. App. 657; Chicago City R. Co. v. Fennimore, 199 Ill. 9, 64 N. E. 985; McDeed v. McDeed, 67 Ill. 545; White v. Mackey, 85 Ill. App. 282; Donley v. Dougherty, 75 Ill. App. 379; Leggett v. Ill. Cent. R. Co., 72 Ill. App. 577; Effinger v. State, 9 Ohio Cir. Ct. 376, 6 Ohio Cir. Dec. 417; Chapman v. McAdams, 1 Lea (Tenn.) 500; Telford v. Frost, 76 Wis. 172, 44 N. W. 835; Trott v. Wolfe, 35 Ill. App. 163; Chicago, etc., R. Co. v. Givens, 18 Ill. App. 404; Gage v. Eddy, 179 Ill. 492, 53 N. E. 1008; The Queen, etc. Mfg. Co. v. Mallory, 10 Blatchf. 140; Sayer v. Mead, 171 Pa. St. 349, 33 Atl. 355; Smith v. Slocum, 62 Ill. 354; Gibson v. R. Co., 164 Pa. St. 142, 30 Atl. 308; Graham v. State, 92 Ala. 55, 9 So. 530.

The certificate of acknowledgment is regular on its face. A strong presumption exists in favor of its truth, and the burden of proof rests on the party assailing it. 1 Cyc. 623 (B) 1 and 2 and cases cited; 1 Cyc. 624, b and cases cited; 1 Cyc. 625 (II) and cases cited.

Appellee was present when the deed in question was signed, and did not protest. He is estopped from asserting his claim. Note "Silent Acquiescence" in 7 L. R. A. at page 756 and cases cited; 16 Cyc. 770, c and d and cases cited; 20 Cyc. 434, 3 and cases cited.

Rodey & Rodey, of Albuquerque, for appellee.

It is strongly in evidence from the defendant's side that the deceased did not sign the deed but that the woman, Leonides, took his hand and inserted a pencil between his forefinger and middle finger, and then squeezed the two fingers together so as to hold

the pencil, and that he made his mark on the deed with her guidance and help in that way. Plaintiff's side of the case denies this emphatically and says that no such thing occurred, but that she simply took the hand of the unconscious man and touched it to the pen. As to the formal requisites of a deed, see 8 R. C. L. p. 935, sec. 13 and citations. As to the mental capacity of persons who sign a deed, see 8 R. C. L. p. 946, sec. 22.

The best case in the books which counsel can find for the enlightenment of the court in this case is that of Barkey v. Barkey (Ind.), 106 N. E. 609, L. R. A. 1915B 678. See also Dunlop v. Dunlop, 10 Watts. 153.

On the question of delivery. 8 R. C. L. p. 978, sec. 48.

The grantor had only inherited an undivided one-fourth interest in the property, and could therefore only dispose of that much. 8 R. C. L. p. 1052, secs. 105, 106 and notes.

OPINION OF THE COURT

FORT, J. Isaac Garcia, as the sole heir of his deceased partners, and as the administrator of the estate of his father, Meliton Garcia, brought this action against Primitivo Leal and Perfecta G. de Leal, his wife, to quiet the plaintiff's title to certain described real estate, and to cancel a certain deed dated September 30, 1921, conveying this property and bearing the signature of Meliton Garcia, the deceased, by mark, with a count in the alternative to recover the purchase price for this land, should the deed be declared to be valid. The complaint alleges that no consideration was paid for the land, and that the deed in question was prepared by E. L. Vernier and brought by him to the sick room of the grantor, who was then unconscious, and shortly thereafter died without recovering consciousness; that, notwithstanding his condition, Primitivo Leal, one of the defendants, induced some one present to attach the mark of the grantor, and pro-

cured the signature of witnesses to the deed, and the acknowledgment thereof by a notary; that the deed was left in the house of the plaintiff, and some two weeks, thereafter abstracted therefrom by Perfecta G. de Leal, one of the defendants, without permission or any right thereto, and recorded. The defendants denied the allegations of the complaint, and alleged that the deed was duly executed by the deceased while fully conscious, and that the full consideration therefor had been previously paid to the deceased. After hearing the evidence the court found that the grantor, Meliton Garcia, never in truth or in fact consciously signed or delivered the deed, and that no consideration was ever paid for the property described therein by either of the defendants; that at the time of the purported signing of the deed, the grantor was unconscious and not possessed of sufficient mentality to execute or deliver a conveyance of realty; and that the deed was void for want of consideration, and for want of execution and delivery. Upon these findings a decree was entered in favor of the plaintiff canceling the deed, and quieting his title to the property therein described, from which decree the defendants appealed. For convenience the appellants will also be referred to as the defendants, and the appellee as the plaintiff.

As stated in the brief of counsel for appellants, the assignments of error necessary to be considered in the decision of this case raise the question of the sufficiency of the evidence to establish the two material findings of the court to the effect: (a) That, at the time the alleged deed purports to have been signed and acknowledged, Meliton Garcia was unconscious and not possessed of sufficient mentality to execute or deliver a conveyance of realty, and, for this reason, the deed in question was never in truth or in fact consciously executed or delivered by him; and (b) that no consideration was ever in fact paid for the property by either of the grantees.

The testimony of the witnesses for the plaintiff and

the defendants was in direct conflict upon each of these matters. If the testimony of the plaintiff's witnesses was believed by the court to be true, and the conflicting testimony of the defendants' witnesses was rejected as untrue, the evidence was sufficient to authorize the trial court to make the findings in favor of the plaintiff and against the defendants, unless such testimony was of a quality and character insufficient to sustain the burden placed upon the plaintiff by the rules of law applicable to this case. The appellants contend that as a question of fraud was involved, and the deed was regularly acknowledged before a notary public under his official seal, more than a mere preponderance of the evidence was required to impeach this certificate, and set the deed aside. The brief of appellants' counsel contains a very exhaustive argument upon the facts, supported by elaborate citations of text-books and reported cases in support of his contentions.

[**1**] 1. Since the decree in favor of the plaintiff is based upon the findings of the court that the grantor, Meliton Garcia, at the time the alleged deed purported to have been signed and acknowledged, was unconscious, and not possessed of sufficient mentality to execute or deliver it, we will first consider this phase of the case. In Barkley v. Barkley, 182 Ind. 322, 106 N. E. 609, L. R. A. 1915B, 678, it was held that:

> "A deed executed by using the hand of an unconscious person to make his mark on the paper at the place of signature is void."

And in Abee v. Bargas (Tex. Civ. App.) 65 S. W. 489, a deed executed by the grantor while wholly unconscious at the time and up to his death, was declared to be in effect a forgery, and void as to all who claimed title under it.

The deed in the instant case purported to have been executed on the morning of September 30, 1921. At that time, the grantor, Meliton Garcia, was suffering

from the effects of very serious injuries received on the evening of the 26th day of September, prior thereto, and from which he died early on the morning of Oct. 1st. The signature of the grantor was by mark, which was placed there with the assistance of Mrs. Leonidas Rael, and his name was signed thereto by E. L. Vernier, who had prepared the deed at the request of either the plaintiff or defendant on September 29th, and brought it to the chamber of the sick man shortly prior to the time of its alleged execution. The deed bore a certificate of acknowledgment signed by J. M. Sandoval, as notary public under his seal of office.

The witness Vernier testified that he was postmaster at Sandoval; that Meliton Garcia had on several occasions in August and September, 1921, requested him to prepare a deed conveying the property in question to Primitivo Leal, and another deed conveying certain property to the plaintiff, and that on September 29th, Primitivo Leal came to his house and wanted him to prepare the deed, as Meliton Garcia was very sick; that he prepared both deeds, and on the next day took them to the house of Meliton Garcia; that the notary public stated to Meliton Garcia that "there was the deed," and asked "if he would accept it"; that Meliton Garcia did not answer anything, and did not say a word, but was lying there with his eyes closed, and that Mrs. Leonidas Rael placed the mark of Meliton Garcia upon the deed and he signed the grantor's name thereto, and his own name as a witness, and the other subscribing witnesses then attached their signatures, and the notary attached his seal; that the grantor, since deceased, could not speak at the time, and was lying down with his eyes closed and could not move. In answer to the question, "Did this Leonidas that put this cross on the deed, did she in any manner touch his hand to the pen or touch the pen to his hand, or how?" he answered, "He put the pen on the hand, and then after he put the pen on his hand, then she put the cross;" that he saw no consideration passed for the deed; that he signed the grantor's name to

the deed and attached his own signature as a witness, because the grantor had no several occasions told him that he intended to make such a deed, and had requested him to prepare the same.

Leandro Griego, another subscribing witness, corroborated the testimony of Vernier as to the circumstances attending the execution of the instrument, as did also the plaintiff and his wife. There were other witnesses as to the unconscious condition of Meliton Garcia during the day on which the deed was alleged to have been executed and prior thereto, who testified that he was practically unconscious and helpless during the greater portion of that time.

J. M. Sandoval, Jr., the notary who took the acknowledgment, testified for the defendants substantially as follows: That on September 30th, he was met at the postoffice by Primitivo Leal and Isaac Garcia and thas Isaac said, "We are looking for you;" and upon being asked what was wanted, Isaac said, "We are looking for you to take an acknowledgment from my father, for deeds that he made to us;" that the notary desired a sufficient time to go to his house for his seal, but Isaac said, "No, you better take said acknowledgment right away without signing it, and afterwards you can bring the seal and seal it," to which he answered: "That is all right;" that he then went to the house of Meliton Garcia with Isaac and Primitivo, and when he entered, found the wives of Primitivo and Isaac Valentin Leal, Leandro Griego, E. L. Vernier and Dona Leonidas Rael; that, when he arrived, he went in and saw Meliton Garcia in bed propped up and resting upon pillows, and said to him, "How do you do, Meliton?" to which the sick man replied, "I am a little sick;" that he took the deeds from Vernier, who, he saw, had them, looked at them, and saw that they were from Meliton Garcia, the one to his son Isaac and the other to Primitivo Leal; that he took them in his hands, stood right by the bed and said, "Meliton, is it you will that these deeds should be signed?" to which he replied, "Yes,

sir;'' that he took the deeds and placed them on his knees, and Mr. Vernier said to Mrs. Leanidas Rael to take hold of the pen, to give it to him, which she did; that he tried to raise his hand to pick it up—it was impossible, he could not do it; that he then told Mrs. Leonidas Real to take hold of the pen and put it in his fingers, which she did; that she then got him to put a cross upon the documents, on one first and then on the other, and the witnesses started to sign on one side; that Mr. Valentin Leal signed first; that Mr. Vernier signed the grantor's name and also signed Leandro Griego's name to it, and Leandro affixed his cross; that after all had signed, the deeds remained in the hands of Mr. Vernier; that he went to his house and brought his seal and found the deeds over in the postoffice; that Mr. Vernier gave him the deeds, and he put his seal upon them, and delivered one to Isaac, Garcia and the other to Primitivo Leal, who were there at the postoffice to receive them; that the delivery of the deeds was about two hours after they were signed; that from his conversation with Meliton Garcia after explaining the papers, it was his opinion that he knew what he was doing.

The defendant and his wife, and Mrs. Leonidas Rael, corroborated the testimony of the witness Sandoval in all material respects. Dr. A. Davis, who attended him as his physician about noon on September 29th, testified that Meliton Garcia was then suffering from a fractured leg, was cut by three broken ribs on his right side, and was suffering from internal injuries; that the muscles of his right arm were injured, and that he could not have used his arm and could not have signed an instrument legibly; that he was suffering from a high fever and seemed to be sleeping quite a bit with it, although when roused up, he would answer rationally.

Father Lammert, the priest who received the confession of the sick man on the night of September 30th, prior to his death on the following morning, stated that he went to the house of Meliton Garcia

for the purpose of hearing his last confession, and talked to him at that time; that he made his confession in a way; that Meliton did not speak to him; that he was called into the room and spoke to him; that the sick man looked at him and he thought recognized him; that the rest of the people left the room, and he tried to hear his confession, but the sick man could not make a verbal confession because he was speechless; that he was conscientiously sure that the sick man was conscious—

"because of the questions I put to him, he would look at me and nod at me. Then there were moments when he would look off, shut his eyes, tired or sick or whatever it was. I would allow him to rest a few moments and then direct again a question to him and he would look at me, and he would shake his head or move so that induced me or persuaded me that he was conscious. * * * I am conscientiously sure that he understood me and he was conscious, understood what I was asking him and he would nod or shake his head, the other way, and then he would lapse so that occasionally I would have to give him time."

The trial court, who heard these witnesses testify, evidently believed the testimony of Vernier and the other witnesses who corborated him, and rejected that of Sandoval and the witnesses who corroborated him. The evidence on behalf of the plaintiff, if true, was sufficient to support the findings of the court in his favor, unless the rules of law applicable to a case of this sort require a greater quantum.

[**2**, **3**] 2, 3. The appellants contend that since the deed was regularly acknowledged before a notary public under seal, who testified in support of his certificate of acknowledgment, a strong presumption exists in favor of its truth, and the burden of proof to overcome this presumption rests upon the party assailing it; and the proof to impeach such a certificate must be clear, strong, convincing, and conclusive as to its falsity; and it is earnestly insisted that the evidence on behalf of the plaintiff here did not furnish the quantum of proof necessary to overcome it. The question of the probative value of a certificate of acknowledgment, and the quantum of evidence necessary to

overcome the presumption of the truth of the facts certified therein, has been often before the courts, and there is great diversity of expression in the many decisions relative thereto. The rules stated in these opinions with respect to the probative force or weight to be attached to such certificates are diverse and conflicting, but this dissention is often more verbal than substantial. In 1 C. J. p. 896, it said:

"With one possible exception, the courts are all agreed that a bare preponderance of evidence is not sufficient to overcome the presumption in favor of a certificate of acknowledgment regular on its face," and that it "can be overthrown only by evidence so clear, strong, and convincing as to exclude all reasonable controversy as to the falsity of the certificate."

An examination of the cases cited in support of the text discloses that many of them do not go quite so far. A more accurate statement of the rule of law in this regard is found in 1 R. C. L. p. 297, and is as follows:

"The decisions disclose a very decided tendency on the part of the courts to attach weight to certificates of acknowledgment and to view attempts to discredit them with suspicion and distrust. It frequently has been stated as a rule that in order to impeach a certificate the evidence must be clear, cogent, and convincing beyond reasonable controversy. Indeed, it has been said that it must be almost as strong as that required to correct a mistake in a deed. Thus it appears that the burden assumed by the assailant of the certificate is, if the language of the rule is to be understood in its literal sense, much greater than that usually cast upon a party by a presumption of fact. It is apprehended, however, that there is in this case no departure from the ordinary rules respecting the determination of issues of fact, and that the jury should not be instructed as if such were the case . The truth is that the evidence adduced to contradict certificates of acknowledgment very seldom is clear, cogent, and convincing. The principal witnesses almost always are deeply interested in the result, and very often, by their delay to complain promptly, they have subjected their own fairness and even their credibility, to suspicion. The rule in question is expressive merely of this state of facts and should not be held applicable under other circumstances."

Some of this diversity of opinion arises from the fact that in some jurisdictions the ceremony of acknowledgment by the officer is considered as judicial

in character, while in others it is only considered to be a ministerial act. In the former jurisdictions, the quantum of proof is usually considered to be the same as that required to overcome a judgment, but in all, because of the serious injury which might accrue to the general public by making record titles insecure, it is generally considered that the proof to set aside a deed when duly and regularly acknowledged before a proper officer should be strong and convincing. In many states the acknowledgment of a married woman is required to be taken separately and apart from her husband, and as this form of acknowledgment is said to have been a substitute for the proceeding of fine and recovery at common law, which took place in open court, the act of taking the acknowledgment is considered to be judicial. Kerr v. Russell, 69 Ill. 666, 18 Am. Rep. 634; Hitz v. Jenks, 123 U. S. 297, pp. 301, 302, 8 S. Ct. 143, 31 L. Ed. 156. And a like result as to the character of the officer's act has by analogy been extended to acknowledgments in general.

"But the weight of modern authorities, and certainly the better reasoning, pronounce the duties performed in taking an acknowledgment to be ministerial rather than judicial." 1 R. C. L. 254, § 6.

In many states the statutes require deeds to be acknowledged. Such was the law in this state prior to 1901. Compiled Laws 1897, § 3943. This provision was repealed by chapter 62, § 32, Laws 1901. Hayden v. Speakman, 20 N. M. 513, pp. 519, 520, 150 P. 292. Our present law requires that all conveyances of real estate shall be subscribed by the person transferring his title or interest or by his legal agent or attorney. Code 1915, § 4760. And a certificate of acknowledgment is only necessary for the recordation of such deeds, and the protection of the grantee against subsequent purchasers in good faith and without notice. Code 1915, §§ 4788, 4791, and 4795. Acknowledgments taken as required by law are prima facie evidence of the execution of the instrument acknowledged in all courts of this state. Code 1915, § 11. But neither the certificate of acknowl-

edgment nor the record or a transcript of the record of the instrument acknowledged, shall be conclusive, but may be contested. Code 1915, § 4793. Chapter 82 of the Laws 1921 provides that a notary public who is also a stockholder, director, officer, or employee of a corporation, may take the acknowledgment of any party to any written instrument executed to or by such corporation, except where such notary is a party to such instrument, either individually or as a representative of the corporation. It has also been held by this court in Genest v. Las Vegas Masonic Building Association, 11 N. M. 251, 67 P. 743, that:

"An attorney at law who is also a notary public in New Mexico may take the affidavit of his client, or of his client's agent, upon which service of process by publication is based, it having for many years been the practice in New Mexico to do so and there being nothing in the law to prohibit it."

Since acknowledgments of bonds, recognizances, and corporate deeds are in the form affidavits, we can see no reason why a notary, who is the agent or attorney of either or both of the parties to a conveyance, is not authorized to take such acknowledgments; and if so, then also the ordinary form of noncorporate acknowledgments to an instrument in which he was not a party, either individually or in a representative capacity. From these provisions of our law it would seem that the notary's act in taking a certificate of acknowledgment is, in this state, ministerial and not judicial in character. There are numerous expressions characterizing the quantum of proof necessary to overcome the presumption in favor of the truth of a certificate of acknowledgment in many opinions from the courts of the several states. The following expressions have been used in connection with the degree of proof required for this purpose: "Clear and convincing," "clear and satisfactory," "clear, cogent, and convincing," "clear, exact and convincing beyond a reasonable doubt," "so clear and convincing that it has not the appearance of being prompted by interest or selfish motives," clear, convincing, and satisfactory, establishing the defense beyond all reasonable controversy," "clear and convincing and must overcome to a moral certain-

ty." These and many others will be found in the case note to People's Gas Co. v. Fletcher, 81 Kan. 76, 105 P. 34, as reported in 41 L. R. A. (N. S.) 1161, in the third division of this note entitled "Degree of Proof Required. (a) In General," at page 1176 et seq. In some of the cases it is held that the unsupported testimony of the interested witnesses, or of the grantor alone, is insufficient to overcome the certificate. Id 41 L. R. A. (N. S.) p. 1178 b. While the statement of the quantum of proof is thus variously expressed, it will be seen that the conclusions reached in most of these cases were based upon a discussion of and conclusion reached from the testimony in each particular case, from which it will appear that the facts there set out, rather than the rule of law, determine the decision of the court. In the case of People's Gas Co. v. Fletcher, supra, the court held:

"A certificate of acknowledgment made by an officer authorized to take acknowledgments is only prima facie evidence of the execution of the instrument, and, while it is entitled to a strong presumption in favor of its truth, it may be impeached by parol testimony."

While in some of the cases it is held that the testimony of the grantors alone is not sufficient for this purpose, in the case just cited it is held:

"Where the parties have actually appeared and signed an instrument, and, afterward attempt to contradict the certificate as to what took place, the evidence to impeach the acknowledgment must be clear and convincing *** But where the parties deny the execution of the instrument and claim neither to have signed nor acknowledged it, their testimony is admissible to impeach the certificate and will be entitled to as much weight as that of any other interested witness"

In American Freehold, etc., Co. v .Thornton, 108 Ala. 258, 19 So. 529, 54 Am. St. Rep. 148, there is a very clear and able discussion in the case note thereto by Judge Thompson, at pages 150 to 159, inclusive, wherein, after discussing the question and citing authorities at page 157, he states:

"Nevertheless, in our judgment, the weight of evidence in cases of this class should not be affected by any rules peculiar to the subject, and the jury, or court acting as such, should be left to determine from all the circumstances disclosed whether or not the certificate of acknowledgment is

false, and that as against such certificate the evidence of the grantor or of any interested party should be regarded as sufficient to overcome it, when such testimony produces a conviction of its truth and of the falseness of the certificate."

We approve the above statements as the correct view of the law as to this question in this state. For a discussion of these and other related questions relative to the conclusiveness of the probative value of acknowledgments, and the nature of the proof required to overcome them, See Ford v. Ford, 27 App. D. C. 401, 6 L. R. A. (N. S.) 442, 7 Ann. Cas. 245, and note; Wester v. Hunt, 123 Tenn. 508, 130 S. W. 842, Ann. Cas. 1912C, 329, 30 L. R. A. (N. S.) 358, and note; note to People's Gas Co. v. Fletcher, supra; Houlihan v. Morrissey, 270 Ill. 66, 110 N. E. 341, Ann. Cas. 1917A, 364, and extensive case note thereto, wherein many of the later authorities are collected. The cases of People's Gas Co. v. Fletcher, supra, and Houlihan v. Morrissey, supra, very clearly represent two conflicting views upon the greatly controverted question as to the sufficiency of the evidence of interested witnesses alone to impeach such a certificate. In the instant case the court heard the testimony of all the witnesses, observed their manner of testifying, and exercised the function devolving upon him as trial judge of weighing their testimony and determining their credibility. This testimony was sufficient to clearly convince him of the truth of plaintiff's case, and, if the testimony of plaintiff's witnesses was true, as found by the court, the evidence is clear and convincing of the facts that the grantor did not consciously execute or deliver the deed, and that the notary's certificate to the effect that the grantor personally appeared before him and acknowledged that he executed the same as his free act and deed, was false. Since, in our opinion, there was very clear and very convincing testimony to support the findings of the trial court, if he believed such testimony, we will not disturb his findings in favor of the plaintiff.

[**3**, **4**] 3, 4. Upon the question as to whether any

consideration had been paid by the defendants to Meliton Garcia, the evidence introduced by the plaintiff and defendants is likewise in direct conflict. The defendants testified that such consideration had been paid in cash some nine months before the execution of the deed, with currency which had been kept in the grantees' house for some four years; that no receipt was taken for this money, and that only they were present, and neither of them had ever mentioned such payment to any other person except their attorney in this case. The plaintiff and his wife lived with Meliton Garcia, the grantor, and they testified that they had never heard of any such payment. Shortly prior to the time the payment was alleged to have been made, Meliton Garcia and the plaintiff borrowed the sum of $2,000 upon certain lands, including the land described in the deed in question, no part of which was repaid by Meliton Garcia in his lifetime; and several witnesses, including the plaintiff and his wife, testified that the defendant Primitivo Leal had admitted on various occasions that he had not paid for the land, but would do so. The evidence shows that there had been a contract of some sort for the sale of this land by Meliton Garcia to Primitivo Leal, and that Meliton Garcia had so stated at a ditch meeting some months previously; that Vernier had been requested by him to draw such a deed of conveyance; but neither the amount of the consideration nor the terms of the deed were ever mentioned, and, confessedly, the consideration named in the deed was not the one agreed upon, nor was such consideration paid at the time of the execution of the deed. Furthermore, the plaintiff and his wife testified that the deed had never in fact been delivered, but was abstracted from their premises by Perfecta G. de Leal, the wife of Primitivo Leal, one of the defendants. Whether the fact that the consideration named in the deed was not the real consideration thereof, and the further fact that no consideration actually passed at the time of the purported execution of the deed, placed the burden upon the defendants to establish such payment, we

are not called upon to decide, as in any event there was substantial evidence to sustain the finding of the trial court that no consideration had in fact been paid for such conveyance.

[5, 6] 5, 6. Appellant also urges that because of the fact that another deed was made to the plaintiff at the same time, and that plaintiff was present at the time the defendant's deed was executed, and apparently acquiesced therein, he is estopped from attacking this conveyance. No estoppel is pleaded by the defendants, altho full opportunity was accorded therefor, since the plaintiff set out not only the source of his title, but also fully described the deed sought to be canceled and the grounds for such cancellation. It is a general rule that an estoppel, to be available, must be specially pleaded, if there has been an opportunity for so doing. 10 R. C. L. 842. Nor does the present case come within the exception set out in Hoskins v. Talley (N. M.) 220 P. 1007, which holds that an estoppel need not be pleaded "in a suit to quiet title, where the plaintiff does not set forth nor plead in his complaint the precise claim of the title which will be relied upon, nor the muniments establishing the same." In the opinion in this case at page 1010, it is said:

"The reason which underlies such exception is that ordinarily a plaintiff in ejectment is not required to plead the title upon which he relies for his right of possession, and the facts upon which he relies to establish such title are unknown to the defendant until proof is submitted."

This exception should be limited to the reason which gives rise to it, and if it is desired to urge an estoppel against a claim which has been specifically alleged, the facts constituting such estoppel should be pleaded. 10 R. C. L. 843. Besides this, it is not even alleged that plaintiff paid any present consideration for the deed, or parted with any valuable consideration at the time of or subsequent to its execution, or that he was in any other manner injured by the acquiescence of the plaintiff. See, in this connection, Oliver v. Enriquez, 17 N. M. 206, 124 P. 798. It is true that de-

fendants claimed to have made some slight improvements on the land, and to have been in the possession thereof. Such claims, however, were denied by the plaintiff. Even if true they would rather constitute a claim of equitable title to the premises in dispute arising by reason of the contract, possession thereunder, and the full payment of the purchase price therefor, which was not pleaded by the defendants in this case. There is therefore no merit in defendants' claim that the plaintiff was estopped. See, in this connection, Dye v. Crary, 13 N. M. 439, 85 P. 1038, 9 L. R. A. (N. S.) 1136.

While errors were assigned upon the refusal of the court to make certain findings of fact relative to admissions of Meliton Garcia that he had contracted to sell this land to defendants, and to references in descriptions of deeds made by the plaintiff wherein he had referred to this land as that of defendants, such admissions were necessarily considered by the court upon the question of the payment of the consideration, and such references in these descriptions could in no way estop plaintiff, and the court did not err in refusing to make such findings.

Since the findings of the court are sufficiently supported by substantial evidence, the judgment of the court is affirmed; and it is so ordered.

PARKER, C. J. and BOTTS, J., concur.

[No. 2842. Dec. 13, 1924]

STATE v. BOND-DILLON CO.

SYLLABUS BY THE COURT

Chapter 133, Laws 1921, **held** to afford no relief to a taxpayer from overvaluation of his property, where the valuation by the taxing officers had become final prior to the time the act went into effect.

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

Action by the State against the Bond-Dillon Company and the personal property of such company, described in delinquent tax list of Bernalillo County for the year 1919. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

John Venable, of Albuquerque, for the State.

Lawrence F. Lee, of Albuquerque, for appellee.

OPINION OF THE COURT

PARKER, C. J. This is an action for taxes for the year 1919, resulting in a judgment for appellee, from which judgment the state has appealed. The complaint, filed September 28, 1921, alleges that for the year 1919 there were taxes legally assessed and levied against the appellee in the sum of $5,605.20, of which appellee paid $4,000, leaving a balance of $1,605.20, which, together with interest, penalties, and costs, down to the time of filing the complaint, aggregated a sum of $2,085.55, which appellee failed and refused to pay. Appellee answered, admitting all of the allegations of the complaint except the legality of the levy, and the amount claimed to be due, which it denied. Appellee further answered and, by way of new matter, alleged that in the year 1919 it had owned personal property of the value of $100,000; that it duly returned said property for taxation in Bernalillo county, and that, the same having been assessed by the assessor and board of county commissioners at an unsatisfactory valuation, it took an appeal to the state tax commission, resulting in a valuation of the property at $139,000; that said valuation was greatly in excess of the true valuation of said property, and was discriminatory, oppressive, and in its nature confiscatory and unauthorized by law; that said property was not equally and uniformly assessed in proportion to its value as compared with other property; that appellee was discriminated against, in that its property was valued at $39,000 above its true value, and in that it was the uniform and established practice to value property of the kind owned by appellee at not to exceed 70 per cent, of its value,

citing numerous instances of other taxpayers whose property was so valued for taxation; that appellee paid the $4,000 taxes upon its property valued at $100,000, which was its true value, as conceded by it. A demurrer was interposed to the answer, and, it being overruled, appellant replied, denying the excessive valuation of the property, and denying the discriminatory character of the assessment, and denying the allegations of the answer relating to the alleged practice of valuing property at not to exceed 70 per cent. of its value. The parties stipulated in the court below and likewise in this court, that the evidence as it appears in the transcript in the case of Bond-Dillon Co. v. Matson et al., reported in 27 N. M. 85, 196 P. 323, should be considered as the evidence upon which the trial was had.

1. Since this case was argued and submitted, we have handed down an opinion in the case of State v. Persons, etc., 29 N. M. 654, 226 P. 886. The facts in that case are identical with the facts in this case, and the opinion is controlling here. In that case we pointed out that, prior to the passage of chapter 133, Laws 1921, there was no power in the courts to relieve a taxpayer from overvaluation of his property where the question had been submitted to the tax officers of the state, and they had found against him. We likewise interpreted the act of 1921, and concluded that, where valuations had become fixed and final prior to the time when that act went into effect, the act afforded the taxpayer no relief. It seems to us to be rather a harsh and unjust result in this case to say that, simply because the tax had become final before the act went into effect, no relief can be afforded the taxpayer while, under the same circumstances, if the tax had become fixed and final just subsequent to the act, relief could be afforded. We are nevertheless bound by the letter of the act, and must obey it.

In this connection we are not unmindful of the doctrine that discrimination in taxation may be a violation of the Fourteenth Amendment of the Constitu-

tion of the United States, as was held in Sioux City Bridge Co. v. Dakota County, 260 U. M. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979. But, as pointed out in that case, the discrimination must be the result of intentional wrong, rather than an honest mistake of judgment, in order to be available, independent of enabling statutes authorizing appeal to the courts, In this case there is no evidence in the record of intentional wrong on the part of the taxing officers, the evidence being devoted entirely to the question of actual value of the property.

It follows that the judgment of the district court was erroneous and should be reversed, and the cause remanded, with directions to set aside the judgment and enter judgment in favor of the appellant for the amount of the taxes, interests, costs, and penalties due; and it is so ordered.

BOTTS and FORT, JJ., concur.

[No. 2850. Dec. 8, 1924.]

VAL VERDE HOTEL CO. v. ROSS.

SYLLABUS BY THE COURT

1. A deed, delivered in escrow and to be delivered to the grantee upon the performance of the conditions imposed in the escrow, becomes the property of, and effective to pass title to, the grantee, as soon as the conditions have been performed, whether manual delivery of the paper has been made or not.

2. Where a false representation induced a stock subscription, but the representation was made true prior to notice of recission by a subscriber, he can no longer rescind or defend against the subscription; there being no injury to him.

Appeal from District Court, Socorro County; Owen, Judge.

Action by the Val Verde Hotel Company, a corporation, against T. J. Ross. Judgment for plaintiff, and defendant appeals. Affirmed and remanded, with directions.

E. W. Dobson, of Albuquerque, for appellant.

James G. Fitch, of Socorro, for appellee.

OPINION OF THE COURT

PARKER, C. J. This is an action upon a stock subscription to the capital stock of the Val Verde Hotel Company, resulting in a judgment for the plaintiff (appellee) from which the defendant (appellant) has appealed.

The stock subscription is in the following terms:

"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 1st, 1918; Lots 1, 2 3, 4. 5, & 6, block 45, Stapleton addition, 142x150 feet, donated by C. T. Brown. Name: T. J. Ross. Address: Shares: 15."

The defendant answered, admitting the subscription, but denying the donation of the real estate by Brown to the plaintiff, and claiming such false representation by means thereof as to avoid the subscription. Plaintiff replied, denying that Brown had not donated and conveyed the property to the plaintiff, and denying all false representation. The court found that at the date of the stock subscription (April or May, 1918), Brown had not conveyed the property but that on September 28, 1918, he conveyed the same to the plaintiff, and delivered the deed in escrow upon the following terms:

"The enclosed deed is to be turned over to the Val Verde Hotel Company at any time within one year from date, on completion of the hotel building, according to plans and specifications of Trost & Trost: same to be free and clear from all liens and indebtedness of any nature whatsoever."

That within seven months after the date of the escrow, the hotel was completed, free and clear of all liens and indebtedness, but through oversight of the plaintiff the deed was not filed for record until shortly (three days) after the filing of the defendant's answer.

[1] 1. This action was begun February 18, 1920. Long prior thereto, to wit, September 28, 1918, the conveyance was executed and placed in escrow, and within seven months thereafter all of the conditions of the escrow had been performed. It therefore appears that long prior to the bringing of the action plaintiff was entitled to the delivery of the deed by the escrow holder. The deed belonged to the plaintiff, and the grantor no longer had any power or control over the same. Under such circumstances, the delivery of the deed was complete, and title vested in the grantee, notwithstanding the manual delivery of the paper had not been made. 21 C. J. Escrows, § 34; 10 R. C. L., Escrow, § 10; Wilkins v. Somerville, 80 Vt. 48, 66 A. 893, 11 L. R. A. (N. S.) 1183, 130 Am. St. Rep. 908 and note at page 965, where the subject is exhausted.

[2] 2. Counsel for defendant argues that, as the representation in the subscription in regard to the donation of the land was false at the time the defendant signed the subscription, there can be no recovery. We doubt that the representation was to the effect that Brown had already donated the land, but believe that, taking the whole matter together, and in view of what sought to be accomplished by the parties, the word "donated" is to be interpreted as equivalent to the words "to be donated." The object was to give value received for the payment of the subscription, and this was all that was contemplated by the recital in the subscription paper. But, be that as it may, the defendant is still in the wrong. While a fraudulent representation may authorize recision, prompt action being taken of the false representation is remedied and made true before notice of recission is given, the right to rescind or the right to defend against the subscription is lost. In such case there is no injury to the subscriber, and he has no right to complain. See 1 Cook, Corp. (8th Ed.) § 146; 2 Fletcher, Cyc. Corp. § 626; 14 C. J. Corp., § 887; Ship v. Crosskill, L. R. 10 Eq. 73; National Leather Co. v. Roberts, 221 F. 922. 137 C. C. A. 492.

There may be special circumstances in some cases which would modify this general rule, but there are none in this case.

It follows from all of the foregoing that the judgment of the district court is correct and should be affirmed and the cause remanded with directions to proceed accordingly and to enter judgment against the sureties upon the defendant's supersedeas bond, and it is so ordered.

BOTTS and FORT, JJ., concur.

[No. 2901. Dec. 22, 1924]

STATE v. HUNT et al.

SYLLABUS BY THE COURT

It is error, requiring reversal, to submit to the jury a degree of unlawful homicide not within the proofs, and over the objection of the defendant.

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

Samuel L. Hunt and Joseph S. Hunt were convicted of voluntary manslaughter, and they appeal. Reversed and remanded, with directions to discharge defendants.

Percy Wilson and W. B. Walton, both of Silver City, and Clifton Mathews, of Globe, for appellants.

Milton J. Helmick, Atty. Gen., and John W. Armstrong, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

PARKER, C. J. This case was before this court once before, and was reversed for considerations not pertinent to this inquiry. See State v. Hunt, 26 N. M. 160, 189 P. 1111. Over the objection of appellants, the court in this trial submitted to the jury the question of guilt of appellants of voluntary manslaughter. The trial resulted in a conviction of voluntary manslaughter, and this is the sole question presented

for review. The facts in the case are, briefly stated: That on the morning of September 13, 1917, the deceased left his homestead on horseback to go to the the Hunt place, some four or five miles distant, where appellants and their brother, Jack P. Hunt, lived with their parents and sister. When the deceased left his home, he had with him a 30-30 Winchester rifle, which he carried in a scabbard on the right-hand side of his saddle. He was riding along a trail which led through rocks and brushes to the point where his body was afterwards found. His body showed numerous bullet wounds, which were the cause of his death. On the morning of the said September 13, 1917, the appellants, together with their brother, Jack P. Hunt, started out to drive some cattle from the Hunt place to what is called the Blair place, for the purpose of taking the cattle to a watering place situated on the Blair place. The Hunts were all armed with rifles and pistols. In so driving the cattle, they drove them along the same trail upon which the deceased was traveling toward them. At the point where they met the deceased, the trail divided, and one branch went around either side of a clump of bushes, through or beyond which the appellants could not see a man on horseback. Just prior to reaching the clump of bushes, some of the cattle which they were driving left the trail, and the brother, Jack P. Hunt, left the trail to go after and return the cattle, and he was not present at the killing. One of the appellants passed to the right and the other to the left of the clump of bushes, and upon arriving at the farther side of the bushes they saw the deceased sitting on his horse, his horse standing still, the deceased holding the bridle reins in his left hand and attempting with his right hand to take his Winchester out of the scabbard in which he was carring the same. The gun hung in the scabbard, and the deceased was never able to get the gun more than halfway out of the scabbard. Not a word was spoken by any of the three parties. Upon seeing the deceased drawing his Winchester from the scabbard, the two appellants opened fire upon him

with pistols, discharging several shots, and keeping on firing until the deceased began to fall from his horse to the ground, where he instantly died. Jack P. Hunt, upon hearing the shots, came to the spot, and the three Hunts left together; Jack Hunt going at once to the justice of the peace and announcing the killing, and the two appellants going to or near the Hunt place, where they surrendered themselves to the justice of the peace. The Hunts account for the fact that they were armed by testifying that one of them had been shot at on three different occasions by some unknown person about a week prior to the homicide, and that they believed that the deceased was the person who fired the shot. Prior to that time, they had gone unarmed. Witnesses testified in behalf of appellants that the deceased tried to employ them to assist him in getting the Hunts out of the country, and said that there was $5,000 in it if it could be done, and that he (the deceased) was going to get them out if he had to kill them himself. Appellants were not informed of this threat until after the homicide. A forest ranger also testified that deceased tried to get him to give deceased a permit covering the same land which the Hunts had already procured from the Forest Service, which he declined to do, and that the deceased told him that he wanted to run the Hunts off of the Blair place, which was the place for which he desired the forest ranger to give him a permit. The evidence seems to be uncontradicted in any material particular. The Attorney General seeks to sustain the instruction of the court by arguing that the evidence justifies the inference that there was, or might have been, heat of passion in the minds of the appellants. He suggests that shooting at one of the appellants by deceased about a week previous to the homicide was adequate cause for heat of passion in the form of fear and terror. He also suggests the presence of the deceased on the trail, causing the cattle to stampede, the watering of deceased's horse at appellants' watering place without leave, and the mere fact of the trespass of deceased by being on the

trail and on the land covered by the forest permit of the appellants, as possible adequate cause for heat of passion. It is perfectly apparent that none of these facts are adequate cause for heat of passion, and if appellants killed deceased for any one or all of these reasons, they murdered him. The former shooting, if they had reason to believe and did believe that deceased had done it, they might take into consideration in viewing the situation when the deceased made the deadly assault upon them, if he did. If he made no such assault, appellants murdered him. If he did make the assault, and appellants, as ordinarily reasonable men, had reason to believe and did believe in the imminence of danger to their lives, or danger of great bodily harm to them, from such assault, they were justified in the killing on the ground of self-defense.

This case was tried at a time when the law in this jurisdiction was in some confusion owing to a concurring opinion in State v. Kidd, 24 N. M. 572, 175 P. 772, in which it was stated that a defendant could not complain of a conviction of a lower degree of unlawful homicide than was shown by the evidence. Since that time, however, the whole matter has been cleared up, and it is now the settled law that it is error, requiring reversal, to submit a degree of homicide not within the proofs, and over the objection of the defendant. See State v. Pruett, 27 N. M. 576, 203 P. 840, 21 A. L. R. 579; State v. Trujillo, 27 N. M. 594, 203 P. 846; State v. Crosby, 26 N. M. 318, 191 P. 1079; State v. Luttrell, 28 N. M. 393, 212 P. 739.

The appellants have been acquitted of murder, and cannot be shown to be guilty of manslaughter. They are therefore entitled to be discharged.

It follows that the judgment is erroneous and should be reversed, and the cause remanded, with directions to discharge the appellants; and it is so ordered.

BOTTS and FORT, JJ., concur.

(No. 2864. Dec. 29, 1924)

HANNETT v. KEIR et al.

SYLLABUS BY THE COURT

1. The intent of the parties is the controlling consideration in determining whether a partnership exists between them.

2. Where no partnership exists in fact, before a person can be charged as such, he must have so conducted himself as to induce a reasonable person to believe in and rely upon the existence of the partnership.

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

Action by A. T. Hannett, administrator of the estate of James Mair, deceased, against William Keir and another. From judgment for plaintiff as against defendant, Merchants Bank, it appeals. Affirmed and remanded with directions.

E. A. Martin and J. W. Chapman, both of Gallup for appellant.

A. T. Hannett, of Gallup, pro se.

OPINION OF THE COURT

PARKER, C. J. James Mair, a stone mason, and William Keir, a carpenter, submitted a joint bid for the performance of certain labor for the government in repairing the Tohatchi Indian school building, which was accepted, and they entered into a joint contract to perform the services and gave a joint bond as security therefor. They performed the services, and in due time a warrant was issued on the United States Treasury for the payment of the amount due. The warrant was issued to them as individuals, and one-half of the money belonged to each. Without the knowledge of Mair, Keir obtained possession of the warrant, signed his own name and Mair's name to the indorsement thereon, presented the same to the appellant bank, who gave him the money thereon, and in due course received the money from the government. This action was brought by Mair against the bank and Keir to recover one-half of the money. Subse-

quent to the trial, Mair died, and, the cause being revived in the name of his administrator, the present appellee, judgment was rendered in favor of the latter, against the appellant bank.

[1] 1. The appellant must rely, and does, upon the proposition that there was a partnership existing between Kier and Mair which authorized the indorsement of the warrant by Keir. Otherwise there was no authority to indorse Mair's name, and the bank took no title so far as Mair was concerned, and will be liable for his part of the money. The evidence shows there was no contract for partnership between these parties, no firm name, no books of account, no agreement to share profits and losses; there was simply an agreement to share the gross proceeds of their separate efforts in different departments of the work, one doing his carpenter work and the other his masonry work, and neither having anything to do with the other's work. There is no evidence whatever that either ever contemplated the assumption of a partnership relation, with the usual powers of one partner to represent both in the business in hand. Had their business been of such a character as to necessarily require the exercise of such powers, a partnership might have been created, but such is not the case. The test most usually applied to determine whether a partnership exists, as between themselves, is to inquire into the intent of the parties. If there is no intent to assume that relation it does not exist, 20 R. C. L. "Partnership," § 36; 1 Rowley, Mod. Law Partnership, § 102. Here, surely, there was no such intent, nor did either do anything which would authorize the other to collect more than his half of the money. As between themselves, then, they were not partners, as the court found.

[2] 2. The appellant bank is liable to the appellee, unless Mair by some act or declaration had misled it to believe in the existence of a partnership relation such as would authorize Keir to collect the money. American National Bank v. Wood, 24 N. M. 268, 171

P. 507. The evidence shows that Mair never at any time made any statement to the bank upon this subject or any other, and never had any business whatever with the bank. The bank had knowledge of the contract and bond by reason of its cashier having taken the acknowledgments to the same, and he heard some conversation between the parties, and was told by a third party, of Mair having stated that they were partners, from all of which he concluded that they were partners, and when the warrant was presented with both names indorsed thereon, he made no inquiries and cashed the same upon the theory that Keir, as a partner, had power to indorse the paper and collect the money. He relied upon his own judgment of the law under the facts as he had heard them, not upon any acts or representations of Mair. In this he was in error, as before seen. Of course, the indorsement of Mair's name, and the presentation of the warrant by Keir, was a representation by him either that he had authority to make the indorsement or that Mair's signature was genuine; but, so far as shown, even Keir made no claim to derive authority from any partnership relation. The matter was not discussed at all, the bank cashier simply assuming the power from a partnership relation. The appellant bank was not dealing with these parties as a firm, and never had. It was a case of dealing with an ordinary piece of negotiable paper, made payable to two persons, and was wholly unconnected with any business of the parties as a firm. Under such circumstances it was the duty of the bank to inquire into the matter of the indorsement and the right to the proceeds, as in any other case. This it failed to do, and must sustain the loss upon the same.

It follows from the foregoing that the judgment of the district court was correct and should be affirmed, and the cause remanded with directions to proceed accordingly, and to enter judgment against the sureties on the supersedeas bond; and it is so ordered.

BOTTS and FORT, JJ., concur.

[No. 2825. Dec. 30, 1924]

VILLAGE OF CLAYTON v. COLORADO & S. RY. CO.

SYLLABUS BY THE COURT

1. To establish an implied or common-law dedication to public use, the proof must be clear, convincing and unequivocal.

2. Where the findings of the court and the undisputed evidence, tending to disclose the intent of the owner, as cogently support a conclusion that the intention was to devote the property to private use as they do a conclusion of dedication, the latter conclusion is error.

Appeal from District Court, Union County; Leib, Judge.

Suit by the Village of Clayton, against the Colorado & Southern Railway Company. From judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

O. P. Easterwood, of Clayton, and E. E. Whitted and J. L. Rice, both of Denver, Colo., for appellant.

H. B. Woodward, of Clayton, and Joseph Gill, of Albuquerque, for appellee.

OPINION OF THE COURT

BOTTS, J. The village seeks to enjoin the railway company from obstructing what the former claims is a public crossing over the latter's right of way tracks. The trial court granted the injunction and the company appeals.

The court bottomed its judgment on two grounds: (1) Dedication; and (2) estoppel. The latter ground may be disposed of quickly, since an examination of the record discloses that estoppel was not pleaded by the village, and therefore, is unavailable. Palmer v. Town of Farmington, 25 N. M. 145, 179 P. 227. This, however, will not work a reversal, since the judgment is still sufficiently supported by the dedication, if that be well founded.

There is no claim of an express dedication; but the court implies a dedication from the conduct of

the company. The material facts are uncontroverted. When the company's predecessor, some 30 years ago, constructed its railroad through the territory later and now occupied by the village, it crossed a trail which for about a year theretofore had been and was being used by the traveling public. No claim is made that the public had, up to that time, acquired any rights in the trail, or to a right of way for a public highway. As a part of the railway construction, a depot was built adjacent to the point of crossing, and crossing facilities provided, all of which have since been maintained by the company. Later a tract of land lying east of the railroad and opposite the crossing was platted by the owner for townsite purposes, and Chestnut street, as platted, intersected the company's right of way approximately at the crossing. Still later a tract of land on the opposite side of the railroad was platted by the owner for townsite purposes, and Monroe street, as platted, intersected the company's right of way approximately at the crossing. The two streets, however, are not directly opposite each other, the north line, extended, of one practically coinciding with the south line of the other. The line of travel, therefore, over the company's right of way, has never been at right angles to the tracks, nor, as we understand the record, does the village claim a full-width street over the right of way. Such a width, if claimed, would be very materially encroached upon by various structures erected from time to time by the company. In other words, the claim of the village is of a right to cross between these structures and from one street to the other. During all of this time the crossing has been used by the patrons of the company as a means of ingress and egress to and from its office, station, and warehouse, and has likewise been used by the general traveling public on Chestnut and Monroe streets.

These facts, in considerably more detail than here set out, were found by the court. In addition thereto, the court "found" that any use of the crossing by patrons of the company in receiving and discharging freight and express was incidental to the use of the

general public, and that the crossing was not originally established for the use or convenience of the patrons of the company, or to afford them access to its depot, but that the depot and platform were located conveniently to the road and crossing so they might be conveniently used by the general traveling public. These "findings" are merely deductions from the facts above stated, being otherwise unsupported, and are more properly conclusions to be considered along with and as a part of the court's conclusion of dedication. We shall so consider them.

[1] In order to show the establishment of a street by common law or implied dedication, it is essential to prove clearly, satisfactorily, and unequivocally that the owner of the land intended to donate it to the public for that use. Cordano v. Wright, 159 Cal. 610, 115 P. 227, Ann. Cas. 1912C, 1044; City of Clatskaine v. McDonald, 85 Or. 670, 167 P. 560; I. & G. N. R. Co. v. Cueno, 47 Tex. Civ. App. 622, 108 S. W. 714; Mayor, etc. , of Savannah v. Standard Fuel Co., 140 Ga. 353, 78 S. E. 906, 48 L. R. A. (N. S.) 469; O'Malley v. Dillenbeck Lumber Co., 141 Iowa, 186, 119 N. W. 601; C. & M. V. R. Co. v. Roseville, 76 Ohio St. 108, 81 N. E. 178; Harmon v. Lay, 169 Ky. 132, 183 S. W. 459; Doss v. Bunyan, 262 Ill. 101, 104 N. E. 153; Chicago v. C., R. I. & P. R. Co., 152 Ill. 561, 38 N. E. 768; Marino v. Cent. R. Co., 69 N. J. Law, 628, 56 A. 306; Atlanta v. Georgia R. & B. Co., 148 Ga. 635, 98 S. E. 83; State v. Hood, 143 Mo. App. 313, 126 S. W. 992; Bacon v. Boston & M. R. R., 83 Vt. 421, 76 A. 128; Stacy v. Glen Ellyn Hotel & Springs Co., 223 Ill. 546, 79 N. E. 133, 8 L. R. A. (N. S.) 966.

In the case last cited the court said:

"In order to constitute a dedication at common law it is essential (1) that there be an intention on the part of the proprietor of the land to dedicate the same to public use; (2) that there be an acceptance thereof by the public; and (3) that the proof of these facts be clear, satisfactory, and unequivocal. The vital and controlling principle is the animus domandi, and, whenever this is plainly and unequivocally manifested on the part of the owner of the soil, either by

formal declaration or by acts from which it may fairly be presumed, such as should equitably estop him from denying such an intention, the dedication, so far as the owner is concerned, is complete. Without such manifestation of intention by either of said modes, it cannot be said that a valid dedication is possible. To make a sufficient dedication the proprietor of the soil must devote the portion thereof intended for public use to such use, and on the part of the public it must be accepted and appropriated to that use. The acts on the part of the donor, and of the public, of an intention to dedicate, accept, and appropriate the lands to public use, where the dedication is relied upon to support some right, must be equally clear and unambiguous. A dedication is not an act of omission to assert a right, but is the affirmative act of the donor resulting from an active, and not a passive, condition of the owner's mind on the subject. A mere nonassertion of right does not establish a dedication unless the circumstances establish a purpose or intention to donate the use to the public."

Since the law will not permit private property to be taken for public use without compensation, unless it be clearly and unequivocally shown that the owner intended to donate it for that purpose, it would seem that the proof in this case is insufficient to support the court's conclusion of dedication. The village argues that the installation and maintenance of the crossing by the company at that point, with the long use made thereof by the general public, compels the inference that the company and its predecessor intended to dedicate its property to public use while the company says that the building and maintenance of its station facilities adjacent to the crossing, with the long use of the crossing made by the company and its patrons, necessarily leads to the inference that the crossing was installed and maintained for its private use and benefit; there being no duty on the part of the company to install the crossing at the time the railroad was constructed. One inference seems to be just as legitimate as the other. "It is just as probable that the crossing was maintained solely for the accommodation of the patrons of the road as for the public." C. & M. V. R. Co. v. Roseville, supra.

But if the inference of one intent be as strong as that of the other, then the proof of dedication is not clear, convincing, and unequivocal, as the rule re-

quires. True it is that the court, after hearing the evidence, drew the conclusion of dedication, but the facts from which a conclusion one way or the other may be legitimately drawn are not in dispute, so that there is no occasion for an application of the rule that this court will not disturb a finding of the trial court made on conflicting evidence. In such case the conclusion to be deduced therefrom is purely a question of law. Nolan v. N. Y., N. H. & H. R. Co., 70 Conn. 159, 39 A. 115, 43 L. R. A. 305; People v. Reed, 81 Cal. 70, 22 P. 474, 15 Am. St. Rep. 22. In the latter case the court said:

"From the findings of the fact the court concluded that the property in controversy had been dedicated as and was a public street of said city, and entered judgment accordingly.

"This action was heard by this court, and decided in favor of the appellants, on the ground that the facts found by the court did not show a dedication. People v. Reed, Sup. Ct. Cal., December, 1888. A rehearing was granted. In their petition for a rehearing, it was urged upon us that we had overlooked or had not given sufficient weight to the thirty-sixth finding, which they claimed was a finding of the ultimate fact of dedication, and concluded the case on this appeal against the appellant; the appeal being on the judgment roll. And they now attempt to forestall any inquiry into the question whether the specific facts found constituted a dedication of the property in controversy as a street by the same contention. But, conceding that the finding is one of fact, or, as counsel terms it, a 'conclusion of fact,' it is apparent that the court below did not intend to cut off the right of the appellant to test the sufficiency of the specific facts found to show such dedication in the manner indicated. This finding is based upon the other facts found. It recites in terms that 'by the acts, facts, and matters above found, said premises were by said parties dedicated,' etc. It may be that if this finding had stood alone, and had not been put in this argumentative form, it might have been upheld as a sufficient finding of an ultimate fact. But this cannot be so where the facts are fully found, and the general finding of a dedication is expressly drawn as a conclusion from such facts. Counsel say it does not appear that the court found all of the facts proved. But it does appear from the finding itself that it was based entirely upon the facts found, and not, in whole or in part, on facts proved but not found. Therefore, if the specific facts found do not support this one, which is a summing up of the others, the judgment should be reversed."

[2] Since the facts, undisputed and found by the court, no more cogently support a conclusion that the

crossing was intended for the use and benefit of the general traveling public than they support a conclusion that it was intended for the private use and benefit of the company and its patrons, it inevitably follows that the court must have failed to recognize and apply the rule of law which requires the proof of an intention to dedicate to be clear, convincing, and unequivocal, and that thereby error was committed.

An examination of the cases already cited will disclose that, to constitute a dedication, there must be present, not only an intent or offer to dedicate on the part of the owner, but also an acceptance by the public. The court concluded from the facts that, in this case, an acceptance had been effected by long continued public user. That an acceptance may be so effected is supported by a great deal of authority. On the other hand, there is much authority which requires action on the part of the proper public authorities. But, since we have decided that there has been shown no intent or offer to dedicate, there is nothing to accept, and it becomes of no importance to determine in what manner or by what means an acceptance may be effected.

For the reasons stated, the judgment of the lower court should be reversed and remanded, with directions to dissolve the injunction and enter judgment for appellant company, and it is so ordered.

PARKER, C. J., concurs.

FORT, J., not having heard the argument, did not participate.

(No. 2869. Dec. 31, 1924.)

BALDWIN PIANO CO. v. GEORGE H. WADE & CO.

SYLLABUS BY THE COURT

1. Where there is no agency in fact, and no necessity, nor custom, nor ratification, nor acts creating an estoppel, there is no liability, on the part of a consignor of goods, to a landlord for rent of premises in which the property of a consignor is stored or exhibited by a consignee who has leased the premises in which to conduct his own business.

Appeal from District Court, Union County; Leib, Judge.

Action by the Baldwin Piano Company against George H. Wade & Co. From judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

T. A. Whelan, of Clayton, for appellant.

O. T. Toombs, of Clayton, for appellees.

OPINION OF THE COURT

PARKER, C. J. [1] Appellees recovered judgment against appellant for the amount claimed to be due for rent of a store building. The court found there was a landlord's lien in favor of appellees upon two certain pianos, the property of appellant, which were in the building, but the judgment is an ordinary money judgment and no foreclosure of the lien was decreed. The judgment can be sustained only upon the theory that appellant was the tenant of appellees, and this is the position taken by counsel for appellees in support of the judgment. The facts, briefly stated are that appellees entered into a written lease of the premises with one L. D. Wright, who therein ran a music store, selling pianos and other musical instruments. Appellant furnished pianos to Wright on consignments, under a written contract which provided that Wright "agrees to pay all freight taxes and other expenses connected with the handling and sale of your goods," and "that nothing in this agreement shall be in any sense construed as constituting a sale of said goods to the undersigned (Wright), or as giving the undersigned (Wright) an interest of any kind whatever in them." As between these parties it is apparent that Wright had no power to charge appellant with any rentals for a building in which to store or exhibit the pianos, it being Wright's duty to pay all such charges. There can be no agency sufficient to bind appellant unless the same is to be implied from the circumstances. Both appellant and Wright deny any such agency. According to the evidence for appellant, Wright was appel-

lant's agent merely for the sale of its property, consigned to Wright to be sold on commission, with no power to rent buildings for appellant for the storage or display of the instruments.

Counsel for appellees relies upon the circumstances to create an implied agency or an estoppel of the appellant to deny the agency. He argues that appellees, knowing that Wright got all of his pianos from appellant and negotiated the sale of the same in appellant's name, were caused rightfully to believe in the agency of Wright with authority to lease the building for appellant's business. Some declarations of Wright are also relied upon. There is not one word or deed of appellant shown in evidence tending to establish Wright's agency to rent the building, and no inquiry was made of appellant by appellees into the relations between Wright and appellant. The sale of appellant's pianos was not the sole business of Wright. He ran a music store, and handled phonographs and sewing machines, as well as pianos, and lived in the building. Just why appellees failed to assert the lien against Wright's own property, but chose, rather, to rely upon appellant's property, does not appear. Under such circumstances, it is clear that appellees have no remedy against appellant. In the first place, there was no actual agency in Wright ot charge appellant's property with a landlord's lien. The authority to do so is not to be implied, as there is no showing that it was necessary to rent a store building in which to store and exhibit appellant's pianos. Nor is it shown to be customary for persons receiving pianos on consignment to rent store buildings for the owner of the same. Nor is any such course of business between these parties shown to have been previously carried on and ratified by appellant. Nor can the power result from estoppel of appellant, for it is not shown to have done any act upon which appellees, as reasonably prudent men, might rely and take a position to their detriment. Appellant did not act except to ship its pianos to Wright on consignment, under a contract to be exempted from all expenses incurred in their sale, and

appellees had no right to simply assume, as they did, and without inquiry of appellant, that Wright had authority to rent the store for appellant. See 1 Mechem on Agency (2d Ed.) §§, 241-246, 722; 1 Clark & Skyles on Agency, §§ 55, 56; 2 C. J. "Agency," §§ 32-34, 72-74, 231; 21 R. C. L. "Principal and Agent," §§ 32-34. Specific application of some of these considerations is made in Schoenhofen Brewing Co. v. Wengler, 57 Ill. App. 184. In that case, the Brewing Company shipped beer on consignment to a person to be sold in Chicago, and the consignee fitted up a room for the use of his patrons. It was held that the expense of fitting up this room was not recoverable against the Brewing Company.

[2] We have examined the cases cited by counsel for appellee, and find that they were decided upon facts so different from those in this case as to render them inapplicable. Our case of Beebe v. Fouse, 27 N. M. 194, 199 P. 364, and section 19, c. 65, Laws of 1917 need not be noticed because, while the court found that appellees had a valid landlord's lien, no decree was entered establishing and foreclosing the same, the judgment being a simple money judgment.

It follows from the foregoing that the judgment of the court was erroneous, and should be reversed, and the cause remanded, with directions to set the judgment aside, and to render judgment for the appellant; and

It is so ordered.

BOTTS and FORT, JJ., concur.

[No. 2823. Dec. 16, 1924]

NELSON v. HILL.

SYLLABUS BY THE COURT

1. An action for malicious prosecution will not be defeated by the sole fact that the complaint made against the plaintiff failed to charge a crime.

2. Questions not decided and objections not saved in the court below will not ordinarily be considered in the appellate court.

3. The discharge of a defendant in a criminal proceeding without his connivance, is a sufficient termination of the proceeding to support an action for malicious prosecution.

4. Secaion 2, chapter 150, Laws of 1921, does not prohibit the employment of children under 14 years of age, except when the schools are actually in session for purposes of instruction.

5. A requested instruction which is inapplicable is properly refused.

6. The facts examined, and the verdict HELD to be excessive, requiring a remittur.

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

Action by Florace Nelson against A. D. Hill. Judgment for plaintiff, and defendant appeals. Judgment affirmed, on condition plaintiff consent to a remittitur within 30 days; otherwise, judgment reversed, and cause remanded for new trial.

S. D. Stennis, Jr., of Dallas, Tex., and C. J. Roberts and C. F. Cornell, both of Santa Fe, for appellant.

McCullough & Wyatt, of Roswell, E. P. Bujac, of Carlsbad, and E. R. Wright, of Santa Fe, for appellee.

OPINION OF THE COURT

PARKER, C. J. This is an action for malicious prosecution in which recovery was had against the appellant, from which judgment he has appealed.

[1] 1. The first point presented is to the effect that the complaint fails to state a cause of action, and consequently will not support the judgment. The argument is that the complaint shows that the accusation, before the justice of the peace, failed to charge a crime, and therefore the wrong, if any, was false imprisonment rather than malicious prosecution.

Some general considerations may tend to clear up what seems to be a much mooted question in the cases,

and upon which they are about equally divided. In the first place, it is to be observed that a proceeding either civil or criminal in form, prosecuted maliciously and without a probable cause, resulting in failure and the discharge of the defendant, is the basis of the action for malicious prosecution. It is the malicious misuse or abuse of legal process, to harrass and oppress the defendant, which is the gist of the wrong. If the charge fails to state a crime, the injury is just the same as if it did. Of course, if the person in good faith truly states the facts to a magistrate or a prosecuting officer, and, without more, the officer mistakes the law and initiates the proceeding, the person may be excused from the consequences of the wrong, because he does not in fact bring the proceeding, the action of the law officer being the moving and proximate cause of the injury; but not so if he makes a false statement and participates in the design and purpose to bring on the prosecution. The mere fact that the charge does not constitute a crime, and may subject the moving party to an action for false arrest or imprisonment, can have no effect upon the question; he is also liable for malicious prosecution if all of the other elements are present. Of course, if the charge does not state a crime, there is no criminal prosecution in a strict legal sense, as is held in some cases; but the injury is the same whether a crime is charged or not, and the person responsible therefor should be held to answer. Upon this subject, see 18 R. C. L. "Malicious Prosecution," § 10; 1 Cooley on Torts (3d Ed.) pp. 344, 345; Ross v. Hixon, 46 Kan. 550, 26 P. 955, 12 L. R. A. 760, 26 Am. St. Rep. 123 and note; Allstock v. Moore Lime Co., 104 Va. 565, 52 S. E. 213, 2 L. R. A. (N. S.) 1100 and note, 113 Am. St. Rep. 1060, 7 Ann. Cas. 545; Segusky v. Williams, 89 S. C. 414, 71 S. E. 971, 36 L. R. A. (N. S.) 230 and note; Haskins v. Ralston, 69 Mich. 63, 37 N. W. 45, 13 Am. St. Rep. 376; Antcliff v. June, 81 Mich. 477, 45 N. W. 1019, 10 L. R. A. 621, 21 Am. St. Rep. 533; McIntosh v. Wales, 21 Wyo. 397, 134 P. 274, Ann. Cas. 1916C, 273 and note. On the other hand, many

well-considered cases hold to the contrary. See Krause v. Spiegel, 94 Cal. 370, 29 P. 707, 28 Am. St. Rep. 137; Satilla Mfg. Co. v. Cason, 98 Ga. 14, 25 S. E. 909, 58 Am. St. Rep. 287; Maher v. Ashmead, 30 Pa. 344, 74 Am. Dec. 708; Kramer v. Lott, 50 Pa. 495, 88 Am. Dec. 556.

It is true that actions for malicious prosecution are not favored in the law, because they tend to restrain action by the citizen in the enforcement of the criminal laws, in which matter the public is interested. The allegations and proofs, for this reason, perhaps, should be rather strictly construed in determining whether the action shall be allowed. But where all the other elements of malicious prosecution are present, except the technical charge of a crime, we believe it would be too narrow an interpretation to hold that the action must fail. It follows that the complaint is sufficient to sustain the judgment.

[2] 2. Appellant assigns error upon the giving of the court's instruction on the subject of the effect of reliance upon the advice of counsel as reflecting upon the question of probable casue. An exception was saved in general terms to the instruction, and it is stated that "instruction No. ——" is tendered. We have examined the requested instructions, and find none covering this subject. The alleged error therefore is available. Appellant argued that the court erroneously commented upon the weight of the evidence in violation of section 2796, Code 1915. This point was not made and saved in the court below. Improper conduct of counsel for appellee during the trial, by way of questions to witnesses tending to abuse and degrade appellant, are called to our attention, but we do not find that the matter is available. The court sustained objections to the questions.

[3] 3. Appellant argues there was no proof of an acquittal in the criminal proceeding before the justice of the peace. There is evidence in the case that the appellee appeared before the justice of the peace and demanded an immediate trial, and was sworn and testi-

fied as a witness. Appellant was not called and was not present. The docket of the justice of the peace shows his judgment as follows:

"Case considered, and found that so little violation of any law was incurred and defendant discharged."

This is certainly a legal curiosity. The justice of the peace finds in effect there was a violation of the law, but that the same was so "little" he would discharge the defendant. The justice of the peace was in error in holding there was a violation of the statute in question, but he did, nevertheless, discharge the appellee, without her connivance, so far as appears. This is a sufficient termination of the proceeding under the circumstances to support malicious prosecution. Meraz v. Valencia, 28 N. M. 174, 210 P. 225.

[4] 4. The prosecution before the justice of the peace was brought under section 2, chapter 150, Laws 1921, which is as follows:

"It shall be unlawful for any person, firm or corporation to employ any child under 14 years of age in any business or service whatsoever in this state, during the hours when the public schools of the municipal district, or rural school district, in which the child resides, are in session.

The proof shows that the appellee, the school-teacher, had the children take turns in sweeping the schoolroom, and that appellant's son swept the room during the noon recess; a labored argument to the effect that the school was technically in session from the time of opening in the morning to the time of closing in the afternoon. The statute itself is a sufficient answer to the contention, and, as the lower court held, the school was not in session during the noon hour, and there was no violation of the statute.

[5] 5. Counsel complain of the refusal to give the requested instruction to the effect that, the statute being of doubtful construction, there might, under the circumstances, be probable cause to believe a crime had been committed. The instruction was inapplic-

able, because the statute is not of doubtful construction, and no exception was saved to such refusal, for both of which reasons the action of the court will not be disturbed.

[**6**] 6. Counsel argue that the verdict is excessive and must be the result of passion and prejudice. Appellee, in her complaint, claimed actual damages in the sum of $3,000, and exemplary damages in the additional sum of $3,000. The jury returned a verdict for $2,000 actual, and $1,500 exemplary damages. In the motion for a new trial the verdict was challenged as excessive and as being the result of passion and prejudice. The district judge considered this proposition in passing upon the motion and refused to find that the verdict was the result of passion or prejudice, but did find that it was excessive, and he required a remittitur of $1,000, which was agreed to, leaving the verdict stand at $2,500. It appears that the little son of appellant, who swept the schoolroom, was afflicted with granulated eyelids, and for that reason appellant desired that he should not sweep the floor, the dust being injurious to his eyes. He and his wife asked appellee not to require the boy to sweep and explained the reason, and she asserted that if he came to school he would have to sweep the same as the other pupils. An effort was made by appellant and his wife to have a second conversation with appellee to try to induce her not to require the child to sweep, but appellee avoided the meeting and thus prevented further conversation on the subject. It is thus seen that the controversy was not entirely one-sided so far as a desire to do the right thing was concerned. An officer was sent by the justice of the peace to the schoolhouse about 11:30 a. m. with a warrant for the arrest of appellee. He requested appellee to go with him to the office of the justice of the pease, which she readily did. At noon she appeared, requested an immediate hearing, and she gave her testimony, whereupon the justice of the peace discharged her, as before seen. The proof as to actual damages was very meager, there being shown no substantial actual physical or

mental injury or suffering from the arrest. The charge involved no moral turpitude, the sole damage to reputation, if any, being the bare fact of the arrest.

As before seen, the district judge declined to find that the verdict was the result of passion or prejudice, but did find that it was excessive in the amount of $1,000. We likewise fail to find passion or prejudice on the part of the jury. If the result was reached because of passion or prejudice, the whole verdict would be vitiated and a new trial would necessarily result. But excessiveness is evidence only, and not proof conclusive, of passion and prejudice. The jury in this case simply overestimated the damages to which appellee was entitled and to a greater extent, we think, than was found by the trial court. Under all the circumstances we believe that $500 is ample to compensate the appellee and to punish the appellant. A remittitur down to $500 will be required. The judgment is correct, but the damages are excessive. If appellee shall remit down to $500 within 30 days from this date, the judgment will be affirmed for that amount, and, otherwise, the same will be reversed, and the cause remanded for a new trial, and

It is so ordered.

BOTTS and FORT, JJ., concur.

Remittur filed this 26th day of January, 1925.

(No. 2884. Jan. 21, 1925.)

NOBLE v. McKINLEY LAND & LUMBER CO.

SYLLABUS BY THE COURT

1. A general appearance waives issuance and service of citation on appeal.

2. The signing of a consent that an order be entered extending the time for the filing of appellant's brief, which consent is entitled in the court and cause, and filed in the appellate court, constitutes a "general appearance", and waives citation.

3. In an instrument entitled in the court and cause, and filed in the appellate court, consenting that an order be entered extending the time for the filing of appellant's brief, the reservation of "the right to raise and present any question touching the failure of the appellant to appeal this cause within the time and in the manner provided by law" does not include the right to object to failure of issuance or service of citation.

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

Action by W. S. Noble against the McKinley Land & Lumber Company. From judgment for plaintiff, defendant appeals. On motion to dismiss appeal. Motion denied.

E. W. Dobson, of Albuquerque, for appellant.

A. T. Hannett, of Gallup, for appellee.

OPINION OF THE COURT

WATSON, J. This cause is before us on motion to dismiss the appeal. The appeal was not taken in open court, but allowed on ex parte application; the effective date of the allowance, whether June 6, 1923, or July 13, 1923, being in question. In view of the conclusion reached, the date is not important.

Up to the filing of this motion on November 15, 1923, no citation had been issued or served. Upon this the motion is based.

Appellant concedes that, standing alone, the facts above stated would require dismissal of the appeal under the decisions of this court, but contends that other facts constitute a waiver on the part of the appellee of the issuance and service of citation.

[2] On or about September 17 counsel for appellant applied to A. T. Hannett, Esq., appellee's counsel in the court below, for an extension of time within which to file appellant's brief, and thereupon Mr. Hannett signed and returned to the appellant the following instrument:

"In the Supreme Court of the State of New Mexico.
"W. S. Noble, Appellee, v. McKinley Land & Lumber Company, a Corporation. No. 2884.

"The undersigned atorney for appellee in the above cause hereby consents that an order be made by the Supreme Court of the state of New Mexico, extending the time for appellant to file brief in the above cause, until the 1st day of November, 1923. The appellee does not waive the right to raise and present any question touching the failure of the appellant to appeal this cause within the time and in the manner provided by law by entering into this stipulation.

"(Signed) A. T. Hannett,
"Attorney for the Appellee."

—which instrument was attached to appellant's application to the court for such extension of time, which was filed in this court on October 1, 1923, bearing approval of the Chief Justice.

[1] Appellant contends that the instrument set forth constitutes a general appearance on the part of the appellee, and, further, that it constitutes conclusive proof of notice and knowledge of the appeal pending, and hence performs the function of a citation. That a general appearance waives citation has been decided a number of times by this court. Dailey v. Foster, 17 N. M. 377, 128 P. 71; Childers v. Lahann, 18 N. M. 487, 138 P. 202.

In Dailey v. Foster, supra, citing 3 Cyc. 504, it was said:

"Any action upon the part of the defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance."

In State ex rel. v. Huller, 23 N. M. 306-330, 168 P. 528, 1 A. L. R. 170, the same rule is announced, as, also, in Crowell v. Kopp, 26 N. M. 146, 189 P. 652.

[3] There can be no question that the instrument above set forth constitutes a recognition of the appeal, and hence was a general appearance on the part of the appellee. It is contended, however, that the last clause of the instrument reserves the right to object

on the present ground. We are of opinion that the language used cannot be given such effect. Had counsel at the time intended to raise any question which might then have arisen, or might thereafter arise, concerning the issuance or service of the citation, it is not to be supposed that he would have signed any agreement recognizing the case as being in court. If he had desired or intended to raise such question, and had still deemed it advisable to sign the agreement, common prudence would have dictated that he use expressions more apt in reserving the right. The reservation relates to the "failure of the appellant to appeal this cause." As commonly used by the profession, the "appeal" of the cause includes the order granting the appeal and the other statutory proceedings by which the appellate court obtains jurisdiction of the cause. The citation and the service of the same constitute the proceeding by which the court obtains jurisdiction of the person. The distinction is not unlike that between the commencement of suit by filing the complaint and the subsequent service of process.

A party signing for filing of record an instrument which of itself imports a knowledge and a recognition of an appeal pending will not, by any equivocal language, be presumed to have intended therein to reserve the right thereafter to raise objections to defects in nor to absence of the citation. Whether the court should give such effect to any reservation, however plain, is a question which suggests itself, but is not decided.

Holding, therefore, that the signing of the agreement by counsel for appellee constitutes a general appearance, and that the reservation therein was neither calculated nor intended to cover any objections to the citation, the motion to dismiss will be denied.

Since the foregoing was written, the court's attention has been called to a motion to dismiss filed herein on January 14, 1925, upon the ground that the appellant

failed to file cost or supersedeas bond within 30 days after the appeal was taken.

Reference to the record shows that a supesedeas bond was filed and approved by the clerk of the district court on July 13, 1923. Section 17, chapter 43, Laws of 1917, provides for the filing of such bond within 60 days from the the date of entry of judgment. The supersedeas bond was therefore filed in sufficient time if, as appellee contends, the date of the entry of judgment was June 4, 1923. This motion to dismiss will likewise be denied, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

(No. 2826. Jan. 17, 1925)

STATE TAX COMMISSION v. SANTA TERESA LAND CO.

SYLLABUS BY THE COURT

An appeal will be dismissed, and the judgment affirmed for failure to file assignments of error.

Appeal from District Court, Dona Ana County; Ed. Mechem, Judge.

Proceeding by the State Tax Commission against the Santa Teresa Land Company, etc., relating to the taxes for the years 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, and 1922. From the judgment below the State Tax Commission appeals. On motion of the company to dismiss appeal and affirm judgment. Appeal dismissed, judgment affirmed and cause remanded.

M. B. Thompson, of Las Cruces, for appellant.

Catron & Catron, of Santa Fe, for appellee.

OPINION OF THE COURT

PARKER, C. J. No assignments of error have been filed by appellant although the time for filing the same has long since passed. Appellee has moved to

dismiss the appeal and affirm judgment. The motion will be sustained, upon the authority of section 22 of chapter 43, Laws 1917, and Acequia Madre et al. v Meyer et al., 17 N. M. 371, 128 P. 68, Gauss-Langerberg Hat Co. v. Bank, 17 N. M. 233, 134 P. 794, Hubbell v. Armijo, 18 N. M. 68, 133 P. 978, In re Murray, 19 N. M. 53, 140 P. 1042, and Neher v. Armijo, 11 N. M. 67, 66 P. 517, and the appeal will be dismissed, and the judgment affirmed, and the cause remanded, with directions to proceed accordingly; and it is so ordered.

BICKLEY and WATSON, JJ., concur.

(No. 2904. Dec. 22, 1924. Rehearing Denied Feb. 17, 1925.)

KEMP et al. v. WILLIAMS et al.

SYLLABUS BY THE COURT

Questions not presented to the lower court will not ordinarily be considered on appeal.

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

Action by W. C. Kemp and others against H. C. Williams and others. Judgment for plaintiffs, and defendants appeal. Affirmed and remanded, with directions.

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

E. P. Davies, of Santa Fe, for appellee.

OPINION OF THE COURT

PARKER, C. J. This is an action for $750, the amount claimed to be due under contract for an option granted by appellee to appellant of the right to purchase certain real estate within a certain period of time. The court found:

"That all the allegations of the plaintiff's complaint and amended complaint are true, and have been fully proven."

This is the only finding made by the court, and no findings were requested by appellant. At the conclusion of the judgment, an exception was inserted as follows:

"To all of which defendant at the time excepted."

It is perfectly apparent that under these circumstances there is nothing before the court for review. The general exception above quoted presented no question to the trial court, and none of the steps or conclusions, leading up to the judgment, were called to the attention of that court as erroneous, by request for finding and conclusions, or otherwise. Under such circumstances we cannot review the alleged errors set out in the brief. See Stumpf v. Pohle, 28 N. M. 606, 216 P. 498, where many of our former cases are collected. Also Collins v. Unknown Heirs, 29 N. M. 140, 219 P. 491.

It follows that the judgment of the court below should be affirmed, and the cause remanded, with directions to proceed accordingly, and to enter judgment against the sureties upon appellant's supersedeas bond, and it is so ordered.

BOTTS and FORT, JJ., concur.

(No. 3029. Feb. 13, 1925.)

STATE ex rel. HANNETT v. DISTRICT COURT OF FIRST JUDICIAL DIST. IN AND FOR SANTA FE COUNTY et al.

SYLLABUS BY THE COURT

Under the provisions of chapter 28, Laws 1919, an action must, in any event, be brought in the name of the state. A private person, desiring to contest for a state office, must apply to the Attorney General for his concurrence in the filing of his complaint, and the Attorney General must either concur or refuse to act, in which latter event the private person may proceed independently. There is no authority under such statute to file a complaint in the name of such con-

testant, and, unless all the foregoing requirements are complied with, there is no jurisdiction of the subject-matter in the court in which such a proceeding is filed.

Petition by the State of New Mexico, on the relation of Arthur T. Hannett, for prohibition to be directed to the District Court of the First Judicial District of the State of New Mexico within and for the County of Santa Fe and Reed Holloman as Judge thereof. Peremptory writ awarded.

Summers Burkhart, of Albuquerque, and James A. Hall, of Clovis, for relator.

A. B. Renehan, of Santa Fe, and F. E. Wood, of Albuquerque, for Manuel B. Otero, and against writ.

OPINION OF THE COURT

PARKER, C. J. A motion for leave to file a complaint in the nature of quo warranto was filed in the district court of Santa Fe county by Manuel B. Otero, charging Arthur T. Hannett with usurpation of and unlawful intrusion into the office of Governor of the state, to which office the said Otero claimed to have been elected at the November, 1924, election. The motion sets up that A. B. Renehan, Esq., attorney for Mr. Otero, wrote John W. Armstrong, Attorney General, as follows:

"Santa Fe, N. M., January 2,1925.

"Hon. John W. Armstrong, Attorney General, Santa Fe, N. M.—Dear Sir: I herewith present to you in person the complaints of Manuel B. Otero, candidtae on the Republican ticket at the last election for the Governorship of this state, John W. Chapman, candidate on the said ticket for the Attorney Generalship of this state, at the last election, Thomas McGrath, candidate on the said ticket at said election for the office of member of the state Corporation Commission, Antonio T. Chaves, candidate on said ticket at said election for the office of state auditor, and Prager Miller, candidate on the said ticket at said election for the office of state commissioner of public lands, all defeated on the face of the returns and on the face of the certificate of election issued by the state canvassing board to their respective opponents on the Democratic ticket as successful in their candidacies for the respective offices, to-wit: Arthur T. Hannett for the office of Governor, John W. Armstrong, yourself, for the office of Attorney General, Ed. Tafoya for the office of member

of the Corporation Commission, Juan N. Vigil, for the office of state auditor, and Justiniano Baca for the office commissioner of public lands, the said complaints being verified.

"Assuming that among other reasons, on account of the fact that you yourself are respondent in the complaint so submitted, you will not undertake to handle these cases on the part of the state, I ask that you make known to me at the earliest reasonable moment, the attiutde which you will assume on these matters. At the bottom of my retained copy of this communication I have prepared a form which I will ask you to execute.

"These complaints give in detail the bases, general and particular, upon which the complainants base their charge of wrong, the general purport thereof being that the said respondents respectively are in law intruders upon and usurpers of the respective offices of Governor, Attorney General, member of the Corporation Commission, state auditor, and commissioner of public lands of the State of New Mexico.

"Very respectfully,

"(Signed) A. B. Renehan,
"Attorney for Respective Complainants.

"For good and sufficient reasons, I, as Attorney General of this state ,refuse to act in these matters.

"Dated at Santa Fe, N. M., this..... day of January, 1925.

"....., Attorney General."

"January 3, 1925.

The complaints of the five state officers referred to in the letter were not submitted to the Attorney General with the letter. In reply to this letter, the Attorney General wrote Mr. Renehan as follows:

"Hon A. B. Renehan, Attorney at Law, Santa Fe, N. M.—Dear Sir: Replying formally to your request of today with regard to instituting certain proceedings in the nature of quo warranto against Governor A. T. Hannett and others, so far as to proposed proceedings against me is concerned, inasmuch as the statute requires my express refusal before such a proceeding may be instituted by my opponent and in order that you may have full power to proceed, I expressly refuse to institute such a proceeding, but this refusal is limited to the case proposed to be filed against me. As to the others, I expressly decline to refuse to institute them, but on the contrary shall be glad to consider anything you may have to submit concerning the good faith of such proceedings and the facts upon which you rely to support them, and, if I become satisfied that proceedings of such nature should in good faith be filed, and that there is merit in the claims of the

persons desiring to institute them, I shall promptly act by instituting and prosecuting the same.

"My reason for assuming this attitude is that such proceedings will necessarily entail a great deal of expense to those instituting them as well as to those against whom they are filed. People from all parts of the state will be inconvenienced and put to expense in connection therewith, and the same will have a very disturbing effect upon business conditions throughout the state, and a great deal of time will needs be consumed in their prosecution.

"I have received a similar from Hon. Felipe Sanchez y Baca for permission to institute a proceeding of the same nature against Hon. Edward Sargent involving the office of Lieutenant Governor, and I have assumed the same position with reference to his request that I am taking herein.

"As soon as you are prepared to submit the nature of the suit you desire filed together with a summary of evidence you rely upon to sustain the same, I shall give the subject my careful consideration and act in accordance with what I have hereinbefore said.

"Respectfully,

"(Signed) John W. Armstrong,
"Attorney General."

On January 6, 1925, Mr. Renehan held a personal interview with Attorney General, in which the Attorney General was asked what he would require to cause him to act in the proposed proceeding of Mr. Otero against Mr. Hannett, and he agreed to examine the proposed verified complaint of Mr. Otero and confer with Mr. Renehan later. On the same day, Mr. Renehan wrote the Attorney General as follows:

"Santa Fe, N. M., January 6, 1925.

"Hon. John W. Armstrong, Attorney General, Santa Fe, N. M.—My Dear Attorney General: Herewith I submit the sworn complaint of Mr. Otero, and a copy thereof, in conformity with my conversation with you today, in which you stated that you thought I ought to submit to you affidavits supporting the allegations of the complaint, but later stated that you would look at the complaint, under oath, to which I referred. and which I transmit to you herewith.

"I also ask you to keep it intact for me, both in the event that you refuse to file it or the others, and in the event that you do determine to file the information or complaint as Attorney General, and so that you will have a complete copy I send you herewith an extra copy which you may retain on the return to me of the original, which is signed and sworn to and which is backed.

"You will notice that the first page is largely blank. It was so left in order that I might accommodate myself to your refusal or consent, as the case might be.

"In order that your file may be complete, I return herewith to you my original letter to you dated January 2d, and which my messenger brought back to me, somewhat inappropriately, and which you answered on January 3d.

"Very truly yours,

"(Signed) A. B. Renehan."

This letter, with the proposed complaint, was delivered to the Attorney General on January 8, 1925, which complaint was verified by Mr. Otero and signed by Mr. Renehan as attorney for Mr. Otero. The Attorney General, instead of conferring further with Mr. Renehan, struck out the name of Mr. Renehan as attorney for Mr. Otero, and signed his own name as Attorney General, and filed the complaint in the district court of Bernalillo county. (We assume from the argument that the complaint was entitled in the district court for Santa Fe county, although that fact does not directly appear in the record.) The motion for leave to file was ex parte; the Attorney General having no notice of the same. The court made an order on January 15, 1925, granting leave to file the complaint, and made certain other orders regarding security for costs by both parties, and for process to be observed on Mr. Hannett, as contemplated by the provisions of chapter 28, Laws 1919. The complaint filed, in pursuance of the leave granted, is entitled "Manuel B. Otero, Plaintiff, v. Arthur T. Hannett, Defendant." and no attempt was made to make the state a party. It alleged the supposed facts of wrongs in the said election committed in favor of Mr. Hannett, and upon which Mr. Otero claimed the election, in great detail, as prescribed by said chapter 28, Laws 1919. No motion or other application has been made to said court by Mr. Hannett to dismiss said cause or to decline jurisdiction thereof. On January 24, 1925, there was filed in this court a petition for a writ of prohibition against the said court and Judge Holloman, the presiding judge, restraining them from hearing and determining said cause, upon the ground of want of jurisdiction of the subject-matter. We issued an alter-

native writ, to which a return was made, setting up the foregoing facts, and the cause was argued and submitted on January 31st last. At the hearing a supplemental return was filed by the respondents, setting up certain facts, occurring after the filing of the complaint, designed to show inferentially that the Attorney General had in fact refused to act in the matter, but we do not see how we can consider the same. Whether the district court of Santa Fe county had jurisdiction to entertain the cause at the time he did entertain the same must depend upon the facts then existing.

At the threshold of the inquiry a consideration presents itself as to whether relator, Mr. Hannett, is entitled to the writ of prohibition; he having made no application to the court below to determine the question of jurisdiction. All that was done was to ask the judge unofficially whether he intended to take jurisdiction and proceed with the case. However, as this point is not made by counsel for Mr. Otero, who on the other hand, rather invites the action of this court, we will pass the point as negligible in this case.

It is apparent from a reading of the complaint filed by Mr. Otero that the action was brought upon the theory that a person, claiming a state office, may bring an action in his own name to contest the seat of his opponent who has obtained the certificate of election. This proposition is denied by relator. The whole question turns upon a proper interpretation of chapter 28, Laws of 1919, heretofore mentioned.

It may be said, preliminarily, that statutes of this kind are remedial in character, and as such should be liberally interpreted to effectuate the objects intended. High on Extraordinary Legal Remedies, § 622. The act is entitled "An act to authorize proceeding in quo warranto." Section 1 provides for the filing of a complaint as in other civil actions where quo warranto remedies are sought, and dispenses with the necessity of the formal writs employed in such cases, but reserves to this court and the district courts the power to employ the original writs as heretofore. This sec-

tion does not provide as to who may file the action. Sections 2 and 3 contain procedural provisions not necessary to be noticed. Section 4 designates the instances in which the action may be brought, including cases of usurpation of, intrusion into, and unlawfully holding, any public office, and provides that the action may be brought by the Attorney General or a district attorney in the name of the state upon his own information, or upon the complaint of any private person. It further provides:

"When the Attorney General or district attorney refuses to act, or when the office usurped pertains to a county, incorporated village, town or city, or school district, such action may be brought in the name of the state by a private person on his own complaint."

This section contains no authority, in any event, to bring the action in the name of a private person for the possession of a state office, but the same must be brought in the name of the state and with the concurrence of the Attorney General, if he will act, and in the name of the state by a private person in case the Attorney General refuses to act. In other words, the private suitor must in any event bring the action in the name of the state, and may do so only in event the Attorney General refuses to act. Section 5 provides for the giving of a cost bond by the private plaintiff. Section 6 provides that, "whenever such action shall be brought against a person for usurping an office, the Attorney General, district attorney or person complaining, in addition to the statement of the cause of action,"—here follows provisions requiring certain facts to be alleged and providing for a bond by the defendant for repayment of fees and emoluments in case he loses the office, and providing for an injunction against the disbursing officers from paying the defendant in cas eof his failure to give such bond. Sections 7, 8, 9, and 10 have no bearing upon the present inquiry. Section 11 exempts the state and Attorney General from costs. The remaining sections of the act have no bearing upon the inquiry.

It is apparent from the foregoing review of the

statute that the state is an indispensable party plaintiff in a proceeding of this kind. It is so provided by the letter of the statute. While the state, ordinarily, has no substantial interest in such a controversy, the real party in interest being the contestant for the office, who might well be allowed to bring the action in his own name, it is not for us to question the wisdom of the statute. That rests with the Legislature. The relative interest of the state and that of the contestant, however, are important in the consideration of some other phases of the question. It appears from section 6, above quoted, that the contestant may formulate his complaint, and shall state herein certain required facts. This is strong evidence of the legislative intent to allow the contestant for a state office to frame his allegations in his own way and submit the finished pleading to the Attorney General, with his request to file the same or to refuse to file it. The contestant is the real party in interest, and should be allowed to present and try his own case in his own way, and to be represented by counsel of his own choice; the state, ordinarily, having no more than a nominal interest in the proceeding. We are aware that in Wisconsin, whence this statute is apparently adopted, a contrary view is expressed to the effect that the Attorney General may use his own discretion as to the form of the pleading in an election contest, so long as the issues, as made by the contestant, are substantially preserved. But the reasoning seems to be inconclusive. If a claimant to a state office has a right to present his case in his own way, as we hold, there is no reason for the Attorney General to meddle with it; there being no interest of the state to be subserved. Of course, if the interests of the state are or become involved in any given controversy, the Attorney General may take such part in the proceeding as to protect those interests, whether he has consented to act or has refused to act. But such is not the case here.

In this same connection, the question of venue is involved. A case of this kind is fundamentally an election contest in which no one is substantially interested

except the parties concerned. It is in the nature of a civil proceeding, although for some purpose it might be held to be a special proceeding. It is, at any rate, such a proceeding as to be governed as to venue by the provisions of section 5567, Code 1915, which provides for the bringing of civil actions in the county where the plaintiff or defendant resides, or where the cause of action originated. The cause of action in this case, as between the contestants for the office, originated in Santa Fe county, where the entry into office took place. The venue, therefore, may be properly laid in that county. In the question of venue the state has no interest, and the contestant may select the venue according to his own convenience. The Attorney General was in error in selecting Bernalillo county against the wishes of the contestant in the first instance mentioned above.

Counsel for Mr. Otero suggests that, even if we conclude that the state is an indispensable party, we should not award a peremptory writ of prohibition, because the name of the state may be added by way of amendment in the court below. In this he is in error. The state is the only party plaintiff. The contestant has the whole substantial interest, but he is merely prosecuting the case for the state. To now bring in the state by amendment would be to institute a new proceeding, which cannot be done at this stage.

Unfortunately the Attorney General is involved in a contest over the same state of facts as are present in this case; he having received the certificate of election, and being contested by his opponent at the last election. This would seem to tie his hands and prevent him from participating in this or any other similar proceeding along the same lines. However, he may well be trusted to observe the ethics involved and, if the state's interest becomes involved, the court could appoint counsel, we assume, to represent the same.

It follows from all of the foregoing that the per-

emptory writ should be awarded as prayed; and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 2840. June 30, 1924. Rehearing Denied Feb. 27, 1925.]

STATE v. JACKSON.

SYLLABUS BY THE COURT

1. Evidence reviewed, and HELD sufficient to sustain a verdict of murder in the second degree.

2. If it is shown that the accused has had an opportunity to cross-examine a witness at a preliminary hearing, the testimony of such witness may be read at the trial upon it being satisfactorily shown to the court that the witness is dead, insane, or cannot with due diligence be found within the state. The admission of such testimony is not in conflict with a constitutional guaranty that the accused "shall have the right" to be confronted by the witnesses testifying against him.

3. Evidence offered as foundation for admission of testimony of witness given at the preliminary hearing considered and deemed sufficient. Further HELD, that whether or not a satisfactory showing has been made is a matter within the discretion of the trial court, and this court will not interfere with the trial court's exercise of discretion provided it is not abused. Identity of cause in which witness testified at preliminary hearing HELD sufficiently shown to warrant admission at trial.

4. Assignment that there was not due process of law, because record does not disclose verdict of the jury, will not be considered where the record shows final judgment and sentence.

5. Under the circumstances disclosed in the evidence, it was not error to permit a witness to testify that a gun would or would not make an imprint if it had fallen a distance of 12 inches.

6. Objections to testimony of accused as to a conversation alleged to have been had with a codefendant properly sustained.

7. Not error to refuse requested instructions not applicable to issues raised by the testimony.

8. Under evidence adduced, HELD sentence of 90 to 99 years not excessive.

Appeal from District Court, Quay County; Leib, Judge.

Orin B. Jackson was convicted of murder in the second degree, and he appeals. Affirmed.

Renehan & Gillbert, of Santa Fe, for appellant.

M. J. Helmick, Atty. Gen., and J. W. Armstrong, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

HATCH, District Judge. The appellant, Orin B. Jackson, and two codefendants. Brent Cosner and Jack Lewis, were indicted March 14, 1922, in Quay county, N. M., the indictment charging the defendants with the felonious killing of Royal W. Lackey. The defendants were jointly tried at the September, 1922, term of the district court of Quay county. Cosner and Lewis were acquitted. Jackson was convicted of murder in the second degree, and sentenced to a term in the penitentiary of not less than 90 nor more than 99 years. From the judgment and sentence of the lower court, the defendant has appealed to this court.

[1] From the transcript the following facts appear:

On Saturday before the homicide, one W. K. Bell and Brent Cosner were at the Jackson camp in Quay county. After they had eaten supper the deceased, Roy Lackey, came to the camp. He ate supper, and they all went to bed about 8 o'clock, Bell and Lackey occupying the same bed and Cosner another. Later in the evening, about 10 o'clock, Jackson and Lewis arrived at the camp. They brought with them two guns, a Winchester and a shotgun. After their arrival at the camp there was some drinking, all men taking a few drinks.

The following morning all ate breakfast together, and Jackson, Lewis, and Lackey rode off toward the north abreast. This was Sunday morning. Shortly after they left the ranch, Jackson returned and procured some whisky.

The appellant and his brother owned the ranch where the killing occurred, Lackey, the deceased, had a homestead claim, and at the time was ranging about 150 head of cattle within the Jackson pasture.

It appears that one Dave or D. L. Snyder, on the morning of the homicide, left the Oden ranch where he was working, starting for Roy Lackey's place. About 9 o'clock he met Lewis and Cosner, who told him they would show him Lackey's home. They then rode north until they saw Jackson and Lackey. Just before the three men, Lewis, Cosner, and Snyder, met Lackey and Jackson they observed the two men pointing their pistols at them. They rode on until they came up with Jackson and Lackey, at which time Jack Lewis got down from his horse and took a bottle out of Jackson's pocket. Jackson then turned and drew his gun on Snyder, and, with offensive language, ordered him off his horse. He then made Snyder drink. Brent Cosner then introduced Snyder to Lackey and Jackson, and Snyder told them his business; that he was searching for a cow when he met Cosner and Lewis. Thereupon Jackson made him take another drink of whisky, and said that he (Snyder) had accused Roy Lackey of stealing his cow. Several things then occurred, Jackson drawing his gun again, and making Snyder drink; swearing him at one time not to tell his employer, Mr. Oden, what had happened, and a minute later making him swear he would tell what had happened. He (Jackson) waved his gun around in what appellant says was a playful manner, but in which we fail to see the humor. At one time he shot down at Snyder's feet and jerked him back and forth. Roy Lackey, the deceased, then told Jackson to put up his gun, and thereupon the appellant waved his gun around his head and told Lackey to stand back or he would kill him. Lackey stood still, but Brent Cosner stepped in front of Jackson and started to say something. Jackson struck Cosner across the chest with his gun. Cosner then knocked Jackson down and grabbed him by the wrists.

Jack Lewis jumped down from his horse and grabbed Jackson's gun. Snyder reached for the reins of his horse and Lackey gave him a nod to go on to his (Lackey's) house. Snyder immediately mounted his horse and rode away. A minute, or even less, after Snyder left, he heard two shots coming from the direction of the place where he had left the men. He did not turn back, but continued on his way. This was about 9:30 Sunday morning.

No one appears to have seen any of the men after Snyder left them until about 11 o'clock in the morning, when Brent Cosner returned to the camp. The witness Bell testifies that Cosner came to the camp about 11 o'clock Sunday morning. Cosner did not remain at the camp, but immediately remounted his horse and rode away in a westerly direction. Later, Jack Lewis arrived at the camp and inquired for Brent Cosner. Upon ascertaining the direction Cosner had gone from the camp, Lewis also rode away, going in the same direction Cosner had gone. About 12 o'clock the three men, Cosner, Lewis, and Jackson, came riding back to the camp together from the north. When they arrived at the camp, Jackson got off his horse and walked to the barn, which was about 180 feet away. Cosner and Lewis went in the house. Late in the evening appellant came to the ranch house. He had remained out of sight all day. When Jackson came to the house he ate some tomatoes and then went out to the well, where he sat on a piece of pipe sticking out of the water trough, sitting in a stooped position with his head down. While the appellant was sitting at the well, the witness Bell went out and talked with him, asking him where Roy (meaning the deceased, Roy Lackey) was. Appellant replied that he had left Roy driving a cow. This was about the entire conversation. This conversation is denied by the appellant, but the jury evidently disregarded his story.

About dusk the three men, Jackson, Cosner, and Lewis, left the camp, Jackson and Lewis driving in one automobile and Cosner in another. Before leav-

ing the ranch, Brent Cosner told Bell to wait at the camp until he returned; that he would be back about 9 o'clock Monday morning, and for Bell to keep up a horse for him, and they would ride the pasture together. The evidence of Jackson shows that he went to the ranch in Texas, close to the town of Vega. When informed by his brother that the sheriff of Quay county was in Vega looking for him, he went to Vega and surrendered, returning to New Mexico without requisition. However, this was two or three days after the shooting, and none of the men reported the shooting to the officers.

The morning following, Bell waited for Cosner, but, Cosner, not coming back, he (Bell) rode away before Cosner returned. Bell had gone about 10 or 12 miles north of the camp when he discovered Roy Lackey's horse. The horse had his saddle and bridle on, the reins dropped on top of a bush. The witness testified that the horse was in bad condition, "drawed terrible bad, jaded, and gaunt." The condition of the ground about the horse was "tromped up some." The witness went south from the place where he found Lackey's horse and then west to the White place, where he met one Taylor Lytton. From there he went to Lackey's home. From Lackey's residence Bell was accompanied by Margaret Lackey, daughter of the deceased, and Joe Talmadge. The three of them rode back to the place where the horse was found and begain looking the country over for Roy Lackey. After the three had searched for some time without success, Margaret Lackey went for the officers, and Bell and Talmadge continued their search for the deceased.

The two men found the body of Roy Lackey about three-quarters of a mile from the place his horse was first seen. Lackey was lying with his head to the south, feet to the north, on his back, arms stretched out. The physician testified that he found the following wounds in the body of the deceased:

"A gunshot wound entering the left breast about an inch above the left nipple, very nearly on a line with the nipple, at an angle of about forty-five degrees, and coming out on the right side in front of the kidney, over the hip bone. * * * A deep cut wound began at the inner portion of the right eye and extending around to the outer portion, the eyeball being lifted completely out of the socket."

The doctor further testified that death was caused by the gunshot wound, and that it was such a wound as could not be self-inflicted.

The defendant testified in his own behalf, admitted the killing and claiming it was done in self-defense.

Many other facts were adduced at the trial. There was some evidence tending to show that the tracks of the horse ridden by Roy Lackey leading from the place where the body was found to the place where the horse was found were followed by small horse tracks. A pistol was found lying about six inches from the hand of the deceased. It was lying on top of grass and had made no impression in the earth.

1. We have made this statement in facts in view of appellant's first contention, which is that there is no evidence sufficient to sustain a verdict of murder in the second degree.

In connection with this contention, the appellant argues that the court erred in denying the motion for an instructed verdict both at the end of the state's case in chief and at the close of the trial. He argues that the evidence discloses friendship existing between Jackson and Lackey for a good many years and even on the morning of the homicide. Appellant also contends, in line with his first argument, that the facts as shown by the evidence are as consistent with innocence as with guilt, and therefore they are insufficient to sustain the verdict. We do not think it necessary to go into a discussion of the facts, it not being the province of this court to weigh the testimony adduced at the trial. In the case of State v. Cooley, 19 N. M. 91, 140 Pac. 1111, 52 L. R. A. (N. S.) 230, we find facts which are not nearly as strong as they are in

the instant case. In that case the verdict was of murder in the first degree. From the statement of facts it appeared that the appellant indulged in strong drink resulting in the killing of his bosom friend and cousin. In that case we find the following statement:

"If the killing is unlawful and voluntary, and without deliberate premeditation, the offense is murder in the second degree, malice being implied, unless the provocation was of such character as would reduce the crime to voluntary manslaughter, for which offense a drunken man is equally responsible as a sober one."

In the case of State v. Parks, 25 N. M. 395, 183 Pac. 433, it is said:

"There was evidence of the footprints of the appellants and of empty cartridges. * * * Killing with a deadly weapon was admitted; therefore malice was implied. It was for the jury to determine from all the evidence whether the killing occurred according to the theory of the state, or that of the appellants, or in some other manner. The case properly called for an instruction as to murder in the second degree."

From the foregoing authorities and from the facts proved, this court cannot say that the evidence was insufficient to warrant the verdict of murder in the second degree. The facts we have detailed; the quarrel at the place of the homicide, the threat of the appellant that he would kill the deceased if he did not stand back, the wanton disregard for human life as demonstrated in the acts of the appellant at the place of the homicide as detailed by the witness Snyder, the circumstances proved by the state, the leaving of the body, the driving away of the horse of the deceased, the return to the ranch and concealment, and the going into another jurisdiction, all tend to show premediated malice, and under circumstances showing a wicked and malignant heart. Remembering that the jury are the judges of the facts, and that they may believe or doubt all or parts of the evidence for the prosecution or for the defense, it can well be said in this case, after reviewing the entire record, that the appellant killed the deceased with premediated malice and without considerable provocation or without justi-

fication on the ground of self-defense. Therefore appellant's argument on both his first and second contentions must fail.

[2] 2. Appellant contends that the evidence of the witness Snyder, given at the preliminary examination, was not admissible. From the record, it appears that Snyder appeared at the preliminary examination and testified; that he was sworn by John Grayson, justice of the peace; that his testimony was taken in shorthand by a stenographer, and later transcribed; that Snyder was fully cross-examined at said hearing by counsel for the defendant; and that the testimony he gave was material in the case. He did not appear at the trial, and the testimony he gave in the preliminary hearing was read by the stenographer.

Counsel for appellant contends that this proceeding violates the constitutional right of an accused to be confronted with the witnesses against him. The state argues that the evidence is admissible by virtue of chapter 29, Session Laws of 1919, being "An act to provide for the taking of testimony out of court, by oral examination, and for the use of testimony taken at former trials." The state further argues that, notwithstanding this statute, the evidence is admissible under the common law. Appellant takes the position that the statute in question applies only to civil cases.

Inasmuch as the appellant challenges the right to introduce this testimony and raises thereby a constitutional provision, the application of the statute of 1919 does not seem to us to be material, for if appellant's position is correct and he was deprived of a constitutional right, then the statute cannot aid the state, for it is obvious that if the constitutional provision is susceptible to the interpretation placed on it by the appellant, the statute could not be used as a means to deprive him of that constitutional right. In short, if the statute gives the right to use the testimony of an absent witness, and if such testimony is inadmissible by virtue of the constitutional inhibition, then the rights given

by the statute fail. For this reason, we will not discuss the statute of 1919, but will confine ourselves to deciding the question as to whether appellant has been deprived of a constitutional right.

Our Constitution (article 2, § 14) contains the usual provision:

"In all criminal prosecutions, the accused shall have the right * * * to be confronted with the witnesses against him."

This right of confrontation has been said to be simply the right to meet the witness face to face. The right of the accused to meet a witness face to face is an important one, and is too grave to be brushed aside lightly. As has been said:

"It is next in importance and value to the right of trial by jury, and it would be fully conceded and secured to him according to the true intent and meaning of the Constitution."

Such being the case, we have carefully reviewed the authorities in an endeavor to arrive at the true intent and meaning of this constitutional provision. After careful consideration, we have come to the conclusion that the purpose of the constitutional provision is to secure to the defendant the opportunity of cross-examination. In this connection, Mr. Wigmore says:

"What was, in principle, the meaning and purpose of this confrontation? So far as there is a rule of confrontation what is the process that satisfies the rule? It is generally agreed that the process of confrontation has two purposes—the main and essential one, and a secondary one. The main and essential purpose of confrontation is to secure the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon a witness or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers. That this is the true and essential significance of confrontation is demonstrated by council and judges from the beginning of the hearsay rule to the present day."

Continuing, the writer then points out the secondary purpose, which is, he states, the advantage to be obtained from the personal appearance of the witness.

The opportunity, as it is otherwise stated, for the judge and jury to observe the demeanor of the witness while testifying. But that this is only an incident to the main right, and is not a right in itself, is ably pointed out by Wigmore, concerning which he says:

"In other words, this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination. The witness' presence before the tribunal may be dispensed with if not obtainable. The question, then, whether there is a right to be confronted with opposing witnesses, is essentially a question whether there is a right of cross-examination. If there has been cross-examination there has been confrontation. The satisfaction of the right to cross-examination disposes of any objection based on the so-called right of confrontation."

The writer continues his discussion of the principles involved in his characteristic thorough manner, but the length is such that the entire argument cannot be set forth herein. We refer to volume 2, §§ 1365-1418, inclusive, Wigmore, Cr. Ev. (10th Ed.)

The case of State v. King, 24 Utah, 482, 68 Pac. 418, 91 Am. St. Rep. 808, deals with the question exactly as it is presented in the instant case, except in that case the appellant sought to have the statute under which the testimony was admitted declared unconstitutional as conflicting with the Utah Constitution, which gave the accused the right to be confronted by the witnesses against him. In the opinion it is said:

"'Under the Constitution and statutes of the state the accused had a right to be present at the trial, to be confronted by the witnesses against him, and to meet his accusers face to face. He also had the right to appear and defend against the accusation preferred against him in person and by counsel. He had the right not only to examine the witnesses, but to see into the face of each witness while testifying against him, and to hear the testimony given upon the stand. He had the right to see and be seen, hear and be heard, under such reasonable regulations as the law established. By our Constitution it is clearly made manifest that no man shall be tried and condemned in secret, and unheard.' The chief purpose in requiring that the accued shall be confronted with the witneses against him is held to be to secure to the defendant an opportunity for cross-examination; so, that if the

opportunity for cross-examination has been secured, the test of confrontation is accomplished. If the confrontation can be had it should be had. By taking the testimony of the witness Johnson in the presence of the accused upon the examination at a time when he had the privilege of cross-examination, this constitutional privilege is satisfied, provided the witness cannot, with due diligence, be found within the state."

In 8 R. C. L. 213, § 209, we find the following:

"Generally, the viva voce examination of a witness in the presence of the party on trial is required, because it is the best evidence. The direct and cross-examinations are the best means of eliciting the whole truth, and the manner of the witness is one of the tests by which to determine the degree of credit to which he is entitled; but this is not always attainable, and what a deceased witness, or one who from other causes has become incapacitated to give evidence, has sworn on another trial or preliminary examination where the accused had the opportunity to cross-examine the witness, is admitted on the principle that it is the best of which the case admits. Such testimony is not open to the objections ordinarily urged against hearsay or derivative evidence, having been delivered under the sanction of an oath, and the adverse party having had the full benefit of a cross-examination. It is therefore admitted upon the principle of necessity so as to prevent a defeat of the ends of justice. There is doubtless reason for saying that the accused should never lose the benefit of any of the safeguards thrown around him, even by the death of the witness, and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."

Again, in volume 10 R. C. L. p. 968, the rule is stated, as follows:

"The constitutional or statutory right of the accused 'to be confronted by the witnesses against him' is not necessarily infringed by the admission of former testimony of a witness, who has since gone beyond the jurisdiction of the trial court, or has died, or has become incapable of giving his testimony. * * * The prevailing view is that the right of confrontation is satisfied, in cases of necessity, if the accused has been once confronted by the witnes against him in any stage of the proceedings upon the same accusation, and has had an opportunity of a cross-examination, by himself or by counsel, in his behalf."

In 16 C. J. p. 839, we find the general rule thus stated:

"Although there is authority to the contrary, the general rule is that, where the testimony of a witness against accused has been taken down in writing by a magistrate or official reporter at a preliminary examination in the presence of accused, who had an opportunity to cross-examine the witness, such testimony is admissible on the trial, where it is shown that the witness cannot be found after diligent inquiry, or is beyond the jurisdiction of the court."

In the case of Territory v. Ayer, 15 N. M. 581, 113 Pac. 604, a question was presented as to the sufficiency of the predicate laid for the introduction of such testimony, and in passing upon that question the territorial court, through Judge Mechem, held:

"There was sufficient evidence of a competent character to satisfy the trial court that the witness Cutter was beyond the reach of process of the court, and there was no error in admitting the record of his testimony at the preliminary hearing, where the appellant had the opportunity and did cross-examine the witness."

We deem it unnecessary to review the authorities further. We have examined the decisions and have reached the conclusion that the appellant was not deprived of his constitutional right of confrontation. It may be said that the great weight of authority sustains the authorities from which we have quoted. In fact, reason and consideration of public policy and necessity all support the holdings to the effect that where an accused has once had the opportunity of meeting the witness face to face, in a lawfully constituted tribunal, where he is given the opportunity of cross-examing the witness, the constitutional provision has been met, and we so hold.

An exhaustive note dealing with this question will be found in 15 A. L. R. beginning at page 495. This note is continued in 21 A. L. R. p. 662.

[3] This brings us to the question raised by the appellant that if the evidence was admissible, the state did not show proper diligence in attempting to have the witness Snyder present at the time and that, therefore, the evidence was improperly received.

As to the diligence used the sheriff of Quay county testified that he received a subpoena for the witness Snyder, as a witness in the case of State v. Jackson, Cosner, and Lewis; that he went to Glenrio, where the witness had been working, and that he sent a man out to inquire for the witness after court was in session. The only information he could receive was that the witness had gone east into Texas. The sheriff then telephoned the sheriff at Amarillo and also wired to Sherman, Tex., where Snyder had some people; that he had made search by phone and otherwise to ascertain the whereabouts of the witness Snyder. From the general search made he was unable to locate the witness. On cross-examination he testified that Snyder had appeared before the grand jury in March preceding the trial in September, and that he was placed under a recognizance bond in the district court, after the indictment had been returned; that he had heard from the witness frequently as being at Glenrio until just before the subpoena was issued. The foregoing is all the testimony concerning the absence of this witness and the reason for his nonproduction by the state.

Under the general rule hereinbefore quoted, it seems necessary that the party seeking to introduce the testimony must make sufficient showing that the witness whose testimony was taken at the preliminary examination cannot, with due diligence, be produced to testify in person.

In the case of Territory v. Ayer, supra, the testimony which the territorial court held was sufficient to permit the introduction of the evidence taken at the preliminary hearing was, in substance, as follows: The witness Davern testified that Cutter, the absent witness, was located in Los Angeles, Cal.; that he left Albuquerque to go there about a year before the trial; that before leaving he stated to Davern that he was going to Los Angeles to take a position as surgeon of a traction company there. On cross-examination Davern testified that all he knew about Cutter leaving was

what Cutter told him and that he had not seen Cutter since he left. The return of the sheriff on the subpoena issued for Cutter was in the following words: "I further certify that Dr. James B. Cutter could not be found in my territory and is now in California." This return was admitted in evidence. This was all the testimony appellant introduced at the trial showing the unavailability of the witness Cutter. The territorial court held that the showing was sufficient.

In Lowe v. State, 86 Ala. 47, 5 South. 435, the absence of the witness from the state was held sufficiently established by testimony showing that the witness had gone to a distant state about two weeks before the trial for an indefinite period.

Sufficient diligence was held to be shown in the case of People v. McIntyre, 127 Cal. 423, 59 Pac. 779, where the officer having the subpoena for the witness testified that after following every clew as to the whereabouts of the witness he was informed by acquaintances of the witness that he had left the state, and it could not be told when he would return, although one person said he was liable to return on business at any time.

In Wilson v. State, 175 Ind. 458, 93 N. E. 609, the predicate was held to be sufficiently laid by proof that the prosecuting attorney and sheriff made diligent effort to locate the witness, all subpoenas being returned "not found," and witnesses likely to know where he was testifying that they did not know.

These are only a few of the many cases which discuss the question of the sufficiency of the predicate. There are found many which hold that the evidence offered was insufficient, but we cannot so hold in this case. In fact, from the record, it appears that the state used every reasonable effort to secure the attendance of the witness Snyder. He was placed under recognizance by the district judge. Subpoenas were issued in due time, and from the testimony of the sheriff it seems apparent the witness had gone

into another jurisdiction and was in fact absent from the state of New Mexico.

In this connection, we want to call attention to the fact that the sufficiency of the showing is a question of fact to be determined by the trial court, and this court will not reverse the trial court's ruling unless it is shown that the lower court abused the discretion vested in it.

"Whether or not it has been satisfactorily shown that a witness whose testimony was taken at the preliminary examination cannot be, with due diligence, found within the state is a question of fact that is presented to the trial court to be determined by it from the evidence introduced before it, and the appellate court will not interfere with the trial court's exercise of discretion, provided it is not abused." People v. Poo On, 49 Cal. App. 219, 192 Pac. 1080.

Certainly it cannot be said in this case that the court abused its discretion in permitting the testimony taken at the preliminary hearing to be used.

[4] 4. Appellant argues that there was not due process of law because, in the record, no verdict of the jury appears. The state and appellant do not agree as to what was called for in the original praecipe, but we do not deem this of importance. In the stenographer's transcript it appears, at page 324, that the jury returned its verdict into open court, to which verdict the defendant, Orin B. Jackson, excepted and gave notice of appeal. At page 328 of the record appears he sentence of the court. From this final judgment this appeal is perfected. At page 329 appears the order granting the appeal. It is not contended by the appellant that the verdict was "not guilty," nor is it contended that the court wrongfully passed sentence upon the verdict, returned. He makes the bare statement that the verdict is not shown in the record. No authorities are cited showing that this is error. Therefore, we will not further consider this assignment.

[5] 5. Appellant next complains that the court erred in overruling an objection to a question pro-

pounded to the witness Fred White. The question is shown at page 96 of the record, and is:

"State whether or not from the examination you made of the character of that soil there, if it was of such a nature that a gun of the kind and character that you saw there would have made an imprint or impression of the ground there, if it had fallen say for a distance of twelve inches?"

The objection to this question was that it called for a conclusion of the witness and assumed a statement of facts not proved by the evidence. The objection on this point is not well taken.

In the case of State v. Pruett, 22 N. M. 223, 160 Pac. 362, L. R. A. 1918A, 656, this court said:

"We do not deem it necessary to go into any extended discussion of the so-called 'opinion rule' of exclusion of testimony. It will be sufficient merely to state the underlying principle by which said rule is applied. That principle is that any person may express an opinion before a jury, upon a nontechnical subject, based upon data which he has observed when it is impossible by word of mouth or gesture to reproduce the data before the jury, so that the jury may intelligently draw the inference therefrom which the witness has drawn."

The witness had been previously interrogated as to the condition of the soil and the position of the gun, and the court was correct in permitting the witness to answer the question.

[**6**] 6. It appears that the defendant offered to prove that, immediately after the killing, Jack Lewis and Brent Cosner suggested to the appellant, Jackson, that he surrender, and that Jackson said that he would go to the ranch and "wait for the law to come for him; that the boy Snyder had probably seen the whole thing." It was stated by the appellant that the purpose of this offer was to show why he did not go and surrender himself at once and overcome any prejudice against him by reason of the fact that he did not surrender. The court excluded this testimony, and the appellant assigns the court's ruling as error.

In connection with this alleged error, the appellant contends that the state offered a great deal of evidence showing that the defendant, Jackson, after the homicide, went to the Frost camp and later into Texas, thereby inducing the suggestion of concealment and flight. He further says: "The defendant should be allowed to explain his mental attitude on this subject." In support of this, the appellant cites authorities to the general effect that when evidence of flight is introduced, the defendant may explain his motives and reasons for concealment. It it can be said that the state's evidence did show flight on the part of the defendant, it would seem proper to permit the defendant to explain those facts and circumstances which showed, or tended to show, an attempt to escape.

"For it must be remembered that evidence of flight, concealment and other like acts is admitted only because it is generally assumed that such acts indicate consciousness of guilt. Therefore the accused should be permitted to testify directly to his motive at the time of the act charged, and he may relate his state of mind." Wharton's Cr. Evid. (10th Ed.) vol. 2, § 950.

However, the proof offered in this case was not such proof as is contemplated by the foregoing authority. The accused was on the stand testifying. If he had been asked to explain his actions or to testify concerning his motives and reasons for the acts which the appellant says the state claims amounted to flight, doubtless the court would have permitted such explanation. But the offer was not such an explanation. It was the offer of a conversation in which the defendant, who was then on the stand testifying claims he made certain statements.

We do not think that the offer of a conversation is the proper method of proving the matters attempted to be proved in the offer. The defendant was on the the stand, and there was no reason why he should not have testified directly concerning such matters. In fact, he stated why he went to Texas. The question asked at this time gave him full opportunity to explain his reasons, had he so desired. The question was,

"When you found the law had not come for you up to 5 or 6 o'clock, what was your idea in going to Texas?" to which he answered, "I told my brother I would be back. He wanted me to help gather steers, and we went over there to gather steers." Further, he explains the facts and circumstances which fully conveyed to the jury the thing sought to be conveyed by the tender in that, in his direct examination, he testified that on Wednesday following the killing on Sunday, he was advised that the sheriff of Quay county was in Vega, Tex., and, upon learning such fact he, the defendant, went immediately to Vega, met Mr. Simpson and returned with him to New Mexico without requisition. As we stated in the beginning, the conversation was not admissible; and finally we find that the defendant was given full opportunity to explain, *directly,* what reasons he had, if any, for leaving the state. Therefore it cannot be said that there was any error in the court's ruling.

[7] 7. We fail to find any merit in the contention of the appellant that the court erred in refusing to give his requested instructions numbered 3, 4, and 5. So far as the defendant Jackson is concerned, we cannot see the applicability of the instructions requested. As abstract propositions of law they may be correct, but it appears from the instructions given by the court that the jury was fully advised as to all the issues in the case. This being true, there was no error in refusing the instructions requested.

[8] 8. In subdivisions 9, 10, and 11 of appellant's brief, it is argued that there is an entire absence of motive; that it is lawful to kill in defense of a third person, particularly a relative; and that no verdict higher than manslaughter, if even that, is justified by the testimony.

We cannot agree with the appellant that these objections are sustained by the record. We have heretofore determined that there was sufficient evidence to sustain the verdict of murder in the second degree. This disposes of the matters argued in these three sub-

divisions except possibly that of the tenth, which is argument based upon the proposition that it is lawful to kill in defense of a third person, particularly a relative.

The appellant's argument as to the law in this particular fails to disclose any error, even if his contention is correct. The trial court submitted the defenses raised by defendant's testimony to the jury under proper instruction. The verdict of the jury was against the defendant's version, and that decision is binding on this court. Therefore we need not consider this argument.

9. Appellant seriously contends that the sentence, under all the circumstances, was excessive and an abuse of the discretion imposed in the court by the statute. Necessarily, the appellant admits that the sentence does not exceed the statutory limits, but he argues that there cannot be found in the evidence any justification for a sentence from 90 to 99 years, and that both the jury and the court were affected by prejudice and passion which was not justified by the evidence. In this connection the appellant seeks to invoke the constitutional prohibition against cruel and unusual punishment. This constitutional provision has been before the courts in a great many cases and an interesting question is raised as to whether the constitutional provision is directed to the Legislature or to the courts.

An illuminating opinion dealing with this question will be found in the case of Territory v. Ketchum, 10 N. M. 718, 65 Pac. 169, 55 L. R. A. 90. The opinion was written by Justice Parker, now Chief Justice of this court, and in it he carefully reviews all the authorities to that time. He concludes that the discretion of the Legislature in determining the adequacy of punishment for crime is almost, if not quite, unlimited. However, he does assume, for the sake of argument, that the courts may, in extreme cases, review the discretion of the Legislature in determining the severity of punishment, but he holds that the

statute in question in that case was not unconstitutional, because the penalty inflicted was not cruel or unusual as compared to the gravity of the offense.

In the present case, the appellant does not question the validity of the statute itself, but he does seriously contend and urge that the sentence is excessive and is disproportionate to the offense committed. The sentence imposed was within the limits fixed by statute, and the only question presented by appellant's argument is whether the sentence is disproportionate to the offense committed. We have found the question as to the power of an appellate court to review a sentence which is within the statutory limits an interesting one.

The authorities are not in harmony on this question, and it has been held that a sentence that is within the limits fixed by the statute is valid, no matter how harsh it may be; the reasoning of the courts so holding being that the constitutional interdict has reference to the statute fixing the punishment and does not refer to the sentence assessed by the court, and that any punishment within the statutory limits cannot be held to be excessive. We also find ample authorities holding that an appellate court does have power to review the sentence and to determine whether the lower court has abused the discretion vested in it by the statute.

In 16 C. J. 1362, it is said:

"The statute frequently leaves the extent of the punishment to the discretion of the court within certain limits, and the exercise of such discretion within the limits prescribed by statute will not be interefered with unless it is clearly abused."

In 8 R. C. L. 264, the general rule is thus announced:

"It has been stated as a general rule, in cases where the objection was to the particular sentence, and not to the statute under which it was imposed, that a sentence which is within the limits fixed by statute is not cruel and unusual and is therefore valid, and it has been held that this is true no matter how harsh and sevree it may appear to be in a particular case, because the constitutional prohibition has

reference to the statute fixing the punishment and not to the punishment fixed by the jury or court within the limits fixed by statute. If the statute is not in violation of the Constitution, then any punishment assessed by a court or jury within reason that the power to declare what punishment may be the limits fixed thereby cannot be adjudged excessive, for the reason that the power to declare what punishment may be assessed against those convicted of crime is not a judicial power, but a legislative power, controlled only by the provisions of the Constitution. But where the court on appeal, taking into consideration all of the circumstances surrounding the commission of the crime, determines that the sentence imposed is excessive, it may modify the sentence imposed by the trial court."

If it should be conceded that this court does have power to declare a sentence invalid if it should seem excessive and out of proportion to the offense committed, we do not think it would be necessary or proper in this case to invoke such power. It is said that—

"In order to justify a court in declaring a punishment cruel and unusual with reference to its duration, the punishment must be so disportionate to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances." 8 R. C. L. 266; Fisher v. McDaniel, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 971; Territory v. Ketchum, supra.

This proposition seems to be in harmony with the rulings of all the courts. With this rule in mind, we have reviewed the testimony and are convinced that the circumstances in this particular case fully warranted the sentence imposed. Instead of finding a sentence such as would shock the moral sense of all reasonable men as to what was right and proper under the circumstances, we find one which we believe is fully justified by the evidence. Having arrived at this conclusion, it is unnecessary in this opinion to determine the power of this court to review the action of the lower court and say whether the sentence passed does abuse the discretion vested in the lower court by the statute. It being conceded that the statute does not violate the constitutional provision, and we, having determined that the facts proved justify the court in imposing the sentence of not less than 90 nor more than 99 years, anything further is unnecessary to this

decision. For the reasons stated, there is no merit in appellant's contention in regard to the sentence passed.

10. Appellant's contention that the court committed error in giving its instruction numbered 22 cannot be sustained. This is the ordinary form of instruction given in cases where self-defense is interposed, and has often been approved by this court. The facts proved fully warrant the instructions.

11. In the thirteenth assignment the appellant contends that there was no competent proof of the identify of the cause heard before the committing magistrate, before which the testimony of the witness Snyder was alleged to have been given, as a basis for its admission at the trial. At page 43 of the record, in the direct examination of the witness John Grayson, the following appears:

"Q. Are you acquainted with one D. L. Snyder, or Dave Snyder? A. Yes, sir.

"Q. You may state whether or not a preliminary hearing was held before you on the 17th day of October, last year? A. Well, it was about that time. I don't exactly remember the date at this time.

"Q. That was the case in which the state of New Mexico charged these defendants with killing and murdering one Royal W. Lackey on the 2d day of October, 1921? (Mr. Renehan: Objected to for the reason that it calls for a conclusion of the witness and is not the best evidence. The Court: Overruled. Mr. Renehan: Exception.) A. It was."

The foregoing shows that the cause heard before the committing magistrate was the case in which the state of New Mexico charged the defendants, Jackson, Cosner, and Lewis, with killing and murdering one Royal W. Lackey, on the 2d day of October, 1921. We consider that the proof offered was competent and the objection made by counsel was properly overruled. Inasmuch as it was for this same offense that the defendants were tried in the district court and from the conviction of the defendant Jackson this appeal is perfected, we deem the identification sufficient.

12. The last assignment made by the appellant is that the verdict was contrary to the law and contrary to the evidence. It is a conclusion from the other assignments, and, as it presents no new matters, there is nothing to be considered.

We have carefully considered all the points presented by the appellant. We have reviewed the entire record and find no error. The judgment of the lower court will therefore be affirmed; and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

[No. 2829. Dec. 17, 1924. Motion to Modify Denied March 9, 1925.]

BENDERACH v. GRUJICICH et al.

SYLLABUS BY THE COURT

1. Counsel fees for the prosecution of an action for malicious prosecution are not allowable.

2. In an action for malicious prosecution, tried to the court without a jury, where the evidence shows that the plaintiff paid his attorneys $25 to represent him in the court of justice of the peace, and $160 to defend him in the district court upon a charge of felony in a contested case before a trial jury, the court may allow such expenditures as an element of damages without proof of the value of the services rendered.

3. Evidence as to a conspiracy to maliciously prosecute the appellee examined, and HELD to be sufficient to support the judgment, although not entirely conclusive.

4. Where a judgment is affirmed in principle, the mere fact that some item of recovery is denied, and the judgment modified accordingly, does not discharge the sureties on the supersedeas bond.

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

Action by Marko Benderach against Dick Grujicich and others. Judgment for plaintiff, and defendants appeal. Modified, and as so modified affirmed.

Crampton, Phillips & Darden, of Raton, for appellants.

L. S. Wilson, of Raton, for appellee.

OPINION OF THE COURT

PARKER. C. J. This is an action for malicious prosecution, tried to the court without a jury, resulting in a judgment for $850, from which an appeal has been taken. The appellants were first defaulted and the proofs taken ex parte, and judgment rendered for $750, made up of $200, expenses incurred by appellee in defending himself in the criminal prosecution, and $550 damages. The default was opened, and appellants were allowed to answer, and the case was again tried by the court. At the close of the trial the judge announced:

"It is apparent, gentlemen, that the court must render judgment for the plaintiff and the matter left is just a matter of the amount. At the time I heard the evidence in the exparte case, I rendered judgment for $750, and the plaintiff has been to considerrble expense since then and I am still of the same opinion. I am going to render judgment for $850 in this case."

[1] I. Counsel for appellants urge that the increase of the judgment from $750 to $850 was for expenses in the prosecution of this case and cannot be allowed. Counsel for appellee does not dispute this legal proposition, but argues that it does not appear that the $100 increase was for expenses incurred in the prosecution of this case. We do not see, in view of the court's announcement, how it can be doubted that this increase was for this purpose, and we determmine that it was. The judgment is erroneous, therefore, to this extent.

[2] 2. Counsel argues that the allowance to appellee of $195 for attorneys' fees and expenses in defense of the criminal case is erroneous. because no evidence was submitted to establish the reasonableness of the charges. We doubt whether the question is raised and saved in the court below. The complaint alleged the expenditure of the money in the defense of the criminal case. The answer contains simply a general denial of the allegation of the complaint. The issue was whether the money had been expended by the

appellee. The proof of the expenditure was submitted without objection. The court found that the expenditures by appellee for counsel fees and expenses, all itemized, had been necessarily made in the defense of the criminal case in the sum of $195. Up to this time no question had been made that the reasonableness of the expenditures had not been shown, the question being first raised by an exception to the finding, after the evidence was closed and the case submitted. Under such circumstances, we doubt if the question is before us. The time to raise the question was when appellants pleaded to the complaint, and could then have been raised by demurrer, or by objection when the evidence was offered, or by motion to strike it out on the ground that it had not been supplemented by proof of the reasonableness of the expenditures. Had either of these courses been taken, the appellee would have been in a position to have offered proof on the subject, and the court would have been in a position to have passed upon the question of whether the reasonableness of the expenditures should be shown and whether it was, in fact, shown.

Assuming, however, that the question is before us, we do not see how appellants can prevail. It appears from the opinion of the court in this record that he presided at the trial of the criminal case. He thereby, as judge of the court, acquired knowledge of the fact that the attorneys, to whom the money was paid by appellee, defended him in that trial. It appears in evidence in this case that appellee paid his attorneys $160 for defending him in the criminal case before the district court, which was upon indictment for a felony and a contested case before a jury. Assuming, but not deciding, that the judge might not bring into this case the knowledge which he acquired as the presiding judge in the criminal trial, we still have the proof before him that appellee paid his attorneys $160 to defend him, and paid $9.50 for various bonds required of him, and expended $3 for taxi hire in going to and from the courts, making in all $172.50, thus accounting for the total allowance of $195, except the

sum of $22.50. This latter sum probably is a part of the $25 paid for attorneys' fees in the court of the justice of the peace, of which the judge had no knowledge further than the evidence that the appellee had paid it. Counsel for appellant vigorously argue that the court, while it has power to allow, without evidence, attorneys' fees for services rendered in the case then before the court, has no power to so allow them for services performed in another case, without proof of the character of the service, and its value. This is probably true in the ordinary case, at least so far as the character of the services is concerned. But this case is rather unusual. In the first place, it was tried to the court without a jury. In case of jury trials, there must be proof of the character of the services, and proof of the reasonable value of the same, because the jury has no standard, without proof, with which to measure the value as an element of damages. But in a case of this kind, tried to the court as this was it being shown what the prosecution was, and the course it took, the mere proof that the attorneys defended the appellee is a sufficient characterization of the services. Every lawyer knows that a mere employment of two attorneys in good standing to defend a man charged with a felony, regardless of the amount of work required in conducting his defense before a trial jury, is worth more than $160. Of course, where the service is long drawn out, covering a multitude of items, and where the allowance is large, evidence of the character and extent of the service and its value ought, perhaps, to be required, except where the service is performed under the eye of the court. But not so where the mere statement of the fact of services proves its value up to the amount of the allowance, as in this case, both as to the fee in the justice's court and the district court. Counsel for appellants admit that proof of payment is some evidence of the value of the services, as claimed by counsel for appellee; but they deny the application of the principle in this case because the character of the service is not shown. In this they are in er-

ror, as before seen, because the fact of service sufficiently shows its character. Upon the subject of proof of payment being some evidence of value; see Carnego v. Crescent Coal Co., 164 Iowa, 552, 146 N. W. 38, Ann. Cas. 1916D, 794 and note. We do not commit the court on this proposition, but merely apply the principle in view of the admission in the briefs. We do not desire to be understood as departing from any of the well-established principles in regard to the power of the court in matters of this kind. We simply hold that this case is exceptional in character, and that there was no error on the part of the court under the circumstances in allowing the $195 as an element of damages in the case.

[3] 3. The complaint was framed, and the cause was tried, upon the theory that the criminal prosecution of the appellee was the result of a conspiracy between all of the appellants. The theory of the appellee was that all three of the appellants conspired to assault him, which assault was effectuated by one of the appellants; the others being present, aiding and abetting him. The theory was, further, that appellants, after the assault, conspired to falsely prosecute appellee for the crime of assault with a deadly weapon, alleged to have been committed by appellee during the first controversy. There is doubtless sufficient evidence to establish the conspiracy to assault the appellee. Appellants were present at the home of appellee, dropping in, one at a time, without any apparent reason, and all participating in the assault, according to appellee's evidence. The evidence of conspiracy to maliciously and falsely prosecute the appellee is not quite so clear. All three appellants left together in an automobile after the assault upon appellee. One of the appellants, the same day, made the complaint in the criminal case before the justice of the peace, and all three testified before the justice, and afterwards before the district court, to the assault with a deadly weapon, falsely as the court found. Just how the two appellants came to testify in the two courts, whether they volunteered or were brought in

by process, does not appear. They are not shown to have counseled or abetted the institution of the prosecution, or to have participated in a common design to carry forward the same, by any direct evidence. Of course, evidence of conspiracy need not be direct; the same being susceptible of proof circumstantially. In this case, the court saw and heard the witnesses and became convinced that all three appellants participated in the common design and purpose, and committed acts in futherance thereof, and we are not prepared to say that there was no evidence to support his conclusions, although, as above stated, it is not as clear as it might be on this subject.

It follows from all of the foregoing that the judgment is excessive in the sum of $100, and should be modified to that extent, and, as so modified, should be affirmed, and the cause remanded with directions to so modify the same, and it is so ordered.

BOTTS and FORT, JJ., concur.

On Motion to Modify Judgment.

PARKER, C. J. A motion for a modification of the judgment of this court has been filed. It is founded upon the proposition that, as we modified the judgment to the extent of denying one item of recovery in the sum of $100, and affirmed the judgment as modified, the sureties on the supersedeas bond thereby became discharged from the payment of the remaining portion of the judgment. The statute (section 17, chapter 43, Laws 1917) provides for a bond conditioned "for the payment of such judgment, and all the costs that may be adjudged against him in case such appeal or writ of error be dismissed or the judgment or decision of the district court be affirmed." The bond given in this case is conditioned that if the appellants "shall prosecute their said appeal with due diligence in the supreme court of the state of New Mexico, and, if the judgment or decision of the court below be affirmed, or the appeal be dismissed, shall comply with the decree of the district court, pay said judgment, and pay all damages and costs," etc.

Counsel cites the case of Orr v. Hopkins, 3 N. M. (Gild.) 183, 3 P. 61, as supporting his contention that the sureties are discharged; but we do not find the case to support his contention. That was a case where an excessive amount of interest had been allowed, and the court required a remittitur of the excess interest, and affirmed the judgment as thus modified. The court held that this was an affirmance of the judgment, and that the sureties on the appeal bond were not discharged. This case was decided under statutes substantially like, if not identical with, our present statute. There is a statement in the opinion to the effect that if the appeal had been taken to correct the erroneous interest charge, a different conclusion might have been reached. But this was merely a suggestion, and not a part of the decision. The decision was that the judgment was an affirmance of the judgment below, and we fail to see the distinction whether counsel found and relied upon the error, or whether the court found it, and of its own motion compelled the remittitur. This case went to the Supreme Court of the United States, and is reported as Hopkins v. Orr, 124 U. S. 510, 8 S. Ct. 590, 31 L. Ed. 523, and was affirmed, that court saying:

"The judgmyent of the district court was affirmed within the meaning of the territorial statutes and of the appeal bond."

See, also, 4 C. J. "Appeal and Error," §§ 3361-3365. See, also, note to Howell v. Alma Milling Co. (36 Neb. 80, 54 N. W. 126) 38 Am. St. Rep. 694, where a vast number of cases on this subject are collected.

[4] We are aware of the general doctrine that sureties are favored in the law, and their obligation is strictissimi juris, and may not be extended by implication. But this doctrine is susceptible of misapplication, resulting in injustice. The surety is the cause of the suspension of appellee's right to enforce his judgment, at a time, often, when it could be enforced. If the slightest modification of the judgment

on appeal is to be deemed to discharge the surety, then the giving of a supersedeas bond affords no protection to the appellee in most cases. On the other hand, if the judgment of the district court be affirmed in principle, it should be held to be affirmed within the meaning of the statute and bond, notwithstanding some slight modification. In this way, the ends of justice are promoted, and the purposes of the bond, and the intention of the parties, are accomplished. See 4 C. J. "Appeal and Error," § 3321. Of course, the obligation of the surety must not be extended to something other and different from his undertaking, but such is not the case here.

It follows from the foregoing that the motion to modify our judgment should be denied, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

(No. 2951. Feb. 17, 1925.)

MICHELIN TIRE CO. v. AKERS et al.

SYLLABUS BY THE COURT

1. A motion to strike the bill of exceptions should be sustained where it appears that the certificate as presented to the trial judge for signature recited both the presence of and due notice to counsel, and the judge struck out the recital of presence of counsel, and it is admitted that the recital of notice is not true.

2. The responsibility is upon appellant to bring up a correct transcript, and it is his duty to see that the judge's certificate to the bill of exceptions correctly recites the facts regarding the presence of counsel and notice of settlement.

3. On petition for certorari for diminution of the record for correction of the judge's certificate to the bill of exceptions to show waiver of notice of settlement, it appeared that appellant tendered to the judge for signature a certificate reciting both the presence of and due notice to appellee, both recitals being untrue. HELD, that such showing is not special cause to satisfactorily account for failure to apply for the writ within 30 days after the filing of appellant's brief, as required by section 33, c. 43, Laws of 1917.

4. On petition for certorari for diminuition of the record to show approval of cost bond, it appears that the clerk, by

inadvertence, omitted from the transcript the second page of cost bond upon which the clerk's approval was indorsed; that appellant was not at fault, and that he applied for the writ immediately after discovering the error. HELD, that this showing constitutes special cause accounting satisfactorily for failure to apply for the writ within 30 days after filing of appellant's brief, as required by section 33, c. 43, Laws of 1917.

5. The record showing that appellant, 2 days after the filing of findings of fact and conclusions of law, filed written exceptions thereto, and the judgment entered thereafter showing, by recital, that the making of the findings and conclusions was at appellant's request, and that he duly accepted thereto, HELD that appellant's contentions were brought to the attention of the trial court and may be reviewed.

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

Action by the Michelin Tire Company against T. G. Akers and others. From a judgment for defendants, plaintiff appeals. On appellee's motion to strike bill of exception and dismiss appeal, and appellant's petitions for certiorari for diminution of record. Motion to dismiss appeal overruled. First petition for certiorari sustained in part, and second petition for certiorari denied.

John F. Kelton, of Ft. Sumner, for appellant.

Keith W. Edwards, of Ft. Sumner, for appellees.

OPINION OF THE COURT

WATSON, J. This cause is before us on appellee's motions to strike the bill of exceptions and to dismiss the appeal, and upon appellant's first and second petitions for certiorari for diminution of the record.

[1] 1. In his motion to strike the bill of exceptions, appellee urges that the record fails to show that counsel had 5 days' notice of intention to apply for the signing and settling of the bill of exceptions. The first paragraph of the judge's certificate to the bill of exceptions is as follows:

"And now on this 2d day of April, A. D. 1924, the plaintiff, Michelin Tire Company, and the defendant, W. K. Jones, ap-

peared by their (its) respective attorneys, Jno. F. Kelton, Esq., and Keith W. Edwards, Esq., and the said plaintiff submitted to be settled, signed and sealed by me the bill of exceptions in the above entitled cause; and it appearing that due and proper notice was given to the defendant by the plaintiff of its intention to apply to the undersigned for the purpose of having me sign, seal and settle the bill of exceptions in this cause at this time and place, and that there is no objection on the part of the defendant."

The words and the letter "s" in italics were, as is evident, stricken by the trial judge at the time of signing the certificate, and the word "its," in parenthesis, was by him written through the word "their."

In its brief upon this motion, appellant assumed that there had been no changes in the certificate as originally drafted, and took the position that it showed upon its face the presence of counsel for appellee, as well as due and proper notice. Later, however, appellant withdrew from this position and admitted both that appellee's counsel was not present at the settlement of the bill of exceptions, and that he had no notice of the time and place of actual settlement. It is plain from the judge's certificate that counsel for appellee was not present at the settlement. We do not deem it necessary to decide the effect of the recital of due and proper notice, since the appellant admits that it is not true. This would necessitate sustaining the motion to strike the bill of exceptions, unless appellant's second petition for certiorari for diminution of the record, which we shall next consider, is well taken.

[**2**, **3**] 2, 3. Appellant seeks to correct the certificate of the trial judge to show the facts actually existing touching the presence of counsel and his notice of the settlement. Appellant's own statement of these facts is as follows: That he presented to counsel for appellee a waiver of notice of appeal and a wavier of notice of settlement of the bill of exceptions, the former of which was signed and the latter refused, counsel stating that he desired to see the stenographer's transcript before signing the latter waiver. At a later date, appellee's counsel stated to appellant's counsel that he would require the statutory notice and did not

wish to waive anything. Soon thereafter notice was served that appellant would apply for settlement of the bill of exceptions on March 17, at Tucumcari, at which time and place the matter was not taken up. Shortly thereafter appellant's counsel inquired of appellee's counsel if he had read the transcript, and was answered in the affirmative, and further, if he desired to be present at the signing and sealing of the bill of exceptions, and was answered in the negative. He then asked counsel for appellee for a letter to the trial judge to that effect, whereupon appellee's counsel addressed a letter to Judge Hatch stating, in substance, that he had read the transcript and found the same to be substantially correct. On March 31, an order was filed, dated March 28, granting at 10-day extension for settlement of the bill of exceptions. On April 2d, the trial judge was at Ft. Sumner, and appellant's counsel asked him to certify the bill of exceptions which he would find at the clerk's office, and a few days thereafter appellant's counsel discovered that the certificate had been signed.

Under the facts stated by appellant a new notice was required. Ojo del Espiritu Santo Co. v. Baca, 28 N. M. 509, 214 P. 768. The transcript was filed in this court on April 9, 1924, appellant's briefs were filed here on May 20, 1924, and the second petition for certiorari was filed here July 28, 1924. The petition having been filed more than 30 days after the filing of the briefs can only be granted upon such special cause as shall account satisfactorily for the delay. Section 33, c. 43, Laws of 1917. It is urged that appellant had good reason to consider counsel's conduct a waiver of notice. No doubt it had. However, the duty is upon appellant to bring to this court a correct transcript. Norment v. Mardorf, 26 N. M. 210, 190 P. 733. A most important part of that duty is to see that the judge's certificate to the bill of exceptions recites the true facts. Appellant tendered to the judge a certificate reciting presence of, and due notice to, counsel, when in fact a waiver was relied upon. The showing is not satisfactory. either in point

of diligence or otherwise, for which reason the petition must be denied, and it follows that the motion to strike the bill of exceptions must be sustained.

[4] 4. Appellee has moved to dismiss the appeal, his first ground therefor being that, as appears from the transcript, the cost bond was not approved by the district court clerk. In this connection, appellant, by its first petition for certiorari filed on June 23, 1924, shows that, by the clerk's inadvertence, a page of the cost bond was omitted, which, if supplied, would show that the cost bond was in fact approved; that counsel was not at fault in this regard, and that he made his application for the writ immediately upon discovery of the error. Accompanying the petition is the affidavit of the district court clerk corroborating the facts stated, and setting up a true copy of the cost bond, from which it appears that the same was approved on January 31, 1924. It is to be observed that this petition for certiorari was filed more than 30 days after the filing of the briefs. The showing of special cause, however, is deemed sufficient to meet the requirements of the statute above cited. A writ of certiorari will therefore issue to the clerk of the district court of De Baca county, requiring him to return under his certificate a true copy of the cost bond filed by appellant in this cause, with the indorsement thereon, showing the approval thereof, unless counsel choose, by stipulation, to dispense with the issuance of the writ and to treat the copy of such bond now here, authenticated by said clerk, as a part of the record.

[5] 5. In the motion to dismiss the appeal, it is also urged that the assignments of error filed herein raised no questions except such as require reference to the bill of exceptions for their determination, and, as the bill of exceptions has been stricken, there is nothing for consideration by this court. This appears to be true as to all assignments except Nos. 8 and 10, which seem to raise the question whether certain conclusions of law are supported by the findings of fact. It is further urged, in the motion to dismiss,

that no questions are properly before us because none were reserved in the court below. Included in the transcript, as a part of the record proper, are certain exceptions made by appellant to the findings of fact and conclusions of law which appear to have been filed on November 15, 2 days after the filing of the findings and conclusions. In the judgment filed December 13, 1923, it appears, by recital, that the findings of fact and conclusions of law, were made at appellant's request, and were duly expected to. In paragraph 4 is an exception to the conclusion of law "that the plaintiff at least impliedly released W. K. Jones, and is estopped to hold the defendant W. K. Jones for such further indebtedness, and cannot now recover from him," upon the ground (e) "that such conclusion of law is not supported by the findings of fact filed herein." This question appears therefore to have been reserved for review (Epstein v. Waas, 28 N. M. 608, 216 P. 506), and to be presented to this court by assignment of error.

It follows that appellee's motion to strike the bill of exceptions should be sustained, and his motion to dismiss the appeal overruled, and that the first petition for certiorari should be sustained to the extent hereinbefore indicated, and otherwise denied, and the second petition for certiorari should be denied, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2851. Feb. 19, 1925]

SANDOVAL v. ATCHISON, T. & S. F. RY. CO.

SYLLABUS BY THE COURT

1. Negligence of a railway company in operating its train over a country crossing at a speed of 30 miles per hour, which was its usual custom, within the knowledge of the plaintiff, whose automobile was wrecked by collision with the train, is not made out, in the absence of other evidence as to excessiveness of speed.

2. The charge of negligence in failing to give proper signals for a crossing over a railroad is not made out where,

without contradiction, the railroad company shows that such signals were in fact given, and where plaintiff whose automobile was wrecked by collision with the train, simply says that he did not hear the signals, and that probably the reason was that he was completely enclosed in his car with the curtains.

3. The plaintiff drove his automobile into the train of defendant, after the locomotive and tender had passed the crossing. From a point thirty-three feet from the crossing, the view of the track was entirely unobstructed, and an approaching train could be seen by any one willing to look. The plaintiff did not look. Under such circumstances, no recovery can be had for damages for the loss of his automobile. Morehead v. A. T. & S. F. Ry. Co., 27 N. M. 249, 201, P. 1043, followed.

4. A plea of general denial and a plea of contributory negligence are not inconsistent in a legal sense and may, when separately pleaded, be embodied in the same answer.

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

Action by Gabriel Sandoval against the Atchison, Topeka & Santa Fe Railroad Company, in which defendant filed cross-complaint. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

W. C. Reid, of Albuquerque, J. M. Hervey, of Roswell, and E. C. Iden, of Albuquerque, for appellant.

D. J. Melton and W. C. Heacock, both of Albuquerque, for appellee.

OPINION OF THE COURT

PARKER, C. J. The plaintiff (appellee) was driving his automobile on the road west of Grants, in Valencia county. At a point 3 miles west of Grants, the road leading to San Mateo, where plaintiff resides, makes a right-angle turn and proceeds north across the tracks of the defendant (appellant). Defendant's right of way is 100 feet wide on each side of its tracks, and, from the turn, 100 feet away from the tracks, to the crossing, the highway gradually ascends. It was a windy day, the wind blowing from the west and raising considerable dust. Plaintiff had all of the curtains on the car and was, together with three com-

panions riding with him, completely inclosed in the car. He drove to within 10 feet of the crossing, when one of his companions called his attention to the approaching train of defendant from the east, whereupon he applied his brakes, but failed to stop in time, and the automobile collided with the baggage car of defendant's train, the locomotive and tender having already passed the crossing. No one was hurt, but the automobile was wrecked.

Plaintiff brought action for damages for the destruction of the automobile, based upon the alleged negligence of defendant. Defendant answered, denying negligence, and, by way of new matter, charging plaintiff's negligence in the operation of his automobile as the proximate cause of the injury, and charging plaintiff with contributory negligence. Defendant also filed a cross-complaint, charging plaintiff with negligently injuring defendant's train to the extent of $100. Plaintiff replied, putting into issue the allegations of the answer by way of new matter, and answered the cross-complaint. At the close of the case defendant moved for an instructed verdict, which motion was denied. The case went to the jury, and it returned a verdict for plaintiff in the sum of $1,400. Defendant moved for judgment non obstante veredicto, which motion was denied. The court required a remittitur of $500, which was agreed to by the plaintiff, and judgment was thereupon rendered for plaintiff for $900 as damages, from which defendant has appealed. Counsel for plaintiff seek to sustain the judgment upon three acts of alleged negligence of defendant.

[**1**] 1. They say that defendant was operating its train (No. 3) at a high rate of speed, amounting to negligence under the circumstances. The circumstances relied upon are that it was windy and dusty. Whether it was sufficiently dusty to obscure the view is not shown. The plaintiff, long familiar with the crossing and the speed of trains thereat, testified that the train was running at its usual speed of about 30 miles per hour. Under such circumstances, and there

being no statutory regulation of the speed of trains, the question of excessive speed of trains as evidence of negligence is not involved and need not be considered. 3 Elliott on Railroads, 523.

[2] 2. Counsel say that defendant was negligent in not giving proper warning signals for the crossing. Defendant proved without contradiction by its trainmen that warning signals were given both by whistle and bell. No attempt by plaintiff was made to show that if signals had been given they could have been heard by the occupants of the automobile. He simply says that no signals were heard, and that probably the fact that the curtains were all on, completely inclosing the occupants of the car, accounts for their failure to hear the signals. Under such circumstances, the evidence is that the signals were given, and there is no evidence to the contrary.

[3] 3. Plaintiff relies upon the alleged negligent maintenance of an embankment upon defendant's right of way, obscuring the view of travelers approaching the crossing. There is some evidence to the effect that at the turn, 100 feet from the crossing, there is an embankment which might obscure the view of the track, but the evidence is uncontradicted that from a point 33 feet from the crossing, all the way up to the crossing, there is nothing to obscure the view of an approaching train by any one who is willing to look. The plaintiff, in traveling this 33 feet, never looked up the track to see if there was an approaching train until he was within 10 feet of the crossing, when one of his companions called out that the train was approaching, whereupon he applied the brakes to stop his automobile, but failed to stop in time. This was gross negligence on the part of the plaintiff, and prevents a recovery. It is a worse case than Morehead v. A., T. & S. F. Ry. Co., 27 N. M. 349, 201 P. 1048, where it was held no recovery could be had.

[4] 4. A point is made by plaintiff on the pleadings. It is said that, inasmuch as defendant pleaded a general denial of negligence, and pleaded contributory

negligence on the part of plaintiff, the latter plea nullifies the former, because of inconsistency. The argument is faulty. In the first place, the pleas are not inconsistent in a legal sense. Upon this subject, see 29 Cyc. 582; 31 Cyc. 151, 152; 20 R. C. L., "Negligence," § 150; Kimble v. Stackpole, 60 Wash. 35, 110 P. 677, 35 L. R. A. (N. S.) 148; Seattle National Bank v. Carter, 13 Wash. 281, 43 P. 331, 48 L. R. A. 177 and note, which contains a valuable discussion, generally, of inconsistency in pleas. See also Pomeroy, Code Remedies (4th Ed.) §§ 598-600. Mr. Pomeroy points out that even where inconsistent defenses are not allowable, a plea of one inconsistent defense cannot be used to nullify another inconsistent plea, the remedy being by a motion to strike out or to compel an election. See also 31 Cyc. 151, to the same effect. It is true that the plaintiff, at the beginning of the trial, made an oral motion to strike the entire defense of the defendant, on the ground of inconsistency. This seems to be allowable in some states. But the more proper method would seem to be to move to compel the party to elect between the inconsistent pleas, or at least to move to strike out the inconsistent pleas occurring after the first plea, rather than to move to strike out the entire pleading. See 31 Cyc. 635. It thus appears that these pleas interposed by the defendant were not inconsistent in a legal sense, and if they were, the proper mode to present the question was not pursued in this case.

Counsel makes a misapplication of what we said in Thayer v. D. & R. G. R. R. Co., 21 N. M. 330, 154 P. 691. In that case, we considered no such question as is here presented, viz., can a general denial and a plea of contributory negligence, separately pleaded, be united in the same answer? We hold that they may be. In the Thayer Case, the language used, to the effect that a plea of contributory negligence is a plea of confession and avoidance, and admits negligence on the part of the defendant, was used to demonstrate that the plea interposed in that case was not a plea of con-

tributory negligence, but was merely only a further general denial of plaintiff's complaint.

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

BICKLEY and WATSON, JJ., concur.

[No. 2856. Aug. 25, 1924. On Motion for Rehearing, Jan. Term, 1925]

STATE v. QUINTANA et al.

SYLLABUS BY THE COURT

1. A person may be indicted in general terms with being a principal in the first degree, and then be convicted upon evidence establishing his guilt as a principal in the second degree, such as an aider or abettor at the fact. It is only in those states where the punishment for the two divisions is different that a principal in the second degree must be necessarily charged as such.

2. A verdict that is supported by substantial evidence will not be disturbed on appeal. Record reviewed, and verdict HELD to be supported by such evidence.

3. In a homicide case, evidence tending to establish an illicit or a meretricious relation on the part of the female defendant with the male defendant, as well as the deceased, is admissible on the question of motive.

4. Where evidence is admissible for one purpose but not for another, and is offered generally without any limitation, it will be presumed to have been offered and received for its legitimate purpose.

5. If it is desired that such testimony be limited to its proper purpose, a requested instruction that effect should be tendered. A failure to do this precludes any complaint.

6. A requested instruction, even if correct, need not be given where the law embraced therein has been fully and accurately covered by the court's instructions.

7. In order to secure a new trial on account of newly discovered evidence, it must affirmatively appear that it is such as will probably change the result if such new trial is granted; it must be discovered since the trial; it must be such that it could not, by the excuse of due diligence, have been

discovered before the former trial; it must be material to the issue; it must not be merely cumulative to the former evidence nor merely impeaching or contradictory of it.

8. It is not error to deny such a motion that fails to affirmatively show that the newly discovered evidence could not, by the exercise of due diligence, have been discovered before the former trial.

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

Guadalupe Quintana and another were convicted of murder in the second degree; and they appeal. Affirmed.

A. B. Renehan, of Santa Fe, and R. L. Hitt, of Mountainair, for appellants.

M. J. Helmick, Atty. Gen., and J. W. Armstrong, Asst. Atty Gen., for the state.

OPINION OF THE COURT

BRATTON, J. The appellants were jointly indicted, charged with the murder of George Burkhold. They were tried together, and each convicted of murder in the second degree. From the sentence imposed they have perfected this appeal.

[**1**, **2**] 1. It is urged upon behalf of the appellant, Maud Peña, that the indictment charges her with being a principal in the commission of the crime, while the proof establishes her guilt, if guilty at all, of being an aider and abettor, and consequently there is a complete failure of proof of the crime laid in the indictment. It appears from the testimony that at the time the deceased knocked at her door, told her who he was, and started to forcibly enter her room, she lowered the light, went into the room of the appellant Quintana and brought him into the scene of the difficulty with a flashlight in one hand and a pistol in the other; that she came along with him and stood within two or three feet of him at the time he fired the fatal shot in the face of deceased's request that he not shoot. That having thus brought the two men together, and with the difficulty impending and appar-

ent, she made no effort to prevent the trouble or avoid the killing. These, with other facts and circumstances proven, which it is unnecessary to detail at length, were sufficient to warrant the jury in believing that the two were acting in concert in the commission of the crime, with a common object, purpose, and intent. So, accepting this appellant's contention, she would be an aider, abettor, or accessory at the fact, and not an accessory before the fact in the sense that she had taken part in planning the homicide and was absent at the time it was committed. What we shall proceed to say in no wise concerns an accessory before the fact, as this was not that kind of a case. Aiders and abettors are commonly called principals in the second degree. The distinction between principals in the first and second degrees is, for all practical purposes, one without a difference. In this jurisdiction the punishment is the same for the two divisions, and, in such cases, it is almost universally held that a person may be charged in the indictment as a principal in the first degree, and then be properly convicted upon evidence establishing his guilt as an aider or abettor at the fact. It is only in those states where the punishment prescribed for the two classes is different that the ancient rule, requiring an aider or abettor at the fact to be necessarily charged as such, is still followed. In 1 R. C. L. p. 143, the author says:

"Owing to the fact that the distinction between principals in the first degree and principals in the second degree is for practical purposes at the present time a distinction without a difference, it is generally held that a person may be charged in an indictment as being an aider and abettor or principal in the second degree and be convicted on proof that he was a principal in the first degree, or he may be charged in the indictment as a principal in the first degree and be convicted on proof that he was principal in the second degree."

To the same effect is Wharton on Homicide, p. 56, wherein it is said:

"The distinction between principals in the first and second degree, it has been said, is a distinction without a difference; and therefore it need not be made in indictments. Such is only the case, however, where the punishment is the same

for the two divisions. But where by particular statute, the punishment is different, then principals in the second degree must be indicted specially as aiders and abettors. So far as concerns murder, however, it is to be noticed that, if in the indictment several be charged as principals, one as principal perpetrator and the others as aiding and abetting, it is not material which of them be charged as principals in the first degree, as having given the mortal blow; for the mortal injury given by any one of those present is, in contemplation of law, the injury by each and every one of them."

While in Bishop, Cr. Law (9th Ed.), the rule is stated in this language:

"The distinction between the two degrees is without practical effect. It originated in this way: By the ancient law, those only were principals who are now such in the first degree, persons present and abetting being accessories. When afterward the court held the latter to be principals, they termed them of the second degree. Now an indictment against one as principal of the first degree is sustained by proof of his being such of the second, and an indictment against one as principal of the second degree is supported by proof that he is of the first. The distinction is in all respects without a difference; and there isno practical reason for retaining it in exposition of the common law."

The texts correctly state the law and are fully supported by modern authority, with which we agree. What we have said does not conflict with the holding of this court in State v. Martino, 27 N. M. 1, 192 P. 507. It was there held to be proper to indict a principal in the second degree as such, but it was not held to be necessary. It is optional with the pleader, as he may charge the ultimate fact in suitable and proper language, or he may plead the outward facts constituting such crime. The latter course was followed in the Martino Case, and that was held to be proper, but not exclusive. The contention is therefore without merit.

[3] 2. Through the witness Harrington the state proved that, beginning several months before the homicide, the appellant Maud Peña and the deceased were living together in a certain house at or near the town of Scholle; that the witness joined them and began living in this house, paying Mrs. Peña regular board;

that Mrs. Pena had her bed in a certain room and slept there regularly, and that the deceased came out of that room in the mornings; that shortly after the witness began boarding there the appellant Guadalupe Quintana began living there also. That afterwards the two appellants and the deceased moved to another building in the town of Scholle, called the "Post Office," and continued to live together there until the day of the homicide; that there were openings in the walls of the latter house between the bedrooms, but no doors had been placed in them, only curtains separating the bedrooms occupied by the woman and the two men. The grounds of objection interposed at the time this testimony was offered were that it was irrelevant, incompetent, immaterial, and had nothing to do with the alleged crime. That such testimony was germane is too plain for serious debate. These circumstances were clearly relevant as indicating an illicit or meretricious relation on the part of the woman with both men, from which the jury might legitimately infer that jealousy was the motive prompting the commission of the crime arising from the desire to thereby remove an obstacle to the complete gratification of the wrongful desires of the appellants. For a complete discussion of this rule, and a citation of the many cases discussing various phases of it, see Underhill, Cr. Ev. (3d Ed.) § 503.

[4] 3. It is now insisted that such testimony carried with it an insinuation of immoral relations between the three parties; that it constituted an attack upon the character of both of the appellants, and particularly Maud Peña, and therefore was prejudicial. That it may have produced this result would not render the testimony inadmissible, even though it was not admissible for that purpose. Where testimony is admissible for one purpose but not for another and is offered generally without any limitation, it will be presumed that it was offered and received for its legitimate purpose. 38 Cyc. 1341; Car Manufacturing & Supply Co. v. Wagner, 14 N. M. 195, 89 P. 259.

[5] If the appellants desired such testimony limited to the one purpose for which it was admissible, it was their duty to request the court to so instruct the jury. Having failed to do this, they cannot now complain. Stewart v. Raleigh & A. Air L. R. Co. et al., 141 N. C. 253, S. E. 877; Bird et al v. Bird et al., 218 Ill. 158, 75 N. E. 760; Viellesse v. City of Green Bay, 110 Wis. 160, 85 N. W. 665; Kircher v. Town of Larchwood, 120 Iowa, 578, 95 N. W. 184: Aughey v. Windren et al., 137 Iowa, 315, 114 N. W. 1047; C. R. I. & P. Ry. Co. v. Holmes, 68 Neb. 826, 94 N. W. 1007; Lisko v. Uhren, 130 Ark. 111, 196 S. W. 816.

[6] 4. Appellant Quintana complains of the refusal to give his requested instructions numbered 1, 2, and 4. The law treated in each of these instructions was fully and accurately covered by the court's instructions given to the jury. It has been time and time again held that a requested instruction, even if correct, need not be given where it is merely cumulative, and states in another form what has already been covered in the court's instructions. State v. Ulibarri, 28 N. M. 107, 206 P. 510; State v. Vaisa, 28 N. M. 415, 213 P. 1038; State v. Todd, 28 N. M. 518, 214 P. 899, and cases there ctied.

[7] 5. Error is assigned upon the court's denial to grant appellants a new trial on account of newly discovered evidence. It was set forth in the motion that about four days prior to the homicide, and in the presence of one Justo Padilla, the deceased told Frank Gomez that he, meaning the deceased, intended to kill both the appellants, and that one Kayser told one Lovatta that Contreras would spend $20,000 for the purpose of sending the appellants to the penitentiary. The latter testimony was perhaps an expression of an opinion, and would not have been admissible, had it been available; but, irrespective of that, in order to secure a new trial on account of newly discovered evidence, it must affirmatively appear that it is such as will probably change the result if

the new trial is granted; it must be discovered since the trial; it must be such that it could not have been discovered before the trial by the exercise of due diligence; it must be material to the issue; it must not be merely cumulative to the former evidence; and it must not be merely impeaching or contradictory of the former evidence. Territory v. Claypool et al., 11 N. M. 568, 71 P. 463; Hancock v. Beasley, 14 N. M. 239, 91 P. 735; State v. Padilla, 18 N. M. 573, 139 P. 143; State v. Gonzales, 19 N. M. 467, 144 P. 1144; State v. Luttrell, 28 N. M. 393, 212 P. 739.

[8] The weakness of this motion is that no sufficient showing of diligence is made. It is not affirmatively shown that such testimony could not, by the exercise of due diligence, have been discovered before the former trial. The motion states "that due diligence for the time allowed defendants was made in search of all testimony possible." This is merely the statement of a conclusion. Appellants conclude that, taking into consideration the time allowed them for the preparation of their case, they exercised due diligence in the search of evidence. No effort was made to secure a postponement or continuance, and it was never contended that other or additional testimony could be secured if further time were given, or that they were in any wise unprepared for trial. On the contrary, they voluntarily announced ready and willingly entered the trial. They do not show that they were confined in jail or were otherwise handicapped in securing their evidence. Neither do they show what diligence they exercised or what effort they put forward in preparing their case, but content themselves with the statement of this conclusion. The motion, therefore, fails to meet the requirement that it affirmatively appear therefrom that such newly discovered evidence could not, by the exercise of due diligence, have been discovered before the trial.

Other questions are urged, but we think they present

no reversible error. For the reasons stated, the judgment should be affirmed; and it is so ordered.

PARKER, C. J., and BOTTS, J., concur.

On Motion for Rehearing.

PARKER, C. J. A motion for a rehearing has been filed in behalf of the appellant, Maud Peña, based upon the ground that there is no substantial evidence in the case to support the verdict as to her. We have carefully re-examined the record, and are compelled to say that it is extremely doubtful whether the state has shown any facts pointing directly to the guilt of the defendant Peña. She was in her own house when the deceased broke in the door, and entered over her express protest, and she called upon the other defendant, Quintana, to help and protect her against the impending assault of the deceased. There was no evidence of a common design or purpose to murder the deceased, or to do any violence to him. Quintana shot and killed him, and the defendant Peña was there present. But that she contemplated any such result is extremely doubtful. There may have been an atmosphere surrounding the trial which caused the jury to find as it did, but there are certainly no facts appearing in the record from which we can gain an appreciation of the same. There was no evidence that the defendant Peña invited deceased to her house, but, on the contrary, all the evidence shows that she tried to keep him away from the house, and forbade him to enter. There is some evidence that tended to establish that she was an immoral woman, and was in possession of liquor, and this may have caused the jury to convict her. But a woman cannot be convicted of murder simply because of such supposed delinquencies.

It follows that she is entitled to a new trial, and that the judgment should be reversed as to her, and that the cause should be remanded with directions to proceed accordingly; and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 2858. Dec. 23, 1924. Rehearing Denied March 18, 1925.)

FIRST NAT'I. BANK OF CLAYTON v. HARLAN et al.

SYLLABUS BY THE COURT

1. A finding by the trial court, unsupported by any evidence, will not be sustained.

2. There can be no estoppel where the party relying upon the same has not been induced to take a position to his detriment by the act of the other party.

3. Where a case is submitted to the court, sitting without a jury, upon the evidence then before it, and the court erroneously finds for the plaintiff, without any substantial evidence to support the finding, and erroneously refuses to find for defendant as requested, there is no right to a new trial, but this court may reverse and remand the cause, with directions to enter the proper judgment.

Appeal from District Court, Union County; Leib, Judge.

Action by the First National Bank of Clayton against J. A. Harlan and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

Joseph Gill, of Albuquerque, for appellants.

O. P. Easterwood, of Clayton, for appellee.

OPINION OF THE COURT

PARKER, C. J. This is an action for the foreclosure of a chattel mortgage, resulting in a decree in favor of appellee (plaintiff) against appellant (defendant), from which appeal has been taken. The plaintiff introduced the note and chattel mortgage, showing that the same were unpaid and that the note was a renewal note, and rested its case. The defendant alleged and proved, without contradiction, that the original note of one Harlan, signed by him, a renewal whereof was the note sued on, was signed by him upon the express consideration and contract of plaintiff that it would turn over to him the cattle, upon which the chattel mortgage of said Harlan was

executed, which cattle he should sell at private sale and apply the proceeds to the payment of the note, and the overplus, estimated at $1,000 by plaintiff, was to be divided equally between plaintiff and defendant; that the plaintiff failed to turn over the cattle, and defendant notified plaintiff of election to rescind the contract; that no consideration of any kind moved between the parties other than the promise of plaintiff as above set out; that no consideration moved between the parties for the signing of the renewal note, and that defendant was induced to renew the note by threats of plaintiff to sue him on his certain other indebtedness to plaintiff, but no contract for forbearance was made. At the close of the evidence, plaintiff moved for judgment, which motion was granted and the decree entered. Proper exceptions to the findings were made, and proper requests for findings were presented to save all the questions raised. The court found:

"That the defendant, C. E. Anderson, for a valuable consideration, executed the notes and chattel mortgages sued on, and renewed such indebtedness from time to time by the execution of the various instruments described in the complaint, and that he likewise paid a pasture bill upon said live stock, and paid other expenses in connection with the same, and in connection with the recording of the chattel mortgage sued on; and that the defendant is barred and estopped on account of his acts and conduct, as appears from the evidence, from recovering in this suit."

[1] 1. Just how the court found that defendant received a valuable consideration for the execution of the note is hard to understand. There is no evidence to support such a finding, and, on the other hand, the evidence is all the other way. The court was in error.

[2] 2. The finding of estoppel is erroneous. In the first place it was not pleaded; and, in the second place, there is no evidence upon which estoppel could be founded. There is not a word of testimony that the plaintiff relied upon any act of defendant, and thereby was induced to take a position to its detriment. In such case, there can be no estoppel. See Doran v.

First National Bank of Clovis, 22 N. M. 236, 160 P. 770; King v. Stroup, 22 N. M. 241, 160 P. 367.

It follows that the judgment is erroneous, and should be reversed and the cause remanded, with directions to set aside the judgment and render judgment for the appellant; and it is so ordered.

BOTTS and FORT, JJ., concur.

On Motion to Modify Judgment.

PARKER, C. J. A motion to modify our judgment has been filed, based upon the proposition that we should have remanded the cause for a new trial, instead of remanding it with directions to enter judgment for the defendant. The proposition is founded upon the following facts appearing in the record:

The case was tried to the court, without a jury. At the close of defendant's evidence, counsel for plaintiff moved for judgment on the evidence, pointing out alleged insufficiency of defendant's evidence, and certain facts claimed to amount to an estoppel, and that "he has failed to make out any case, and we therefore move for judgment." In reply to the motion, after argument, the court said:

"Well, I think the motion is addressed to the present condition of the case, and it is up to the court to decide what its opinion is to be from the evidence already heard. I can't see any use in going on and taking longer to try the case. With the evidence before the court now, even though the defendant has set up a general defense, the preponderance of the evidence is clearly in favor of the plaintiff. I will find for the plaintiff."

It thus appears that the plaintiff submitted the case upon the evidence then before the court, and did not deem it necessary to rebutt the defendant's evidence, if it could, although it had opportunity to do so. The court considered the case as submitted on the evidence, and found it to preponderate in favor of plaintiff, erroneously, as we have held. Now the plaintiff asks another opportunity to put in his rebuttal testimony, we assume. The defendant requested findings fully

covering the issues, and all of the evidence in the case supported the same. It is apparent that plaintiff has no such right. The error of the district court was an invited error, so far as the plaintiff is concerned. The case stands here, just as it stood before the district court when the submission was made, and the court should have rendered the judgment then, which we have now directed. In such case there can be no right to a new trial. It follows that the motion should be denied; and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 2871. March 6, 1925]

LANDRUM v. HARVEY.

SYLLABUS BY THE COURT

1. Facts examined and held to be sufficient to support a finding by the jury that the jewels of a hotel guest had been stolen by some employee of the inkeeper.

2. Where the property of a guest is lost in a hotel, a prima facie case of liability of the innkeeper is made out, and the burden of proof is upon him, if he would escape liability, to show that the loss was caused by some fault of the guest.

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

Action by L. Billie Landrum against Fred Harvey. From judgment for plaintiff, defendant appeals. Affirmed and remanded, with directions.

W. C. Reid, of Albuquerque, J. M. Hervey, of Roswell, and E. C. Iden, of Albuquerque, for appellant.

We do not believe there can be very much controversy at this stage of this case touching the law as to the liability of an inn-keeper, nor that the plaintiff was guilty of such negligence as was well calculated to have caused her loss; the main question, if not the only question, in the case being whether or not she could save herself from the consequences of her acts by showing that the proximate cause of the loss was not the negligence, but the dishonesty of the defendant's employees.

We contend that the loss was caused by plaintiff's negligence. It is true that in the special findings of the jury the following occurs:

"Q. Did plaintiff exercise the care of an ordinarily prudent person in the care and protection of her jewels? A. Yes."

This, however, is not a finding of fact, but a conclusion. If the acts of the plaintiff claimed to have been negligent are undisputed, and it is not a question upon which reasonable minds might differ, this court will exercise its right to draw a conclusion therefrom, regardless of what the jury or the lower court concluded. 20 R. C. L., p. 169.

The act of the plaintiff in sitting up and allowing the jewels to be wrapped in the soiled linen and dispatched to the laundry can have but one effect under any set of circumstances; that is to say, such act is well calculated to cause the loss or destruction of the property. Glenn v. Jackson (Supreme Court of Ala.), 12 L. R. A. 382; Elcox v. Hill, 98 U. S. 222.

Plaintiff was guilty of contributory negligence and the court's instructions in this respect were inadequate, incomplete and erroneous. Elcox v. Hill, 98 U. S. 222; Lanier v. Youngblood. 73 Ala. 587; Beale on Inn-Keepers and Hotels, Sec. 223; Oppenheim v. Hotel Co., 6 C. P. 515, cited in note to the case of Cutler v. Bonney, 18 A. R. 134; Cashill v. Wright, 6 El. & Bl. 891; note to Cayle's Case, 1 Smith's Leading Cases 126; note to the case of Johnson v. Chadbourn Finance Co., 99 A. S. R. 571.

The real battle-ground in this case was the proximate cause of the loss of the jewels, and the burden of proof as to this cause. If the defendant pleads and succeeds in proving contributory negligence on the part of the plaintiff, or in this case, negligence calculated to have caused the loss, then the plaintiff may escape the loss by showing that her negligence was not the proximate cause of the loss, but the burden is upon the plaintiff to show this, and not upon the de-

fendant to prove the negative. Union Pac. Ry. Co. v. Callaghan, 56 Fed. 988 at 990; Shearman & Redfield on Negligence, 6th Ed., Vol. 1, p. 125 and note.

The verdict was inconsistent with the special findings and not supported by the evidence.

Marron & Wood, of Albuquerque, for appellee.

Upon the former appeal this court decided that the evidence did not establish plaintiff's negligence causing or contributing to her loss, as a matter of law; and also that the evidence was sufficient to warrant the jury in finding that some servant of the defendant stole the jewels. The evidence being unchanged, that became and is the "law of the case." State ex rel. Garcia v. County Comrs., 22 N. M. 562, 1 A. S. R. 721 n.; Roberts v. Cooper, 20 How. 481.

It was not error to refuse defendant's proposed instruction number ten. That requested instruction told the jury that, in order to recover, the plaintiff must prove that some agent or servant of the defendant, "employed by it to protect its said guests and care for their property and the rooms occupied by them," carried away from the room of the plaintiff and from her bed the rings and jewelry; and that the burden of proving all of those facts was upon the plaintiff. It is perfectly apparent that the instruction as proposed would have been error. It did not matter whether the rings were stolen by an agent or servant "employed by it to protect its guests and care for their property and the rooms occupied by them" or whether the agent or servant who stole them was the hostler in the barn or the fireman in the cellar. The instructions given by the court fairly presented the question of burden of proof. Corcoran v. Traction Co., 15 N. M. 19; State v. Archuleta, 20 N. M. 19.

The judgment should be affirmed.

OPINION OF THE COURT

PARKER, C. J. This case was here before. See 28 N. M. 243, 210 P. 104. At that time, the law as to

a landlord's liability for loss of his guests' property was declared so far as this case is concerned. The case was retried, resulting in a verdict and judgment for plaintiff (appellee) for $2,360, from which defendant (appellant) has appealed.

[1] 1. The jury made a special finding that the jewels of plaintiff were stolen by some employee of defendant. If this conclusion was reached upon substantial evidence, and no error of the court intervened, it would seem to dispose of the whole matter. Therewas no direct evidence of the larceny. The rings were in a pillow slip, and the maid came into plaintiff's room, as was her custom, shook out the pillows from the slips, removed the same, together with the sheets, from the bed, and laid the same in the hall just outside the door of plaintiff's room. Soon thereafter the maid discovered a ring on the floor, and returned the same to the plaintiff, whereupon a search was instituted. It was found that the linen had been removed from the hall floor, and had reached the laundry, after having passed through the hands of several employees. The rings were never found. The maid knew of plaintiff's custom of keeping the rings in the pillow slip. After the jury had been instructed and had retired to consider of their verdict, they returned into court, and, through their foreman, made the following request of the court:

> "Since this property was not found on any person, we would like to have some instruction regarding circumstantial evidence."

The court thereupon gave an instruction on circumstantial evidence, and the jury again retired, and later returned the finding above mentioned. The jury evidently considered the above facts as sufficient to establish, circumstantially, the larceny of the jewels by some employee of defendant. We cannot say that this evidence was not sufficiently substantial to support the finding. The receptacle in which the rings were placed is traced to the possession of the maid, and

from the maid to the hallboy, and from him to the woman in the linen room, and from her to the employees in the laundry, and, when examined, it is found not to contain the rings. If they were in the pillow slip when it left the room, then several employees of defendant had the pillow slip in their possession successively, and no one else is shown to have had access to it. This is sufficient to support the finding.

[2] 2. Counsel for defendant, however, urge that this conclusion must have been reached by the jury by reason of misdirection on the burden of proof. The court instructed the jury that, if they found that the plaintiff lost her rings in defendant's hotel, then the burden was on the defendant to establish the cause of such loss, and that it was produced by some means or agency for which the plaintiff herself was responsible. Counsel objected to this instruction on the ground that it put the burden upon the defendant to show that the rings were not stolen by an employee. Counsel also requested an instruction that the burden was on the plaintiff to show that some employee of the defendant had stolen the rings. The issue was thus squarely presented to the court whether the burden of showing that the rings were stolen was on the plaintiff, or whether the burden was on defendant to show that the loss occurred in some manner which would excuse him, such as the negligence or contributory negligence of the plaintiff, or that defendant's employees did not steal the rings. The court put the burden on the defendant. In view of the law at the time this loss occurred, as declared in the former opinion, this was undoubtedly correct. At that time the innkeeper was the insurer of the safety of his guests' property. The loss of such goods made out a prima facie case of liability. If the innkeeper would escape liability, he must show that the property was lost through some other cause than the larceny of his employees. In this case, he tried to show that the rings were lost by reason of the negligence or contributory negligence of the plaintiff. In this he failed, the jury

having specially found that the plaintiff had used the care of an ordinarily prudent person in the protection of her property, which means, of course, that she was guilty of no negligence. Upon this subject of the burden of proof, the cases are collected in 32 C. J. "Innkeepers," § 66.

Some other considerations are presented in the briefs, but, in view of the foregoing conclusions, they need not be noticed.

It follows from all of the foregoing that the judgment of the court below was correct and should be affirmed, and the cause remanded, with directions to proceed accordingly, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 2945. March 10, 1925]

STATE v. SMITH et al.

SYLLABUS BY THE COURT

1. Alleged errors not discussed in the briefs of appellants will be deemed waived and abandoned.

2. It was not error to admit evidence of the actions of appellants in assaulting the jailer of the Torrance county jail; the jury being properly instructed as to the proper consideration to be given to such evidence.

3. Severance of trial of two or more defendants jointly court, and his action will not be renewed by this court, unless such discretion is abused.

4. Instruction relative to statements made by defendants examined, and **HELD** not prejudicial.

5. When an instruction contains a term alleged to be misleading, it is the duty of the party complaining, to request a special instruction defining the term. Instruction examined and **HELD** not erroneous, and that in any event appellants not in a position to complain in default of proper requests for explanatory instruction and in absence of proper exception.

6. There was no error in instruction No. 8; the same being clear when considered with attending instructions.

7. The court properly refused appellants' tendered instruction No. 3 as having been covered by other instructions.

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

Bernard Young Smith and Mack Clyde McCulley were convicted of second degree murder, and they appeal. Affirmed.

E. P. Davies, of Santa Fe, for appellants.

Milton J. Helmick, Atty. Gen., and J. W. Armstrong, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

BICKLEY, J. This case arose in the district court of Valencia county, N. M., by reason of the finding and filing therein of an indictment by the grand jury at the September term, 1923, of the district court thereof, against Bernard Young Smith and Mack Clyde McCulley, wherein the said Smith and McCulley were charged with having unlawfully, feloniously, wilfully, deliberately, premeditatedly, of their malice aforethought, killed and murdered one William R. Carman. To this indictment the defendants and each of them pleaded not guilty, and upon this issue the cause proceeded to trial in said court on September 10, 1923, and resulted in a verdict of guilty of second degree murder being returned against each of the defendants, and upon which judgment and sentence of the court was entered by the provisions of which the said Smith was sentenced to a term of not less than 35 years nor more than 45 years in the state penitentiary, and the said McCulley was sentenced to a term of not less than 25 years nor more than 35 years in the state penitentiary. A motion for a new trial was filed and presented to the court by each of the defendants, and was overruled by the court. An appeal was then taken to this court, and the cause is now here for review upon the various exceptions to actions and rulings of the trial court.

On or about the 27th day of April, 1923, in Valencia county, N. M., the dead body of one William R. Carman was found in an empty coal car attached to a freight train of the Santa Fe Railroad when the said

freight train took a siding at a station known as Grants at about 9:40 a. m. on that day. The defendant McCulley was subsequently arrested in Phoenix, Ariz., charged with the murder of the said Carman, and admitted that he was on the train just before the time Carman was killed and in the coal car where the body was found, with the defendant Smith; that he was in one end of the car and Smith in the other; that the deceased Carman came over the top of the car and said: "You sons of bitches, get off," and that he proceeded forthwith to get off the car; that he was not present when the fatal shot which produced the death of said Carman was fired, but that he was subsequently told by Smith that he (Smith) shot Carman for the reason that Carman was about to take his (Smith's) life, and it became necessary for Smith to protect his own life. Smith was arrested on the 30th day of April, 1923, near Bluewater, N. M., and at the time of his arrest there was taken from his person a 38-caliber Colt revolver, a small caliber automatic, and a belt of cartridges. Prior to his arrest, after the killing, Smith had a gun fight with officers who tried to apprehend him. When asked why he shot Carman, Smith replied: "He struck me with a club on the leg." When the dead body of Carman was found, there was a bullet hole two inches above the right nipple and a gunshot wound on the left hand. Near the body was also found a club. It was shown by medical testimony that the bullet wound in the breast of the deceased was such a wound as could and did produce his death. The evidence further showed that Smith and McCulley had been previously incarcerated in the Torrance county jail on charges of varying degrees of gravity, and had escaped with one Mike Bender after holding up the jailer and tying him in the jail. Upon the trial of the cause, Smith testified; his testimony being practically the same as had been previously stated to the state's witnesses by him. McCulley denied, in his statements to various parties, being present at the time of the shooting. Smith admitted that he fired the shot that killed Carman, but contended that it was

done in self-defense to protect himself from Carman's apparent attempt to take Smith's life. He denied that McCulley had anything to do with the killing, and corroborated McCulley's extrajudicial statements in this regard.

The foregoing statement is the most favorable which can be made from the viewpoint of the appellants, and is taken very largely from the statement of the facts made in appellant's brief.

A more detailed statement of the facts, as the jury might have concluded them to be, would show that Smith and McCulley, being both legally incarcerated in the county jail at Estancia, N. M., overpowered the jailer and, taking his guns and ammunition from the jail, made their escape. The circumstances of the jail delivery would indicate a desperate frame of mind in the appellants and that they were not overly sensitive about using a substantial degree of force to accomplish their objects. The appellant McCulley, having been permitted to remain outside of his cell in the jailer's room for a short time, upon being conducted back to his cell, said: "Wait a minute; I have forgotten my tobacco." While there he took the jailer's gun, and on his return threw the gun in the jailer's face and told him to get in the cell. Mike Bender, another prisoner, came out about this time, and he and appellant McCulley choked the jailer down. Appellant Smith came out of the cell about that time, and took the gun from appellant McCulley. Appellant McCulley was twisting the jailer's arms behind him, so that it was impossible for the jailer to get loose. The persons attacking the jailer told him that it would not be best for him to make any noise. Appellants took the jailer to a cell, tied his feet together, threw him to the floor, ran his hands through the bars of the cell behind him and tied them on the outside. Appellants then demanded the guns in the jail and took the keys from the cell door and left to get the guns from the office of the jail. When appellant McCulley stuck his gun in the jailer's face, he told the jailer to get into

the cell and see how he liked it there. He had the pistol cocked and drawn on the jailer at the time he told him to get inside the cell. This gun was a 38 Colt army special, apparently the gun with which Carman was killed. Appellant Smith took this gun away from appellant McCulley, saying that he would feel safer with it. The appellant Smith said that they could not leave the jail without guns, and told the jailer he would give him a very short time to tell him where the guns were. When Smith told the jailer this, he was standing on the outside of the cell to the jailer's back with a gun pressed in the back part of his head. The muzzle of the gun was against the jailer's head. The appellants told him to hurry up and tell where the guns were, and then went to the sheriff's office. The jailer saw nothing more of the appellants, and remained bound in the manner described for about two hours. After the jailer had been released, he made an inspection of the sheriff's office and of the desk drawer where the guns had been kept, and found that this drawer had been taken out and was resting upon the floor, and that all the guns were missing. In this drawer there had been a Colt .380 automatic, a 32-20 Colt on a 45 frame, a 44 Colt double action, and an old 45 Colt. These were in addition to the jailer's gun which they had obtained prior to the occurrence described, and with which appellant McCulley held up the jailer. This latter gun, together with the holster and belt of cartridges for same, was carried away. Five guns in all were taken, as was also about 200 rounds of ammunition. Smith had two guns when arrested, one which he had taken from the deceased after killing him. This gun of the deceased had not been fired. The 38-Caliber Colt described as State Exhibit C is the one appellant McCulley took from the jailer's quarters and the one he used on the jailer, and is doubtless the one which inflicted the mortal wound upon Carman. The 32-20 Colt was also identified as one of the guns taken from the Estancia jail by appellants. This 32-20 Colt was apparently the one which was hidden and abandoned by McCulley on a hill near the

scene of the homicide after the killing had taken place. The jailer's 38 Colt shot a Winchester 38 special leaden bullet. Both Smith and McCulley held revolvers in the proximity of the jailer's face and head during the jail delivery.

The deceased, William R. Carman, was a brakeman in the employ of the Santa Fe Railway Company, and was in the discharge of his duty as such brakeman on the freight train which left Belen for Gallup at 4:20 o'clock on the morning of April 27, 1923. The train was composed of 85 cars—coal, refrigerator, and flat cars. The position of the deceased brakeman was near the rear of the train. He was in the discharge of his duties, which included dealing properly with hoboes stealing rides on trains. The train stopped at Wall, which is near milepost 58, which indicated that it was located 58 miles from Albuquerque. The train left Wall at 7:40 o'clock a. m. The deceased was in the caboose when the train stopped at Wall. At Quirk near milepost 64 is an extra track for passenger trains. About two miles west of Quirk two men, said to have been appellants, were seen near milepost 66 about 100 yards south of the railroad track, sitting behind a small cedar bush. The train reached Grants, which is west of milepost 66, about 9:40 o'clock a. m., taking the siding there. It being discovered that the deceased Carman did not perform his usual duties upon taking the siding, a search of the train was made, and the deceased was found in an empty coal car 32 cars ahead of the caboose. Carman was dead when his body was discovered. The body of Carman had apparently not been disturbed. It was lying approximately 8 feet from the west end of the car; the car being about thirty-six feet in length. The body was on the north side of the car, the feet being almost against the north side thereof. It was lying on its left side, face toward the west, with the right arm with the hand clenched right in front of and west of the face; the left and and arm extending back of the body. There was a pool of blood about 6 inches in diameter which had apparently come from

the deceased's mouth, which was lying close to the floor of the car. The car floor was wooden, and the pool of blood was over a crack in the floor. There was a brake stick about 2⅛ feet long, which had been carried by the deceased, found near his body; also a pair of gloves belonging to the deceased were found nearby on the floor of the car. Blood stains were found on the railroad track near milepost 66 and were followed on the railroad track to a point west of milepost 66. There were no eyewitnesses to the homicide except the appellant Smith, so far as the direct testimony shows.

The facts heretofore stated comprise in the main the narrative of what occurred. There are many other statements of facts and circumstances which doubtless had a bearing upon the verdict of the jury.

The appellant Smith endeavors to assume all of the blame for the shooting, and says that he acted in self-defense. He says that he fired the only shot which was fired at the deceased. Seeming to contradict this is the fact that the deceased suffered two wounds—one in the breast and one in the fingers of the left hand. A medical expert testifying on behalf of appellants said that a leaden bullet from a 38 caliber Colt revolver passing through the fingers would break and shatter the bones. It is true that this witness also stated that, in his opinion, any bullet passing through the fingers of the deceased would have shattered the bones. There is, however, testimony of witnesses, medical experts, and otherwise, describing the gunshot wounds found upon deceased—one in the breast which caused the death of deceased, and the others found in the three fingers of the left hand. One of the fingers was completely penetrated, evidently by a ball of small caliber, apparently so because the points of entrance and exit were quite small and apparently the same size. One witness expressed the opinion that the wound in the finger was caused by a 25 or 30 caliber bullet; the wound in the fingers being much smaller than the wound in the breast. One of

the fingers was drilled straight through; that is, the bone of the finger was drilled through like the opening had been made with a drill. It was not shattered. Another witness for the state probed the hole in the finger of deceased with a lead pencil and found that the bone was penetrated with a clear hole, with practically no shattering of the bone, and testified that the hole through the finger was made by a smaller bullet than the hole in the breast. The testimony concerning the wounds in the fingers of the deceased is important because it was the duty of the jury to consider all of the facts and circumstances as elicited by the testimony in determining whether the appellant McCulley was present at the homicide aiding, encouraging, and abetting the appellant Smith, who admits having fired the fatal shot. It seems to be the endeavor of appellants in their brief to rely upon Smith's statement as to having fired the fatal shot. It is there said:

"As to who fired the fatal bullet which resulted in the death of the unfortunate Carman, we have no testimony save that of the defendant, Bernard Young Smith. His testimony as to who fired the shot which killed Carman is corroborated by the record in several particulars.

It is argued in the brief of appellants that there is not sufficient testimony to show that McCulley, in conspiracy with Smith, had formed a design to kill Carman. Of course, if McCulley and Smith, when breaking jail and endeavoring to escape, had formed a design to kill any one who should obstruct their attempts at escape and pursuant to that intention, one of them fired the fatal shot, the other only passively acquiescing, they would both be equally guilty. On the other hand, it is strongly argued by counsel for appellants that a conspiracy to escape from the jail, unless it went so far as to embrace the intent to take human life in aid of such escape, would not justify the jury in finding both the appellants guilty, where only one of the appellants had fired the fatal shot, in the absence of testimony showing the formation of a conspiracy between the two to take human life.

The extent to which a design once formed in a

conspiracy between persons to commit an unlawful act may bind all of the participants when the exigencies of the case impel one of the number to commit a different and separate crime, seemingly following in natural sequence upon the commission of the original crime, is the subject of much argument and speculation and it would be more important in this case, and would require a much closer scrutiny upon our part, were the verdict of the jury dependent alone upon testimony relative to the conspiracy to escape jail and subsequently to escape rearrest, and to what extent McCulley might have acquiesced and approved of the violent acts of Smith, assuming that said Smith was the only one who fired a shot at the deceased. Where, however, the testimony as stated above, together with many other facts and circumstances heretofore and hereafter pointed out, indicate that the jury may have not unreasonably disbelieved Smith's testimony about his being the only one who fired a shot, and the jury may have reasonably believed that the wounds made in the fingers of the deceased were made from a pistol in the hands of the appellant McCulley, in which event the question of conspiracy becomes of less importance because, if the jury believed that McCulley was actively participating in the events leading up to the death of Carman, then it is not necessary to speculate as to his frame of mind concerning the extent to which he approved of Smith's actions or constructively participated therein.

There are other circumstances which cast discredit upon the story of Smith that he fired the only shot which was fired and also descredit the plea that McCulley had withdrawn from the scene before the shooting commenced. We will note some of the more prominent of these circumstances. McCulley traded off his mackinaw for a different sort of a garment; he had a revolver and threw it away after the killing of Carman, according to Smith; McCulley said he hid a gun and some other articles on the mountain side near the scene of the tragedy. McCulley stated to witnesses that he jumped off of the train before Smith fired

the shot which killed Carman, and that he knew nothing about it until after Smith told him of what had occurred. McCulley told witnesses that he jumped off of the the car that he was riding at the cement apron near a bridge. Testimony showed that this cement apron is at or near milepost 63, about three miles from the place of the tragedy. On the other hand, Smith testified that when he got off of the car after killing the deceased Carman, he saw McCulley on the ground five or six car lengths back from where he (Smith) got off. When it is considered that the train was moving and that Smith, after killing Carman, had stopped long enough to watch him for a short time and then take Carman's revolver before getting off the train, it may be readily understood that the jury concluded that they both got off very nearly at the same time. Smith testified that the events from the time Carman spoke to him till the fatal shot was fired did not occupy more than two minutes. At the speed the train was moving at that point, it would have gone about forty-four car lengths in two minutes. There is other testimony of witnesses to the effect that near milepost 66, where the blood stains were first seen on the railroad track, there were well-defined foot tracks on the ground at the side of the track made in such a manner as to indicate that two men had jumped off of the moving train. These two sets of tracks were about 75 feet apart, and went off to the side of the track and converged where the parties had apparently proceeded together to a point where a witness says he saw them together by a small tree. McCulley said that, when Carman came over the end of the coal car, Smith was sitting down in the east end of the car. Smith says they were in the west end. The body of Carman was found in the west end of the car. There were many other discrepancies of statement of Smith and McCulley, from which the jury might view with suspicion the exculpatory statements which each of them made.

[1] Counsel for appellants requests an examination of the record by this court to ascertain whether all of

the errors alleged to have been committed by the trial court were in fact such. We will consider only those alleged errors which have been discussed in appellants' brief. State v. Luttrell, 28 N. M. 393, 212 P. 739.

As we understand appellants' contentions, it is claimed:

1. There is no sufficient evidence to support the verdict of the jury as to the appellant McCulley. From the statement of facts heretofore made and other facts in the record, the jury could have believed that the appellant McCulley, about three days prior to the killing of Carman, had broken jail at Estancia, and in doing so disarmed the jailer and assaulted him with a deadly weapon, and by violent means secured the jailer in a cell, robbed the jail of all guns and of considerable ammunition, and fled from justice; that, constantly in flight with his associate in the escape enterprise, he was apprehended, while riding on a freight train, by deceased, the brakeman Carman, who was advised of the jail delivery and a description of the persons escaping, and who, at the time of the fatal encounter, was in the performance of his duties; that he saw Carman first and gave an alarm or warning to his companion Smith; that, in order to make good their escape both he and Smith shot deceased, one of the shots killing Carman; that he and Smith continued their flight, hiding one of the guns they had been carrying, and also hiding other articles which might identify them, and further sought concealment by disguise. So far as the verdict of the jury is concerned, it must stand, unless errors of law were committed by the trial court. State v. Whitener, 25 N. M. 20, 175 P. 870; State v. Jaramillo, 25 N. M. 228, 180 P. 286; State v. Wilson, 25 N. M. 439, 184 P. 531; State v. Luttrell, 28 N. M. 393, 212 P. 739.

The court particularly cautioned the jury as to the contention of McCulley that he was not present when Carman was killed, using the following language:

"You are instructed that, before you would have a right to convict the said defendant Mack Clyde McCulley, you

would have to find from the evidence beyond a reasonable doubt that the said Mack Clyde McCulley was present, aiding abetting, or assisting the said defendant, Bernard Young Smith, at the time of the shooting of the said William R. Carman by the said defendant Smith, or if you have a reasonable doubt as to whether the said defendant Mack Clyde McCulley was present, aiding, abetting and assisting the said defendant Smith at the time of the said shooting, then you should find the defendant Mack Clyde McCulley not guilty."

[2] 2. There is a claim that the trial court erred in admitting evidence of the incarceration of appellants in the Torrance county jail, and of their subsequent violent actions toward the jailer and the theft of the pistols and ammunition from the jail, and their escape therefrom.

We think the court committed no error in admitting this testimony. In the case of State v. Starr, 24 N. M. 180, 173 P. 674, this court had under consideration a similar contention to that made by the appellants here, and in that case we said:

"This rule is not without exceptions. A leading case in in which a number of exceptions are treated is People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, to which is appended a case note in which numerous cases are collected. The rule upon the subject is set out in the case note in the following language: 'It is a general rule of criminal evidence that, on the trial of a person accused of crime, proof of a distinct, independent offense is inadmissible.'

"As pointed out in the Molineux case, exceptions to the general rule referred to cannot be stated with catagorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish: (1) Motive: (2) intent; (3) the 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 the proof of one tends to establish the other; (5) the identity of the person charged with the commission of the crime on trial. In the instant case it is contended by the state that the trial court permitted the introduction of testimony relative to the transactions in and around the jail pertaining to the escape upon the theory that this evidence tended to show a motive for the homicide. It is argued that the appellants conspired together to make their escape, and secured arms and ammunition to prevent their recapture, and, if necessary, to take life in order to prevent being brought back to the jail."

In the later case of State v. Smith, 24 N. M. 405,

174 P. 740, we referred to the Starr Case, and otherwise referred to the principles therein discussed, as follows:

"The third point urged is that the court committed error in permitting the state to put in evidence the commitments under which the appellant and those jointly indicted with him were arrested and placed in the county jail of Luna county, and also that error was committed in permitting the state to put in evidence the jail records of such county, showing the fact that the defendant and the others named were incarcerated in such county jail at the time and prior to their escape therefrom. The objection urged to this evidence is that it tended to show that the parties had committed a crime other than that for which they were being tried, and that proof of such other independent crime was prejudicial to them. Appellant contends that under the rule laid down in the case of State v. Starr, supra, not yet officially reported, the evidence here in question was clearly improper, because the court in its twenty-fourth instruction told the jury that such committments and jail records were admitted in evidence for the purpose of showing, if they did show, the legality of the detention and incarceration of the prisoners named in such committments, in the Luna county jail. The evidence was clearly admissible upon several distinct grounds. It was properly received, as stated by the court,, for the purpose of showing that the parties who broke jail and subsequently killed the sheriff who pursued them, were legally incarcerated therein. If such was the fact, the sheriff had the right to pursue and recapture them, and, if they resisted arrest with knowledge of the purpose of the sheriff and his deputies and slew the sheriff for the purpose of evading recapture, they would be guilty of murder in the first degree. An escaped prisoner who is either convicted or held for trial under a warrant, fair on its face, who shoots an officer attempting to recapture him is guilty of murder. The status of the defendant would have been quite different had he and his conspirators been illegally held as prisoners in the Luna county jail. It was proper for the state to show that they were legally confined in the jail, and for this purpose the committments were proper evidence. Such evidence was also admissible for the purpose of showing motive on the part of the defendant and his conspirators in slaying the officer attempting to arrest them. The fact that they were in prison awaiting trial on felony charges furnished a strong motive for their slaying of the officer who was attempting to rearrest them and hold them for trial."

While both of the appellants in the case at bar were not in jail on felony charges, they would have been liable to prosecution for felonies on account of their actions in breaking jail and assaulting the jailer with deadly weapons. The jury was instructed as to the

proper consideration to be given to this evidence complained of.

[3] 3. It is contended by the appellants that the trial court abused its discretion in refusing to grant appellant McCulley's motion for a severance. We have examined the record with this point in mind and in view of the ruling of this court in State v. McDaniels, 27 N. M. 159, 196 P. 177, and other New Mexico decisions, we find no error in the court's refusal of a severance.

[4] 4. Appellant Smith complains of instruction No. 29 given by the court, which is as follows:

"There have been introduced before you statements purporting to have been made by the defendant Bernard Young Smith at the time he was being detained for investigation or in custody. It is for you to determine beyond a reasonable doubt whether such statements were made. and the court charges 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 defendant, Mack Clyde McCulley And you are further instructed as to nay statements in evidence before you purporting to have been made by defendant Mack Clyde McCulley at the time he was being detained for investigation or in custody. 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 bearing upon the guilt or innocence of the defendant Bernard Young Smith; but such statements of either the defendant Smith or McCulley 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 statements were not made freely and voluntarily, or that they were induced by force, threat, or coercion or any external influence that operated to deprive them of freedom."

This instruction was not prejudicial to the defendants or either of them. It is not claimed that the statements made by appellants were not entirely voluntary, but that in some way the instruction deprived the jury of the right to consider any exculpatory portions of the statements. Appellants were not denied the opportunity to explain any statements said to have been made by them, and we are unable to see in this instruction the fault urged by appellant.

[5] 5. Instruction No. 25 given by the court, was as follows:

"A defense interposed by the defendant Bernard Young Smith is that of self-defense. You are instructed that the rule of law on the subject of self-defense is this: Where a person in the pursuit of his affairs is assaulted, and when from the nature of the assault there is reasonable ground to believe that there is a design to take his life, or to do him great bodily harm, or to perpetrate any felony upon him, and the party attacked does so believe, then the killing of the assailant under such circumstances would be excusable or justifiable, although it should afterwards appear that no injury was intended and no reasonable danger existed. It is enough that there be an apparent danger; such an appearance as would induce a reasonable person in the defendant's position to believe that he was in immediate danger of great bodily harm. Upon such appearance a party may act with safety, nor will he be held accountable, though it should afterwards appear that the indications were wholly fallacious, and that he was in no actual peril.

"The rule in such case is this: What would a reasonable person, a person of ordinary caution, judgment, and observation, in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from this situation and these surroundings? If such reasonable person so placed would have been justified in believing himself in imminent danger, then the defendant would have been justified in believing himself in such peril, and in acting upon such appearances. And, in considering whether the shooting, if there was a shooting, was justifiable on the ground that the shooting was in self-defense, you should consider all the circumstances attending the shooting, the character of the wound, and the conduct of the parties at the time and immediately prior thereto, and whether or not the deceased was armed and made such a hostile demonstration as would justify a reasonably prudent man in apprehending that he was in imminent danger of losing his life or of suffering great bodily harm, or of a felony being committed upon him, and the degree and nature of the force used by the defendant in making what is claimed to be self-defense, as bearing upon the question of whether the shooting was actually done in self-defense, or whether it was done in carrying out an unlawful purpose.

"But the law of self-defense does not imply the right of attack, nor will it permit acts done in retaliation or for revenge. And if you believe from the evidence, beyond a reasonable doubt, that the defndant sought, brought on or volunentered into a difficulty with the deceased for the purpose of wreaking vengeance upon the deceased, or for the purpose of engaging him in a conflict wtih deadly weapons, then the defendant cannot avail himself of the law of self-defense, and you should not acquit him on that ground. And it is for you to determine from the evidence whether the claim that the deceased was killed in self-defense is made in good

faith, or is a mere pretense. In determining who provoked or commenced the difficulty, or made the first assault, you should take into consideration all the facts and circumstances in evidence before you."

Appellants excepted to this instruction, "for the reason that the same does not clearly show or contain the doctrine of self-defense, as is correctly and clearly contained in the instruction requested by the defendant upon the same subject, in that it injects into and makes a part of said instruction the alleged essential of the person invoking the doctrine of self-defense be engaged "in the lawful pursuit of his business.'" Counsel for appellants says that "affairs," as used in the instruction, is synonymous with "business," and argues that this language in the instruction limits the right of self-defense to a person in the pursuit of his own business. We apprehend that a person may be in pursuit of his affairs, whether bent on pleasure or business, and that the phrase would exclude only those occupations or pursuits as are unlawful in contemplation of the immediate transaction under investigation. Nothing appears in the record to show that the jury was charged that the circumstances of riding or being upon the train at the time of the homicide was in itself alone unlawful.

We think the phrase complained of and similar phrases in instructions on self-defense are meaningless and unnecessary, and might well be dispensed with. However, the appellants were not prejudiced thereby, and, if they were, they were not in a position to complain. The court very clearly told the jury in instruction No. 30 that, so far as the evidence showing the commission of certain acts by the two defendants at the Torrance county jail, and at times and places prior to and other than on the train between Wall and Laguna when the death of Carman was alleged to have taken place, they were to consider such evidence solely for the purpose of determining whether such evidence tended to show the identity of the person alleged to have committed the offense, the identity of the weapon used, and whether defendants were together and acting

in concert at the time of the alleged homicide, and in determining the motives of the defendants and who commenced the difficulty. The court instructed the jury that the defendants were clothed with a presumption of innocence, and that this presumption stood as their protection until it should be removed by facts establishing their guilt beyond a reasonable doubt. In view of these charges and the conduct of the trial as a whole, we are unable to see how the jury could have been misled into thinking that the phrase in instruction No. 25, "in the pursuit of his affairs," was a limitation on the right of self-defense as defined in said instruction.

We say that the appellants are not in a position to complain, because it is a well-settled rule that, if a party to an action believes that a term used by the court in an instruction should be defined and explained, a special instruction should be requested defining the term, and the use of terms claimed to be misleading will not operate to reverse in the absence of requests to define or explain them. 38 Cyc. 1688.

"A general objection to an instruction is not sufficient to call the court's attention to the fact that a word used in the instruction should be defined. If defendant wanted this term defined, he should have prepared an instruction properly defining it and asked the court to give it to the jury. Having failed to do so, he cannot now complain." Kirby v. Lower, 139 Mo. App. 677, 124 S. W. 34.

Merely presenting another instruction on self-defense with the words complained of omitted was not a sufficient compliance with the rule. If the appellants thought the phrase, "in the pursuit of his affairs," was misleading, they should have requested the court to define the words and phrases presenting such an explanatory instruction. This they did not do.

It will also be noted that the exception to instruction No. 25, found at page 277 of the transcript, is not an exception to the language used in instruction No. 25. The language used in the instruction was "in the pursuit of his affairs," whereas the exception complains of the use of the words, "in the lawful pursuit of his business." Whether the words used in the exception

were originally in the instruction and were changed so that the word "lawful" was stricken out and the word "business" changed to "affairs" so as to meet the objection of appellants we are not advised. If such was the case, it was then the duty of appellants to except to the language as changed, if it was still objectionable. This was not done. On the other hand, if the exception was made to language which did not appear in the instruction in the first place, then the court would have been warranted in ignoring the exception.

[**6**] 6. The appellants excepted to instruction No. 8 on the ground that it did not clearly limit the same to the offense of murder being then tried as being committed in the execution of a common design. In instruction No. 8, the court does lay down general principles, but the next instruction, No. 9, which is very evidently a continuation of the matters treated in instruction No. 8, fully ties the discussion into the immediate charge of murder being tried, and no one reading the two together would conclude that the court was referring to any other transaction. Said instructions Nos. 8 and 9 are as follows:

"8. The court charges you that persons who are the immediate and actual perpetrators of an act are what is known in law as principals, and any person who is guilty of acting with the actual perpetrator in the commission of an offense is likewise a principal. When an offense has been actually committed by one or more persons, the true test for determining who are principals, is: Did the parties act together in the commission of the offense? Was the act done in the pursuance of a common intent and in pursuance of a previously formed design in which the minds of both defendants united and concurred? If so, then the law is that each is alike guilty, providing the offense was actually committed during the existence and in the execution of a common design and intent on both.

"9. And so, if you believe from the evidence beyond a reasonable doubt that one of the defendants actually fired the fatal shot which killed the deceased, and that the other defendant was then and there present, aiding, abetting, encouraging, and requesting the commission of the crime, and that such act was done in pursuance of a common design and purpose between the defendant whom you may believe fired the fatal shot and the other defendant, then you are in-

structed that each defendant under such circumstances will be equally guilty."

[7] 7. Appellants objected to the action of the court in refusing instruction No. 3 tendered by the defendants, for the reason that the same contained a correct statement of the law applicable, and that no instruction given by the court adequately covered the ground covered by the proposed instruction. The court refused this tendered instruction as being covered by other instructions. The argument of appellants is that the instruction given by the court was abjectionable, because it added an additional element to the law of self-defense, viz, limiting it to a person in pursuit of his affairs.. This objection to the instruction given we have disposed of, and we find no error in the refusal of the court to give instruction No. 3 tendered by the defendants.

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.

PARKER, C. J., and WATSON, J., concur.

[No. 2865. March 17, 1925]

STATE v. BURKETT.

SYLLABUS BY THE COURT

1. The jury commission having been ordered to place 150 names in the box, the minimum under section 8, chapter 93, Laws of 1917, included 4 persons disqualified under section 19, having served as jurors within 12 months. On challenge to the array, it was shown that the commission in selecting the names, had a list of male voters as required by section 1, chapter 3, Laws of 1921, and also a list of those who had served within 12 months, including the 4 in question, and that the names, as called from the former list, were checked on the latter. **Held**, that the challenge was properly overruled, the evidence not showing that the 4 in question were known to the jury commission to be disqualified.

2. An opinion, not clearly shown to be based on more than mere rumor, does not disqualify a juror if he unequivocally states that he can lay it aside and commence the trial with his mind unprejudiced.

3. It is within the discretion of the trial court to impose a reasonable limit on the number of witnesses to the good reputation of the accused. Where the accused sought to establish a good reputation, both in New Mexico and in Texas, it was not an abuse of discretion to limit the number of witnesses to 7; the court having anounced the limit after the third of such witnesses had testified.

4. If the jury is otherwise correctly instructed as to the effect of evidence of the good character of the accused, it is not error to refuse to instruct that such evidence is sometimes sufficient to create a reasonable doubt as to the guilt of the defendant, when otherwise none would exist.

5. The jury as a whole having been correctly instructed as to reasonable doubt, instructions properly refused which were calculated to impress on each juror his duty in this respect without regard to the conclusions reached by the others. State v. Corral, 27 N. M. 535, 203 P. 533, followed.

6. The jury having been correctly instructed on unlawful homicide and on self-defense, it is not error to refuse to instruct that, if the elements of self-defense are found present a design to kill, entertained prior to firing the fatal shot, would not be unlawful, nor to refuse to instruct that, even though one have express malice, he is not guilty if he acts in self-defense.

7. No error in refusal of instructions sufficiently covered by general charge.

8. A tendered instruction properly refused, to the effect that one whose life has been threatened, or against whom threats of serious bodily harm have been made, may lawfully arm himself for defensive purposes; the tendered instruction omitting the essential element of reasonable apprehension aroused by such threats.

9. Where by the instructions given the right of self-defense is limited by submission of the issue of provocation of difficulty, there being evidence of communicated threats and that the accused armed himself because of such threats, in anticipation of attack, and solely for self-defense, it is error to refuse to instruct that one having reasonable grounds to anticipate an unlawful attack endangering life or limb has a right to arm himself for the purpose of resisting such attack.

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

Harvey Burkett was convicted of murder in the second degree, and he appeals. Reversed and remanded for new trial.

Keith W. Edwards, of Ft. Sumner, and Hall & McGee, of Clovis, for appellant.

Milton J. Helmick, Atty. Gen., and J. W. Armstrong, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

WATSON, J. For the killing of Ora Hall on February 6, 1922, appellant was convicted of murder in the second degree and received a sentence of from 40 to 50 years in the penitentiary.

The homicide occurred at a point some four or five miles west of Ricardo in De Baca county where the highway crosses the railroad right of way. The first news of the homicide was furnished by the appellant, who reported at Ricardo that he had had trouble with the deceased and had killed him. The body was found on the railroad right of way, lying on its face, almost parallel with the right of way fence, with the feet near the gatepost. Near the body was found a two-bladed pocketknife with the smaller blade open. On both hands were leather mittens with latchets fastened. The fatal wound was from a bullet entering in the center of the breast, about two inches below the collar bone. Its course was downward about 30 degrees, it severed the ascending aorta, and found exit on the right shoulder blade. Another bullet wound was found entering the outside of the left arm near the elbow and passing out lower down on the other side. If the left arm of the deceased had been held across his breast, both wounds might have resulted from the same shot.

Appellant and deceased had met in Ricardo on the day in question, appellant leaving first. Deceased was seen to overtake him a little west of Ricardo, and they then rode along together; both being on horseback. They were later seen riding together in apparent amity.

There was evidence showing the deceased had made threats against appellant, some of which were communicated, from which, if believed, appellant might reasonably have apprehended danger to his life or great

bodily harm. He testified that because of these threats, and fearing that the deceased might attempt to carry them out, and just for his protection, he armed himself with the pistol with which he killed the deceased, and that he went to Ricardo not knowing that he would meet the deceased.

The substance of appellant's testimony touching the facts immediately surrounding the homicide is as follows: After the deceased had joined him, they rode together for two or three miles, conversing generally, when deceased broached the subject of appellant's fences being torn down; admitted that it was he who had done it; that he was paid to do it, and was going to do it; that money was what he was after, and he was going to have it. Appellant asked him to lay off and not bother his fences any more. At this point in the conversation they arrived at the crossing where deceased dismounted and opened the gate, and appellant rode through ahead. Appellant then dismounted to urinate, his horse being between him and the deceased. The horse swung around somewhat, and appellant saw the deceased coming toward him with an open knife in his hand, exclaiming, "Here is where I get you." Appellant called on deceased to stop. Deceased continued to advance, and appellant fired two shots, upon which deceased staggered a few steps and fell. Appellant fired the shots because he believed his life was in danger.

[1] 1. Appellant's first ground for reversal is the overruling of his challenge to the array of the petit jury.

It appears that the court ordered 150 names placed in the box, the minimum prescribed by section 8, chapter 93, Laws of 1917. The jury commissioners listed and placed in the box 150 names, but 2 of these names were shown to represent the same person, and 4 of the persons listed were shown to have served as jurors within the preceding 12 months. The list, therefore, represented but 149 actual and 145 qualified persons. At a hearing upon the challenge these facts were shown

and, further, that the jury commission in making up its list had before it a list of male voters of the county furnished by the clerk pursuant to section 1, chapter 3, Laws of 1921, and a list of persons who had served as jurors within the preceding 12 months, including the four in question, and that as the names of the voters were called from the first mentioned list they were checked with the latter.

By section 9, chapter 93, Laws of 1917, it is provided that the commission "shall not knowingly place upon the list selected by them, the name of any person who is not believed by them to be qualified and liable for jury service." By section 19 of the same chapter, it is provided:

"The name of no person shall be placed upon any of the lists provided to be selected by the jury commission as jurors whose name has been drawn from the jury box and who actually served as a juror on the regular panel. or in case of a talesman who actually served in the trial of a case, in the court during the preceding twelve months, nor shall the name of any such person be placed upon any venire, if drawn from the box."

Appellant's contention is stated as follows:

"It is our belief that the statute we have is mandatory in that the jury commission shall not select the names of persons, known to them to be disqualified, and that in the present case, with the list furnished them by the clerk as by law provided, their knowledge of the disqualification of Miller, Ragland, Boweton, and Harrington cannot be denied."

The facts above stated, upon which appellant bases his conclusion that the names of the 4 disqualified persons were knowingly included in the list and placed in the box, are not, in our opinion, sufficient to overcome the well-established presumption of faithful performance of official duty. The challenge was therefore properly overruled.

[2] 2. Appellant complains of the overruling of his challenge for cause directed at a juror who, on his voir dire, stated that from what he had heard about the

case he had formed and then had an opinion which it will take some sworn evidence to remove. It was not shown that the juror had ever expressed an opinion. On examination by the court, he stated, unequivocally, that he could and would set that opinion aside at the beginning of the trial and go into the trial with his mind unprejudiced as between the state and the defendant. Under former decisions of this court, an opinion based on rumor or newspaper accounts does not disqualify a juror if he states that he will lay it aside and decide the case on the law and the evidence. Territory v. Emelio, 14 N. M. 147, 89 P. 239; State v. Rodriguez, 23 N. M. 156, 167 P. 426, L. R. A. 1918A, 1016; State v. Anderson, 24 N. M. 360, 174 P. 215. It is not overlooked that the juror, by some of his answers, indicated that his opinion might be based in part upon statements made by some person claiming to have knowledge of the facts. A reading of the whole examination leaves us in doubt on this point, so that we cannot say that anything more than rumor had reached him. We therefore find no error in the overruling of the challenge.

[3] 3. Appellant had lived at Ricardo about two years, prior to which he had resided for many years in Dawson county, Tex. He sought to establish a good reputation as a peaceable, quiet, and law-abiding citizen in both communities. After seven witnesses had so testified, three as to his reputation in Texas, and four as to his reputation in New Mexico, the state objected to further tendered evidence to the same effect. The court sustained the objection, remarking:

"The rule of this court has always been and now is that seven character witnesses concerning the good reputation of a defendant in a homicide case and five character witnesses in other kinds of criminal cases is the limit which a defendant may use, and at the time the third character witness, Tom Bradford, was called, the court called counsel's attention to this rule, and believing that the number of character witness is within the discretion of the court and that seven is a proper number and that such proper number should be limited to seven witnesses, I deny the defendant the right to use further character witnesses, inasmuch

as seven have already been used and have testified to the good reputation of the defendant."

And further stating, an answer to counsel's objection that he knew of no rule to the effect stated:

"Concerning the question of rules, there has never been any printed rules of this court since statehood, so far as I know. There is no printed rule of any kind in the records of this court, but the rule of seven has been uniform and uniformly followed during the last 3½ years in the courts over which I have presided."

The rule, by weight of authority, seems to be that the trial court may, in its discretion, impose a reasonable limit to the number of witnesses who may testify to the reputation of the accused. 4 Wig. on Ev. (2d Ed.) § 1908; 38 Cyc. p. 1345; People v. Arnold, 248 Ill. 169, 93 N. E. 786; State v. Albanes, 109 Me. 199, 83 A. 548; People v. Nemer, 218 Mich. 163, 187 N. W. 315; State v. Rutherford, 152 Mo. 124, 53 S. W. 417.

Matters of discretion are, according to the familiar rule, reviewable only for abuse. No abuse of discretion appears in this case, and this assignment must be overrulled.

[4] 4. Error is assigned upon the court's instruction No. 17, and also upon the refusal of tendered instruction No. 24; the two assignments being argued together. The court's instruction No. 17 is as follows:

"Evidence has been introduced in this case by which it was sought to prove that the defendant, prior to the time of the alleged commission of the crime with which he stands charged, bore a good reputation in the community in which he lives with respect to being a quiet and peaceable and law-abiding citizen. The law presumes that a person of good character is less likely to commit a crime such as is charged in the indictment in this case than one who is not of such good character, and you shall consider such evidence in connection with all the other evidence in the case, tending to prove or disprove the guilt or innocence of the defendant; but after considering all the evidence in the case, including that touching upon the good character of the defendant, you find and believe beyond a reasonable doubt that he is guilty

of the crime charged in the indictment, you should not acquit him solely upon the ground of such good character."

Appellant requested the giving of his instruction No. 24, as follows:

"You are instructed that the defendant has introduced evidence before you tending to prove that prior to the homicide in question he was a man of good character for being peaceable, quiet, and law-abiding. You are instructed that this is competent evidence and should be considered by the jury in arriving at their verdict in this case in connection with all the other evidence in the case, for the law presumes that a person of good character in this respect is less likely to commit the crime charged than one whose character in this respect is not good, and that the evidence of such good character is sometimes sufficient to create a reasonable doubt as to the guilt of the defendant where otherwise none would exist; but if, after a fair and impartial consideration of all the testimony in the case, including that touching his good character, you are satisfied beyond a reasonable doubt of the guilt of the defendant, you should not acquit him solely on account of such good character."

In the main, the questions here raised were passed upon adversely to appellant's contentions in State v. McKnight, 21 N. M. 40, 153 P. 76. However, the assignments here considered seem to raise one question meriting attention not settled in the McKnight Case, namely, whether appellant, on proper request, was entitled to an instruction to the effect that evidence of good character "is sometimes sufficient to create a reasonable doubt as to the guilt of the defendant, when otherwise none would exist." Both appellant and the state have cited numerous authorities upon the question here involved, referring to which we find a great variety of judicial opinion. In State v. Brown, 39 Utah, 140, 115 P. 994, Ann. Cas. 1918E, 1, is found an exhaustive review of the authorities up to 1911, to which we refer. In that case, the opinion rendered by Mr. Justice Straup supports appellant's contention herein, while that written by Mr. Justice McCarty is to the contrary. We are persuaded that the conclusion reached by the latter is better in reason and policy, and that it is supported by the weight of authority. See, also, Randall's Instructions to juries, § 240; Thompson on Trials, § 2444.

Under the instructions given, the jury was told that evidence of good character is to be considered in connection with all the other evidence in the case tending to prove or disprove the guilt or innocence of the defendant. Such an instruction necessarily contemplates the possibility of a case in which the proof, or lack of proof, of good character may be the determining factor in deciding the question of reasonable doubt. Had the court charged as requested, he would have stated expressly what is necessarily implied from what he did say. Without comment on the weight of the evidence, the court could not indicate an opinion as to whether the particular case was one which such proof of good character should turn the scales. It must always then be presented to the jury in the abstract. The correct principle being found in the instruction, we do not deem it error to refuse an instruction differing from it only in point of emphasis.

[5] 5. Complaint is made of the refusal of the court to give requested instructions Nos. 3, 4, and 16. The purpose and substance of these requested instructions was to impress upon each individual juror the duty of adhering to his own opinion until and unless convinced of appellant's guilt beyond a reasonable doubt, and that he should not be influenced to vote for conviction for the single reason that the majority of the jury might favor conviction, and to warm that any juror, not convinced of the guilt of the accused beyond a reasonable doubt, should he vote for a conviction, would be perpetrating a grievous wrong upon the defendant and would be violating his oath as a juror. The court gave the stock instruction on reasonable doubt, which is set forth in State v. Perkins, 21 N. M. 135, 163 P. 258. The assignments are overrulled on the authority of State v. Corral, 27 N. M. 535, 203 P. 533.

[6] 6. Error is assigned upon the refusal to give this requested instruction:

"You are now instructed that if the elements of self-defense as heretofore outlined to you, existed, then a design to kill formed and entertained by the defendant prior to the firing of the fatal shot, would not be unlawful."

It is urged that the jury should have been expressly instructed that, even though the fatal shot was fired with a design to kill, such homicidal intent was not unlawful, if the elements of self-defense existed justifying the act. The jury having been, as it was in this case, correctly instructed in definition of unlawful homicide, and of justifiable homicide, it would seem absurd further to charge that if the jury found the homicide to be justifiable, they should not find it unlawful. We have examined Bohannon v. Commonwealth, 8 Bush (Ky). 481, 8 Am. Rep. 474, relied on by appellant, and do not think it supports his present contention. For the same reason, we overrule the assignment upon the refusal to give requested instruction No. 34, as follows:

"You are instructed that even though a person have express malice against one whom he kills, yet he is not guilty if he acted in self-defense, for previous ill will or malice cannot take away the right of one to act in self-defense."

[7] 7. Appellant's propositions 14, 16, and 19 relate to the refusal of requested instructions, all of which we find properly refused because substantially covered by the instructions as given. State v. Todd, 28 N. M. 518, 214 P. 899.

[8] 8. Complaint is made of the refusal of tendered instruction No. 32, included wherein was this:

"A man whose life has been threatened, or against whom threats of serious bodily harm have been made, may lawfully arm himself for defensive purposes."

This assignment is overruled on the authority of State v. Moss, 24 N. M. 59, 172 P. 199.

[9] 9. The court refused the following instruction, No. 35:

"You are instructed that one who has reasonable grounds to believe that another will unlawfully attack him, and that

the anticipated attack will be of such a character as to endanger his life or limb, or to cause him serious bodily harm, has a right to arm himself for the purpose of resisting such attack."

Appellant appears thus to have tendered to the court a correct proposition of law. 30 C. J. p. 50; Wharton on Homicide (3d Ed.) pp. 452, 518; 3 Randall's Instructions to Juries, § 2983. There was evidence of threats from which appellant might reasonably have feared an attack dangerous to life or limb, and, further, that in anticipation of such attack he had armed himself for his defense. We thus have a case for the application of this principle of law. The question is whether the court erred in refusing to apply it when requested. In Michie on Homicide, pp. 1553, 1554, it is said:

"The law of self-defense, when invoked by the proof, should be given to the jury, plainly, directly, connectedly, affirmatively, and in such manner as to show its application to the facts in evidence. The charge should apply the law announced to the phase of the case which it is intended to present, and mere abstract propositions, however clear, are insufficient where the jury are left to make their own application of such propositions and to give to them such consequences as they may deem them to possess."

This is merely applying to self-defense the general and well-established rule that the defendant has the right to have his theory of the case clearly and fairly laid before the jury. This rule was referred to by this court in State v. Todd, 28 N. M. 518, 214 P. 899.

The court, by instructions 14 and 15, as given, charged the jury in the identical language of instructions 17 and 18, as set forth in the case of State v. Todd, 28 N. M. 518, 214 P. 899, but added thereto the following:

"In this connection, the law does not require a person who is actually assaulted to wait until such assault has reached the stage where resistance would be useless, but permits such person who is so assaulted to act and use force in his self defense, when he, as a reasonable man, in good faith, believes and has reason to believe that he is in imminent danger of losing his life or receiving great bodily harm at the hands of the assailant. Further in this connection, the state must

prove to your satisfaction and beyond a reasonable doubt that the defendant shot and killed the deceased without excuse or justification and not in self-defense,"

These instructions are abstract. They fail to apply the law to the particular facts in the case, especially to appellant's theory of them. The outstanding fact that appellant had armed himself in anticipation of an encounter with the deceased is completely ignored.

It is laid down in 30 C. J. p. 379:

"Where the court restricts the issue of self-defense by submitting the issue of provoking the difficulty, it should also instruct the jury as to defendant's right to arm himself in anticipation of danger, and, where such an instruction is warranted by the evidence, a refusal to give it constitutes error. Such an instruction, however, is neither necessary nor proper where such an issue is not raised by the evidence in the case, as where the evidence shows that, although he was carrying a weapon at the time, he was doing so merely as was his usual custom, and not in anticipation of danger from deceased; nor is such an instruction required where the court instructs as to self-defense without any limitation as to provoking the difficulty."

Examining the numerous Texas decisions cited to this section, we find the distinction very clearly drawn between cases wherein the instructions gave the defendant the perfect right of self-defense, and those in which such right was abridged or limited by the instructions by submitting the issue of provoking the difficulty. In the former class of cases it is not necessary to instruct as to the right of the defendant to arm himself in anticipation of attack. Smith v. State, 81 Tex. Cr. 368, 195 S. W. 595. But otherwise in the latter class of cases. Brown v. State, 85 Tex. Cr. 493, 213 S. W. 658.

In the case at bar we think that, while there was no special charge on provocation of the difficulty, the instructions as a whole must be taken as a submission of that question. The court correctly charged as an abstract proposition:

"The law of self-defense does not imply the right of attack, nor will it permit acts to be done in retaliation or for revenge."

Again, the jury was instructed:

"If a person is assailed, being himself without fault, and at a place where he has a right to be, and for a lawful purpose, and has reason to apprehend great harm to himself unless he kills his assailant, the killing is excusable."

The jury was also instructed that the evidence of uncommunicated threats should be considered as bearing upon the state of mind of the deceased, as throwing light upon the question as to which party was the aggressor, and that uncommunicated threats should be considered as bearing upon the state of mind of both parties in determining whether the defendant reasonably apprehended danger, and whether the deceased was actually the aggressor. Thus the minds of the jurors were directed, or at least invited to consider which of the parties provoked the fatal encounter, and whether the killing was for retaliation or revenge, or in self-defense. The fact that the defendant was at the time armed with a deadly weapon which, as he claimed, he had with him for his defense, and in anticipation of the attack, could not fail to impress an intelligent juror as having an important bearing upon these questions. Yet the jury was left in the dark regarding the right of the defendant to arm himself under such circumstances. The refused instruction is not a comment on the weight of the evidence. It does not single out some feature of the case and give it undue prominence. It relates to a substantial legal right of an accused person invoking the law of self-defense. The fact that defendant was armed was before the jury undisputed. They were at liberty to believe or disbelieve defendant's testimony that he armed himself for defense only. They were not at liberty to disbelieve that he had a right to arm himself for that purpose. That was a matter of law upon which they should have had instructions from the court. In this we find error.

All other assignments to which appellant had directed argument in his brief have been considered, and are deemed either without merit or to involve questions not likely to arise on another trial of this case.

For the error pointed out, the judgment will be reversed, and the cause remanded for new trial; and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2955. March 18, 1925.]

STATE v. DAVIS

SYLLABUS BY THE COURT

1. Evidence of specific acts of violence on the part of deceased, brought to the knowledge of the accused claiming self-defense in a homicide case, offered as bearing upon the question of the apprehensions of the accused for his life, erroneously excluded, following State v. Ardoin, 28 N. M. 641, 216 P. 1048.

2. In a homicide case, self-defense being claimed, and it being the theory of the state that defendant knew the whereabouts of the deceased and entered the room with pistol in hand, and immediately fired the fatal shot without assault or demonstration by the deceased, evidence properly received that defandant's wife had been in the room, had seen the deceased and had left there just before the shooting, and that she reappeared at the scene shortly thereafter, and the defendant then told her that deceased would never insult her again.

3. In a homicidal case, self-defense being claimed, evidence that defendant had previously told the district attorney of the danger he apprehended from deceased, his reasons therefor, and had notified him that he was carrying a pistol because thereof, properly excluded as self-serving.

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

Robert R. Davis was convicted of murder in the second degree, and he appeals. Reversed and remanded.

W. C. Merchant, of Carrizozo, and A. B. Renehan, of Santa Fe, for appellant.

J. W. Armstrong, Atty. Gen., and James N. Bujac, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

WATSON, J. Robert R. Davis appeals from a judgment upon conviction of murder in the second degree for the killing of James T. Stone. The homicide

was admitted, and sought to be justified as committed in self-defense.

There had been a previous encounter between the parties in which the deceased had shot the appellant. There was evidence of threats made by deceased against the life of the appellant, some of which were communicated. There was evidence, also, that the deceased had a bad reputation as a violent, turbulent, and dangerous man. There was evidence tending to show menacing conduct of the deceased toward the appellant at times when they met after the first encounter, including occasions when appellant, on his own premises, discovered the deceased closely observing and scowling at him through an opening in the fence of an adjoining back yard, not the premises of the deceased.

[1] 1. Appellant testified on his own behalf, and, while on the stand, the following occurred:

"Mr. Renehan: Before Dr. Davis leaves the stand I desire to lay before the court for a ruling the following proposition which the court has intimated to me he will not permit me to show. I desire to show by Mr. Davis that durall of the time that he lived at Corona, and prior to the shooting of November 8, 1921, he knew by general repute in that community and not by personal observation or actual knowledge, that Dr. Stone had beaten up the man Abran Miller over the head with a gun; that he chased a young man named Oliver Parker across the street of the town of Corona and toward the depot with a pistol in his hand; that he had chased a boy or man named Cox, a boy named Cox, and a man named Clay through the streets of the town of Corona. Clay with a knife and Cox with a pistol, and another man whom I don't recall, but this evidence I desire to offer for the purpose of showing specific acts of violence and threats and conduct on the part of the deceased coming to the knowledge of the defendant in the way I have stated for the purpose of showing justification for fear on the part of the defendant at the time of the November shooting when taken in connection with the other facts and circumstances relating to the transaction and the dealings of the men together as described in the evidence of this defendant.

"Mr. Newell: The state objects to said offer for the reason that the matters proffered do not tend in any way to prove the issues involved in the trial of this case and for the further reason that particular acts or form of conduct on the part of the deceased and offences against the law committed by him are inadmissible for the reason they are incompetent, irrevelant, and immaterial.

"The Court: Objection sustained."

Appellant assigns error upon this ruling, citing State v. Ardoin, 28 N. M. 641, 216 P. 1048, decided since the trial of the case now under consideration. That case clearly established, as the law of this jurisdiction, that where the question of anticipated danger to life is present, the defendant is not limited to proof of general reputation of the deceased, but may, within a reasonable discretion, show specific acts of violence of which he has been informed. As defining and limiting this reasonable discretion, it was laid down by Mr. Justice Botts in his able and well-considered opinion:

"It strikes us that the true guide should be a reasonable discretion, and whenever the specific act, by reason of its character, or its relationship in time, place or circumstance to the other facts in the case, would legitimately and reasonably either affect the defedannt's apprehensions, or throw light on the question of aggression, or upon the conduct or motives of the parties at the time of the affray, it should be admitted.'

The Attorney General contends that the offer of proof invoked the discretion of the trial court, who must be presumed to have exercised his discretion upon a fair consideration of all the attending circumstances. We think, however, that the offer, the state's objection thereto, and the ruling indicate, rather, a failure to exercise or recognize this discretion, and the adoption of the view presented in the state's objection, namely:

"That particular acts or form of conduct on the part of the deceased and offenses against the law committed by him are inadmissible for the reason they are incompetent."

In this connection it may be well to observe that the question has been raised in argument, and we do not decide as to the technical sufficiency of the offer. It is clear from the whole record that appellant claimed the right to show specific acts of violence on the part of the deceased coming to his knowledge, and, with other circumstances, causing him to be apprehensive for his life. This right was denied, apparently, as one not existing in any case or under any circumstances, all assuming the sufficiency of the offer.

It is also contended that the offer did not bring the proposed evidence within the rule, because there was a failure to show the time relationship of the specific acts to the other facts in the case. Most of the specific acts of violence of which appellant sought to show knowledge occurred, according to the offer, at Corona. The deceased had resided there 10 or 12 years, appellant had been there but two years; hence the acts must have occurred within 10 or 12 years, and must have been the subject of rumor or comment within 2 years. In the Ardoin Case, the specific act excluded occurred 6 years before the homicide, and was in nowise connected with the defendant. For those reasons it was intimated that if that act had stood alone, it might not have been error to exclude it, but, after reviewing other facts and circumstances, including other specific acts of violence, the court concluded that the one circumstance excluded might have led the jury to a different conclusion.

The Attorney General alludes to the fact that in the Ardoin Case the so-called "shotgun instruction" was made use of, while in this case it was not. This, however, was evidently referred to in the opinion merely as a circumstance showing that the facts made a close case in the minds of the jury, and that the excluded evidence might have turned the scales the other way. On the other hand, the exclusion of the evidence in the present case was much more damaging to the defense than that held erroneous in the Ardoin Case. In that case defendant was permitted to testify to the fact that the deceased had confided to him that the act of violence in question. The error lay in the exclusion of the testimony of a witness to the effect that the deceased had told him the same incident. The defendant was deprived merely of the right to have his own testimony corroborated. In the present case, the facts themselves were kept from the jury. In that case, other specific acts of violence were allowed to be shown. In the present case all evidence of five specific acts was excluded entirely, and the appellant restricted to the proof of general reputation.

Between the present case and the Ardoin Case there is no distinction in principle, and, as indicated, we think that the facts in this case appeal much more forcibly to that reasonable discretion which is established as the true guide. We conclude, therefore, that appellant was entitled to the benefit of the offered testimony, and that it was error to reject it.

[2] 2. The homicide occurred in a butcher shop very near the residence of the appellant. A witness for the state testified that the deceased was in the shop on business; that while he was there the wife of the appellant came in, made a purchase and left, and that, directly following her leaving, appellant entered the door of the shop with gun in hand and commenced shooting at the deceased. Appellant moved to strike the testimony concerning Mrs. Davis because it could lay the ground for nothing but speculation unless connected with something material. Counsel for the state announced an intention to connect it, and thereupon the motion was by the court "overruled at this time." This witness thereafter testified that very soon after the homicide appellant's wife again appeared at the scene of the difficulty, and that appellant stated to her, in substance, that the deceased would never insult her again. At the conclusion of the state's case the appellant moved that "the testimony with reference to Mrs. Davis having come into the butcher shop be stricken on the ground that it is incompetent, irrelevant and immaterial, as of no probative force, and can only tend to prejudicial argument." Again the motion was "overruled at this time." It was not thereafter renewed.

The circumstance sought to be excluded had some bearing upon the state's theory that appellant knew of the whereabouts of the deceased and came to the place determined to kill him. This circumstance, together with the other circumstances supporting that theory, was a proper matter for consideration by the jury, and the motion was therefore correctly overruled.

[3] 3. Appellant offered to prove by his own testimony that some time before the homicide he had told

the district attorney of the danger he apprehended from the deceased, and of his reasons for such apprehensions, and had notified the district attorney that he was carrying a pistol because thereof. In making the offer, counsel disavowed any purpose to claim or show a right to carry arms obtained by the appellant from the district attorney, and expressly limited the application of the proposed proof to a showing of good faith, a lack of malice, explanation of the possession of the pistol, and the emergency existing justifying his being armed. The state objected upon the ground that the offered testimony was self-serving. This objection was sustained, we think, properly. State v. Ardoin, supra.

After the conviction, appellant made a motion for a new trial, upon the overruling of which numerous errors are assigned, but which, in view of our disposition of the case, we need not consider. Other assignments are argued upon the reception and exclusion of evidence, and upon the giving or refusal of instructions, all of which have been considered and are deemed either without merit, or to involve questions not likely to arise at another trial.

For the error pointed out the judgment will be reversed, and the cause remanded for a new trial; and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2745. Nov. 17, 1923. On Rehearing March 30, 1925.]

MARTIN v. NEW YORK LIFE INS. CO.

SYLLABUS BY THE COURT

1. When the record contains a bill of exceptions, evidence not contained therein, whether it be oral or written, cannot be considered upon appeal.

2. Where the plaintiff makes out a prima facie case, by introducing evidence which forms an issue to be submitted to the jury, and nothing appears in the record tending to controvert such case, it is error to direct a verdict for the defendant.

3. The provision contained within an insurance policy

giving to the insurer the right to forfeit the policy upon default in the payment of a premium thereon is for the protection of the insurer and may be waived by it.

4. Where a worthless check is sent by the insured to the insurer with which to pay a premium upon a policy, it may be accepted by the insurer as payment of such premium, and when so accepted, the right to declare a forfeiture for nonpayment of such premium is waived, even though such check is dishonored by the bank upon which it is drawn.

5. The mere sending of a worthless check of the insured to the insurer, with which to pay such a premium, in the absence of any fact or circumstance indicating it is received by the insurer as payment, does not constitute a waiver of the right of forfeiture for nonpayment of such premium.

6. Where the insurer receives the personal check of the insured, tendered in payment of a premium due upon a policy and the insurer issues and delivers its official receipt acknowledging payment, the burden rests upon it to show that such check was not received as payment, but for collection.

7. Forfeitures are not favored, and hence the slightest evidence indicating a waiver of such right will support a finding to that effect.

8. The provision of a policy that it shall be effective from and after a certain named date, which is prior to the date of its issuance, is valid, as the parties have the right to so agree between themselves, and such a provision will be given effect in the absence of anything showing a contrary intention or understanding.

ON REHEARING

9. When physical evidence renders it apparent that certain pages of the bill of exceptions have been inadvertently transposed, so as to follow instead of precede, certificate of the court stenographer, and that it is plain such transposed pages are in fact a part of the bill of exceptions, they will be so considered.

10. It was within the discretion of the court to require all of the material portions of a letter to be read, when the plaintiff offers a portion thereof.

11. It was error for the court to admit in evidence, over objection of plaintiff, a letter from the defendant insurance company, addressed to the deceased husband of the plaintiff, containing self-serving declarations; there being no proof that said letter had not been answered by the addressee.

12. The court erred in admitting certain unauthenticated markings and indorsements appearing upon a check received in evidence, even though the check was properly received in evidence. The indorsements did not prove themselves.

13. Decision in former opinion approved.

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

Suit by Olga A. Martin against the New York Life Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded with directions.

George C. Taylor, of Albuquerque, for appellant.
Francis C. Wilson, of Santa Fe, for appellee.

OPINION OF THE COURT

BRATTON, J. The appellant, Olga A. Martin, who is the surviving widow of Frank A. Martin, deceased, and the beneficiary in the policy of insurance herein referred to, instituted this suit against the appellee, New York Life Insurance Co., to recover judgment upon a policy of insurance issued by it upon the life of Frank A. Martin, under date of October 18, 1907, in the principal sum of $2,000, less the sum of $276, which is admitted to have been loaned to the insured during his lifetime.

The appellee admitted the issuance of the policy, and that all premiums thereon up to and including the year 1914 had been duly paid. It pleaded by way of affirmative defense that the annual premium due on October 18, 1915, was not paid; that, by the terms of the policy, it was extended for a period of three years, plus 329 days, which extended time expired about 7 days prior to the death of the insured, which occurred on September 22, 1919. The nonpayment of the premium referred to was denied by the appellant.

The case was tried by a jury, and at the close of the appellant's case, the appellee moved for a directed verdict in its favor, because the evidence showed that the premium due on October 18, 1915, was not paid, and that the policy had expired prior to the death of the deceased. This motion was granted and the directed verdict returned upon which judgment was rendered.

[**1**, **2**] The appellant urges for a reversal of the case that the court erred in directing such verdict because she had made out a prima facie case, and had introduced evidence which formed an issue to be submitted to the jury. In this connection, appellant testi-

fied that she had delivered to her attorney a number of receipts for annual premiums paid upon this policy; her attorney testified that he had received from her the official receipt of the appellee evidencing payment of the annual premium due on October 18, 1915; that he had seen it and placed it in his safe; that it had been lost and could not be found. This evidence, standing alone, made out a prima facie case for the appellant, as there seems to be no dispute but that the policy was by its terms and provisions extended in force beyond the date on which the insured died, if the premium in question was paid. The appellee, to overcome this prima facie case, relies upon a certain check, which, it contends, was transmitted by the deceased to the appellee with which to pay such premium; that said check was not paid, but was returned unpaid by the bank upon which it was drawn on account of insufficient funds with which to pay it. The difficulty which surrounds the appellee is that the check is not contained within the bill of exceptions. What purports upon its face to be such check is to be found in the record proper, but not within the bill of exceptions. This check is but a part of the evidence, and cannot be considered by us unless it is brought here as a part of the bill of exceptions, duly authenticated by the certificate of the trial judge, his successor in office, or some other judge designated for that purpose as provided by law. Without such a certificate, there is no verity or authenticity to evidence, whether it be oral or written. Oliver Typewriter Co. v. Burtner & Ramsey, 17 N. M. 354, 128 Pac. 62; Mundy v. Irwin, 19 N. M 170, 141 Pac. 877; Rogers v. Crawford, 22 N. M. 365, 161 Pac. 1184; Cox v. Douglas Candy Co., 22 N. M. 410, 163 Pac. 251; State v. Wright (N. M.) 213 Pac. 1029.

The appellant offered in evidence part of a certain letter and desired to read to the jury only such portion so offered. The trial court held that, if she offered any part of it, the whole must be offered and read. This is assigned as error, but we cannot review the question, because the letter referred to is

not contained within the bill of exceptions. What purports to be such letter is shown in the record proper, but not within the bill of exceptions. What we have hereinbefore said controls us here. The question is not reviewable, as the letter is not properly before us.

Other questions are discussed by counsel in their briefs; but the condition of the record does not present them for determination upon this appeal. Obviously, however, these will be presented to the trial court upon the subsequent trial of the case, and, as they are perhaps controlling, we think it best to discuss them for the guidance of the court and counsel as well as the profession generally.

Much is said by counsel with regard to the effect of payment of an annual premium by the personal check of the insured which is dishonored by the bank upon which it is drawn, and our discussion upon this subject will be predicated upon the assumption that the deceased obtained the official receipt of the appellee, evidencing the payment of the annual premium due on October 18, 1915, concerning which the appellant and her attorney testified, by transmitting to the appellee company his personal check, which was not paid by the bank upon which it was drawn, and was returned to the deceased by the appellee with a demand that such receipt be returned to it.

[**3, 4**] A contract of insurance like this one is one extending throughout the lifetime of the insured, and which matures upon his death, with the obligation then resting upon the insurer to discharge it by making payment in the sum and manner and to the person entitled thereto according to the terms of such contract. This obligation is conditioned upon the payment to the insurer of certain sums at fixed intervals. These payments are commonly denominated premiums, and their payments are necessary in order to bind the insurer to discharge its obligations imposed by the contract. The insurer has the right to forfeit and declare annulled the entire contract upon default

being made in such payments. It has the further right to determine how and in what manner they shall be made. It may accept post office or express money order, bank draft, or the personal check of the insured as payment, and it may demand cash in settlement and payment thereof, but these are all rights of the insurer which may be waived by it. If it receives and accepts the personal check of the insured as payment of the premium due, and issues its official receipt evidencing such payment, it thereby waives its right to declare a forfeiture of the policy, even though the check is dishonored by the bank upon which it is drawn.

"Generally, it may be said that, where accepted as such, payment may be accomplished by the delivery to the insurer of a draft, and, where this is done, the effect of payment is not destroyed by the fact of failure of the drawer after the draft has been received by the insurer, or payment may be made by the delivery of the personal check of the insured if it is accepted as payment." 14 R. C. L. 964, 965.

Again it is said by another of the standard authorities:

"The application of this general rule to the payment of premiums is, however, subject to exceptions and qualifications, for a check, draft, or note, may be accepted under such circumstances as to clearly indicate that a payment of the premium was affected thereby, at least so as to continue the policy in force and preclude a forfeiture, and this is so held even though said check. draft, or note be not paid when due or be dishonored. Again, although the insurer has the right to demand cash in payment of a premium, it may waive such right and accept in payment notes, checks, or drafts, or any other thing of value." 2 Joyce on Insurance, 2256.

This rule has found its application in many cases where the insurer has written the insured, calling attention that the premium has either fallen past due, or will be due at an approaching date, and directing that he send a check or draft, as the case may be, which is done by the insured. It is almost universally held that, under such circumstances the right to declare a forfeiture upon nonpayment of such check or draft cannot be had because the insurer, by such directions, is held to have agreed to accept such commercial paper as payment and settlement of the

premium due, and cannot thereafter be heard to asesrt its right so waived. 3 Cooley on Insurance, 2318; Penn. Lumberman's Mut. Fire Ins. Co. v. Meyer, 126 Fed. 352, 61 C. C. A. 254; MacMahon v. U. S. Life Ins. Co., 128 Fed. 388, 63 C. C. A. 130, 68 L. R. A. 87, Mutual Iife Insurance Co. v. Chatanooga Savings Bank, 47 Okl. 748, 150 Pac. 190, L. R. A. 1916A, 669, and the authorities cited in note appended thereto. Such directions merely constitute evidence that the check or draft was received as payment, which fact might be proven in other ways, by direct or circumstantial evidence. We note the leading contrary case of National Life Ins. Co. v. Goble, 51 Neb. 5, 70 N. W. 503, which holds that even though the insurer does direct the insured to remit by bank draft, which was done, and that the draft was not paid because the drawing bank failed before it reached the drawee bank, a forfeiture may still be exercised by the insurer, because no payment of the debt was thereby effected. This case, we think, is against the weight of authority, and we decline to follow it. This conclusion was reached by the Circuit Court of Appeals in MacMahon v. Insurance Co., supra.

[5] In connection with this subject, we think the mere delivery to the insurer of a worthless check or bank draft, which is dishonored when presented for payment, in the absence of any fact or circumstance indicating an agreement on the part of the insurer to accept it as payment of the premium then due, does not operate to waive the right of forfeiture upon its nonpayment, as the general rule of commercial transactions is that the receipt of such a check or draft is predicated upon the implied understanding that it will be paid. Veal v. Security Mut. Ins. Co., 6 Ga. App. 721, 65 S. E. 714; Fidelity Mut. Life Ins. Co. v. Click, 93 Ark. 162, 124 S. W. 764.

[7] And before leaving this subject, we travel out of our way, perhaps, to say that courts never favor a forfeiture. This rule applies in a case where the insurer attempts to escape liability upon the theory of a forfeiture for nonpayment of premiums. So that

very slight evidence will suffice to support a finding that a waiver of the right of forfeiture has occurred. 1 Joyce on Ins. 574; 3 Cooley on Ins. 2259; Mut. Life Ins. Co. v. French, 30 Ohio St. 240, 27 Am. Rep. 433; Lyon v. Travelers' Ins. Co., 55 Mich. 141, 20 N. W. 829, 54 Am. Rep. 354.

[6] And the fact that the insurer, upon receipt of the personal check of the insured, issues and delivers its official receipt, by which it declares in writing that the premium such check is tendered in payment of has been actually paid, so strongly indicates that it did receive such check as payment, that the burden would rest upon it to show otherwise. Such a rule necessarily arises from its written admissions contained in the receipt. It would necessarily bear the further burden of showing that such check was presented to the bank upon which it was drawn, and that its payment was refused. So that if the appellee received and accepted the check of the deceased as payment of the prmium due on October 18, 1915, its right to forfeit for nonpayment of premiums did not arise until default had been made in the payment of the next annual premium due.

The last question discussed by counsel, and which we deem necessary to express our views upon, is the date upon which the policy became effective. It is dated November 16, 1907. It provides:

"In consideration of the sum of seventy-three dollars and ten cents, the receipt of which is hereby acknowledged, constituting payment of the premium for the period terminating on the eighteenth day of October, nineteen hundred and eight, and in further consideration of the payment of a like sum on said date, and thereafter on the eighteenth day of October in every year during the continuance of this policy, until premiums shall have been paid for fifteen full years from October 18th, nineteen hundred and seven, or until the prior death of the insured. * * * This policy takes effect as of the eighteenth day of October, nineteen hundred and seven."

[8] From the quoted provisions of this policy, it is to be observed that, by the terms of the contract agreed upon by the parties, the first premium paid extended the policy until October 18, 1908; that on that day the second premium should be paid; and that

payment of all subsequent premiums during the 15 years such premiums were required to be paid should be made on that day and month. The policy is positive, unambiguous, and free from doubt with regard to the dates upon which the premiums shall be paid. It further expressly provides that it shall be effective from October 18, 1907. The parties had the right to so agree if they chose so to do. There is nothing in the policy which provides that it shall become effective at a subsequent date, nor that it shall not become effective until delivered; there is nothing contained within it which indicates that they had any other idea or intention the nto agree that all subsequent premiums should be paid on October 18th of each year until it had been fully paid out. There is no question of inconsistent provisions of the contract, for they all harmonize. Appellant argues that this construction results in the deceased securing protection under such policy for a term less than a full year in consideration of first premium paid. We may for the moment concede this to be true, and yet it does not affect the terms of the policy with regard to the dates upon which the insured agreed to pay his annual premiums. The policy recites that the sum so paid constituted payment of the premium for the period terminating October 18, 1908. The parties so agreed, and for us to hold otherwise would result in making a new and different contract from that to which they agreed, which is neither the function nor practice of the courts. In the absence of fraud or mistake, neither of which is charged, the plain terms of the policy should be given effect. We are therefore of the opinion that, by the terms of the policy, it became effective October 18, 1907. Tibbitts v. Mut. Ben. Life Ins. Co., 159 Ind. 671, 65 N. E. 1033; Rose v. Mutual Life Ins. Co., 240 Ill. 45, 88 N. E. 204.

From what we have said, it appears that the appellant had made out a prima facie case at the time she rested; that nothing appears in the record to overcome or even controvert the same; hence it necessarily follows that it was error to instruct a verdict against

her. The judgment must therefore be reversed and the cause remanded with directions to award her a new trial, and it is so ordered.

PARKER, C. J., and LEAHY, District Judge, concur.

On Rehearing

BICKLEY, J. A motion for rehearing has been filed on behalf of appellee, based upon the ground that this court, in the opinion heretofore rendered, had overlooked and failed to pass on plaintiff's bill of exceptions, which, it is alleged, fully rebutted plaintiff's prima facie case. It is claimed that this evidence appears on pages 119, 120, 121, and 122 in the transcript of record, and that such pages are a part of the bill of exceptions, certified to by the official court reporter and properly settled by the trial judge. In our opinion heretofore rendered we held that a certain check and other writings contained on the pages referred to were not contained within the bill of exceptions, and that such check was found in the record proper, but not within the bill of exceptions.

[**9**] It appears by a re-examination of the record that the reporter's certificate, found at page 123 of the transcript of record, certifies that pages 101 to 123, inclusive, which includes pages 119 to 122, inclusive, and which were the pages containing the evidence above referred to, was a complete transcript of the proceedings on the trial. The judge's certificate appears at page 125 of the transcript of record, and certifies as a bill of exceptions everything not contained in the record proper. A re-examination of the transcript reveals physical evidence of the fact that the defect was caused by the inadvertent transposition of pages 119, 120, 121, and 122; these pages being inadvertently placed after the court reporter's certificate, instead of before such certificate. It appears from an examination of the testimony of the plaintiff's witnesses wherein the exhibits referred to in said transposed pages were a part of the evidence introduced in this cause, and would not have been a part of the

record proper, but matters properly contained within the bill of exceptions.

It has been held that the inadvertent transposition of certificates, or the inadvertent misplacing of a clerk's certificate, or the transposition of the certificate of the official reporter and the order of the judge, does not affect the authenticity of the record or the completness of the record so certified. Guthiel v. Dow, 177 Ind. 149, 97 N. E. 426; Winters v. Means, 50 Neb. 209, 69 N. W. 753; Clements v. Collins, 59 Ga. 124. In view of the facts above recited, the court will consider the transcript as if the pages 119, 120. 121, and 122 had not been transposed.

In this opinion, we shall resume the history of this case at the point where it was broken off by the supposed discovery that there was not a properly authenticated bill of exceptions covering the matters set forth on such transposed pages. Other grounds for rehearing are set up in the motion, which will be considered as we proceed, and we will consider the alleged errors of the trial court which were not touched upon in our former opinion for the reasons therein set forth.

In our former opinion we held that, where the appellee, the insurer, had issued and delivered its official receipt acknowledging payment, the burden rested upon it to show that a check given in payment for the premium was not received as payment, and that the appellant had made out a prima facie case by the introduction of evidence of the delivery to the insured of such official receipt. We see no reason to change our views so announced, unless this prima facie case is overcome by the evidence contained in pages 119, 120, 121, and 122 now before us for consideration, and which was not before considered by the court for the reasons stated. In a consideration of the weight to be given to the statements in the documents introduced in evidence, and appearing on the pages mentioned, several elements will enter. The testimony of the attorney for the plaintiff below was to the effect that the docu-

ments, or some of them, appearing as Exhibits 2-P, 3-P, 4-P, 5-P, 6-P, and 7-P, were produced in answer to the written demand of the defendant insurance company.

[10] The only one of those exhibits which was offered in evidence by the plaintiff was Exhibit 3-P, which was a letter upon the letter head of the defendant company, which letter head contained the names of some of its officers, and which was addressed to George C. Taylor, as attorney for the plaintiff in this case. The plaintiff offered a portion of this letter for the purpose of corroborating the statement of the plaintiff that the renewal receipt for the year 1915 was issued by the company and delivered to the deceased husband of the plaintiff. This letter contains a statement that the defendant company had mailed the renewal receipt to the deceased, Mr. Martin. The defendant argued that, if the plaintiff offered the letter for any purpose, he must offer the whole letter. The trial court so held. The plaintiff objected that other portions of the letter besides those offered by her were selfserving declarations of the defendant company.

There is a conflict of authority as to whether a portion of a letter or other writing may be introduced in evidence, without the whole of the writing being also offered. Mr. Wigmore in his work on Evidence, volume 3, § 2102, sums up his consideration of the adjudicated cases in the following manner:

> "It would seem that the general tendency is to require the whole of a single document to be put in and treated as the evidence of the party desiring to offer a part only, even though the actual reading be postponed. But the rulings are not harmonious nor always definite. The matter should be left entirely to the discretion of the trial court."

We do not think that the court abused its discretion in admitting other portions of this letter which may have tended to explain the admission by the defendant of the issuing and delivering of the renewal receipt of the company as expressed in the portion of

the letter offered by the plaintiff. Recitals in the letter, having no bearing on the portion of the letter introduced by the party offering it, should not, in our opinion, be admitted. As was said in the case of T. A. Robertson & Co. v. Russell, 51 Tex. Civ. App. 257, 111 S. W. 205:

"The rule that, where one party has introduced a part of a writing in evidence, the opposite party has a right to introduce the whole of the writing, means and refers to the whole of the writing bearing on, having connection with, and relating to the same subject matter, which is necessary to make it fully understood or to explain the same. It does not mean to include immaterial or irrevelant matter."

However, we do not consider the statements in the letter relative to a demand for a return of the renewal receipt because of the alleged nonpayment of the check, and read upon the insistence of the defendant, as being of much, if any, probative force, and surely not sufficient to overcome prima facie case made by evidence of the delivery of the renewal receipt to the insured. The portion of the statement relative to the check having been dishonored would have no more weight than hearsay, unless supplemented by other satisfactory evidence. The statements relative to the check were self-serving, and consequently subject to the limitations imposed upon the weight to be given to self-serving declarations.

[11] Upon cross-examination of Mr. Taylor, the attorney for plaintiff, and testifying as a witness on behalf of plaintiff, the witness was asked concerning Exhibit 6-P, being a letter from "W. Beauvais, Cashier," addressed to Mr. Frank A. Martin, the deceased husband of the plaintiff, which letter was as follows:

"New York Life Insurance Company, Darwin P. Kingsley, President Arizona Branch Office, Northwest Corner Center and Adams Sts., Phoenix, Arizona. I. J. Johnson, Agency Director. William Beauvais, Cashier. In reply please refer to file No. ..... Nov. 30, 1915. Mr. Frank A. Martin, Box 585, Albuquerque, N. M., Dear Sir: Re Policy No. 4,044,700. The check which you gave on account of the premiums due October 18, 1915, on policy No. 4,044,700 and of which the following is a copy: 'Belview, Minn., Nov. 15, 1915. Pay to the order of New York Life Ins. Co. $71.74, seventy-one and 74-100 dollars. To Farmers' State Bank,

Belview, Minn. (Signed) F. A. Martin'—has been returned by the bank not honored; your policy has therefore been lapsed on the books of the company. Herewith we enclose said original check to you and demand return of the renewal receipt you obtained at the time you gave us this check. Yours truly, W. Beauvais, Cashier. Register."

At the same time counsel for defendant identified by the witness Exhibit 7-P, being a check, which check was in words and figures as follows:

"No..... Belview, Minn., Nov. 15, 1915. Farmers' State Bank: Pay to the order of New York Life Ins. Co. $71.74, seventy-one and 74-100 dollars. To Farmers' State Bank, Belview, Minn. F. A. Martin.

[**12**] Immediately after the witness identified these two exhibits, counsel for defendant offered them in evidence over the objection of plaintiff. Counsel for defendant then added that he was also introducing a series of bank "markings" appearing on the check aforesaid, and the memorandum, "Returned, no funds." Plaintiff's counsel renewed objection to this evidence generally, and also specifically objected to the "markings" on the check, on the ground that there was no evidence as to who put them there. Counsel for appellant urges that Exhibits 6-P and 7-P, being the letter and the check aforesaid, were not properly received in evidence by the court: (1) Because they were introduced while plaintiff was making out her case in chief; (2) because the statements in the letter of the defendant company were self-serving statements; and (3) because the pencil markings on the check, "Returned, no funds," was merely hearsay.

As to the first proposition, we find that there are many authorities holding the practice of allowing the party not calling the witness to introduce documents which may have been identified upon cross-examination. Since the purpose of this immediate sequence is to furnish the tribunal with the means of fixing the net significance of the witness' testimony while the tenor of his direct testimony is fresh in their minds, and that it seems proper enough to hold that the opponent is entitled to this immediate sequence in order to expose without delay the weak points of the testimony against

him. See Wigmore on Evidence, § 1884. We think, however, that the reasons as stated above should be clearly apparent to warrant the court in permitting documents introduced by a party who brings out the identification of the document through cross-examination of a witness on the original call of the adverse party. As was said in the case of Kroetch v. Empire M. Co., 9 Idaho, 277, 74 P. 868:

"The practice of allowing a party to identify and introduce exhibits on cross-examination of his adversary's witness * * * should seldom be permitted."

In Blake v. Cavins, 25 N. M. 574, 185 P. 374, we said:

"Where a witness testifying in a case uses a memorandum book made by himself some years previously for the purpose of refreshing his recollection, counsel, on cross-examination, have a right to have such memorandum so used by the witness to refresh his recollection, put in evidence."

The facts in this case, however, are very different. The documents in question were not made by the witness, and he had not testified concerning their contents, nor used them as memoranda to refresh his recollection or otherwise, but were documents which, if used at all, would be properly used as a part of the defendant's case to support its contentions. Even though this letter and check, being Exhibits 6-P and 7-P, were not objectionable as having been received while plaintiff was making her case, were they admissible in evidence, and, if so, what weight should be given to them?

Exhibit 6-P contains self-serving declarations to the effect that the policy of the insured had lapsed, because the check given by the insured had been returned by the bank not honored. To what extent and under what conditions a self-serving unanswered letter or telegram passing between persons in the general course of business is admissible in favor of the person sending it has been the subject of much discussion by the courts and the decisions are not harmonious. The general trend of the decisions is to the effect that such a letter is admissible, but only as an admission implied from the silence of the recipient. See authorities collected

in the note to Dennis v. Waterford Packing Co., 113 Me. 159, 93 A. 58, and cases in Ann. Cas. 1917D, at page 788. In Murphey v. Gates, 81 Wis. 370, 51 N. W. 573, it was held that several letters written by the plaintiff to the defendant, demanding a balance due for services rendered pursuant to a contract, together with evidence of the failure of defendant to deny the truth of the statements, were admissible in favor of the plaintiff. In that case it was said that the failure of the defendant to respond to the letters, or to deny in any form the statements therein, was a tacit admission of them, and to that end the letters of the plaintiff were admissible.

The following is a quotation from the note to Dennis v. Waterford Packing Co., Ann. Cas. 1917D, 788.

"It has been said that failure to answer a self-serving written communication is seldom to be regarded as an admission by the persons addresses, but that exceptional circumstances may justify the court in submitting it to the jury with a proper caution. Morris v. Norton, 75 Fed. 912, 43 U. S. App. 739, 21 C. C. A. 553, wherein the court said: 'The rule is well settled that conversations between parties to a controversy, in which one makes a statement of fact of which both have personal knowledge, and which naturally calls for a denial by the other if the statement is untrue, are competent against the silent party, as admissions, by acquiesence, of the truth of the statement. The weight of the admissions varies with the circumstances of the case, and the strength of the probability that the statement, if untrue, would have evoked a denial, and is always for the jury, guided by a proper caution of the court as to the theory upon which such conversations are admitted. * * * With respect to written communications, however, the rule is different, because the failure of one receiving a letter to answer it may be attributed to many causes besides an acquiescence in the truth of what is written, and such a rule would furnish a dangerous weapon in the hand of an unscrupulous party to make evidence in his favor against a careless opponent. It cannot be said, however, to be an unvarying rule that an unanswered letter may not be evidence against the person addressed because there are cases in which such letters have been admitted. (Authorities cited.) These authorities are explained—some of them—on the view that a demand by the plaintiff of the defendant was necessary to the plaintiff's case, and the latter unanswered was competent to show this, but it will be observed that even in those cases the jury was permitted to draw inferences from the failure to answer the demand. The better supported rule, probably, is that unanswered letters are ordinarily not evidence against

the person addressed, as admissions of the truth of statements contained therein."

A consideration of the discussion quoted above suggests a very important lack in the case of the letter of November 30, 1915, supposedly from the defendant company, in that there is no evidence in the record showing that the letter was not answered by the recipient, the deceased, Mr. Martin. For this reason, and for the reason that the manner of its reception in evidence precluded the plaintiff from a cross-examination of the party sending the letter, which opportunity would have been presented in the event the latter had been identified and offered by the sender, which cross-examination might have elicited facts with respect to the receipt of an answer thereto, we think that the letter was inadmissible as evidence in the manner in which it was received.

Even though it were considered that Exhibits 6-P and 7-P were put in evidence by the plaintiff, or that the body of the check was properly received when offered by defendant, it is apparent that the markings and indorsements which were on Exhibit 7-P, being the bank idorsements and the memorandum in pencil, "Returned, no funds," were not properly in evidence over the objection of plaintiff. It was this indorsement of the words, "Returned, no funds," that defendant relied upon in writing the letter of November 30th, and also in court, as showing that the check had been dishonored.

Even where a paper has been properly admitted in evidence, indorsements on the document are inadadmissible, if objected to. See Encyc. of Evidence on "Objections," vol. 9, p. 118, and Wallach v. Kind (City Ct.) 16 N. Y. S. 204, cited. In the articles on "Payment" in the same volume of Encyc. of Evidence, at page 725, it is said:

"An endorsement of payment on a note is admissible on behalf of the debtor, although not signed, but is not admissible on behalf of the holder."

"The endorsements on the note, on the evidence of the plaintiffs, were utterly worthless to prove either that the

alleged payments were made; or by whom made, or when made; and without this, they should not have been permitted to be read to the jury. * * * To permit the fact of payment to be established by the credit entered on the note," the court said, it "would be, manifestly, allowing the party relying on it to make evidence for himself." Knight v. Clements, 45 Ala. 89, 101, 6 Am. Rep. 693.

In the case of Hugumin v. Hinds, 97 Mo. App. 346, 71 S. W. 479, it was held that in an action by an indorsee on a negotiable note, where it was denied that plaintiff was a bona fide purchaser for value, the admission of the indorsement of the payee in evidence, over defendant's objection, was error. The court said:

"Defendants insist that the cause should have been submitted to the jury on the pleadings and the evidence. Without going very far into the merits of the case, it is clear that the burden of proof rested on plaintiff to submit, in the first instance, some evidence tending to prove the fact of the indorsement. The trial court admitted in evidence the indorsement of the payee without any prior proof of its authenticity, and over the objection and exception of the defendants. The indorsement did not prove itself. Bank v Pennington (K. C.) 42 Mo. App. 355. Defendants admitted the execution of the note, but that admission did not waive or dispense with proof of the indorsement."

In the case of Hellard et al. v. Nance et al. (Ky.) 114 S. W. 277, it was held:

"An indorsement on the back of a deed that the grantee's widow and her heirs assigned the deed to L. and his heirs, signed by only two of the widow's heirs, to which was attached a certificate by a third person to stand good that the minor heirs would sign when they became of age, was inadmissible as evidence, in the absence of proof of execution by the heirs who signed it."

The court further said:

"No witness was introduced who testified as to the alleged assignment: the writing alone being exhibited as evidence of it. The objection to this assignment as evidence on behalf of appellee should have been sustained."

In Sussmann v. MacKewan (Sup.) 148 N. Y. S. 152, it was held:

"The admission in evidence, in an action for rent, of a lease upon the back of which were assignments from the lessor to W. and from W. to plaintiff without proof of the genuineness of the signatures to such assignments, was error."

With respect to these Exhibits 6-P and 7-P, which

appellee relies upon to neutralize the prima facie case made by evidence of the delivery to the insured of the renewal receipt, it is argued by counsel for appellee that plaintiff voluntarily offered these exhibits in evidence, and therefore may not complain of their contents. The record is somewhat confusing, but we gather from an examination thereof that appellee is mistaken, and that only Exhibit 3-P was actually offered in evidence by the plaintiff. At page 107 of the transcript it appears that the witness, who was attorney for plaintiff, testified that there were a number of copies of letters attached to depositions, "some of which they have requested to put the originals in. I am not sure, some of them have been lost—some ten letters from Mr. Martin's files." At page 108 witness said with respect to Exhibit 3-P: "We produce this letter in answer to the demand written by the company." The confusion occurs as to whether the attorney for plaintiff from the witness stand was responding to a written demand for the production of letters and other writings, and was making a record of such response by having such papers produced and identified, or was introducing the documents in evidence. It is clear that plaintiff's counsel did offer in evidence Exhibit 3-P. Plaintiff did not offer to read to the jury from Exhibits 4-P, 5-P, 6-P, and 7-P. It is difficult to reconcile why they offered them in evidence, yet objected to their being so read.

Defendant's counsel, however, on cross-examination of the witness Taylor, further elicited identification of Exhibits 6-P and 7-P as being respectively a letter from the defendant company and a check of the deceased husband of the plaintiff drawn in favor of the company, and established the authenticity thereof by the witness, and then offered them in evidence, and they were so received by the court over the objection of the plaintiff. It is apparent that the able counsel for defendant did not consider these documents as having previously been offered and received in evidence. It is unlikely that, if the court had considered them as having been in evidence, it would have an-

nounced that they would be admitted when they were offered by the defendant. It is singular that the defendant would object to their introduction by the defendant, if he had already offered them and they had been received. Immediately following the account of the last mentioned incident, the court reporter recites:

"The letter and check referred to, Exhibits 6-P and 7-P respectively, were then received in evidence and read to the jury. At the conclusion of reading the latter, Mr. Seth stated, 'With a series of bank markings on that, marked "Returned, no funds,"' to which plaintiff objected, and which objection was by the court overruled."

For the reasons stated, we have considered these exhibits as having been offered in evidence by the defendant alone. If we are mistaken in our view that these two exhibits, 6-P and 7-P, were introduced by the defendant, and not by the plaintiff, we are yet of the opinion that the evidence, if any, contained therein, was not of such a character as would overcome the prima facie case made by the evidence of the receipt of the defendant company delivered to the insured.

In any event, it would not leave such an entire absence of evidence on behalf of plaintiff, which would warrant the court in directing a verdict for the defendant. In the case of Sherman v. Hicks, 14 N. M. 439, 94 P. 959, we said:

"Where there is any evidence on any issue raised by the pleadings, the court must submit it to the jury."

In New Mexico-Colorado Coal & Mining Co. v. Baker, 21 N. M. 531, 157 P. 167, we said:

"Whenever the evidence adduced presents an issue of fact which, if determined in plaintiff's favor, would entitle him to recover, the case should be submitted to the determination of jury."

Even when the situation is most favorable for sustaining the admissibility in evidence of self-serving letters, the jury should be permitted to draw inferences from the failure to answer the demand made in such letters, and that even in conversations where one party makes a statement which calls for a denial by the other,

if the statement is untrue, the weight of the admissions varies with the circumstances of the case and the strength of the probability that the statement, if untrue, would have evoked a denial and is always for the jury, guided by a proper caution of the court as to the theory upon which such conversations are admitted. See Morris v. Norton, 75 F. 912, 21 C. C. A. 553, supra.

[**13**] Although our conclusion is reached by a different route, we see no reason to change the ultimate decision as announced in our former opinion.

PARKER, C. J., and WATSON, J., concur.

[No. 2609. March 28, 1925]

YATES v. WHITE.

SYLLABUS BY THE COURT

1. There is an implied license by the government to all the people to graze their animals upon the public domain without compensation.

2. This license is subject to the police power of the state, by way of reasonable regulation of its enjoyment.

3. A contract to remove one's animals from an illegal enclosure upon the public domain, and to keep them out, is void as against public policy, in view of the federal statute prohibiting the unlawful fencing of the public domain.

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

Action by I. G. Yates against O. D. White. From the judgment for defendant non obstante veredicto, plaintiff appeals. Affirmed and remanded, with directions.

Wright & Harris, of San Angelo, Tex., and R. D. Bowers, of Roswell, for appellant.

O. O. Askren, of East Las Vegas, for appellee.

OPINION OF THE COURT

RYAN, District Judge. This was an action for damages for the breach of a contract, resulting in a gen-

eral verdict for appellant (plaintiff) for $1,000, which verdict was set aside, and a judgment for appellee (defendant), non obstante veredicto, was rendered. The contract was that the defendant, for a consideration of $20,000, would convey to the plaintiff his ranch and range, consisting of certain lands which he owned, certain leases which he held, and certain mineral filings. Upon some of the said lands were living waters and wells, which said waters were all the waters upon the ranch or range of defendant. The defendant further agreed to remove all of his cattle and horses from the said range, which he claimed he did, whereupon the $20,000 was paid to him. These private holdings of defendant were surrounded by the public domain of the United States, which range was controlled by the watering places above mentioned. Upon this ranch was a large amount of fencing, and, in at least one instance (the so-called 12-section pasture), there was a complete inclosure of the public domain by a fence. The plaintiff alleged, and submitted proof, that defendant had, after removing his stock from said range, driven the stock back upon the same, or, in the alternative, had never removed the stock from the range, as he had pretended when he received the $20,000 consideration. The defendant answered, denying his failure to remove his stock, and denying that he drove the same back on the said range. He further pleaded the illegality of the contract under the provisions of the Act of Congress, February 25, 1885, 23 Stat. L. 321, 8 Fed. Stat. Ann. 816 (U. S. Comp. St. §§ 4997-5002), which prohibits inclosures of the public domain. The lower court held this contract to be illegal under this statute, and set aside the verdict and rendered judgment for defendant, as before seen. The jury found specially that 2 large pastures were partially fenced, and that one was completely inclosed by fence; all containing large areas of public domain. The contract pleaded by plaintiff was a contract to remove from these pastures all of defendant's animals within the same, and off the public domain controlled by the waters purchased from de-

fendant. The question then is, can a person make a valid contract to abstain from grazing his animals upon the public domain of the United States, which is illegally fenced by the other party to the contract?

[1] 1. In the first place, it may be said that there is an implied license on the part of the government to all of the people to graze their animals upon the public domain without compensation: Buford v. Houtz, 133 U. S. 320, 10 S. Ct. 305, 33 L. Ed. 618, 620.

[2] 2. This license is subject to the police power of the state by way of reasonable regulation of its enjoyment. Omaechevarria v. Idaho, 246 U. S. 343, 38 S. Ct. 323, 62 L. Ed. 763. We have such a regulation of the right in sections 4628-4630, Code 1915, which we have held to be a proper exercise of the police power. Hill v. Winkler, 21 N. M. 5, 151 P. 1014. The defendant, then, owning all of the waters on his range, had the right to the exclusive enjoyment of the license to graze these lands as against all others who did not develop other waters upon the same. When he sold these lands and waters to the plaintiff, the latter then had the same right. The defendant might well have contracted with the plaintiff to remove from said range his animals, and to keep them off the same until at least he had complied with our statutes as to watering places, but for the considerations now to be mentioned.

[3] 3. At this point, however, the federal act, supra, intervenes. That act was designed to remedy an evil which had grown up in the West of monopolizing the public domain by large raisers of livestock by means of fencing large tracts, and by means of intimidation, thus excluding the public generally from the privileges of the license and from settlement on the public domain. The act makes all such fencing and such intimidation illegal, and provides for injunction against the maintenance of such fences, and for punishment of offenders against the act. If the situation had been reversed; that is, if the plaintiff had agreed

with the defendant to take and pasture his cattle within the illegal inclosure, it is clear, upon authority, that the contract would have been illegal and unenforceable. Garst v. Love, 6 Okl. 46, 55 P. 19; Tandy v. Elmore-Cooper Livestock Com. Co., 113 Mo. App. 409, 87 S. W. 614; Lingle v. Snyder, 160 F. 627, 87 C. C. A. 529. The principle involved is that a contract which contemplates a violation of positive law is void as against public policy. No case has been cited or found by us just like the present one. Here, the contract was not to take and pasture cattle upon illegally inclosed public domain, but it was to take out, and keep out, of illegal inclosures of public domain, the animals of the defendant. The principle involved would seem to be the same in both cases. The plaintiff contracted with the defendant for the exclusive use of illegally inclosed public domain as against the defendant, and the defendant contracted with the plaintiff that the plaintiff should enjoy, so far as he was concerned, the illegal use of such public lands. The transaction cannot be separated from the maintenance of the illegal inclosures, and the contract must be held to be illegal.

A procedural question presents itself as to whether a motion for judgment non obstante veredicto was the proper remedy of the defendant, rather than a motion for new trial; but the court and the parties treated the motion as really the motion for an instructed verdict made before submission to the jury, and, as no mention of the question is made in the brief, it will not be considered here.

It follows that the judgment of the court below was correct and should be affirmed, and the cause should be remanded, with directions to proceed accordingly; and it is so ordered.

PARKER, C. J., concurs.

[No. 2861. Feb. 12, 1925. Rehearing Denied April 29, 1925.]

STATE ex rel. BURG v. CITY OF ALBUQUERQUE et al.

SYLLABUS BY THE COURT.

1. The cost bond was duly filed, and was not ineffectual because the sureties did not subscribe an affidavit of justification. **Bank of Commerce of Taiban v. Duckworth, 26 N. M. 437, 194 P. 367.**

2. It is not required by the statutes of New Mexico that notice be given of the filing of a cost bond, nor that service thereof be made upon the adverse party.

3. Where notice is given that a bill of exceptions will be presented to the court to be settled and signed at a time and place stated, and the excepting party, through his fault, procures the signing thereof at a different time and place without waiver by the adverse party, and the circumstances not falling within the exceptions of section 4181, Code 1915, as construed in Ojo Del Espiritu Santo Co. v. Baca, 29 N. M. 509, 214 P. 768, such bill of exceptions will be stricken on motion as having been settled and signed without proper notice.

Appeal or Writ of Error from District Court, Bernalillo County; Hickey, Judge.

Suit by the State of New Mexico, on the relation of John Baron Burg, against the City of Albuquerque and others. Judgment for defendants, and plaintiff appeals or brings error. On motions to dismiss appeal and to strike bill of exceptions. Motion to dismiss appeal denied, and motion to strike bill of exceptions sustained.

B. S. Rodey, J. Lewis Clark and John Baron Burg, all of Albuquerque, for plaintiff in error.

H. B. Jamison, of Albuquerque, for defendants in error.

OPINION OF THE COURT

BICKLEY, J. [**1**] This case is now before the court on the motion of defendants in error to dismiss the appeal or writ of error filed September 27, 1923, and upon its motion designated "amended motion to

dismiss the appeal or writ of error," and filed October 19, 1923, and upon the motion of defendants in error to strike the bill of exceptions.

The two motions to dismiss taken together make the claim that no cost bond, as required by the statutes, has been filed in this cause within the time required by law, and that no cost bond has been filed with sureties qualified as in other cases.

The record shows that on June 13, 1923, there was duly issued from this court the writ of error to the Second judicial district court of Bernalillo county, and that thereafter on the same day a cost bond was filed on behalf of plaintiffs in error. This bond was duly "approved both as to form and sufficiency of sureties." From the language of the amended motion to dismiss, and from the arguments made, it does not appear that the defendants in error now claim that the cost bond so filed was not filed in time, but that such bond was not sufficient compliance with the requirements of the statutes applicable thereto. It is claimed by defendants in error that the cost bond is insufficient because it is not dated. The bond purports to have been executed on the "———day of June, A. D. 1923." It recites, "Whereas a writ of error to the district court of Bernalillo county has been granted by the Supreme Court of the State of New Mexico"; so it is apparent that it was executed on June 13, 1923, after the writ of error was allowed. The same may be said as to the absence of date in the acknowledgment. The bond is further criticized because it binds the principal and sureties to pay all costs that may be adjudged against the principal "on said appeal."

It is true that the expressions "appeal" and "writ of error" are both used in this bond. The Wyoming Supreme Court in Caldwell v. State, 12 Wyo. 206, 74 P. 496, says:

"The word 'appeal' " designates "generally any method provided by statute for removing a case from an inferior to a

higher court for review, including the proceeding under the statute by petition in error."

It is also claimed that, as the sureties do not make any statement to advise the clerk of the court as to their qualifications as sureties, this omission renders the bond fatally defective. This argument is based on section 15, c. 43, Laws 1917, p. 147, and it is claimed that the phrase therein used, "file * * * with the clerk of the Supreme Court in case of writ of error, a bond with sufficient sureties qualified as in other cases," makes it necessary that the sureties should, by affidavit of justification, show their qualifications. This court took a contrary view in Bank of Commerce of Taiban v. Duckworth, 26 N. M. 437, 194 P. 367, in construing the section of the statute invoked by these defendants in error.

Defendants in error complain that they had no notice of the filing of the bond and that no copy thereof was served on them. It is not required under our statutes that notice be given of the filing of a cost bond, nor that service thereof be made upon the adverse party.

This court, in the case of Bank of Commerce of Taiban v. Duckworth, 26 N. M. 437, 194 P. 367, in

"If the clerk accepts an appeal bond and the appellee regards the surety thereon as insufficient, his remedy is a motion and rule for additional security."

Defendants in error are in about the same situation as were the respondents in the case of De Roberts v. Stiles et al., 24 Wash. 611, 64 P. 795, where the court said, respecting respondents' move to dismiss the appeal on the ground that appellant had not served respondents with a copy of the bond or notice of the filing thereof:

"To make the appeal effectual, an appeal bond must be filed at or before the time when notice of appeal is given or served, or within five days thereafter. 2 Ballinger's Ann. Codes & St. § 6505. Again, 'Any respondent may except to the sufficiency of the surety or sureties in an appeal bond within ten days after the service on him of the notice of appeal or within five days after the service on him of the bond or written

notice of the filing thereof'. Id. § 6510. Notice of appeal having been served, respondents were charged with knowledge under section 6505, supra, that within five days thereafter appellants must file an appeal bond in order to make their appeal effectual. The section does not provide that the bond or written notice of the filing thereof shall be served upon respondents. The only real purpose of such service would be to give respondents an opportunity to except to the sufficiency of the bond. But section 6510, supra, gives to respondents ten days from the date of service of the appeal notice to make such objection, and they must know that at the expiration of five days from the service of the notice of appeal an appeal bond is on file, and they have, therefore, at least five days more within which to call at the clerk's office, examine the bond, and lodge their objections thereto."

For the reasons stated, the motions to dismiss the appeal for lack of proper cost bond are denied.

[2] 2. We will now consider the motion of defendants in error to strike the bill of exceptions. This motion is based on two grounds, as follows:

Because it does not appear upon the face of the record that the five days' notice to the defendants in error or their attorney required by the statutes of the state of New Mexico was ever given.

"Because it affirmatively appears from said record that the only notice ever given was notice given on the 4th day of August, 1923, that the transcript record, etc., would be taken up for signature on Thursday, the 9th, at 10 o'clock a. m. under section 25 of 1917 Practice Act, page 151; whereas the bill of exceptions was signed on the 18th day of August, 1923, under section 27, providing for the bills of exception."

The record, at page 20, shows the following:

"I, the undersigned, attorney for the above city of Albuquerque, and the commissioners thereof, hereby acknowledge service on me this 4th day of August, 1923, of this notice that the matter of the signing of the transcript, record, etc., will be taken up before the district judge of Bernalillo county, on Thursday, the 9th inst., at 10 o'clock a. m. at the courthouse, for his signature and certificate, under Section 25 of the Practice Act, of 1917, page 151, Session Laws. H. B. Jamison, Defendants in Error Attorney for as aforesaid."

It is claimed by defendants in error that, because the acknowledgment of notice heretofore quoted referred to section 25 of the Practice Act of 1917 (Laws 1917, c. 43), and not to section 27 of said act referring to bills of exceptions, he had no notice of what the

parties might present or what the court might do by virtue of said section 27. The office of the certified transcript of the stenographer's notes provided for by section 25 is quite similar to that performed by the bill of exceptions provided for by section 27, and if this were the only objection to the notice and the subsequent proceedings thereunder, we might be able to compose the confusion of the reference to sections 25 and 27; but other serious objections are made. The record shows the following certificate by the court:

"And forasmuch as the matters and things contained are not of record in the above-entitled cause, the respondent having been given the five days' notice required by law, the complainant prays that this, his bill of exceptions, containing the testimony and rulings of the court in said cause, and all proceedings had upon the trial of said cause, may be signed, sealed and enrolled by the judge presiding at the trial of said cause, as his bill of exceptions, which is done this 21st day of August, 1923. Raymond R. Ryan, Judge of the District Court of the Sixth Judicial District, Sitting in place of M. E. Hickey, Judge of the District Court of the Second Judicial District."

Defendants in error complain that the acknowledgment of notice signed on the 4th day of August, 1923, refers to proceedings relative to certifications of record, transcript, etc., to be taken up before the court on August 9th at 10 o'clock a. m. at the the courthouse. They say in their argument that it is apparent that such bill of exceptions was signed and settled on a later date and express a doubt as to whether it was so signed and settled at the courthouse of Bernalillo county. The record heretofore quoted shows that the bill of exceptions was in fact signed and settled on August 21, 1923. We may not consider the affidavits and statements of counsel in the face of the record, and we are bound to consider the points raised upon the record alone. Timm v. White, 27 N. M. 219, 199 P. 904. But we may not ignore statements made by counsel, especially when made against interest and brought into the record. The defendants in error say that the finding of the court that notice had been given of the settlement and signing of the bill of exceptions is shorn of the presumption attending it, when the record

affirmatively shows the notice relied upon, and there being no claim of more than one notice given. While a finding made and entered by the judge while settling and signing a bill of exceptions showing notice of the time and place of settling the bill of exceptions is sufficient evidence prima facie to prove the fact that such notice was given, still the presumption attending the judge's certificate must yield if rebutted by convincing evidence to the contrary.

[3] Plaintiffs in error, on March 15, 1924, filed in this court a paper designated as "Plaintiffs in Errors' Motion to Strike the Defendants in Errors' 'Motion to Strike Bill of Exceptions,' which latter was filed in this Supreme Court March 12, 1924." By this paper, plaintiffs in error bring into the record the following statements of fact:

"First. That as appears by the said motion of the said defendants in error and by the transcript and the files in the cause, due notice of the settling and signing of the bill of exceptions was given on the 4th day of August, 1923, of the intention of plaintiff in error to apply five days later for the settling and signing of the same; and service of such notice was, on said former date, duly acknowledged by the said Jamison as counsel for the defendants in error.

"Second. That on the 9th day of August, 1923, counsel for plaintiff in error appeared in said district court at 10 o'clock a. m. for the purpose of having the bill of exceptions settled and signed, but counsel for defendant in error contrary to his solemn promise in that behalf, failed to appear in response to the notice previously given to him and which he duly acknowledged; and the district judge then and there stated that the said bill of exceptions would have to be settled and signed by Judge Raymond R. Ryan, as he was the one that sat in the cause and passed upon the issues, and that said transcript was at once forwarded to the said Judge Ryan who signed and sealed the same."

From these admissions made by the plaintiffs in error, it appears that the defendants in error are correct in their contention that the bill of exceptions was settled and signed at a different time and place from that upon which they were notified to appear at the taking of or the signing of the transcript, record, etc., under section 25 of the Practice Act of 1917.

It is apparent from the admissions aforesaid that

plaintiffs in error did not contemplate that Judge Ryan would be requested to settle and sign the bill of exceptions on August 9, 1923. They say that on August 9, 1923, the district judge then and there stated that the bill of exceptions would have to be settled and signed by Judge Ryan, as he was the one that sat in the cause and passed upon the issues.

Under the holding of this court in the case of Ravany v. Equitable Life Assur. Soc. of the United States, 26 N. M. 41, 188 P. 1106, the judge of the district court or his successor, even though he did not try the case, might settle and sign a bill of exceptions.

There are many cases holding that where plaintiff in error serves a case-made and gives the prescribed notice as to settlement, and the trial judge is then absent, the notice becomes functus officio, and before the case-made can be legally settled another notice must be served in the absence of waiver by defendants in error. Baker & Lockwood Mfg. Co. v. Voorhees, 63 Okl. 283, 165 P. 125; Sand Springs Ry. Co. v. Oliphant, 53 Okl. 528, 157 P. 284; Okmulgee County Business Men's Ass'n v. Bryan, 79 Okl. 23, 190 P. 1086; Home Builders' Lumber Co. v. West, 95 Okl. 144, 218 P. 512; Edgerly v. Johnson, 80 Okl. 19, 193 P. 872.

In the case of Ojo Del Espiritu Santo Co. v. Baca, 28 N. M. 509, 214 P. 768, there was advanced the proposition by counsel for appellant that, as counsel for appellee had received notice on June 1, 1918, that appellant would apply for the settling and signing of the bill of exceptions, he was not entitled to any further notice. The circumstances, as disclosed by the record, attending the matter, were as follows: Counsel for appellant had served counsel for appellee with notice that he would apply on June 1, 1918, for the order, and it appeared that counsel for appellee was unable to be present, and that counsel for appellant voluntarily applied to the court and was granted an extension of 30 days within which to have the bill settled and signed. From this state of facts, this court held that sec-

tion 4181, Code 1915, was not applicable, and that, under the circumstances, it was clear that upon the extension, notice was required in order to give jurisdiction of the appellee.

For the reasons stated, the motion to strike the bill of exceptions is sustained.

Plaintiffs in error filed a statement submitting cause and moving for judgment on the pleadings and brief of plaintiffs in error, upon the ground that the time within which defendants in error had to file their brief on the merits had expired on the 29th day of September, 1923. In answer to this statement and motion, the defendants in error call attention to the fact that their motion to dismiss the appeal was filed on September 27, 1923, and claim that their time for filing their brief on the merits was tolled by virtue of section 18 of rule 6 of this court. In this respect, the defendants in error are correct.

PARKER, C. J., and WATSON, J., concur.

[No. 2925. May 2, 1925.]

MERRICK v. DEERING et al.

SYLLABUS BY THE COURT

1. Under section 4197, Code of 1915, it is the duty of the court, in cases tried without a jury, upon request, to make such specific findings of ultimate facts as will enable the appellate court, in reviewing such findings and the conclusions, to traverse the same ground as the trial court.

2. Under section 4197, Code of 1915, it is error to refuse to make findings as to ultimate facts essential to conclusion.

3. Under Section 4197, Code of 1915, it is error to refuse to make findings as to ability, standing, skill and experience of attorneys entitled to the allowance of fees, and as to the time and labor expended.

4. Judgment erroneous for refusal to make findings as to the ability, standing, skill and experience of attorneys entitled to the allowance of fees, and as to the time and labor expended, reviewed upon the whole record and allowances made, a remand for findings being impracticable, the trial judge is no longer in office.

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

Suit by George P. Merrick, executor of William H. Bartlett, deceased, against Mary Wentworth Deering and others. From the supplemental decree making allowances to C. J. Roberts and others, as attorneys, the attorneys appeal. Remanded, with directions.

F. C. Wilson and J. O. Seth, both of Santa Fe, for appellants.

George H. Gould, of Santa Barbara, Cal., Pitkin & Moore, of Denver, Colo., E. R. Wright, of Santa Fe, and Crampton & Darden, of Raton, for appellees.

OPINION OF THE COURT

WATSON, J. In a suit by George P. Merrick, executor, for a construction of the last will and testament of William H. Bartlett, deceased, the court, by supplemental decree, made certain allowances to C. J. Roberts, as attorney for interested parties and as guardian ad litem, and to C. J. Roberts and M. F. Prosser, as attorneys, from which the said attorneys appeal.

William H. Bartlett died testate, December 10, 1918. His will was filed for probate December 26, 1918, on which day George P. Merrick, the executor named in the will, was appointed and qualified as special administrator. On March 3, 1919, the will was admitted to probate in Colfax county, and said Merrick was appointed and qualified as executor and gave bond in the sum of $3,000,000. The estate consisted of real property in New Mexico, California, and Illinois, and a large amount of personal property consisting principally of stocks and bonds.

By the second paragraph of the will, the testator created a $1,000,000 trust with George P. Merrick, said executor, Frank S. Cowgill, and Jesse H. Ridge, as trustees. Two granddaughters, Mary Wentworth Bartlett and Virginia Bartlett, minors, and daughters of William H. Bartlett, Jr., son of the testator, were each

to receive, annually, from the income of said trust the sum of $2,500, and the balance of such income was to be paid to Norman W. Bartlett and William H. Bartlett, Jr., sons of the testator, so long as they should live. On the death of either of said sons the share of each income therefore paid to such deceased son was to be paid to his issue or, failing issue, to his legal heirs for 20 years, when such issue or heirs were to receive that part of the corpus of the trust from which such income had been derived.

By the third paragraph of the will, a trust of $250,000 was created, with the same trustees, for the purpose of providing annuities of $1,500 each to Mary Wentworth Deering, testator's daughter, and Sarah M. Stevens, Helen Bartlett, and Noel S. Munn, and $600 to Annie H. Brown. There were cash legacies of $27,000. The Vermijo ranch in Colfax county, N. M., with all personal property thereon, and all of the capital stock of the Adams Cattle Company was given to testator's son, Norman W. Bartlett. All of the residue of the testator's property was to go, one-third to said Norman W. Bartlett and two-thirds to said William H. Bartlett, Jr., sons of the testator.

Norman W. Bartlett died testate September 5, 1919, leaving all of his property to his brother, William H. Bartlett, Jr. William H. Bartlett, Jr., died testate January 15, 1920, leaving all of his property to his widow, Virginia M. Bartlett. Said George P. Merrick was executor of each of these wills. Upon the death of Norman W. Bartlett, his interest in the $1,000,000 trust passed, under the terms of the will, one-half to Mary Wentworth Deering, sister, and one-half to William H. Bartlett, Jr., brother. Upon the death of the latter, his interest in the trust passed to Virginia Bartlett and Mary Wentworth Bartlett, the said minors.

On December 10, 1921, the executor filed his complaint in the district court of Colfax county alleging that by reason of the large necessary expenditures by the executor, including $225,000 of federal inheritance

tax and $325,000 paid to Mary Wentworth Deering in settlement of a contest of the will instituted by her, and by reason of the unproductive character and depreciation in value of many of the properties, and of general business conditions, the executor was not able fully to satisfy the specific devises and legacies of the will and to set up the said trusts, wherefore, it became necessary to have judicial construction of the will as to whether such trusts should have priority. It was further alleged that the executor had advanced large sums of money to Norman W. Bartlett and William H. Bartlett, Jr., during their lives, and to Virginia M. Bartlett for the support of herself and said minor children, with all of whom said executor had imdemnity agreements, and that certain real estate in California of the value of about $100,000, not specifically devised, and originally believed to form a part of the residue of said estate, had been, by decree of the probate court in California, treated as a part thereof, and that the title thereto had passed by succession to said Virginia M. Bartlett. It was further alleged that said executor had made demand upon said Virginia M. Bartlett that she restore to the executor so much of said sums so advanced and of such property as would enable said executor to set up the said trusts, and that said Virginia M. Bartlett had refused to do so.

The executor prayed for a construction of the will as to the priority of the trusts to the specific devises and bequests, for direction as to whether he was entitled to use and should take any portion of the proceeds of the sale of the Vermejo ranch and the corporate stock of the Adams Cattle Company; that the court adjudicate as to his right of reimbursement for the advances made, as to the duty of said Virginia M. Bartlett to make restitution of, or of the value of said New Mexico and California real estate; and that the ownership of said New Mexico property be determined and the title quieted because of the fact that said New Mexico property was acquired by Norman W. Bartlett subsequent to the making of his will, and by William H.

Bartlett, Jr., subsequent to the making of his will, and because of the uncertainty as to whether after-acquired real estate passes by will under the laws of New Mexico. Virginia M. Bartlett, Mary Wentworth Deering, the said minors, the Pacific Southwest Trust & Savings Bank of Los Angeles, as guardian of the estates of said minors, Sarah M. Stevens, Helen Bartlett, Noel S. Munn, and other interested parties were named as defendants.

Virginia M. Bartlett filed an answer denying that the two minors had any interest in the real estate in New Mexico; denying that she should be required to account to the executor for the amount advanced in settling the will contest; denying that the California real estate should be subjected to the establishment of the trusts; and claiming that all advancements made to her inured to the benefit of the minors, her children, and should be apportioned. She asked that the plaintiff be required to file inventory and report as special administrator, and also as executor, and for other relief.

The two minors, by their California corporate guardian, and by appellant Roberts as attorney, filed answer claiming that the executor should be charged with moneys advanced to Norman W. Bartlett, William H. Bartlett, Jr., and Virginia M. Bartlett, and moneys expended in settlement of the will contest and otherwise; claiming that the appellants should be required to file inventories and accounts, and to make report of his acts and doings as executor; claiming that the moneys paid to Norman W. Bartlett, to William H. Bartlett, Jr., and to Virginia M. Bartlett, and for the settlement of the will contest, should be charged as a lien against the real estate in Colfax county and against the interest of Virginia M. Bartlett in the estate; and that the trusts take precedence over all other provisions of the will. This answer also set up that the minors were each the owner of an undivided three-eighths interest in the Vermejo ranch in Colfax county.

On the same day, Sarah M. Stevens, by appellant Roberts, her attorney, filed her answer setting up sub-

stantially the same matters as were alleged in the answer of the minors, excepting the allegation relative to the minors' interests in the Vermejo ranch. On the same day, and by the same attorney, Helen Bartlett and Noel S. Munn filed answers adopting the allegations of the answer of Sarah M. Stevens.

April 5, 1922, the court appointed appellant Roberts as guardian ad litem for the two minors, and on that day he filed an answer adopting the allegations of the answer theretofore filed by the California guardian.

May 17, 1922, the trustees, by their attorney, filed an answer neither admitting nor denying the allagations of the complaint but demanding strict proof thereof, and asking the court to protect, safeguard and defend the rights of the defendants in the premises.

May 27, 1922, Mary Wentworth Deering, by her attorney, appellant Roberts, filed her answer in which she claimed priority of the trusts over all other provisions of the will, and demanding a full accounting by the plaintiff as special administrator and as executor and as manager of the affairs of Adams Cattle Company.

March 26, 1923, the trustees filed a motion for revivor and substitution, asking that E. C. Crampton be substituted as trustee in place of Frank S. Cowgill, deceased. Upon the granting of this order, an amended answer was filed by the trustees, differing from the original only as necessary to show the substitution. To all of these answers the executor replied, denying, in his reply to the answer of the guardian, his liability as executor for moneys advanced.

The cause was set for trial at Raton in April, 1923. Assembled for the trial, the parties, after several days' conference, reached an agreement which was embodied in a stipulation, which, being presented to the court, with formal proofs, resulted in a decree covering all matters in dispute. By this decree, it was adjudged that the plaintiff, as executor, was in duty bound to bring

the action, and that all named defendants were necessary parties thereto. The trustees were authorized and directed to accept from the executor certain named securities in the amount of $551,175. The title of the Vermejo ranch and the capital stock of the Adams Cattle Company was quieted in Virginia M. Bartlett, and she, because of the payments and advancements made as hereinbefore stated, and of the award to her of the California property, was required to give her note to the trustees in the sum of $598,825, secured by mortgage on the Vermejo ranch and by the pledge of 666 shares, being one-third, of the capital stock of the Adams Cattle Company.

One hundred and fifty thousand dollars was deemed sufficient for the establishment of the trust created by paragraph 3 of the will, and it was therefore reduced to that figure; the two trusts being thus filled by the securities and the note. As consideration for the release by the minors of their claims to three-eights interest in the Vermejo ranch, a trust of $125,000 was decreed to be established in their favor. The trust was to be filled from the proceeds of any sale that might be made of the Vermejo ranch and the stock and assets of the Adams Cattle Company remaining after the satisfaction of the liens thereon. The income from said trust was to be paid to Virginia M. Bartlett during her lifetime, and at her death the corpus to go to the minors. It was, however, provided that in case the resources of Virginia M. Bartlett should become so diminished as not to afford her an adequate support, payments for such purpose might be made to her from the corpus of the trust. All remaining assets of the estate were directed to be reduced to cash and to be applied as follows: First, to the payment of further expenses of administration, including counsel fees; second, the payment of a note of Virginia M. Bartlett to Mary Wentworth Deering in the sum of $26,500; third, the payment of interest upon the Virginia M. Bartlett note of $598,825; fourth, in the reduction of the principal of said note; and fifth, any balance to be turned over to Virginia M. Bartlett.

The said decree reserved for determination, and to be covered in a supplemental decree, the question of the fees to be allowed to the several attorneys participating in the litigation and to the guardian ad litem. Pursuant to that reservation and to special hearing had and evidence introduced, a supplemental decree was filed December 3, 1923, in and by which the court awarded to the appellants, Prosser and Roberts, for services as attorneys for Mary Wentworth Deering, the sum of $4,000, to appellant Roberts as guardian ad litem, $4,500, and to appellant Roberts $900 for services as attorney for Sarah M. Stevens, Helen Bartlett, and Noel S. Nunn, $300 for each. From that part of the supplemental decree making these allowances, the appeal is taken.

Appellants filed a request that:

"In passing upon the question of attorney's fees and allowances to be made in this matter, that the court make specific findings of fact, and upon such findings state conclusions of law, and in making such findings the court, by appropriate findings, find as to:

"(1) The ability, standing, skill and experience of the various attorneys employed, and as to the legal skill and ability of the guardian ad litem.

"(2) The necessity and demand for the services of the various attorneys.

"(3) The nature and character of the controversy, the questions involved therein, and the importance of the litigation.

"(4) The responsibility assumed.

"(5) The time and labor expended by each of said attorneys and guardian ad litem, and the benefits derived therefrom.

"(6) The amount involved in the litigation.

"(7) The result attained by reason of the services of the various parties to be compensated by order of the court.

"(8) And any other circumstances attending the cause which, according to established usage, will serve as a guide in determining what is a proper charge.

"(9) That the court in finding as above requested, make separate findings as to each attorney employed in the case and as to the guardian ad litem."

This request the court denied, and upon this denial

error is assigned. The matters, concerning which the court refused to find specifically are the elements which, as stated in Williams v. Dockweiller, 19 N. M. 623, 145 P. 475, quoting Thornton on Attorneys at Law, 449, it is customary to consider in arriving at the reasonable value of an attorney's services. In the supplemental decree, the court recites the submission of evidence with reference to the character, extent, nature, and value of the services, a consideration by the court of such evidence, as well as the files, pleadings, exhibits, the arguments of counsel, and the law applicable and pertinent to the questions involved therein, familiarity with the course, character, and extent of the litigation, and with the questions involved therein, and with the services rendered by the various attorneys and the guardian ad litem. Upon these recitals, the court proceeds to fix a reasonable value of the services rendered by the several attorneys in the cause, and by the guardian ad litem.

[**1-3**] By section 4197, Code of 1915, it is provided:

"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 finding 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."

This statute was construed in Luna v. Coal R. Co., 16 N. M. 71, 113 P. 831, where the judgment was reversed because of the insufficiency of the findings. The findings in that case were criticised as being no more informative to the court than a general verdict, because in reviewing the judgment a search of the whole record would be required, after which it would be impossible to determine whether the facts found to be controlling were so considered by the trial court. The court remarked:

"In effect, the findings made are conclusions of law from facts which must have been found by the trial court in order to reach the conclusions announced, but which are not disclosed."

—and concluded that it must "either retry the case on all the evidence in the record, or remand it for specific findings of fact."

The statute was again considered in Morrow v. Martinez, 27 N. M. 354, 200 P. 1071, the former case being approved, and the doctrine established that the trial court is required 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 review its decisions on the same grounds as those on which it was made."

Counsel for appellees cite Fraser v. Bank, 18 N. M. 340, 137 P. 592, to the point that it is only the ultimate, as distinguished from the evidentiary, facts as to which findings are required. It is argued that there is no limit to the extent to which findings may be carried if, upon the request of any party, the court must find specifically as to every evidentiary fact about which inquiry has been made. It is contended, also, that in this case the ultimate fact to be found was the amount of a reasonable compensation for the services rendered.

As we understand the New Mexico doctrine, as expounded in the cases cited, the purpose of the statute is that this court, in the review of cases, tried without a jury, may be able to traverse the same ground as the lower court, reaching not a conclusion of its own, but a determination as to whether that of the trial court is justified in fact and in law. To that end the trial court must state in writing the facts upon which it bases its conclusions. We may then determine on appeal whether there is substantial evidence to support the findings of fact and whether the facts so found support the conclusion. As said in Morrow v. Martinez, supra:

"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."

For such purpose, it is apparent that it is the ultimate facts, rather than the evidentiary facts, which should be so found. It is equally apparent that a finding upon the very issue in the cause is not, in a case like this, a finding of ultimate fact, but a conclusion. Such a finding can only be reviewed by search of the whole record. In the present case, if the court arrived at its conclusion on the question of reasonable compensation without reference to the ability, standing, skill and experience of the appellants, and without reference to the time and labor expended, it failed to take into account important elements of a just award. Whether these essential considerations, these ultimate facts, were disregarded does not appear from the record. Both parties were entitled to have it appear—appellees, because the findings on these questions, if supported by substantial evidence, would be conclusive in support of the judgment; appellants, because if such findings were not supported by substantial evidence, or if, based upon such findings, the conclusion as to reasonable compensation amounted to an abuse of discretion, they would be entitled to a correction of the error.

Appellees urge that, as the appeal is from a supplemental decree, the original decree should be looked to for any findings omitted in the supplemental decree. It is admitted, however, that neither decree contains findings as to the standing, ability, skill and experience of the appellants, or as to the time and labor expended. It is urged further that it would have been impracticable, useless, and embarrassing for the court to have attempted a classification of all the attorneys employed in the case according to their standing, ability, skill and experience. We do not understand, however, that any such classfication was requested. Certainly no such classification was necessary. The questions were independent as to each attorney claiming compensation, and each attorney was entitled as to himself, to a determination of the ultimate facts and a fair and full consideration of them.

It is contended that there was not sufficient evi-

dence to enable the court to make findings as to the omitted facts. Without determining that question, we think that it was the court's duty to consider the evidence before it, including such matters as came within its judical knowledge. If the evdence was not deemed sufficient for findings, it should have been so stated. A mere refusal to make findings leaves us uninformed as to whether the evidence was considered insufficient, or whether the facts shown, or claimed to be shown, by such evidence were deemed to have no bearing on the result. It is urged that the appellants presented a request for a large number of specific findings, the majority of which related not to ultimate but to evidentiary facts, and that by so doing they precluded themselves from objecting that the court refused to examine the whole mass in order to select those requests properly presented. Whether this contention would have merit, if the requests in question had been buried or conceal within this mass of requests, we do not consider. The fact is, as appears by the record, that the eight requests under consideration were not a part of the mass, but were contained within a separate document, independently filed, and presumably so brought to the attention of the court.

[4] Having fully considered everything urged in support of the judgment as against the attack for failure to make findings, we cannot escape the conclusion that the case at bar falls within the doctrine of Luna v. Coal R. Co., supra, and Morrow v. Martinez, supra, and that the court erred in the respect charged. The judgment being tainted with error, must be reversed. Following the precedents set in the cases cited, the cause would be remanded for proper findings. It is within our judicial knowledge, however, that the trial judge, who heard the case, is no longer in office. His successor is no better situated than we to make the findings essential to a proper judgment. To remand for findings under such circumstances would seem impracticable. We therefore conclude that it is for us, upon a review of the whole record, including such

findings as are before us, to make such award to the appellants for their services as the evidence shall seem to warrant.

[5] Judge Roberts' services extended over a period of 14 or 15 months, he having been retained by the guardian of the minors in January, 1922, by the annuitants interested in the smaller trust somewhat later, and by Mrs. Deering in April, 1922. He at once commenced the work necessary to familiarize himself with the various questions of law and fact involved in the litigation, and at the time of the settlement had written a brief on each of the legal questions involved. which briefs are before us as exhibits. He ascertained at once that no inventory had been filed by the executor. There was on file a general appraisement showing the estate to consist of property of the value of $2,600,000. No accounting of any kind had been made by the executor. In September, 1922, he was furnished by the executor with a copy of an audit, which is before us as an exhibit, the examination of which involved the review and analysis of numerous and large receipts and disbursements and business transactions. To assist him in an understanding of this audit and a grasp of the condition of the estate, he found it necessary to employ his own auditor to whom he gave detailed written instructions as to the information which he desired, and with whom he was in constant communication. The character and amount of work done by appellant Roberts best appears from an examination of the accounts and of the legal briefs before us as evidence. From them it appears that Judge Roberts, as was his duty, left nothing undone to prepare himself at the anticipated trial vigorously to represent the interest of his several clients. The preparations evidence a high degree of skill and ability. As to his standing and broad experience, we may well take judicial notice, as he was for more than 10 years a member of this court. While he kept no daily record of his work upon this case, he testified quite in detail as to the time given by himself and by other lawyers

in his employ, in consultation, in investigation of the facts, in making briefs, and in assimilating the contents of those briefs, and in general preparation for the trial. He concluded that his own time and that of his assistants could not have been less than a total of 200 days.

In testifying as to the service performed, Judge Roberts attempted to classify the same with respect to the particular interests served, and particularly to distinguish as to the services rendered for the minors, which, although legal services, were rendered in his capacity as guardian ad litem. As above shown, the court made five separate awards, namely, as attorney for Helen Bartlett, for Noel S. Munn, for Sarah M. Stevens, and as guardian ad litem, and, jointly with appellant Prosser, as attorneys for Mrs. Deering. It was finally decreed, however, that all compensation should be paid from the residuary estate, for which purpose, with others, a separate fund was left in the hands of the executor. The main question, therefore, is the total amount properly payable. We believe that the practicable distinction is that between the services performed for all of his clients having to do with the construction of the will and the establishment and filling of the testamentary trusts, and those services having relation to the claim of the minors to interests in the Vermejo ranch, resulting in the creation of the $125,000 trust.

Judge Roberts himself placed a value of $25,000 upon all the services rendered by him, exclusive of those relating to the interest of the minors in the real estate. Three attorneys of standing testified as experts. Mr. Howard L. Bickley, now a member of this court, testified that, on the assumption that $600,000 had been brought into the trust as a result of the litigation, wholly or principally through efforts of Judge Roberts, 5 per cent of such sum would constitute a fair and reasonable compensation for such services. Mr. L. S. Wilson testified that such would be a fair and reasonable compensation, provided the sum stated was

brought into the trust wholly through the efforts of Judge Roberts. Mr. John Morrow, now representative in Congress from this state, testified that $25.000 would be just compensation for Judge Roberts' services as guardian ad litem, which would include advocacy of the claim of the minors to a three-fourths interest in the land, together with the fair proportion of the other services chargeable to the minors.

Judge Roberts considered the amounts so brought into the trust to be approximately $600,000, and it was upon this assumption that the experts testified. The actual amount for which Mrs. Bartlett gave her note to the trustees, with security, was $598,825. Counsel for appellees raise no question as to this amount having been recovered by the trustees as a result of the stipulated decree. It is urged, however, that while Judge Roberts' efforts conduced to the result, they were not solely responsible for it. This is doubtless true. It is even perhaps true, as contended by counsel that there is nothing in the record to show that the same result would not have been reached had Judge Roberts not appeared in the cause. It is to be remembered that the decree was stipulated; the interested parties, after several days' conference, agreeing on the settlement represented in the decree. What was said or done at the conference, or what positions were taken do not appear of record. It does appear, however, that Judge Roberts represented all parties beneficially interested in the establishment and filling of the trusts except one $600 annuitant.

All of them were made defendants by the executor and were found by the court to be necessary and proper parties. It is urged that a duty rested upon the trustees to take the necessary steps to secure the establishment and filling of the trusts. Apparently no such steps had been taken 21 months after probate of the will. In their answer, they took no position on the issues involved, assuming an indifferent attitude What part they played in the final adjustment does not appear. The executor himself was one of the trus-

tees, and the executor's attorney of record had become a trustee and had been substituted as a party before the compromise was reached. While the executor, by his complaint, took the position that Mrs. Bartlett should, as he had heretofore demanded of her, restore to him, on account of the sums advanced to herself and to Norman W. Bartlett and to William H. Bartlett, Jr., and the amount paid to settle the contest, enough to enable him to satisfy the trusts, and while he suggested that from an examination of the will it might well be supposed and construed as the testator's intent that the trusts should be preferred to the specific devises and bequests, yet the executor's personal interest in the construction of the will was simply to obtain an authoritative guide for his conduct and to insure his personal nonliability. On the question as to the liability of the executor for the large advances made, including the sum paid in settlement of the contest, the executor's interest and position were adversary. As to the general inquiry regarding the conduct of the executor in his handling of the affairs of the estate and the examination and auditing of his accounts, there was no doubt a community of interest with Mrs. Bartlett, and there were some conferences with her counsel. How much co-operation there may have been does not appear. Judge Roberts apparently was prepared, adequately and independently, to represent the interests of his clients on each issue involved, as appears by his testimony and by the exhibits referred to. There was no counsel engaged in the case except appellant Prosser, whose interests and contentions were parallel.

The analysis might be carried farther, but probably not with profit. From what has been said, it is apparent that this is a peculiar case. Precedents are not controlling. A mathematical solution is impossible. Just what effect each element, to be considered, should have on the result cannot be stated. The court can only exercise its sound discretion aided by its experience, the consideration of all facts and circumstances shown by the record, the expert testimony, and the contentions of the several parties. Having done so, we

conclude that appellant Roberts should have compensation for all services in this cause, except those with respect to the minors' interest in the real estate, in the sum of $15,000.

Appellant Prosser is a member of the law firm of Frear, Prosser, Anderson & Marx, of Honolulu. He is a member of the bar of the Supreme Court of the United States, of the state of New York, and of Hawaii. He was retained by Mrs. Deering in September, 1922. He at once obtained copies of the pleadings, and the office force of his firm, under his direction, carefully briefed the issues involved. He arrived at Santa Fe on March 20, 1923, where he conferred with Judge Roberts, as well as with counsel for Mrs. Bartlett. With these counsel, as well as with Mr. Paul, the auditor, he went over the executor's accounts. He was determined that it was important to find out the exact value of securities available to become a part of the trust funds. He went from Santa Fe to Chicago and there carefully investigated and obtained the fullest information to be had as to such values. He returned to Santa Fe and attended the conference at Raton, resulting in the settlement, intending when the case came to trial to appear as counsel of record for Mrs. Deering. It thus appears that he was under retainer some eight months, was away from his office more than one month, evclusive of the time required in travel from Honolulu to Santa Fe. His client was interested to the extent of a $1,500 annuity under the small trust, one-fourth of the income from the large trust after deduction of $5.000, and one-fourth of the corpus of this trust. His responsibility was shared with Judge Roberts. His brief is not before us. He made no separate claim for expenses, which must have been considerable. He testified that, considering all circumstances, $3,500 would be a fair allowance for the services of himself and his firm. A fuller showing as to his ability, standing, skill and experience, and of the work actually done in prepartion for trial would have been of assistance to us. We consider, however, that the record fully supports Mr. Prosser's estimate. Considering the char-

acter of the litigation, the large amounts involved, the large interests of his client, the long absence from the office, and the necessarily large expenses, we believe that any lesser amount would be inadequate.

Judge Roberts estimated at $7,500 the value of his services in connection with the claim of the minors to interests in the Vermejo ranch. Appellee Virginia M. Bartlett urges that this was not an essential issue in the case, being unnecessary to a construction of the will, or to the establishment or filling of the trust. As to this, it is sufficient to say that the issue was introduced by the executor's complaint, was accepted by this appellee in her answer, was actually considered and disposed of in the stipulated decree, and was found by the trial court to have been essential. By appellees, the executor and the trustees, it is urged that the allowance for this service is not to be made upon the assumption of the creation of a trust of the undoubted value of $125,000. It is pointed out that such trust "has not in fact been established, and whether it shall ever be established depends upon the contingency whether the real estate in Colfax county and 666 shares of stock of the Adams Cattle Company would yield a sufficient net amount to establish the trust, after payment of a mortgage of $598,825, plus taxes, accruing interest, and intervening expenses of maintenance,"

This perhaps correctly states the situation, except in one respect. By the decree the trust is to be created out of the net proceeds of the sale of the Vrmejo ranch and all of the stock and assets of the Adams Cattle Company. Six hundred sixty-six shares mentioned by counsel constitute but one-third of such stock. The stock of this company was appraised at $450,000 and the Vermejo ranch at $512,500, aggregating $962,500. This is subject to the $598,825 secured to the trustees against it. On the other hand, by the provisions of the settlement and decree, it is probable that there will be a substantial surplus in the hands of the trustees in the fund created for the expenses of administration, which will be applied by them in reduction of the secured note. From this trust the minors derive no income.

The corpus comes to them only at their mother's death and subject to be reduced by advancements, which may be made to her if her own resources should become insufficient for her necessary maintenance. The brief prepared upon the claimed rights of the minors in the real estate is elaborate and exhaustive. The time element is large. On the other hand, the question is simple, requiring the labor of research rather than the grasp of complicated and technical questions of law and fact as in the other branches of the litigation. The result might be stated as a compromise of a claimed present interest of the value of some $384,000 for a contingent and postponed interest of $125,000. The trial court found that this compromise was in the interest of the minors, and we do not question that. It is considered in its bearing upon the result achieved. In view of all this, we conclude that $3,000 should be allowed Judge Roberts for his services in this connection.

A number of other errors were assigned and presented in argument which require no consideration. However, lest this case be considered by the profession a precedent for a trial de novo, on the question of allowances to attorneys, we shall allude to one of them. Appellants contend that the inadequacy of the allowances made by the trial court constitutes an abuse of its discretion. It is urged by appellees that an allowance of compensation by a trial court is to such an extent discretionary that the decree will not be disturbed except for very persuasive reasons. We desire to make it plain that we do not question that principle. We hold that the principle is not applicable here. The record does not enable us to determine whether, or in what manner, the trial court exercised its discretion. Hence, we cannot review it. We review the record as we have because no other method is open to us.

For the error pointed out, those parts of the supplemental decree appealed from whereby appellant Roberts is allowed the sum of $4,500 for his services as guardian ad litem, as fees and expenses earned and in-

curred in representing the minor defendants, Mary Wentworth Bartlett and Virginia Bartlett, and the sum of $300 as attorney's fees as attorney for Sarah M. Stevens, and the sum of $300 as attorney's fees as attorney for Helen Bartlett, and the sum of $300 as attorney's fees as attorney for Noel S. Munn, and that part of said supplemental decree whereby appellants Roberts and Prosser are allowed for attorneys' fees and expenses as attorneys for Mary Wentworth Deering the total sum of $4,000 will be reversed. Upon our findings and conclusions herein, in lieu of such ports of said supplemental decree so reversed, allowance is made to appellant Roberts for all services performed in this cause in the sum of $18,000, and allowance is hereby made to appellant M. F. Prosser for all services. and expenses rendered and incurred in this cause in the sum of $3,500. The cause will be remanded, and the district court directed to modify the supplemental decree in accordance herewith, and it is so ordered.

PARKER, C. J., and HOLLOMAN, District Judge, concur.

[No. 2843. April 29, 1925.]

SUNMOUNT CO. v. NAGEL et al.

SYLLABUS BY THE COURT

1. Where there is substantial evidence to support the findings of fact, and such findings support the conclusions of law, which in turn support the judgment, such judgment cannot be disturbed on appeal.

2. A theory of the admissibility of rejected evidence, not advanced in the trial court, cannot be considered on appeal.

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

Suit by the Sunmount Company against John Nagel and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. J. Kenney and Geo. W. Prichard, both of Santa Fe, for appellants.

Renehan & Gilbert, of Santa Fe, for appellee.

OPINION OF THE COURT

WATSON, J. The Sunmount Company, appellee, claiming legal appropriation of the waters of the Arroyo de los Chamisos, and the right to divert the same to its property by means of a small pipe line running from its upper dam and of a larger pipe line running from its lower dam, and that appellants, having enjoyed a revocable license to maintain a branch to their premises from the smaller pipe line, on such license being revoked, refused to permit such branch to be disconnected, and that appellants, by means of drilling and explosives, have made a hole in appellee's lower dam, by means of which they were attempting, and intended to capture the waters impounded therein, filed its suit for an injunction restraining the continuance of such conduct and for damages accrued. The court made findings of fact, specific and general, and conclusions of law, upon which it awarded judgment of perpetual injunction and damages in the sum of $200.

Errors are assigned to the number of 67. In so far as these errors are submitted for our consideration, they are included within seven points, the substance of which seems fairly to be stated in appellee's brief as follows:

"(1) That Mathias Nagel, Sr., was a prior appropriator of underground water from the Arroyo Chamisos, through an inch and a quarter pipe, since 1893, and that the appellee's rights were servient.

"(2) That the court erred in its conclusion that the defendants should be restrained and enjoined, and that the one-inch pipe might be detached from the inch and a quarter main as a permissive right of revocable license and not vested.

"(3) That the court erred in enjoining the use of certain waters by the appellants, because they had acquired the right to use the said waters at least by prescription since 1892.

"(4) That the court erred in denying the appellants' right to show an agreement and arrangement between Gibson and Mitchell on the one hand and the elder Nagel on the other, for the division of the water under a purported contract dated September 10, 1902.

"(5) That the court erred in its finding of fact and con-

clusion of law that the elder Nagel had abandoned the four-inch pipe for more than four years prior to the institution of this suit, and for more than four years prior to the building of appellee's dam.

"(6) That there was no competent evidence to authorize the finding and award of damages.

"(7) That illegal evidence was admitted which swayed the court's judgment."

[1] As to points 1, 2, 3. 5, and 6, it is sufficient to say that the court's specific findings of fact are supported by substantial evidence, and are therefore, for the purposes of review, the facts in the case. These findings of fact are a sufficient basis for the conclusions of law and the resulting judgment. It would not be profitable to set forth herein the court's findings, nor to review the evidence upon which the same are based, nor to discuss the many propositions urged by counsel with respect thereto. We have, however, examined the record with care, concluding as above stated.

Considering appellant's fourth point, it appears that in 1902 a written contract had been entered into between appellee's predecessor in interest and appellant's ancestor, reciting ownership by the latter of water rights in said arroyo, claimed to be, in part at least, the rights herein involved, and granting to the former the right to pipe water from said arroyo on and to supply certain lands therein described, which said right should continue until such time as the objects set forth in a certain other contract therein expressly referred to had been accomplished, which last-mentioned contract was not produced, and concerning the contents of which both parties professed ignorance.

Appellants now claim that they were erroneously prevented, either from showing a subsequent parol modification of the contract of 1902, or from explaining, by parol evidence, a patent ambiguity in said contract in respect to the manner in which the waters, the subject-matter of the contract, were to be divided between the parties. This claim of error is based upon the fol-

lowing record, John Nagel, one of the defendants, being examined by Mr. Kenney, his counsel;

"Q. Were you present when the arrangements were made between Mr. Gibson and your father about the use of the water? A. Yes, sir.

"Q. Do you know what the arrangements were? A. The arrangement was that Mr. Gibson—he used to come over there when he was building Sunmount, and he made the arrangements for the water, he was to keep up the inch pipe, and he was to take half of the flow of water in the inch pipe, and we was to get the other half.

"By the Court: I want to ask a question, Mr. Kenney. Is what you are trying to prove verbally as to some arrangements between the senior Nagel and Mr. Gibson the same thing as is included in this contract introduced in evidence?

"By Mr. Kenney: I can't say; I exhibited that contract for the purpose of showing that at that early time the predecessors in interest to Sunmount acknowledged a prior right in Mr. Nagel.

"By the Court: What I was getting at is this, if it is the same thing, of course this is incompetent testimony; you can't prove verbally the contents of the written contract.

"A. I just want to say that father went over and stopped him.

"By Mr. Renehan: I move to strike out the statement of the witness as immaterial; and I move to strike out all the testimony on the subject of the conversation between himself and his father, or Mr. Gibson, which he heard at his father's house, on the subject of some division of the water through this pipe, because it is based on the contract, Exhibit B, and he can't contradict the contract which has been made.

"By the Court: Yes; the motion will be sustained.

"By Mr. Kenney: Exception."

[2] It appears from this record that counsel presented no such a claim at the trial as is now advanced, although given by the court the opportunity to state the purpose for which the testimony was offered. Whether the testimony was proper for the purposes now claimed we need not consider. It is apparent that it was excluded upon the theory that it was an attempt to violate the parol evidence rule, and that the court's attention was not called to any proper theory upon which the evidence could be admitted.

Under their point 7, appellants urge generally that

much improper evidence was admitted over their objection, which evidently influenced the trial court in the conclusions reached. A careful reading of the record discloses nothing to satisfy us that there is merit in such contention.

Finding no error, we must affirm the judgment, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2997. May 9, 1925.]

FISHERDICK et al v. SAN JUAN COUNTY BOARD OF EDUCATION

SYLLABUS BY THE COURT

1. Under chapter 7 of the School Code, chapter 148, Laws 1923, a proposal to issue and sell in April, 1924, school bonds voted in May, 1923, will not be enjoined for the sole reason of failure to issue and sell them on or before July 1, 1923.

2. Such construction of statute is to be favored as will not tend to defeat its useful purpose.

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

Suit by C. W. Fisherdick and others against the San Juan County Board of Education, to enjoin sale of school bonds. Judgment of dismissal, and plaintiffs appeal. Affirmed.

A. M. Edwards, of Santa Fe, and Geo. F. Bruington, of Aztec, for appellants.

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

OPINION OF THE COURT

WATSON, J. The issuance of $12,000 of school bonds was authorized at an election held May 12, 1923, in school district 18 of San Juan county. In April, 1924, the board of county commissioners caused publication of notice that the bonds so authorized would be sold on April 30, following. This suit was commenced by taxpayers of the district to enjoin the sale upon the sole ground that the board was without au-

thority to sell the bonds. Answer was filed by the board, and judgment was entered dismissing the complaint, from which the plaintiffs appealed.

[1] The case involves a consideration of certain provisions of the School Code, chapter 148, Laws of 1923, and particularly of Chapter 7, relating to school bonds. Section 702 provides that the right to issue bonds of rural districts shall be initiated by the filing of a petition with the board of county commissioners between March 1 and May 31, and at no other time. Section 703 provides that on receipt of the petition the board shall meet and determine the sufficiency thereof, and, if found sufficient, it shall order an election designating the time therefor, not less than 30 nor more than 50 days after such determination. Section 705 provides for 5 days' published and posted notice of the election. Section 709 provides for a canvass of the returns of the election within 10 days thereafter. Section 710 provides that within 5 days after the canvass the board shall publish a certificate of the canvass and of the result of the election. Section 711 provides that actions attacking the validity of the petition for the election, or the resolution approving it, may be commenced prior to 5 days preceding the date set for the election, and not thereafter; that the court shall designate the time for appearance and answer; and that such cases shall take precedence over all other court business. Section 712 provides that the suits to contest the validity of proceedings subsequent to the resolution of the board ordering the election, must be instituted within 10 days after publication of the result of the election. Section 714 provides that a transcript of all the proceedings shall be submitted to the Attorney General for approval or rejection. Section 715 provides that the Attorney General shall, after careful investigation of the legality of said election and proceedings, attach to the transcript his certificate of approval or rejection, and that, in case he approves such transcript authority to issue bonds under such election shall mature, and not otherwise, unless the validity of the bond proceedings has been established by prior court action; and further

provides "that bonds hereunder shall not be issued or sold after July first in *any* calendar year."

Appellants take the position that on July 1, 1923, following the election of May 12, 1923, the bonds not having been issued or sold, the power to sell ceased since it had not been exercised within the statutory time limit. They urge that it was the evident intent of the Legislature, by the several provisions referred to, that bonds should only be issued in the first half of the calendar year and that the provisions fixing the time for initiating and expediting the proceedings are calculated to accomplish the result before July 1 of the calendar year in which the election is held. They contend that the electors have a right to expect that the bonds which they have voted will be issued on or before the ensuing July 1, to the end that there may be a prompt accomplishment of the public purpose in view; that the favorable vote may have been influenced by such belief; that if the board may delay the issuance and sale of the bonds until the next calendar year, it may do so for any number of years, and until conditions have so changed that the proposed schoolhouse or other improvement may no longer be needed, or the proposed expenditure may no longer meet the approval of the electors.

The obvious objection to appellants' theory is that, while the Legislature might easily have limited expressly the issuance and sale of the bonds to the calendar year in which they were voted, it did not do so. By the letter of the statute, the time limit is on or before July 1 of *any* calendar year. It seems quite probable that the other provisions referred to were intended to make it possible, and it is of course usually desirable that the bonds be voted and sold in the same year. On the other hand, the interval between the permissable time of filing the petition and that of issuing the bonds is so short that there could be no assurance of being able to accomplish the result. If the petition were not filed until May 31, only the most prompt action on the part of the board of county commissioners and of the

Attorney General would permit the issuance and sale by July 1. If the petition were filed March 1, the earliest allowable date, any suit attacking the proceedings, however promptly disposed of in the district court, would accomplish delay beyond July 1, because of the right to appeal within six months. It is apparent that to construe the statute as appellants do would be to put it within the power of any dissatisfied taxpayer of the district, by bringing suit, or of the board of county commissioners or of the Attorney General, by delay unavoidable or otherwise, in any case, to defeat the purpose of the statute and the will of the majority of the electors. It is not to be presumed that such was the legislative intent. We therefore look further for an explanation of the peculiar provisions of this statute.

[2] Appellee calls attention to section 606, which provides that before July 1 of each year the state tax commission shall fix and certify the final budget allowances for the schools, and suggests that the requirement that the bonds shall not be issued after July 1 is intended to permit the adjustment of the budgets as affected by such sales. We note, from section 701, that the interest on school bonds is made payable semi-annually; and, from section 718, that an annual tax is to be levied in the district for payment of the interest. It no doubt conduces to the smooth working of the budget and taxation system if the authorities may know by July 1 what interest requirements must be met during the ensuing year. This seems a reasonable view of the legislative intent in requiring all bonds to be issued on or before July 1. If a petition were filed after May 31 it would be reasonably certain that the proceedings could not be completed in time for the issuance of bonds by July 1. Hence the filing of petitions after that date is not allowed. Our examination of the statute has not disclosed a reason why petitions are not to be filed before March 1. If this limitation has any bearing on the inquiry, it would seem to indicate a legislative intent to limit the whole proceedings to as short a time as possible, thus giving some color to appellants' contentions. If such intent were clear, it would be our

duty to give effect to it. Being doubtful and purely speculative, we do not think it compels, or would support, a construction of the statute which in many, if not in most cases, would defeat its useful and necessary purpose. The record before us furnishes no clue to the cause of the delay. Assume that it was because of the deliberate purpose of the board of county commissioners to defect the proceedings. Had mandamus proceedings been brought against such board to compel its action, would it have been sufficient answer on the part of the board to allege merely that the statutory time for the issuance of the bonds had passed? We do not think so. So to hold would be, in effect, to confer the veto power upon the board of county commissioners. If that board could be compelled to sell the bonds, it may do so voluntarily. Township of Chickaming v. Carpenter, 106 U. S. 663, 1 S. Ct. 620, 27 L. Ed. 307.

It is our conclusion that school bonds may not be issued after July 1 and before January 1 of the succeeding year; that the several statutory provisions referred to are intended to expedite the procedure so that they may be ready for issuance the same year in which voted, but that, if not so issued, in the absence of any other objection, they may be issued the succeeding year. In our view, it was not the legislative intent that the will of the electors, lawfully expressed, should be defeated by mere unavoidable delays or obstructionist tactics. Undoubtedly the electors, after voting the bonds, may expect, and are entitled to, a reasonable dispatch in the business of negotiating them. In a situation of refusal to act, or of unreasonable delay amounting to refusal, the remedy by mandamus is available. The supposed case of an attempt to sell bonds several years after the election authorizing them, and under changed conditions, can be dealt with only when it arises. We do not think the possibility of such a situation should control our decision here.

The judgment, being consistent with the views herein expressed, should be affirmed, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[Nos. 2658, 2659. June 8, 1925]

BLANCHARD v. STATE ex rel. WALLACE (two cases).

SYLLABUS BY THE COURT

1. In a proceeding under the Neglected and Dependent Children's Act (chapter 85, Laws of 1917), an information charging neglect and dependency in the language of the statute, not being demurred to, is sufficient to support jurisdiction.

2. The venue of proceedings, under Neglected and Dependent Children's Act (chapter 85, Laws of 1917), is the county where the child is found.

3. Judgment awarding custody of illegitimate children to parents, by adoption, in habeas corpus proceedings, instituted by putative father, attacking the adoption as invalid for lack of notice to him, is not a bar to proceedings by state, under chapter 85, Laws of 1917.

4. In proceedings, chapter 85, Laws of 1917, an order for temporary care and custody of the children, and restricting their communication with their parents for adoption, is not an abuse of discretion.

5. In proceedings, under chapter 85, Laws of 1917, the court, having found a child to be neglected and dependent, may permit it to be adopted by a nonresident of the state.

6. Evidence found sufficient, if believed, to support finding of neglect and dependency, under chapter 85, Laws of 1917.

Error to District Court, Chavez County; Brice, Judge.

Proceedings by the State, on the relation of Pauline Wallace, opposed by Francis L. Blanchard, and by the State, on the relation of Hazel Mae Wallace, opposed by William E. Blanchard; both proceedings being under the Neglected and Dependent Children's Act (Laws 1917, c. 85). Proceedings consolidated for trial and for hearing on appeal. Judgment that relators were dependent and neglected, and ordering their adoption, and William E. Blanchard and Francis L. Blanchard bring error. Affirmed.

See, also, 29 N. M. 584, 224 P. 1047.

C. C. Catron, of Santa Fe, Ed S. Gibbany, of Ros-

well, and H. B. Hamilton, of Carrizozo, for plaintiffs in error.

Renehan & Gilbert, of Santa Fe, for defendant in error.

OPINION OF THE COURT

WATSON, J. Under chapter 85, Laws of 1917, providing for the care, treatment, control, and disposition of neglected and dependent children, proceedings were had in the district court of Chaves county affecting Hazel Mae Wallace, a female child then of the age of 14 years, and other proceedings affecting Pauline Wallace, a female child then of the age of 12 years. These proceedings were consolidated for trial, and have been consolidated for hearing in this court. See Blanchard v. State ex rel. Wallace, 29 N. M. 584, 224 P. 1047, where certain motions were disposed of.

The lower court adjudged the two children to be dependent and neglected within the meaning of the statute, declared them to be wards of the court, and permitted and ordered their adoption by one Elizabeth J. Kaiser, a resident of California. Writs of error were sued out by William E. Blanchard, father, by adoption, of Hazel Mae Wallace, and by Francis L. Blanchard, father, by adoption, of Pauline Wallace.

[1] The proceedings were commenced by information, filed by the district attorney, alleging in each case:

"That said child has not proper parental care or guardianship, has no responsible parent or guardian, and her home is one where, by reason of neglect, abuse, mistreatment, cruelty, or depravity on the part of a pretended parent, is an unfit place for her."

The information in each case is based upon and refers to an affidavit filed by a citizen, in which affidavit the same allegations are made, together with certain other facts more specific. It is urged by plaintiffs in error that the court was without jurisdiction of the proceedings, because neither the information nor the affidavit stated a case under the statute. Section 2 of the act defines a neglected and dependent child as:

"Any child, of either sex, under the age of sixteen years, who * * * has not proper parental care or guardianship; * * * or who has no responsible parent or guardian, or who has a home which by reason of neglect abuse, mistreatment, cruelty or depravity on the part of its parents or guardians or the person in whose care it may be, is an unfit place for such child."

The information was not demurred to, and the question was not raised in the lower court until it was included in a motion for a rehearing. We think that the information was sufficient to support the jurisdiction of the court. Ex parte Gutierrez, 46 Cal. App. 94, 188 P. 1004.

[2] Plaintiffs in error contend, at least as to Hazel Mae Wallace, that as her residence and that of her parent by adoption were in Lincoln county, and as all of the facts and acts upon which the state relied to establish her neglected and dependent condition existed and occurred in that county, the district court of Chaves county, where the children were found, had no jurisdiction of the proceedings. It is contended that these are transitory actions which under section 5567, Code of 1915, must be tried where the parties reside. They further contend that the statutory provision for a jury trial fixes the venue in the county in which the alleged acts took place. It seems clear from section 3 of the act that the proceedings are to be had in the county in which the child is found. The Legislature having, by the act itself, fixed the venue, and its power so to do not being questioned, we know of no reason for consulting other statutes which might otherwise have determined the question.

The court made no specific written findings of fact. At the conclusion of the hearing, in announcing its decision, and again in overruling the motion for rehearing, the court commented to some extent upon the evidence, and it is now contended by the plaintiffs in error that the judgment of the neglected and dependent condition of the children is directly in conflict with these comments of the court. We have carefully considered this objection, and cannot sustain it.

In commenting upon the evidence at the close of the hearing, the court remarked:

"All of the surroundings at the ranch were not proper for little girls, I think, as evidenced from all the evidence in the case, and it does not appear from the testimony there is to be any different situation in the future."

Treating this as a finding of fact, it is contended that it was error because it was proven, and not questioned, that the ranch where the children had been living with William E. Blanchard during the time in question had been sold, and that they were thereafter to live elsewhere. Reading this remark with the context, we are satisfied that the court meant thereby merely that the evidence failed to show that there was likely to be any change in the real objectionable conditions existing. The contention is therefore without merit.

[3] The right to the custody of these little girls had been formerly tested by habeas corpus proceedings. instituted by James Day Wallace, their putative father, against the plaintiffs in error, respectively, as their parents by adoption. Those former proceedings reached this court and are reported under the title "Ex parte Wallace," 26 N. M. 181, 190 P. 1020. It is contended by plaintiffs in error that the present proceedings were instituted at the behest of Elizabeth J. Kaiser, the sister of the said James Day Wallace, for the sole purpose of renewing the litigation thus decided by this court, and were an attempt to overrule and nullify the former decision. In commenting upon the evidence at the close of the hearing, the court remarked:

"The primary mistake in this case was the adoption of little girls by men who have no families."

It is contended that this remark characterizes the court's view of the case; that it was because of this attitude of disapproval of the adoption of female children by bachelors that the court decided as it did; and that this controlling view was in conflict with the decision of this court in the habeas corpus case. That decision had nothing whatever to do with the propriety

or sound policy of such adoptions. It was decided only that the putative father of illegitimate children is not required to consent to their adoption, and is not entitled to notice of the proceedings. Therefore the putative father could not recover the custody of the children in a habeas corpus proceedings, based upon the supposed invalidity of the adoption proceedings, for lack of notice to him. We see nothing in that decision to foreclose or affect the present proceedings. We attach no significance to the remark of the court other than as a conclusion reached from the evidence in the case. The record discloses that full recognition was given to the legal effect of the decision in the habeas corpus case. That the same persons have shown an interest in both proceedings is but natural.

[4] Upon the filing of the information, an order was made by the court providing for the temporary care and custody of the children and restricting their communication with any of the interested parties; the purpose apparently being to protect the children from undue influence from any source which might affect the testimony they were thereafter to give. This order and the provisions therein made are claimed by plaintiffs in error to have been prejudicial to them, and to constitute an abuse of the court's discretion. After considering all the circumstances existing, we are unable to agree with this contention.

[5] It is claimed that the court erred in permitting the adoption of these children by a nonresident of the state. This claim is based solely on section 19, Code of 1915, being section 7 of chapter 32, laws of 1893, relating to the adoption of children, in which it is provided that a person seeking to adopt a child must file a petition in the probate court of the county in which such person resides. It is urged that the former statute limits the right of petition to residents of the state, and that it is not to be supposed that in the adoption of the later statute the Legislature intended to provide otherwise. Defendants in error contend that the jurisdiction of the district court, under chapter 85, to permit adoption by any individual is

not restricted by the earlier provision. They also contend that even under the earlier provision a temporary residence in the county, such as that of Mrs. Kaiser, will support jurisdiction. To this point they cite Wolf's Appeal (Pa.) 13 A. 760; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; Rizo v. Burruel, 23 Ariz. 137, 202 P. 234, 19 A. L. R. 823; 1 R. C. L. 603. We think it unnecessary to consider this contention. Granting that the jurisdiction of the probate court can be invoked only by a permanent resident of the county, it does not follow that this limits the jurisdiction of the district court, under chapter 85, section 3 of which provides that the proceedings are to be had in the county where the child is found. To hold that only a resident of the county where the child is found could qualify as an applicant to adopt the child would unreasonably and unnecessarily restrict the operation of the act, the purpose of which is to promote the welfare of the child. This assignment must therefore be overruled.

[**6**] Plaintiffs in error contend that the evidence does not support the finding that the children were neglected and dependent within the meaning of the statute. They especially urge that the findings must be based largely upon the testimony of the children themselves, and cite Jones on Evidence, § 722, to the point that such evidence is to be received and weighed with great caution. We are impressed, as was the trial judge, with the responsibility of determining the custody of these young girls. Having also in view the legal rights of the adoptive parents, as declared in the former decision, we have reviewed the evidence in this case with care. It would serve no useful purpose to detail it here. It is not for us to weigh it wherein the facts are in dispute. That, under our system, is peculiarly within the province of the trial judge who heard it. The testimony of the children is not without corroboration and, if believed, it fully justified the findings.

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

PARKER, C. J., and BICKLEY, J., concur.

[No. 2802. July 6, 1925]

BOOTH v. GROSS, KELLY & CO.

SYLLABUS BY THE COURT

1. Defendant corporation promised plaintiff that he should enjoy as part of his compensation as employee, as he had been doing, the equivalent of the regular dividend on $5,000 stock. Certain earnings were divided among the stockholders as a stock dividend, no portion of which was awarded to plaintiff. Plaintiff had received the equivalent of a 12 per cent. dividend on $5,000 stock uniformly for many years. Plaintiff claimed that he was entitled to share in all dividends declared from earnings, and that stock dividends are embraced within the term "regular dividends." The trial court sustained a demurrer to plaintiff's evidence, and rendered judgment for defendant. No findings of fact or law were made or requested. The record, which contains all the evidence, has been examined, and the judgment is affirmed.

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

Action by Wilmoth H. Booth against Gross, Kelley & Co., a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

A. B. McMillen, of Albuquerque for appellant.

O. O. Askren, of East Las Vegas, for appellee.

OPINION OF THE COURT

BICKLEY, J. [**1**] Plaintiff (appellant) brought suit against defendant (appellee) on a certain contract wherein, according to plaintiff's allegations, he was to receive a certain fixed salary and, in addition thereto, the equivalent of the regular dividends on $5,000 of stock of the defendant company to be declared by said company each year during the employment of plaintiff with the defendant company.

By paragraph 3 of plaintiff's complaint plaintiff alleged further that he was to have compensation over and above the stated salary in a sum to be fixed upon the success and earnings of said corporation; that only a

portion of the earnings was declared as dividends; and that the plaintiff was paid only a small portion of the compensation he would be entitled to upon the dividend actually declared; and that plaintiff had been paid nothing on account of the earnings made by said defendant which had not been distributed in the way of dividends.

The defendant admitted that the plaintiff was employed by the company as alleged, and that he was to receive a fixed salary for his services, and denied all of the remaining allegations of the plaintiff's complaint except that it had made large earnings during the period referred to, and that it had declared only a portion thereof as dividends, and also admitted that plaintiff had not been paid anything on account of such earnings not distributed as dividends.

The case was tried by the court without a jury, and at the conclusion of the plaintiff's testimony a demurrer to the evidence was interposed by the defendant, and said demurrer was sustained by the trial court, and judgment rendered for the defendant. No findings of fact or conclusions of law were requested or made.

The case is here on appeal on the record, which contains the evidence introduced at the trial.

Without the aid of findings of fact or conclusions of law we have examined the record of the evidence with a view of determining whether the judgment may be sustained upon any reasonable theory upon which the trial court might have decided the case. We find that in 1909 the plaintiff wrote the president and directors of the defendant company a letter asking that there should be issued to him some of the stock of the defendant company, arguing that he was entitled to this privilege on account of his long service with the company. Defendant, through its officer, answered this letter, stating that the policy of the company did not admit of any further issuance of stock in the company to its employes, and further stated:

"The directors did decide, however, that you should enjoy

as you have been doing, the equivalent of the regular dividend on $5,000 stock, and we felt that you would appreciate this."

The evidence showed that plaintiff had received the equivalent of 12 per cent. dividend on $5,000 worth of stock during all of the years he had worked for the defendant company from 1909 to 1917, inclusive.

In 1909 the defendant company was incorporated for $300,000, and during the year 1916 the capital stock was increased to $1,000,000, divided into 10,000 shares of the par value of $100 per share; that on said date there was a large reserve or surplus in the treasury of the defendant company over and above the capital stock, which was set aside as a stock dividend, said sum being $502,715.66; that said surplus was declared to be a stock dividend, and the stockholders were given additional stock in proportion to their then stockholdings, being required to pay in cash or with their notes the balance so as to bring the capital stock up to the increased amount of $1,000,000. The sole contention of the plaintiff in this case is that he did not receive his proportion of this stock dividend. The plaintiff contends, and doubtless contended in the trial court, that the stock dividend, being derived from the profits of the business, was embraced within the phrase "regular dividend."

The evidence shows that no promise had been made by the defendant to the plaintiff respecting dividends, except that plaintiff should receive, as he had been receiving, "the equivalent of the regular dividend on $5,000 stock,". In our opinion, stock dividends are extraordinary dividends, and not included within the phrase "regular dividends." This view finds support in many of the authorities.

The kinds and classification of dividends are set forth in Thompson on Corporations, § 5271, as follows:

"The common understanding among business men and holders of corporation stock is that a dividend, the fund set apart for distribution, is money, and that a distribution to be made of the fund is paid out in cash. But the courts and the law writers recognize different kinds of dividends. These are usually as follows: (a) A dividend payable in cash. (b) a

dividend payable in stock: (c) a dividend payable in bonds; (d) a scrip dividend; (e) a dividend payable in property; and (f) an interest dividend. Nothing more need to be said as to the first kind, except that the general rule is that all dividends are payable in cash, unless there is some special arrangement or agreement by which the stockholders consent to receive some of the other kind in lieu of cash. * * * "

[**2, 3**] "Profits" and "dividends" of a corporation are not necessarily synonymous terms. Boothe v. Summit Coal Mining Co., 55 Wash. 167, 104 P. 207, 212, 19 Ann. Cas. 1255, citing City of Alleghany v. Pittsburgh A. & M. Pass. R. Co., 179 Pa. 414, 36 A. 161.

And:

"The term 'profit' has a larger meaning than 'dividends,' and covers benefits of any kind, excess of value over cost, acquisition beyond expenditure, gain or advance." Simcoke v. Sayre, 148 Iowa, 132, 126 N. W. 816, 817.

" 'A stock dividend is merely an increase in the number of shares; the increased number representing the same property that was represented by the smaller number of shares. One who sells stock, reserving the dividend that may be declared by a certain date, cannot claim the stock dividend thus declared, but only the cash dividend'. Kaufman v. Charlottesville Woolen Mills, 93 Va. 673, 25 S. E. 1003.

"It is held by the Illinois court that: 'A stock dividend gives the stockholder merely an evidence of the additions made by the corporation to its own capital. It adds nothing to the capital of the corporation nor to the capital of the shareholder.'. De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587. 'A stock dividend is not in the ordinary sense a dividend; the latter being the distribution of profits to stockholders as the income from their investments. A stock dividend is merely an increase in the number of shares; the increased number representing exactly the same property that was represented by the smaller number of shares.' 7 Words and Phrases, p. 6664, and cases cited." Lancaster Trust Co. v. Mason, 152 N. C. 660, 68 S. E. 235, 236, 136 Am. St. Rep. 851.

There seems to be some conflict of authorities in the state courts as to when certain dividends are properly classified as cash dividends or when as stock dividends. The rule laid down by the Supreme Court of the United States for determining how a dividend shall be regarded is that it must be determined entirely from the intention of the corporation when it is declared, as expressed by its vote or resolution, and that

the discretion thus exercised by the directors, in the absence of fraud or bad faith, is not the subject of judicial investigation. See Gibbons v. Mahon, 136 U. S. 549, 10 S. Ct. 1057, 34 L. Ed. 525.

From the record it appears that the officers and directors of the defendant corporation had managed its affairs with conspicuous ability and success, and we must assume that they were men of high intelligence, and it seems unlikely that they would deny plaintiff's request for the purchase of stock in the company and at the same time agree to give him each year the earnings on the amount of stock he desired to purchase. It would have been far more advantageous to plaintiff to have enjoyed the earnings on the stock without purchasing it than to be the owner thereof, because thus he would have enjoyed the benefits of the stock without having any of its responsibilities, and without being out the interest on the investment.

We think that under all of the circumstances as disclosed from the record the judgment of the lower court should be affirmed, and it is so ordered.

PARKER, C. J., and WATSON, J., concur.

[No. 3072. July 30, 1925]

D. M. MILLER & CO. v. SLEASE et al.

SYLLABUS BY THE COURT

1. Uuder section 1, c, 43, Laws of 1917, an attempted taking or granting of an appeal prior to entry of judgment is premature.

2. A party, moving to docket and affirm under section 22, c. 43, Laws of 1917, must present a transcript containing an order allowing an appeal from judgment.

3. The record showing a judgment dated February 5th and filed February 25th, reciting that an appeal was prayed for in open court, and "is hereby granted", a motion to docket and affirm, filed May 11th, must be overruled, since, if the order granting the appeal is given effect as of February 5th, the appeal was premature, and, if given effect as of February 25th, the motion was premature.

Appeal from District Court, Sierra County; H. P. Owen, Judge.

Action by D. M. Miller & Co., a copartnership, against Wm. D. Slease and others. Judgment for defendants, and plaintiffs appeal. On motion to docket and affirm. Motion overruled.

H. A. Wolford, of Hillsboro, and J. G. Fitch, of Socorro, for appellants.

Edward D. Tittmann, of El Paso, Tex., for appellees.

OPINION OF THE COURT

WATSON, J. By skeleton transcript filed May 11, 1925, it appears that on February 25, 1925, there was filed in the office of the clerk of the district court a judgment in favor of plaintiffs, concluding as follows:

"* * * To all of which defendants * * * duly except, and pray an appeal in open court, which said appeal is hereby granted.

"Done at Hillsboro, N. Mex., this 5th day of February, 1925."

On such skeleton transcript, plaintiffs move to docket and affirm, on the ground of failure to perfect the appeal by the filing of transcripts within 80 days after taking of the appeal. See sections 21 and 22, c. 43, Laws of 1917.

It is plaintiffs' contention that, from the record before us, the appeal was "taken" February 5th, and hence the time for filing transcripts had passed on May 11th. Defendants contend that the appeal was not taken until February 25th, and hence the time had not passed.

[**1**, **2**] The parties seem to agree that the time within which an appeal may be taken begins to run from the entry to judgment. Section 1, c. 43, Laws of 1917. In this they are doubtless right. That date is shown to be February 25th. Appeals are taken from judgments. Until judgment is entered, there can be no appeal. Section 1, c. 43, Laws of 1917. Therefore, if plaintiffs are right in their contention

as to the date, there was merely a premature attempt to appeal. The right to docket and affirm is dependent on the production and filing of a transcript containing, inter alia, the order allowing the appeal. Section 22, c. 43, Laws of 1917. Under plaintiffs' own theory, therefore, their motion cannot be sustained.

We do not intend to hold that this record shows an abortive attempt to take an appeal effective as of February 5th. It may be well argued that an appeal was taken effective as of February 25th. It is to be observed that, while the record shows that the appeal was prayed for in open court, it does not purport to have been then and there granted. It was "hereby granted." It could be argued that the granting was in connection with, and intended to be effective with, the judgment. Under plaintiffs' theory, if 80 days, instead of 20, had elapsed between the teste and the entry of the combined judgment and order granting the appeal, there would have been no time left within which to prepare transcripts for the perfection of the appeal. Again, we might hesitate to hold that the single document set out in the transcript is effective in its character as a judgment from February 25th, and in its character as an order granting an appeal from February 5th.

[3] These questions which have been suggested in argument we need not here decide, nor need we decide whether an appeal is "taken" when applied for, or when an order granting it is filed. The latter question was raised in Simmers v. Boyd, 26 N. M. 208, 190 P. 732, but not passed upon. We merely decide now that under neither theory can plaintiffs sustain their motion. If the appeal was "taken" February 25th, the motion was prematurely filed. If the appeal was attempted to be "taken" and intended to be granted on February 5th, it was premature, and is not such an appeal as admits of an affirmance of the judgment.

The motion should therefore be overruled, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

STATE v. VINCIONI

[No. 2990. March 11, 1925. On Rehearing Sept. 4, 1925.]

SYLLABUS BY THE COURT

1. Mining property posted by the lessee and operator under sections 3516 and 3517, Code of 1915, included a camp with dwelling houses occupied by the employes as tenants, for ingress and egress to and from which the streets of the camp were necessarily used. In the absence of proof of restriction upon the right of the tenants to use the streets, one using them to make delivery of goods which the tenants have ordered from him does not incur the statutory penalty for entering such posted property without permission.

2. Under a complaint charging entry, without permission, of premises operated and posted by Phelps-Dodge Corporation, it was a variance to prove a posting by Stag Canyon Fuel Company.

3. Sections 3516 and 3517, Code of 1915, contemplated posting of mining property and its consequences only in case the property is being operated, and then by the party operating, whether owner or lessee.

ON REHEARING

4. A corporation operating mining property posted under sections 3516 and 3517, Code of 1915, which property included a camp, with dwelling houses, solely for the use of employes, for ingress and egress to and from which houses the streets of the camp were necessarily used, required each tenant to sign a lease prepared by it containing restrictions upon the use and occupation of the premises, but not referring to the streets. **Held,** that such lease should be construed strictly against the lessor, and as presumably containing within its express terms all intended restrictions, and restrictions upon the use of the streets not expressed are not to be implied. **Held,** further, that one on the street at the invitation and upon such business of the tenant as does not conflict with the restrictions of the lease, is there under the lease, and not in violation of the statute.

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

Celestino Vincioni was convicted before a justice of the peace, and again in district court, of trespass on posted mining property, and he appeals. Reversed and remanded, with directions.

A. C. Voorhees and Henry A. Kiker, both of Raton, for appellant.

Milton J. Helmick, Atty. Gen., and J. W. Armstrong, Asst. Atty. Gen. (Ellenwood & Ross and Crampton & Darden, of Raton, of counsel,) for the State.

OPINION OF THE COURT

WATSON, J. Appellant was convicted before a justice of the peace and again in the district court of Colfax county of a violation of sections 3516 and 3517 of the New Mexico Statutes annotated, Code of 1915, authorizing the owner or lessee of mining property desiring to operate the same and to prevent trespassers from entering thereon to post notices warning all persons from entering upon the said land without the consent of the owner or lessee, and making it thereafter unlawful for any person to enter upon said premises without such permission. The complaint alleged that the Phelps-Dodge Corporation was operating and prosecuting mining upon the property, had duly posted the same, and that the appellant had unlawfully entered and trespassed thereon without permission from the Phelps-Dodge Corporation.

At the close of the state's case, appellant submitted a motion for a directed verdict and here complains of the overruling of that motion. At that time there was testimony showing, or tending to show, the following facts: The property in question was owned by the Stag Canyon Fuel Company and operated by and under lease to the Phelps-Dodge Corporation. On the property in question was situated the mining camp of Dawson, containing a large number of dwelling houses, a store, bank, schoolhouse, post office, railroad station, hospital, and with streets as in the ordinary town, all of which property was owned and leased as above stated. All of the dwelling houses in the camp were occupied by the employees of the Phelps-Dodge Corporation, as tenants; the streets being necessarily used in going from place to place in the camp, in going to their work, and to reach the outside world. It was not the custom to require traveling men, farmers trading at the store, nor persons coming to buy coal from the corporation to obtain special permission to enter the property; but business

men from Raton and other points were required to register with the clerk. Evidence was received of the posting of notices in the name of the Stag Canyon Fuel Company. To this appellant objected on the ground of variance, and also upon the ground that, under the statute, it is only the party operating the property who may post it. There was evidence that appellant had knowledge of these notices. There was also evidence of posting in the name of the Phelps-Dodge Corporation, but none of knowledge thereof by appellant. Some time before his arrest, appellant appeared and made application for a permit to market or peddle grapes, which request was denied. He thereafter obtained orders for grapes from some of the tenants of the company houses, and, while proceeding to deliver the grapes thus ordered, was arrested on the principal street of the camp.

[**1**] 1. Upon this record appellant contends that he was entitled to a direct verdict, citing and relying upon Commonwealth v. Burford, 225 Pa. 93, 73 A. 1064. In that case it was held that a statute somewhat similar to ours did not apply under a state of facts quite similar to the facts under consideration. The court reasoned that the lease of a house entirely surrounded by the property of the lessor, situated upon the streets only by means of which the tenant could have ingress and egress to and from the demised house, implied the right to free use of such streets in the absence of any provisions in the lease limiting his right to the use thereof; and, further, since the right to use the streets was appurtenant to the house, it included not only the right of the lessee to use it, but that it might be used by his family and those who, with his permission, visited his home for any lawful purpose.

It is suggested by appellee that the Burford Case was modified by the more recent case of Harris v. Keystone Coal & Coke Co., 255 Pa. 372, 100 A. 130, but in the latter it appears that there had been inserted in the lease controlling reservations regarding the use of the streets. Aside from this, learned counsel for the state do not question the soundness of the

doctrine or decision of the Burford Case, but confine their argument to an attempt to establish controlling distinctions. We may, therefore, safely follow that decision unless some such distinction is shown.

It is pointed out that there was no evidence, as there was in the Burford Case, to show that the employees were paying rent for the company houses occupied by them. But this point cannot be controlling. The necessity for ingress and egress arises from the occupancy, not from the payment of rent. The occupancy as tenants is shown. The right to the use of the streets follows. Any limitation or restriction on that right cannot be presumed, but should have been proven.

It is contended there was no evidence to show that appellant was delivering grapes to any one, or filling the orders of any one who lived upon the premises. The testimony to this point was given by a state's witness on cross-examination. The witness stated as a fact; "He was starting to unload his load, and he had orders for his carload of grapes in Dawson." On further cross-examination it appeared, it is true, that this fact was the conclusion of the witness, but cogent reasons were given by him on which he based the conclusion. In the absence of any objection, and being undisputed, it stands as a part of the state's case.

In the Burford Case, the defendant was delivering "necessary family supplies", while in the present case he was delivering wine grapes. Counsel point out this difference, but do not indicate what bearing it should have on the result. We do not recognize any distinction in principle here.

[2] 2, 3. It is contended that appellant, in going upon the street where he was arrested, could not have relied upon any permission or invitation from the company's tenants because of the fact that he had applied for permission to market or peddle grapes and had been refused, and because it was shown he had knowledge of the posted notices. It is to be observed that the notices of which appellant was shown to

have knowledge were those of the Stag Canyon Fuel Company. The introduction of these notices was objected to on the two grounds above stated, and error has been assigned on the ruling. We think that both objections were good. Under a complaint charging appellant with a misdemeanor for disregarding the notices of the Phelps-Dodge Corporation, it was clearly a variance to introduce notices of the Stag Canyon Fuel Company.

[3] Again, it seems plain that the statute contemplates posting and its consequences only in case the property is being operated, and then by the party operating, whether owner or lessee. Hence these notices of which appellant had knowledge were improperly in the case, and we have left for consideration only the fact that appellant applied for permission to market or peddle grapes. Standing alone, this fact does not exclude the theory of reliance by appellant on lawful invitation to the premises.

We conclude that the state rested without having established a prima facie case. Appellant was entitled to a directed verdict. To refuse it was error.

The judgment must therefore be reversed and remanded, with direction to discharge the accused, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

ON REHEARING

WATSON, J. By the opinion originally handed down, we reversed the judgment solely on the ground that the court erred, at the close of the state's case in chief, in overruling appellant's motion for a directed verdict. By motion for rehearing, the state makes the point that such error was waived when the appellant, instead of standing upon it, offered testimony in his defense. This point is now raised for the first time. In the original briefs the state not only failed to raise it, but joined in the discussion of the merits of the assignment.

[4] Appellee cites 17 C. J. 339, 38 Cyc. 1590, 26 R. C. L. 1083, Walker's Errors in Criminal Proceedings, 28, and many decisions. Appellant cites decisions, many of which are reviewed in note to Cincinnati Traction Co. v. Durack, 14 Ann. Cas. 222. We do not see substantial difference in the views of counsel. Neither counsel has cited any decision of this court. From a cursory search of our own reports, we find that error has been many times assigned in this court upon the refusal of the trial court to direct a verdict of not guilty on motion interposed at the close of the state's case. On one occasion (State v. Ellison, 19 N. M. 428, 144 P. 10) this court used language which might be urged as contrary to the doctrine of waiver urged by the state. On other occasions, such assignment was considered and overruled, because it was found that there was substantial evidence for the jury. State v. Wilson, 25 N. M. 439, 184 P. 531; State v. Taylor, 26 N. M. 429, 194 P. 368; State v. Ulibarri, 28 N. M. 107, 206 P. 510. On at least two occasions the assignment was considered and upheld, where the defendant did not stand upon his motion, but interposed his defense. State v. Corral et al., 27 N. M. 535, 203 P. 533; State v. Craig, 28 N. M. 110, 206 P. 513. In none of these cases does it appear that the question of waiver was either urged or considered.

The weight of the authorities and the reasoning of the decisions supporting the doctrine of waiver impress us sufficiently that, if necessary to the determination of this case, we should give to the question the most careful consideration. It is unnecessary, however, in view of the conclusion which we have reached upon this motion for rehearing. At the close of the entire case, appellant moved the court for a directed verdict in his favor because of the insufficiency of the evidence to sustain a verdict against him, and he here urges as error the overruling of that motion. At appellee's earnest insistence, we have reviewed the evidence in its entirety, including the rebuttal, and are of the opinion that the same would not support a ver-

dict of guilty, and that the court erred in overruling appellant's motion made at the close of the case.

In the additional evidence adduced after the state first rested, we find but one matter material to this discussion. The state offered evidence tending to show that the tenants and employees of the company held under leases containing the following provisions:

"That said lessor hereby leases to the said lessee * * * those improvements, consisting of a certain dwelling * * * and the outbuildings appurtenant thereto, together with the surface ground occupied by said buildings and improvements. * * * for the temporary occupation of the lessee and his family only, and to provide him a temporary dwelling place during his employment with the lessor."

"This lease is for the term of one month only, and thereafter from month to month until terminated by the lessee, and is subject to the absolute right of the lessor to terminate the same and all rights of the lessee thereunder at any time before expiration, which right of termination is expressly reserved to the lessor. * * * The lessee shall not sublet the premises or any part thereof, or assign this lease, nor use or permit the premises to be used for any purpose except for a dwelling place, nor take any cotenants, or any boarders, who are not the employees of the lessor, nor permit any person or persons, other than members of the family of the lessee, to use or occupy said premises, except with the written consent of the lessor first had and obtained. It is understood and agreed that the lessor owns and uses the leased premises herein described as a part of its plant, and in connection with the operation of its mines, and for the purpose of leasing only to those whose occupation will facilitate and be for the convenience of such operations."

Upon these provisions the state relies to distinguish this case from Commonwealth v. Burford, 225 Pa. 93, 73 A. 1064, claiming that, in view of these restrictions in the leases, Harris v. Keystone Coal & C. Co., 255 Pa. 372, 100 A. 130, becomes applicable. In the Burford Case the leases, in so far as described, are very much like the leases here involved. The court said:

"The owners leased the several houses to various tenants. The written lease in each case was for the term of one month; it designated the lessee, the amount of rent to be paid, the number by which the house was known, provided for the payment of the rent punctually, in case of holding over, the tenancy should be for another month and from month to

month. The written lease contained no reference to any public or private way."

In the Harris Case it is said with reference to the lease there in question:

"It declares in part that 'any and all paved streets or alleys or other highways in and about the said premises are private roads and are the private property' of the defendant company, and reserves to the company 'the right and authority to keep out and away from said premises any person or persons whom it may deem necessary or expedient in the exercise of this reserved right of policing the premises and for the peace, comfort, and safety of the defendant company's tenants."

What is there in the lease here in question which can be construed as restricting the right of the tenant to use the streets of the town or camp in the usual manner of use by town dwellers? The streets are not mentioned, nor the appurtenances. The "premises" are not to be sublet, nor the lease assigned. No boarders are to be received except the employees of the lessor. None but members of the tenants' families are to be allowed to use or occupy the premises without first obtaining the written consent of the lessor.

Certainly some use of the streets was anticipated. It is fair, at least, to assume an intention that the employee may use them in going to and from his work. Other necessary uses suggest themselves. The wife may have business at the store and at the post office. The children must attend school. The family may have occasion to visit the outside world, and must use the streets to reach the railroad station or the public roads. These are only ordinary human necessities, and must have been anticipated. But there are other necessary and usual contacts with the outside world which require the ingress of those with whom the tenant and his family have business. Sickness may require the physician. Protection of life or property may require the peace officer. It would hardly do to say that the physician or the sheriff, summoned on such business, or the person delivering a purchase made by the tenant or his family, was being permitted to use or occupy the demised premises. Use and occupation is a term every day employed in dealing

with the relation and the law of landlord and tenant. If it has ever been so construed, appellee has failed to point out the occasions. If these visits of the physician, the sheriff, or the deliveryman cannot be said to violate the express prohibition against use and occupation of the premises by others than the family, how can they be said to be excluded by the lease, which contains no restrictions whatever as to the use of the streets?

Appellee urges that the provisions of the lease, the recitals therein, and the circumstances shown require a liberal construction, to give effect to the intention of the lessor to retain exclusive control over its streets. The leases are uniform. They are prepared by the lessor. Every tenant is required to contract in those terms. The contract is unusual in the restrictions upon the use of the demised premises. Familiar rules of construction require such a lease to be construed strictly against the lessor. The terms are dictated by it. The lessee has no voice. He can take the lease or leave it. Under such circumstances, why should we add by construction to the restrictions expressed? Should we not, rather, presume that the lessor, having the power and the opportunity, and fully alive to the conditions, has expressed in the lease all that it considers necessary for the protection of its property?

As pointed out in Commonwealth v. Burford, supra, the statute makes public and punishable what was theretofore a private wrong. It is designed merely for the protection of property. The owner may waive it as to the public in general by not posting. He may waive it as to particular persons by granting permission to enter. It does not affect his right to make such contract as he may see fit regarding the use. In this case the owner has seen fit to build a town upon it, and to lay out streets therein, and to lease the houses therein, upon terms implying the right of the tenants to the use of the streets, without incorporating in the contract any restriction upon such use. So doing, it has waived, or rather contracted away, the right to prohibit ordinary use of the streets by its tenants. One who is on the streets at the invitation and upon such

business of the tenant as does not conflict with the restrictions of the lease is there under the contract, and not in violation of the statute. Alabama Fuel & Iron Co. v. Courson, 212 Ala. 573, 103 So. 667, upon which appellee places great reliance, we do not consider in point.

Appellee suggests that our original opinion may justify an inference that it is necessary to a conviction that defendant be shown to have knowledge of the trespass notices. A reading of the opinion will disclose that what we said on the subject of appellant's knowledge was merely in answering a contention of the appellee. It is perhaps well to say, however, that we do not consider that question.

It is also suggested that our original opinion is ambiguous as to whether we reversed the case on the ground of variance. We did not. We held that notices posted by Stag Canyon Fuel Company were not admissible under a complaint alleging operation of the property by Phelps-Dodge Corporation. These were the only notices of which appellant was shown to have knowledge. In argument, appellee made a point of such knowledge. We merely excluded the notices from consideration on the ground of variance, which disposed of appellee's claim as to appellant's knowledge. It was error to admit the notices. Whether it was reversible error, in view of the subsequent proof of posting by Phelps-Dodge Corporation, we did not decide.

Having now considered, as appellee insists that we should, all evidence in the case, we reach the same conclusion as when we considered only the state's evidence in chief. Appellant was entitled to a directed verdict when the state finally rested, as well as when it first rested. We therefore adhere to our original disposition of the case.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2803. Sept. 4, 1925)

BOARD OF COM'RS OF BERNALILLO COUNTY et al. v. COORS, County Chairman, et al.

SYLLABUS BY THE COURT

Moot questions will not generally be decided.

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

Proceeding by Henry G. Coors, Jr., chairman of the Democratic Central Committee of Bernalillo County, and another, for mandamus to be directed to the Board of County Commissioners of Bernalillo County and others. Peremptory writ of mandamus granted, and respondents bring error. Writ of error dismissed.

C. J. Roberts, of Santa Fe, and F. E. Wood, of Albuquerque, for plaintiffs in error.

OPINION OF THE COURT

WATSON, J. October 28, 1922, an alternative writ of mandamus was issued and served upon the board of county commissioners of Bernalillo county, wherein it was recited that the relators (defendants in error) had, by petition, made it to appear that the two dominant political parties in the state of New Mexico and the county of Bernalillo were the Republican party and the Democratic party, and that relator H. G. Coors, Jr., was chairman of the Democratic central committee of Bernalillo county, and relator Zamora, the duly nominated Democratic candidate for sheriff of said county; that all of the county commissioners of said county were elected as candidates of the Democratic party; and that in selecting three election judges for each of the several precincts of the county for the general election, to be held November 7, 1922, from the lists of names submitted respectively by the county chairman of said two political parties, it was the duty of the board to have selected in each precinct two judges from the list submitted by relator Coors, as Democratic chairman, but that said board, in violation of its duty, had selected but one judge for each precinct from such list, selecting two other judges for

each precinct from the list submitted by the Republican chairman.

The respondent board and the members thereof (plaintiffs in error), on October 30, 1922, filed a return to the alternative writ in which they admitted the facts above set forth, but denied their alleged duty, asserted their discretion in the premises, and prayed that the alternative writ be quashed and the proceedings dismissed. Upon this alternative writ and return, judgment was entered on said October 30, 1922, granting peremptory writ of mandamus, requiring the respondent board to convene and revoke the appointment of one Republican judge in each precinct, and to appoint in each precinct one additional judge from the list furnished by the Democratic chairman.

November 4, 1922, the Chief Justice of this court granted writ of error and supersedas; the transcripts upon said writ of error having been filed herein February 14, 1923.

It is apparent from the foregoing statement that no substantial relief can be afforded in this case. It is admitted by plaintiffs in error that the question is now moot, but it is urged that in view of the public importance of the question involved, being the construction of section 1980, Code of 1915, we should proceed to consider and decide the cause. No briefs have been filed by defendants in error.

We do not believe that it is a proper or useful function of this court to decide moot questions. Yates et al. v. Vail et al., 29 N. M. 185, 221 P. 563. Passing the question whether any case could be of sufficient public importance to justify us in deciding it after it had become moot, we should, in any event, desire the aid to be had from argument or briefs of counsel. The question involved does not seem to possess sufficient importance at this time to warrant us in requesting such aid from counsel apparently no longer interested.

For the reasons stated, the writ of error will be dismissed.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3031. Sept. 4, 1925]

CHRISTIAN v. LOCKHART

SYLLABUS BY THE COURT

1. In a motion to dismiss appeal, by combining the ground of failure of citation with the ground "that it affirmatively appears from the record herein that said appellant has no interest in the subject-matter of the action, in which the decree appealed from herein was entered," appellee recognizes the appeal, appears generally, and waives citation.

2. Motion to dismiss appeal, on ground "that it affirmatively appears from the record herein that said appellant has no interest in the subject-matter of the action in which the decree appealed from herein was entered," denied, because better practice and more convenient for the court to determine such question when appeal submitted on merits.

3. Under section 36, c. 43, Laws 1917, the trial judge has no power to extend the time for settling and signing the bill of exceptions, unless application therefor is made at least 10 days prior to the return day of the appeal.

4. Under section 36, c. 43, Laws 1917, trial judge has no power to extend the time for settling and signing the bill of exceptions, unless praecipe for record has been filed within 30 days after appeal taken.

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

Action by R. V. Christian against Henry Lockhart. Judgment for plaintiff, and defendant appeals. On motion to dismiss appeal and to strike out bill of exceptions. Motion to dismiss appeal denied, and motion to strike out bill of exceptions granted.

See also 29 N. M. 143, 219 P. 490.

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

Summers Burkhart, of Albuquerque, for appellee.

OPINION OF THE COURT

WATSON, J. [1] Appellee has moved to dismiss this appeal upon four grounds, the first three of which relate to the failure of the appellant to take out and serve citation on appeal. The fourth ground is as follows:

"That it affirmatively appears from the record herein that said appellant has no interest in the subject-matter of the action in which the decree appealed from herein was entered."

Appellant contends that, by including this fourth ground in his motion, appellee has appeared generally and has, therefore, under our decisions, waived citation. We think the point well taken. Dailey v. Foster, 17 N. M. 377, 128 P. 71; Crowell v. Kopp, 26 N. M. 146, 189 P. 652; Noble v. McKinley Land & Lbr. Co., 30 N. M. 294, 232 P. 525.

[2] Appellee argues that it was not his intention to urge this fourth ground as a basis for his motion to dismiss the appeal, but rather thereby to point out that it would be fruitless to permit citation to issue and to be served after the return day, as was done in Childers v. Lahann, 18 N. M. 487, 138 P. 202. no doubt this is what counsel had in mind. However, having been set forth in the motion as a ground for dismissal, even though inadvertently, it would seem to constitute a recognition of the appeal, a general appearance, and a waiver of citation within our former holdings. We are compelled to this view, because counsel in the argument and in the brief still urges this ground in support of his motion. While we might, no doubt, at this time, examine the record for the purpose of deciding the question raised, we think it better practice, and it better meets the convenience of the court, to determine it when the appeal is submitted on the merits. Appellee also submits a motion to strike the bill of exceptions. The appeal was allowed August 23, 1924. The bill of exceptions was signed and settled January 23, 1925, some time after the return day. Praecipe for record was filed September 29, 1924, more than 30 days after the allowance of the appeal. On application, made less than 10 days before November 21, 1924, the return day, the trial court, by order dated November 15, 1924, attempted to extend the time for settling and signing the bill of exceptions until January 1, 1925, and, upon application made less than 10 days before January 1, 1925, the trial court, by order dated December 23,

1924, attempted to extend the time for settling and signing the bill of exceptions until February 1, 1925.

[3, 4] Appellee contends that the several orders extending the time for signing and settling the bill of exceptions were made without jurisdiction and are void under section 36, c. 43, Laws of 1917, for two reasons: First, that the section prohibits any such extension "except application for such extension shall have been made at least 10 days prior to the return day," and second, that the section prohibits any such extension, "unless it shall appear from the record and files in the office of the clerk of the district court that the appellant or plaintiff in error has filed or caused to be filed in the office of the clerk of the district court, within 30 days after appeal taken or writ of error sued out, his praecipe for the record on appeal or error as the case may be, and has ordered the transcribing of the testimony, to be included in his bill of exceptions."

Both points seem to be well taken. As to the first see Puritan Mfg. Co. v. Toti, 16 N. M. 1, 113 P. 624; Costilla L. Co. v. Allen, 17 N. M. 343, 128 P. 79; State ex rel Divelbiss v. Raynolds, 17 N. M. 662, 132 P. 249; Pople v. Orekar, 22 N. M. 307, 161 P. 1110. As to the second, see Security Ins. Co. v. City of Socorro, 25 N. M. 200, 179 P. 748; Stroup et al. v. Frank A. Hubbell Co., 25 N. M. 525, 184 P. 976.

Appellant by affidavit attempts to justify his failure to make timely application for the extensions. Even if such showing could be considered, which we do not decide, no excuse is shown for failure to file the praecipe within 30 days after allowance of the appeal, except that appellant had no reason at that time to suppose that it would be necessary for him to make application for the extensions. In view of the prohibitory language employed, and of the evident purpose of the statute to require diligence in the perfecting of appeals, as pointed out in our former decisions, such excuse could not justify the failure, even if it were admitted that any showing could be considered. To

hold otherwise, we must ignore the statute and the former decisions.

For the reasons stated, the motion to dismiss the appeal will be denied, and the motion to strike the bill of exceptions will be granted, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2675. May 2, 1925. Rehearing Denied Oct. 10, 1925.]

BYERS BROS. & CO. LIVE STOCK COMMISSION CORPORATION v. McKENZIE et al.

SYLLABUS BY THE COURT

1. Certificate of acknowledgment to a chattel mortgage examined, and held to comply with the statute substantially, and therefore to entitle the instrument to registration.

2. Finding of trial court suported by substantial evidence will not be reveiwed on appeal.

3. Estoppel urged by mortgagor against mortgagee examined and held untenable.

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

Action by Byers Bros. & Co. Live Stock Commission Corporation, against R. E. McKenzie and others. From a decree for plaintiff, defendants E. W. & R. E. McKenzie, a copartnership, appeals. Affirmed.

H. R. Parsons, of Ft. Sumner, for appellant.

L. O. Fullen of Roswell and W. A. Dunn of Huntington Beach, Calif., for appellee.

OPINION OF THE COURT

RYAN, District Judge. On June 23, 1919, H. B. Reed & Son, a copartnership, executed and delivered to Byers Bros. & Co., a corporation, a chattel mortgage covering, among other live stock therein described, 250 head of steers branded in the Tumble Seven brand, securing the payment of a large indebtedness evidenced by promissory notes, most of which were renewals of notes previously given. Suit was instituted in the

district court of De Baca county, July, 1920, to foreclose this mortgage, and in this action the appellants, the McKenzie copartnership, were made parties defendant on the allegation that they purchased from one H. C. Roberts, another defendant, 72 head of cattle which the latter purchased from the mortgagor during the life of the mortgage, without the consent of the mortgagee and with constructive notice. These cattle were alleged to be part of the 250 head in the Tumble Seven brand, and at the time of the execution of the mortgage were described as being two and three years old, a description which gave rise to much of the conflict in the testimony as to whether they were wholly covered by the mortgage. A decree was entered by the district court for the sale of these cattle, together with those in the possession of the mortgagor and from such decree the McKenzie copartnership has perfected this appeal.

The grounds urged by the appellant for a reversal of a decree of the lower court are these: (1) That the mortgage was defectively executed so that the purchaser Roberts had no constructive notice of the mortgage, it being admitted that he had no actual notice; (2) that the cattle purchased by Roberts were not covered by the mortgage; (3) that the mortgage consented to the sale; (4) that the proceeds of the sale, having been exclusively devoted to the running of all the cattle mortgaged, and the mortgagor having no other funds available for that purpose so that the use of the proceeds of the sale was necessary to the preservation of the security, the mortgagee is stopped from repossessing the cattle sold since he cannot both utilize the proceeds of the sale and repossess the thing sold.

[1] The following is the acknowledgment of the chattel mortgage by the Reed Copartnership, which appellants say was so defective as not to have entitled it to registration, though accepted for that purpose by the county clerk of De Baca county:

"State of Missouri, County of Jackson—ss.:

"Before me, a notary public in and for the county of

Jackson, in the state of Missouri, on this day personally appeared H. B. Reed for H. B. Reed & Son, a copartnership, known to me to be the persons whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

"Given under my hand and seal of office this the 23rd day of June, A. D. 1919.

"My commission expires December 13, 1919.

"Bess M. Lewis, Notary Public."

It is conceded by appellant that a substantial compliance with the statute in regard to acknowledgment is sufficient. The statute provides that "the certificate of acknowledgment shall express the fact of the acknowledgment being made, and also that the person making the same was personally known" to the official "granting the certificate to be the person whose name is subscribed to the" instrument. Section 8, Code 1915.

Section 9, Code 1915, states further several forms of acknowledgment. None of the forms provided by this section of the statute relates to an acknowledgment by a copartnership. One of the forms provided is in case of natural persons acting by attorney acknowledged that he executed the instrument as the free act and deed of his principal. Appellant maintains that this section applies to partnership acknowledgments, and the acknowledgment we are not concerned with is fatally defective because of the omission of the recital that H. B. Reed the person acknowledging, acknowledged the execution of the same as the free act and deed of the copartnership. It is our opinion that none of the forms provided by the statute refers to partnerships. The form used in this case expresses the fact of the acknowledgment being made, and also that the person making it was known to the official making the acknowledgment. Similar acknowledgments under statutes practically identical have been considered in other states and upheld as valid. Citizens' National Bank et al. v. Johnson et al., 79 Iowa, 290, 44 N. W. 551; Fabian & Co. v. Callahan, 56 Cal. 159; Blum Land Co. v. Dunlap, 4 Tex. Civ. App. 315, 23 S. W. 473; Sloan v. Machine Co., 70 Mo. 206; Keck, Trustee,

v. Fisher, Adm'r., 58 Mo. 532; Hanson v. Metcalf, 46 Minn. 25, 48 N. W. 441; Trerise v. Bottego, 32 Mont. 244, 79 P. 1057, 108 Am. St. Rep. 521. note; Finance Co. v. Cotton Mills Co., 29 A. L. R. 916 note; 1 Devlin on Deeds, §§ 469, 524; 1 R. C. L. § 69. The acknowledgment was good and entitled the instrument to registration.

[2] The second and third points argued by appellant are untenable. The trial court found specifically against them and the findings are supported by substantial evidence.

[3] The fourth point, that of estoppel, appellant rests upon the case of Etheridge v. Hilliard, decided by the Supreme Court of North Carolina, 100 N. C. 250. 6 S. E. 571. We do not think the facts in that case are here relevant. In the cited case the mortgagor was expressly authorized by the mortgage to prepare and house for market the cotton crop mortgaged. The court held that such a direction to the mortgagor carried an implied authorization to him to use such means as were necessary to the purpose authorized and hence to sell part of the mortgaged crop; the mortgagor being without other financial means. There is no such direction to the mortgagor from the mortgagee in this case, from which consent to a sale might be implied, nor is there evidence of any act on the part of the mortgagee as to which honest and fair dealing would deny to him the right to receive the benefits and at the same time repudiate the disadvantages.

The evidence in this case is that the mortgagee had been making advancements to the mortgagor for the running of the cattle and thereafter notified the mortgagor that he would discontinue so doing and that he (the mortgagor) would "therefore have to make arrangements down there to take care of the expense money." This was not an authorization to sell, as the trial court correctly held, either expressly, or by implication. If the mortgagor was unable financially to run the cattle and preserve the security, it

was his duty to surrender the cattle mortgaged to the mortgagee. The terms of a chattel mortgage may be waived by some act of the mortgagee; they do not yield to the convenience of the mortgagor or become inoperative because he is confronted by circumstances of distress. We find no error in the record.

The decree of the lower court will be affirmed, and it is so ordered.

PARKER, C. J., concurs.

[Nos. 2923, 2924. May 9, 1925.]

STATE v. STATE INV. CO. et al.

SAME v. BOARD OF TRUSTEES OF ANTON CHICO LAND GRANT, et al.

(On Rehearing Oct. 7, 1925.)

SYLLABUS BY THE COURT

1. Section 1863, Code 1915, authorizes district attorneys to compromise and settle tax suits.

2. The powers conferred by Section 1863, Code 1915, are not restrained by section 32 of article 4 of the state Constitution, in case of tax suits.

3. Various sections of the statutes examined, and held to authorize such proceedings in court as are contemplated by section 32 of article 4 of the state Constitution.

Appeal from District Court, Guadalupe County; Leahy, Judge.

Suits by the State of New Mexico against the State Investment Company and others, and against the Board of Trustees of the Anton Chico Land Grant and another, tried together. From judgments for defendants, the State appeals. Affiirmed and remanded, with directions.

Milton J. Helmick, Atty. Gen., and Fleming & Neal, of Santa Rosa, for the State.

O. O. Askren, of East Las Vegas, and E. R. Wright, of Santa Fe, for appellees.

OPINION OF THE COURT

PARKER, C. J. An action was brought by the state of New Mexico, in Guadalupe county, against the board of trustees of the Anton Chico land grant, for taxes upon the Anton Chico grant, in which judgment was sought for $138,510.89. The complaint set up the amount of taxes claimed to be due for the years 1905 to 1918, inclusive. No answer was filed by the defendant. A stipulation, however, was entered into by C. W. G. Ward, district attorney, and Luis E. Armijo, special counsel for the state tax commission, as attorneys for the state, and by S. B. Davis, Jr., attorney for the defendant. In this stipulation it was agreed that $500 was the amount due and owing from the defendant to the plaintiff as taxes for each of the years 1905 to 1915, inclusive, and $4,000 for the year 1916, and $5,000 for the year 1917, and $5,500 for the year 1918—making a total of $20,000. It was further stipulated and agreed that judgment might be rendered in said cause against the defendant for the said sum plus 10 per cent., making a total of $22,000, which said amount should be adjudged by the court as the full amount due on account of taxes due on said property for said years. A judgment was thereupon entered in pursuance of said stipulation, finding the above amounts due the plaintiff for and on account of said taxes and establishing the same as a lien upon defendant's property, and providing for the sale of said property to satisfy said lien and taxes. Said judgment was made and entered March 9, 1920, and the said cause was numbered 1167.

Thereafter, on June 1, 1923, there was filed in said court the complaint of the State of New Mexico v. Board of Trustees of the Anton Chico Land Grant, said cause being numbered 1517 upon the docket of said court, in which was alleged the recovery of the former judgment of March 9, 1920, in said cause No. 1167. The complaint further alleged that for the year 1919 there was assessed and levied against the defendant and the said lands taxes amounting to $5,761.56, for the year 1920, the sum of $7,220.73, and

for the year 1921, the sum of $2,518.56, and that no part of said taxes had been paid. The complaint in this action was signed by the district attorney and by special counsel for the state tax commission. An answer was filed by the defendant, denying all the allegations of the complaint except that it was the owner of the land described in said complaint, which allegation was admitted. Thereafter there was filed a stipulation, signed by counsel for the state and for the defendant, stipulating and agreeing that the defendant was liable for taxes as follows: For the years 1919 to 1921, inclusive, the sum of $1,200 per year. In pursuance of said stipulation, the district court entered judgment for the state against the defendant for $1,200 for each of three years 1919 to 1921, inclusive, and the further sum of $120 for the fees of the state tax commission, which judgment was dated January 17, 1923.

On June 1, 1923, there was also filed in said court the complaint of the State of New Mexico against the State Investment Company, a corporation, S. B. Davis, Jr., and Ruby J. Spiess as defendants, in cause No. 1518. This complaint sets out the recovery of the judgment of March 9, 1920, in cause 1167, for the sum of $22,000, and alleges that the defendants, the State Investment Company et al., are properly chargeable with $9,000 of said judgment, on account of their ownership of a portion of the lands upon which the $22,000 had been adjudged a lien in cause 1167. For a second cause of action, plaintiff alleged that there had been levied against the defendants Davis and Spiess taxes for the year 1919 amounting to $2,484.87, and for the year 1920, taxes amounting to $4,607.59, and for the year 1921, taxes amounting to $6,021.79. The complaint alleged that the State Investment Company claimed some right, title, or interest in the land and real estate. The plaintiff prayed for judgment against all of the defendants in the sum of $13,114.25, and that said sum might be decreed to be a lien against all of the lands described in the complaint, and for sale thereof to satisfy said taxes and lien. The com-

plaint was signed by the district attorney and by special counsel for the state tax commission. No answer was filed in this case. However, on June 1 there was filed in the cause a stipulation, signed by the district attorney and special counsel for the state tax commission in behalf of the state, and by S. B. Davis, Jr., counsel for the defendants, which said stipulation provided that there was due the plaintiff for taxes from the defendants, for each of the years 1919 to 1921, inclusive, the sum of $2,500, and that judgment might be rendered against the State Investment Company, the holder of the legal title to said lands, in the sum of $7,500, that said amount should bear interest at the rate of 6 per cent. per annum, and that if not paid within 90 days from the date of the stipulation, execution should issue. In pursuance of said stipulation, a judgment, dated January 17, 1923, was, on the said June 1, 1923, made and entered by the court in behalf of the plaintiff, and against the defendant, the State Investment Company, on account of said taxes, in the sum of $7,500, together with $250 fees for the state tax commission, together with interest, and providing for execution if the judgment be not paid within 90 days from date.

Thereafter two actions were commenced in the district court of Guadalupe county, numbered, respectively, 1525 and 1526 upon the docket of said court, which said causes are now here on appeal, and are numbered 2923 and 2924, respectively, upon the docket of this court. The complaints in each of said actions were filed July 16, 1923.

In the first of those actions, No. 2923, it is alleged that on the 17th day of January, 1923, judgment was rendered in the said cause No. 1518, that thereafter, on June 1, 1923, the complaint in said action was filed, and that on said day, there was filed a stipulation, which said stipulation has been heretofore referred to. It is thereupon alleged that said judgment of said court was void and of no effect, but that the same constituted a cloud upon the right of the plaintiff to collect from

the defendants its lawful taxes for the years 1919 to 1921, inclusive. It is further alleged that said judgment is void for the following reasons, to wit: That said judgment was made and rendered without jurisdiction or authority, in that, at the time of the rendition of the judgment, there had not been filed in the office of the clerk any complaint, and that, at the time of the rendition of said judgment, no cause of action was pending in which a judgment of any kind or character could be rendered, and that said judgment was rendered and entered without the introduction of any evidence, and for a sum less than the amount shown to be due the state by the assessment rolls of Guadalupe county; that the amount sued for and set forth in said complaint was for a less sum than the sum due and payable to the state, and was not sufficient to give the court jurisdiction to hear and determine the matters therein stated, and that the court never obtained jurisdiction to render the judgment; that said judgment shows on its face to have been rendered and entered by consent, and upon a written stipulation filed in the cause by the district attorney and special counsel for the state tax commission; and that they were wholly without authority to enter into such stipulation or in any way to give consent of the state to the entry of such judgment; and that the pleadings were insufficient to confer jurisdiction upon the court over the subject-matter or to render the judgment; and that, at the time of the rendition of said judgment, and during all the years 1919 to 1922, inclusive, the defendants were the owners, and taxes were lawfully and legally assessed against the lands, describing the same. The plaintiff prayed that the said judgment be set aside and declared void, and for general relief. As a second cause of action, the plaintiff set up the amount of taxes levied and assessed upon the property for the year 1919, and prayed judgment for the same. For a third cause of action, the complaint set up the amount of taxes due for the year 1920, and prayed judgment for the same. The fourth cause of action was pleaded

in the same form for the taxes for the year 1921. The fifth cause of action is in the same form for taxes for the year 1922. All of said taxes are alleged to amount to the sum of $35,411.80.

In the second case, No. 2924 on the docket of this court, the plaintiff sets up the judgment in cause No. 1167, heretofore referred to, and alleges that the judgment is void and of no effect, but that it constitutes a cloud upon the right of the plaintiff to collect its lawful taxes for the years covered by said judgment, and that said judgment is void for the following reasons: That the complaint was insufficient to give jurisdiction of the subject-matter of said suit, for the reason that said complaint does not include all of the taxes and penalties lawfully assessed and levied against the defendant upon the real estate owned by the defendant; that the judgment is void for the further reason that the judgment entered is not responsive to the pleadings in the cause filed, there being no answer and no issue between the parties for the court to determine, and that the court had no power to render any judgment, under said pleadings, except for the amount prayed for in the complaint; that the judgment is void because the same was entered and rendered without proof having been introduced showing the lawful amount of taxes upon the property; that the court was without authority to render any judgment except for the amount of taxes, interest, and penalties which had been assessed and levied against the defendant for the years 1905 to 1918, inclusive, as the same was shown by the assessment rolls of the county; that said judgment is void for the further reason that it shows on its face that it was rendered upon and by authority of the stipulation, heretofore referred to; and that the district attorney and the special counsel of the state tax commission were each wholly without authority to make and enter into any such stipulation, and were wholly without authority to remit, decrease, diminish, or lessen, by stipulation or otherwise, the claims of the state for its taxes, penalties, and interest; and that the pleadings in said cause were not sufficient to

confer jurisdiction of the subject-matter upon the court. Plaintiff prayed that the said judgment be vacated and set aside, and for general equitable relief. The second to the fifteenth causes of action, inclusive, are for the recovery of taxes for the years 1905 to 1918, inclusive. The sixteenth cause of action is identical with the first cause of action pleaded in No. 2923, hereinabove mentioned, except that the defendant is the board of trustees of the Anton Chico land grant, but the allegations of fact and the reasons assigned why the judgment should be vacated are the same as those in No. 2923. Plaintiff prayed that the judgment be set aside and vacated, and for general equitable relief. The seventeenth to the twentieth causes of action, inclusive, are to recover taxes for the years 1919 to 1922 inclusive.

Demurrers were filed in each of these cases, and sustained by the court, and, the plaintiff electing not to plead further, the complaints were dismissed, and from those judgments appeals were taken to this court. In No. 2923, the demurrer to the first cause of action which, as before seen, is an action to vacate and set aside the former judgment of the court, is based upon the proposition that it fails to state facts sufficient to constitute a cause of action, in that it appears from the facts stated that the district attorney and the special counsel for the state tax commission had full and complete authority to execute the stipulation upon which the judgment in cause No. 1518 was rendered, and that the complaint fails to allege facts showing either mistake, fraud, misrepresentation, or lack of authority of said district attorney and said special counsel of the state tax commission, and that the plaintiff is shown by the facts pleaded to be estopped to claim or contend that the judgment in cause No. 1518 should be vacated and set aside. The demurrer to the second, third, and fourth causes of action sets up that it appears upon the face of the complaint that all the matters and things set up therein, and all the relief prayed for therein, have been fully adjudicated in said cause 1518, and the estoppel is

more fully pointed out in succeeding paragraphs of the demurrer in somewhat different form. The demurrer is further directed to the complaint as a whole, in that there is a misjoinder of causes of action; the first cause of action being a suit in equity to vacate and set aside the judgment, and the second, third and fourth causes of action being suits at law to collect taxes. The demurrer likewise goes to the fifth cause of action, upon the ground that the first cause of action is a suit in equity to set aside a judgment, and the fifth cause of action is an action at law for the collection of taxes for 1922.

In No. 2924, the demurrer is to the same effect as to the first cause of action, which is directed against cause No. 1167 on the docket of the district court, and points out that the plaintiff is estopped by the facts shown in the complaint to question said judgment in cause No. 1167, and that it appears that the district attorney and the special counsel for the state tax commission had full and complete power to enter into the stipulation upon which judgment was based. The demurrer further points out that said judgment under the facts pleaded, is res adjudicata between the parties, and that the plaintiff is barred and estopped from maintaining the second, third, fourth and fifth causes of action, and that it appears from the face of the complaint that said causes of action are based upon taxes levied and assessed for years prior to January 1, 1910, the demurrer points out that it appears upon the face of the complaint that causes of action 7 to 15, inclusive, have been heretofore adjudicated in said cause 1167, and are res adjudicata between the parties. The demurrer to the sixteenth cause of action is the same, in substance and effect, as is interposed to the first cause of action. The demurrer to the seventeenth, eighteenth, and nineteenth causes of action is to the effect that the facts pleaded show that these causes have heretofore been fully adjudicated in cause No. 1517, which judgment remains still in full force and effect, and that the matters therein adjudicated are res adjudicata between the parties, and that the

plaintiff is barred and estopped from maintaining these causes of action. The demurrer then goes to the complaint as a whole and is to the effect that there is a misjoinder of the first and sixteenth causes of action, with causes Nos. 2 to 15, inclusive, and 17 to 19, inclusive; the former being suits in equity to vacate judgments, and the latter being suits at law for taxes. The demurrer further points out that there is a misjoinder of causes of action; the first and sixteenth causes being united with the twentieth cause of action, which is likewise an action for the collection of the 1922 taxes.

[1] 1. The question arising out of this mass of allegation in the record is whether the district attorney and the special counsel for the state tax commission have power to compromise and settle a tax suit, and to consent to a judgment for less than is shown by the tax rolls to be due from a taxpayer, and thus bind the state. If this question be answered in the affirmative, the whole controversy is settled in favor of the validity of the judgments. The authority under which the district attorney evidently acted is section 1863, Code 1915, which is as follows:

"The Attorney General and district attorneys of the state in their respective districts, when any civil proceedings may be pending in their respective districts, in the district court, in which the state or any county may be a party, whether the same be an ordinary suit, scire facias proceedings, proceedings growing out of any criminal prosecution, or otherwise shall have power to compromise or settle said suit or proceedings, or grant a release or enter satisfaction in whole, or in part, of any claim or judgment in the name of the state or county, or dismiss the same, or take any other steps or proceedings therein which to him may appear proper and right; and all such civil suits and proceedings shall be entirely under the management and control of the said Attorney General or district attorneys, and all compromises, releases and satisfactions heretofore made or entered into by said officers are hereby confirmed and ratified."

This statute was enacted in 1876, and has been the law ever since, and was carried forward into the Code as section 1863. A simple reading of the act shows that it authorizes the action taken in these cases. It governs all civil proceedings "whether the same be

an ordinary suit * * * or otherwise." It is a matter of common knowledge that for years district attorneys have acted under it, just as was done in these cases. It is clear, therefore, that, unless restrained by some other provisions of law, the district attorney and special attorney for the tax commission were within their powers in making the stipulation for these judgments, and if so, the state is bound.

This view is strengthened by reference to the history of the legislation in this connection. As before seen, section 1863, Code 1915, was enacted in 1876. By chapter 88, Laws 1889, the powers of the Attorney General and district attorneys were restrained to the extent that the consent of the auditor of public accounts should be first obtained before such compromises might be made. By chapter 22, Laws 1899, however, which is strictly a tax statute, chapter 88, Laws 1889, is expressly repealed, thus restoring section 1863, Code 1915, to its original scope and effect. This is clearly a legislative interpretation of section 1863, to the effect that it applies to tax proceedings.

[2] 2. It is strenuously argued by counsel for the appellant, however, that this power conferred by this statute is restrained by section 32 of article 4 of the State Constitution, which is as follows:

"No obligation or liability of any person, association or corporation, held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed, or in any way diminished by the Legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court."

It is to be observed that the first clause is a restriction on the Legislature itself, and not upon taxing officers. The latter part of the act provides two methods of extinguishment of the obligation or liability—one, payment; and, the other, a proper proceeding in court.

[3] 3. It is argued, however, that in cause No. 1167 there was no proper proceeding in court, on account of restrictions in the statutes at that time. In this,

counsel is clearly in error. The legislation is as follows: Section 5509, Code 1915, an old statute, which gives power to district attorneys and others to bring separate tax suits where the amount of taxes exceeds $100. The next provision is section 4 of chapter 80, Laws 1917, which while it contemplates the issuance of summons in the general tax suit, recognizes the power of counsel for the state to pursue taxpayers individually, and obtain judgments against them. The next provisions are sections 2 and 3 of chapter 102, Laws 1919, which would seem to settle the whole matter. These provisions were in force when cause No. 1167 went to judgment. They give express authority to the district attorneys and special counsel for the state tax commission to bring separate tax suits against individuals for any number of years, or to join any number of taxpayers in the same proceeding. It follows that cause No. 1167 was a legal proceeding in court within the constitutional requirement, and, the attorneys for the state having the power to compromise and settle the claim, the judgment is valid and binding on the parties.

At the time of the entry of the judgments in causes 1517 and 1518, on June 1, 1923, the Tax Code (chapter 133, Laws 1921) was in effect and controlling and in section 448 of that act the express power to bring separate tax suits in cases where the tax exceeds $100 is granted in almost the same language as in the act of 1919, and section 5509, Code 1915. These two judgments were therefor likewise valid and binding,

In connection with all of these judgments, it is to be noted that there is no allegation of fraud, misrepresentation, or mistake. These stipulations, so far as appears from the record, were entered into in the utmost good faith by the counsel for the state. Just what moved their discretion does not appear, but, in the absence of allegation to the contrary, it is to be presumed to be based upon sufficient and proper facts. Much is said in the brief about the judgments in 1517 and 1518 being dated January 17, and the complaints

and stipulations being dated and filed on June 1, 1923. This was clearly an error, as the judgments refer to the stipulations, and are based upon them, and the record does not in fact show that they were filed and entered prior to the filing of the complaints and stipulations. It is also contended that some of these judgments are void, because no answer tendering issues was filed. We fail to appreciate the argument. If a proper complaint was filed, it was sufficient to support a judgment consented to by the parties.

There is nothing in our recent decisions which antagonizes this conclusion. See Bond-Dillon Co. v. Matson, 27 N. M. 85, 196 P. 323; State v. Persons, etc., 29 N. M. 654, 226 P. 886; W. S. Land & Cattle Co. v. McBridge, 28 N. M. 437, 214 P. 576; State v. Bond-Dillon Co., 30 N. M. 267, 231 P. 701. In all of these cases, the state was resisting the reduction of the taxes, while, in the present case, the state, through its proper legal representatives, and for reasons apparently sufficient to them, sought to and did compromise and settle the claim, and asked for and obtained the judgments as above set out.

It may be considered by some that the possession of the powers mentioned by district attorneys and tax attorneys is unwise; but that is a matter for the Legislature, and not for the courts to determine. It may, however, be suggested that, in view of the many void or doubtful assessments found all over the state, and the inability of the taxing officers in many instances to describe large bodies of land with sufficient accuracy to form the basis of a legal assessment, it may be wise to allow the attorneys of the state the discretion to settle tax suits as was done in these cases, and thus secure with promptness revenues which might with great difficulty be otherwise collected.

It may be noticed, in this connection, that the last Legislature, by substitute for House Bill No. 58, approved March 11, 1925, has provided for the correction of inequalities in assessments and reduction of the same to equality with those on other like property, and for

the remission of the taxes on property already sold to the county to an amount for which the property can be sold, all by a proceeding in the district court, thus directly and specifically providing proceedings following out generally the practice pursued in the present cases, without the aid of the powers of the district attorneys which were exercised in the present cases.

It follows from the foregoing that the judgments of the court below were correct and should be affirmed, and the causes remanded, with directions to proceed accordingly, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

ON MOTION FOR REHEARING

PARKER, C. J. Counsel for appellant urge, in the motion for the rehearing, that the statute (section 1863, Code 1915) under which the action was taken in these cases violates section 1 of article 8 of our Constitution, which provides for equality and uniformity in taxation. He also argues that it violates section 18 of article 2 of the Constitution, which is the due process of law and equal protection of the laws provision. He also relies upon the Fourteenth Amendment of the federal Constitution to the same effect.

Reliance is had upon the case of Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220. That case is clearly not in point here. There power was vested in the supervisors in the county and city of San Francisco to arbitrarily refuse or grant to persons a license to conduct a laundry within the city, without regard to the fitness of persons, places, and surroundings. The ordinances were necessarily held to be invalid. They were held to be invalid, not only because they provided for arbitrary action, but also because, in the practical administration thereof, it was made to appear that the supervisors employed them as a weapon to destroy the businesses of persons of the Chinese race. Not so with our statute. It provides for such action in each case, "as may appear proper and right," and evidently contemplates an investiga-

tion of the facts by the tax attorneys and by the court under the provisions of section 32 of our article 4 of the Constitution. It is clear that these constitutional and statutory provisions are not open to the objections pointed out in the Yick Wo case.

Counsel also relies upon State of Nevada v. California Mining Co., 15 Nev. 234. An examination of that case discloses its inapplicability to the present situation. There the district attorney had no power of compromise of tax suits, and the courts were expressly commanded to enter judgment for the taxes due and to add 25 per cent. as penalties for nonpayment. The court indulged in some speculation as to whether, if the law had authorized the compromise of taxes, the statute would be valid, to which Hawley, J., registered a vigorous dissent.

The other cases cited have been examined and found to be inapplicable. The general trend of the argument of counsel is that to hold the statute constitutional is to sanction unequal taxation and taxation not uniform among the taxpayers. It is a misconception of the principle involved. As pointed out in our original opinion, there is no allegation of fraud, misrepresentation, or mistake on the part of the taxing officers. The question is, solely, whether the possession and exercise of this power in good faith violates constitutional guaranties. If the exercise of the power in good faith results in inequality, this is no objection to the law. Nor can objection be made to inequality, unless intentional discrimination and fraud are shown. Under this general subject see 1 Cooley on Taxation (4th Ed.) §§266 and 302.

It is sought to show that our conclusion in this case overturns some of our former decisions. We do not so conclude.

It follows that our former decision was correct, and should be adhered to; and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3092, Sept. 17, 1925.]

SENA et al. v. DISTRICT COURT OF FOURTH JUDICIAL DISTRICT, et al.

SYLLABUS BY THE COURT

1. An order of a justice of the Supreme Court that "the judgment of the district court be superseded until the final disposition of said cause," pursuant to and endorsed upon an application for writ of error praying "that the judgment of the district court be superseded by the order of this court," construed as suspending the operation of a prohibitory injunction.

Original petition by Juan Sena and others for a writ of prohibition to be directed to the District Court of the Fourth Judicial District, sitting within and for the County of Guadalupe, and Luis E. Armijo, Judge. Writ withheld, with permission to petitioners to renew application.

F. Faircloth, of Santa Rosa, C. J. Roberts, of Santa Fe, and Chester A. Hunker, of Las Vegas, for petitioners.

Thomas W. Neal, of Las Vegas, for respondent.

OPINION OF THE COURT

WATSON, J. [1] On September 4, 1925, an alternative writ of prohibition issued out of this court upon the petition of Juan Sena, Severo Maes, and L. M. Casaus, directed to the district court of the Fourth district, sitting within and for the county of Guadalupe, and to Hon. Luis E. Armijo, as judge thereof, directing the said court and judge to take no further steps or proceedings in the matter of certain contempt proceedings pending in said court, and to show cause why the said court and judge should not be finally prohibited from exercising any further jurisdiction over said contempt proceedings, except to dismiss the same. Return was made, and the cause orally argued and submitted.

On August 4th in a suit in which A. P. Anaya, Leopoldo Sanchez, Juan Aragon, and James L. Abercrombie, as the Guadalupe county board of education

were plaintiffs, and the board of county commissioners of Guadalupe county and said Juan Sena, Severo Maes, and L. M. Casaus, members of said board, were defendants, a final judgment was entered perpetually enjoining and restraining the defendants from exercising or pretending to exercise any authority conferred by law upon the Guadalupe county board of education, and from interfering or attempting to interfere with said plaintiffs in the performance of their duties as the Guadalupe Board of Education, and from exercising or attempting to exercise any authority over the rural school affairs of Guadalupe county.

On August 10, 1925, the said defendants applied to Justice Bickley of this court for a writ of error, the prayer of which application was in the following language.

> Wherefore petitioners pray that a writ of error issue, and that the judgment of the district court be superseded by the order of this court."

Upon this application Justice Bickley indorsed the following order:

> "Having this day examined the above and foregoing application, it is ordered that the writ issue and that the judgment of the District court be superseded until the final disposition of said cause."

Thereupon writ of error issued in the usual form, but including the following:

> "This writ is hereby made to act as a supersedeas of the judgment in the above cause."

Thereafter there was filed in said district court an information charging that the said Juan Sena, Severo Maes and L. M. Casaus, after the issuance of said injunction, and with full knowledge thereof, and notwithstanding the same, and in contempt thereof, acted and assumed to act as a board of education of Guadalupe county, and did attempt to discharge the duties appertaining to such board. An order issued directing them to show cause why they should not be punished for contempt. Further proceedings were suspended, as above stated, by our alternative writ.

It is the theory of the petitioners that the order of supersedeas obtained from a justice of this court had the effect to suspend the operation of the injunction, and that the district court was therefore without jurisdiction to enforce it. The return to the alternative writ raises no issue as to the facts herein stated, but attempts to justify the contempt proceedings instituted in the district court upon the theory that the order of supersedeas did not affect or suspend the vitality of said court.

The issue to be determined has been greatly narrowed by concessions made by counsel, respectively, at the hearing. Counsel for respondent concede that the question of jurisdiction involved is properly brought to the attention of this court by petition in prohibition. He further concedes that this court, or one of its justices, possesses the inherent power to grant at discretion, an order staying or suspending the operation of a prohibitory injunction, pending appeal. On the other hand, it is conceded by counsel for petitioners that the mere taking of an appeal, or suing out a writ of error, and the giving of a supersedeas bond, under the provisions of our statute, are not sufficient to effect a suspension of a prohibitory injunction. We have, then, only to determine the true meaning of the application and order above recited. If they are to be construed as invoking and exercising the discretion residing in a justice of this court to stay the operation of the said injunction, the writ of prohibition should issue. If they are not to be so construed, but merely as an attempt to bring the applicants within the statutory provisions for supersedeas or stay of proceedings, then the alternative writ should be discharged.

By section 17 of chapter 43, Laws of 1917, it is provided, in substance, that there shall be no supersedeas or stay of execution upon any final judgment or decision unless the appellant or plaintiff in error shall execute a bond in double the amount of the judgment complained of, to be approved by the clerk of the district court in case of appeals, and by the clerk of the Supreme Court in case of writ of error, conditioned for

the payment of the judgment and costs. In case the decision is for a recovery other than a fixed amount of money, the amount of the bond so to be given is to be fixed by the district court or judge thereof in case of appeal, and by the chief justice or any associate justice of the Supreme Court in case of writ of error. Upon the approval of such bond, and the filing thereof with the clerk of the district court, or of the Supreme Court, as the case may be,

"There shall be a stay of proceedings in such cases until the same is finally determined upon such appeal or writ of error in the Supreme Court."

Section 18 of said chapter provides:

"When the appellant or plaintiff in error is an executor or administrator, as such, the state, a county or other municipal corporation the taking of such appeal or suing out of such writ of error shall operate to stay execution of such judgment, order or decision."

It is respondent's contention that the purpose of the order in question was merely to grant supersedeas as to the three individual plaintiff's in error, without requiring of them any bond; the provisions of section 18 effecting supersedeas without bond as to the other plaintiff in error, the board of county commissioners It is urged that the order was intended merely to bring the parties within the statute, so that the individual plaintiffs in error, as well as the board of county commissioners, became entitled to the benefit of whatever effect the statute has upon a prohibitory injunction. In the brief, the contention is stated thus:

"In the case at bar, Mr. Justice Bickley, by the terms of the order itself simply permitted the issuing of a 'supersedeas' as to the three petitioners in this cause, without their having given bond required by statute, doubtless upon the theory that, since the petitioners as individuals constituted the board of county commissioners—a public corporation, in favor of whom a 'supersedeas' was granted as a matter of law upon the issuing of the writ of error that the three individuals composing the board of county commissioners should not be subjected to the burden of giving a bond as required by the statute, and we think, in exercise of his discretion and in the interest of justice, he has the right and power to make this order, but the order is no broader in its language than the statute itself, and does not purport to suspend, set aside, or dissolve the injunction pending the determination of this

court in cause No. 1717, as to which the writ of error was granted."

It is to be observed, first, the order expressly and affirmatively declares "that the judgment of the district court be superseded." From a careful consideration of the sections referred to, we are unable to find any case in which it is necessary to apply to the court or to any judge or justice to obtain the benefit of the statute. In any case, it is the approval and filing of the bond which gives effect to the supersedeas or stay of proceedings. The benefit of the statute, whatever its effect may be, the appellant or plaintiff in error may obtain as a matter of right. The only duty of the court and its only discretion consists in fixing the amount of bond to be entered in case of a nonmoney judgment. If, therefore, the plaintiffs in error had desired to obtain only the benefit of the statute, they need only have applied to the court to fix the amount of the bond. They made no such application, but in fact prayed "that the judgment of the district court be superseded by the order of this court." Thus it was the discretion of this court and not the benefit of the statute that was expressly invoked. As the order was obviously made pursuant to and in compliance with the application, the language of the latter may well be considered in construing the former. In Maloney v. King et al., 26 Mont. 492, 68 P. 1012, there was an appeal from an injunction pendente lite, restraining the defendants from carrying on mining operations on a certain lode claim, and from interfering, with the plaintiffs in mining thereon. The application was "for an order staying the order appealed from, and all proceedings thereunder, pending the appeal." After expounding the statutory provisions and in denying the stay applied for, the court had occasion to interpret the application, and in that regard says:

"If the injunction is mandatory in effect, the appeal stays proceedings; if merely prohibitory, matters are to remain in statu quo, and there are no proceedings to be taken under it—no affirmative acts are necessary to execute it. What the appellants really desire, and by their application intended to ask for is the vacation or annulment of the order pend-

ing the appeal—and this is upon the theory, necessarily, that the injunction is prohibitory only. They do not in fact, desire this court to grant a stay of proceedings, but that the operation of the order to be suspended, and its effect be destroyed, while the cause is here on appeal, to the end that they may proceed to do the acts and things prohibited by it without committing contempt of the court below."

In Johnson v. Turner et al., 44 Fla. 244, 33 So. 238, there was a decree for a perpetual injunction, but containing numerous other provisions. On being granted an appeal, the defendant applied to the trial judge "for an order fixing the amount, terms and conditions of bond to be given by him, in order that said appeal may operate as a supersedeas." The trial judge, by order, fixed the amount of bond and provided that on the approval thereof, "then the appeal entered herein * * * shall be and operate as a supersedeas." Upon motion to the Supreme Court to vacate the order of supersedeas, the court, after expounding the statute of that state, construed the proceedings thus:

"The application of the appellant to the circuit judge was not for a supersedeas, but expressly called the attention of the circuit judge to the fact that his appeal was entered within thirty days from the rendition of the decrees appealed from, and asked only for an order fixing the amount and conditions of the bond that he should give in order that, under the statute his appeal might have the force and effect of a supersedeas. This application the circuit judge responded to by making the order prescribing the amount and conditions of such bond, and the bond as prescribed was given, which, under the circumstance, by force of the statute, and without the aid of an order from any judge or court, gave to the appeal the force and effectiveness of a supersedeas of all the provisions of the decrees appealed from, except that feature thereof that granted a perpetual injunction, and as to this latter provision the supersedeas in the case, imposed by the statute, does not affect it, and we do not understand that it is claimed to do so."

The judgement to be reviewed upon the writ of error contains no provisions whatever except the prohibitory injunction and the award of costs. We are not advised as to the amount of costs, but from the nature of the proceedings it must have been slight. Under respondent's theory of the order, its only effect would be to stay execution for the costs. It is questionable whether, if plaintiffs in error had not intended by their

application to obtain a suspension of the injunction, they would have taken the trouble to make the application at all.

We cannot quite concede that the language of the application and order is no broader than the language of the statute. The application asks, and the order provides that "the judgment of the district court be superseded." Section 17 above referred to provides "there shall be no supersedeas or stay of execution upon any final judgment or decision. * * * " and further provides that on the approval and filing of the bond "there shall be a stay of proceedings in such cases * * * " By the literal terms of the order, the judgment itself is superseded. By the statute, the judgment itself is affected only in so far as ordinary supersedeas or stay of proceedings operates upon it.

[2] It is to be admitted that, if some other term than "supersedeas" had been used in the application and in the order, their import and effect would have been more clear. Yet except for the confusion in the decisions regarding the meaning of the word "supersedeas," there could be no doubt. From a general survey of many decisions cited by counsel, respectively, and of many others, we are satisfied that the term is to be construed according to the occasion of its use. When used in a statute such as ours, it is interpreted by a great majority of courts as practically synonymous with "stay of proceedings," or "stay of execution," or "stay," as intended to preserve the status quo of the parties at the time of the taking of the appeal or suing out of the writ of error. But, where the judgment under review is a prohibitory injunction, it may well be that the ends of justice require the preservation of the status quo ante. The many decisions upholding the power of appellate courts to maintain the status quo by suspending the operation of prohibitory injunctions pending appeal—a power conceded here—point out that without the power the appellate jurisdiction might often be practically defeated. Irreparable injury may result as well from the injunction as from the conduct enjoined. The purpose of injunction

is to prevent such injury. After it has occurred, relief comes too late. So in many cases it will appear that the appellate court must either assert its power to suspend the operation of the injunction or abandon the power to grant substantial or effectual relief.

Whether the considerations mentioned require the suspension of the effect of the prohibitory injunction pending appeal is manifestly a question depending upon the particular situation. Whether such relief should be granted cannot be practically determined in advance by a general statute, but must be left to sound judicial discretion.

"In the case of State ex rel. * * * v. Stallcup [15 Wash. 263, 46 P. 251), this court suggested that if a supersedeas were allowed by statute as a matter of right, the constitutionality of such statute might well be doubted. The reason given therefor was that the status of the parties might thereby be changed and valuable rights lost which could not be compensated. This, of course, is the reason why the Legislature has not seen fit to place the power of supersedeas in such cases in the hands of the parties, as a matter of right, as suggested above." State ex rel. Burrow v. Superior Court, 43 Wash. 225, 86 P. 632.

Upon such considerations, most of the courts have construed the term "supersedeas" as used in the statutes as not suspending the operation of a prohibitory injunction. We find, however, that these same courts, when their discretion is appealed to for suspension of the operation of a prohibitory injunction, have freely and frequently made use of the same term and of the term "stay of proceedings" in granting such relief. Admitting the desirability of the use, both in statutes and in court orders, of terms having a certain and definite meaning, we think that the substantial effect of orders of this court should not be defeated by a narrow construction, when from the circumstances, the practical results to be accomplished can be determined with reasonable certainty. We are satisfied, also, that there is abundant precedent for suspending the operation of a prohibitory injunction in substantially the same terms here employed.

In Union Sawmill Co. v. Felsenthal Land & Town-

site Co., 84 Ark. 494, 106 S. W. 676, there was an appeal from a prohibitory injunction upon which the appellant filed supersedeas bond in the statutory form, and the clerk issued supersedeas. The appellee filed a motion to quash the supersedeas in so far as it had effect upon the injunction. Upon that motion, the court held that the bond did not of itself suspend the injunction, but, as the justice of the case required that the status quo be preserved, and as the supersedeas bond, filed fully protected appellee's rights, it determined by its order to stay the injunction, and directed thus:

> "It is therefore ordered that the clerk issue a stay of proceedings under the judgment appealed from until the hearing of this case upon the merits, or until further orders of the court."

In State of Washington ex rel. Barnard v. Board of Education, 19 Wash. 8, 52 P. 317, 40 L. R. A. 317, 67 Am. St. Rep. 706, the trial court had quashed an alternative writ of prohibition and refused an application to supersede its order pending appeal, because the judgment appealed from was not such a judgment as could be superseded. The appellant then applied to the Supreme Court for an order of supersedeas. That court, concluding that its discretion was properly invoked, merely ordered, "the permanent writ will issue." In Laney v. Rochester R. Co., 81 Hun. 346, 30 N. Y. S. 893, a justice of the Supreme Court, in the case of a prohibitory injunction, made an order "staying proceedings on the part of the plaintiff to enforce the injunction awarded by the judgment." Similar language was employed in Pach et al. v. Geoffroy et al., 19 N. Y. S. 583. In City of New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 P. 735, 54 L. R. A. 190, the Supreme Court affirmed an injunction prohibiting the city from taking water without compensation, but, recognizing the hardship of immediate enforcement of the injunction, allowed the city 60 days within which to commence proceedings to condemn the property, and ordered that, if such proceedings were commenced within such time, "then the injunction granted by the decree of the court below shall be stayed

until the final determination of such condemnation proceedings.

In State ex rel. Gibson v. Superior Court, 39 Wash. 115, 80 P. 1108, 1 L. R. A. (N. S.) 554, 109 Am. St. Rep. 862, 4 Ann. Cas. 229, there was a temporary injunction restraining the operation of a shooting gallery. The defendants appealed from this order, "and applied to the court to fix the amount of the bond which was required to supersede the order pending the appeal." The court refused to fix the amount of the bond, on the ground that the order was not one that could be superseded, and the defendants thereupon applied to the Supreme Court for a mandamus to compel the trial court to fix the amount of the bond. The opinion denying the application concludes thus:

"The relators insist that they are entitled to supersede the order appealed from as a matter of right, and this we hold they cannot do, as the order is a preventative, and not a mandatory, injunction."

In Lund v. Idaho & W. N. R. Co., 48 Wash. 453, 93 P. 1071, the power of an appellate court to suspend a prohibitory injunction pending appeal is referred to as "authority to grant a supersedeas pending the determination of an appeal." In State ex rel. Burrows v. Superior Court, 43 Wash. 225, 86 P. 632, the trial court having announced findings and conclusions awarding a prohibitory injunction, the defendants, before reduction of the judgment to writing, applied for a suspension of the judgment pending an appeal. The court, after argument, announced that he would make such an order, conditioned upon filing bond, but in the meantime, an application having been made to the Supreme Court for a writ of prohibition, delayed making such order. The discussion of the Supreme Court upon the question of prohibition well illustrates the indiscriminate use of terms here under consideration, and for that reason we quote as follows:

"It is apparently conceded by the counsel for respondent that the trial court cannot be required, as a matter of right under the statutes, to grant a **stay of a prohibitory injunction,** and it is also conceded that there is no statute

authorizing the trial court to make an order granting a stay of such judgment pending an appeal to this court. But respondent contends that, independent of the statute, the trial court, by virtue of its equity jurisdiction, has inherent power to suspend the operation of the injunction upon such conditions as appear just, pending appeal to this court. The power of the trial court in this respect is the question presented upon this hearing. This court has repeatedly held that the trial court would not be required by mandate to order a stay or fix a bond which should operate to **supersede a prohibitory injunction** pending appeal, and that a **statutory supersedeas cannot stay** such decree."

Respondent places great reliance upon Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225. In that case the prayer of the petitioner was "that an appeal and supersedeas be allowed it (the petitioner) staying said injunction." The order was, "Appeal and supersedeas allowed as prayed for in the foregoing petition." In the opinion of that court, the order did not attempt to exercise the power to suspend the injunction. It was said:

"This order simply awards an appeal and supersedeas. It is not a special order, expressly staying the operation of the injunction. The most that can be said is that, inferentially, it undertakes to say the effect of a supersedeas is to stay the injunction. If it so declares, it does not thereby extend the scope of the writ. A mere erroneous definition of the writ would not have that effect. The important function of staying the operation of an injunction ought to be performed by a positive, affirmative order, having the same certainty as a judgment or decree. Whether it is stayed or not should not be left to mere inference or intendment."

There is an important distinction between this case and the case at bar. There the injunction to be reviewed contained provisions mandatory as well as prohibitory. An ordinary supersedeas under the provisions of the statute that the court or a judge thereof "may allow an appeal, writ of error, or supersedeas, and may stay proceedings, either in whole or in part," would have effect upon the mandatory provisions of the judgment, and the application and the order might well have been construed as applying only to such provisions. In fact, the court concluded that—

"As to so much of the charge of contempt as consists of disobedience of that part of the injunction which requires the

petitioner to continue to ship its coke to the Pocahontas Coke Company, as its sole selling agent under said contract [the mandatory provisions], the writ of prohibition must be awarded, but refused as to the residue of said charge [the prohibitory provisions]." * * *"

He also places reliance on Johnson v. Turner et al., cited supra; Sixth Avenue R. Co. v. Gilbert Elevated R. Co., 71 N. Y. 430, and Sheridan v. Reese, 121 La. 226, 46 So. 218. In Johnson v. Turner et al., as in Powhatan Coal & Coke Co. v. Ritz, supra, there were numerous provisions of the decree other than the injunction, upon which statutory supersedeas might operate. Sixth Ave. R. Co. v. Gilbert Elevated R. Co., supra, merely holds, as we gather from the opinion, that an order staying "all proceedings on the part of the plaintiff in execution of the judgment" obtained from the trial court on motion pursuant to statute does not have the effect to suspend the operation of a prohibitory injunction. In Sheridan v. Reese, from a prohibitory injunction against cutting timber, defendant obtained from the trial court "an order for a suspensive appeal," and, proceeding to cut timber, was cited for contempt. The form of the "order for a suspensive appeal" does not appear, but the action of the Supreme Court in denying prohibition was based upon the grounds apparently not in conflict with any views we express herein.

Counsel for respondent has assumed that the construction given to "supersedeas" as it occurs in stay statutes has narrowed the legal meaning of the term so that it can have no broader meaning when it appears in an order of court whose discretion is invoked to suspend the operation of a prohibitory injunction. In this we think he has fallen into error. Compelled to determine whether the order has the substantial effect to maintain the status quo ante pending appeal between these rival claimants to public office, or the trivial effect to stay execution for costs, we are not greatly in doubt. Without any disparagement of counsel's good faith or of his able presentation of his theory, we feel that to adopt his views would be mere trifling with words instead of giving a reasonable and practical con-

struction of an order of this court, the purpose of which seems plain. No motion to vacate the order has been made. Possessing broad discretionary powers, it is inevitable that courts at times exercise them mistakenly or improvidently; but the doors are always open to a party aggrieved therby, to apply directly for the vacation or modification of orders of which he complains. Our decision here cannot be affected by any considerations as to the propriety of the exercise of the admitted power in this particular case. So long as the order stands, it must govern.

From what has been said, it follows that petitioners are entitled to the writ of prohibition. Fully satisfied, however, of the entire good faith in which the contempt proceedings were instituted and that a genuine doubt existed as to the import of our order, and that such proceedings will be dismissed when our views become known, the writ will be withheld, with permission to petitioners to renew their application if occasion should require, and it is so ordered.

BICKLEY, J., concurs.

PARKER, C. J., being absent, did not participate in this opinion.

[No. 2831. Sept. 21, 1925.]

McKINLEY COUNTY ABSTRACT & INVESTMENT CO. v. SHAW

SYLLABUS BY THE COURT

1. Failure to give prior notice of the entry of judgment in a case taken under advisement, as required by section 4229, Code 1915, is an irregularity to be taken advantage of by motion to vacate, under section 4230, Code 1915. The lack of such notice is not available as error if no motion to vacate has been made, particularly if the appellant has succeeded nunc pro tunc in obtaining consideration of his objections and their incorporation in the record.

2. A resulting trust may be shown by parol evidence.

3. Waiver of building restrictions in a deed may be shown by parol.

4. Estoppel to enforce building restrictions in a deed may be shown by parol.

5. Authority of o..icers and agents to bind a corporation by waiver or estoppel not always necessarily shown by formal action of board of directors.

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

Suit by the McKinley County Abstract & Investment Company against M. Shaw. From an adverse judgment, plaintiff appeals. Affirmed.

A. T. Hannett, of Gallup, for appellant.

E. A. Martin and J. W. Chapman, both of Gallup, for appellee.

OPINION OF THE COURT

WATSON, J. This is a suit brought by appellant in the district court of McKinley county for an injunction to restrain violation of a building restriction. Upon the complaint and the giving of bond, temporary injunction issued, with order to show cause why it should not be made perpetual. Answer was filed and a hearing had.

From findings 1 to 4 it appears in substance that the appellant, under its former corporate name of the Thornton-Riddington Company, purchased a certain tract of land which it subdivided and platted as an addition to the town of Gallup, and was engaged in selling lots therein, in the great majority of cases inserting in the deeds thereto the following restriction:

"Provided always that it is one of the conditions of this deed that the grantee herein, his heirs or assigns forever, will not build or permit to be built more than one house on any two lots or more than two houses on any three lots, and in no event any house that costs less than $3,500 to build."

That on March 1, 1920, plaintiff sold the lots in question to one H. W. Potts, and conveyed the same by deed including such restriction.

The fifth, sixth, and seventh findings are as follows:

"Fifth. That the said H. W. Potts, becoming, for some reason, dissatisfied with the nature of the lots so bought by

him, entered into an agreement with the said plainti.. to retransfer the lots so purchased, and to receive in lieu thereof a deed to other lots selected by him; that the said Potts did so receive other lots from the plainti.., but, for some reason undisclosed by the evidence, the deed retrnsfering the lots first bought by the said Potts was made, not to the plainti.. herein, but to one C. R. Ridington, who was at that time an o..icer of this plainti..; that the deed retransferring said lots to C. R. Ridington as aforesaid from the said H. W. Potts did not contain any restriction or condition as to the use and enjoyment of the property conveyed.

"Sixth. That thereafter the said plainti.., through its authorized agent, W. W. Turner, negotiated a sale for the lots formerly sold to said Potts, to the defendant herein. That the defendant refused to purchase said lots subject to any restriction or condition as to the use and enjoyment of the land, and, after long negotiations, the said plainti.., through its o..icers, authorized and instructed the said W. W. Turner, as its agent, to sell the said lots to this defendant and to tell her that the said conditions and restrictions would not be enforced as to her, and authorized the said Turner to deliver to the defendant a deed for said lots, signed and executed by the said Ridington, which did not contain any such condition or restriction; that the said Turner, acting under said authority, did deliver a deed, without restriction or condition, to this defendant and did assure her that any such restriction or condition would not be enforced as to her, the said Turner then and there receiving from this defendant the purchase price of the said lots, and turned the money so received, less his commission for said sale, over to the plainti.. herein.

"Seventh. The court further finds that at various times officers of said plaintiff made similar representations to this defendant that she should receive a deed and should take said lots without restrictions or conditions."

Upon these findings, the court concluded as matter of law that the defendant took the title to the lots in question free and clear from any conditions or restrictions as to the use and enjoyment thereof, that the complaint should be dismissed for want of equity, and that the preliminary injunction was wrongfully and improvidently sued out by plaintiff and should be dissolved. Judgment was rendered dismissing the complaint, dissolving the injunction, for $100 as attorneys' fees, and for the costs of the suit.

[1] At the conclusion of the trial, the court took the cause under advisement, requiring the parties to

file briefs on the law and the evidence. Thereafter, on September 5, 1922, the findings, conclusion, and decree were signed and filed without any notice to the appellant. Thereafter appellant presented to the court his objections to the decree and the findings and conclusions, wherein is included the objection "that the plaintiff was given no notice whatever of the signing of the judgment given in this cause, and for the further reason that the plaintiff was given no opportunity to file requested findings of fact and conclusions of law." An order was made by the court, dated January 10, 1923, reciting that the cause came on to be heard on plaintiff's objections, and that both parties appeared by their attorneys. It was ordered that plaintiff be allowed to file its objections nunc pro tunc, and that the record show that such objections were filed before the judgment and considered and overruled by the court, and that plaintiff requested an exception to the ruling, which was granted.

Appellant complains first of error in the overruling of his objection to the decree on the ground that it was signed without notice, citing sections 4229 and 4197, Code of 1915. In Fullen v. Fullen, 21 N. M. 212, 153 P. 294, this court had occasion to consider section 4229 and the purpose thereof. It was there said:

> "When a case has been submitted and taken under advisement by the court, the parties should have an opportunity, before the decree is entered, to suggest the form of the decree, except to findings of fact and conclusions of law by the court, if so advised, and to propose other findings and conclusions, so that their respective views, theories, and contentions may be fully represented by the record. If this opportunity is offered to a party, he has had all that he is entitled to by way of notice."

From the procedure adopted by the appellant in this cause, and the action of the court, it is to be inferred that appellant did present to the court all the objections which he desired to present to the decree and findings, and it appears that all of his objections were considered and overruled by the court. Thus, while appellant did not have the opportunity which the sec-

tion in question contemplates, he was allowed to take a later opportunity to accomplish the same purpose. He is, therefore, in the position of having received every benefit he could have received from notice, and of attempting at the same time to preserve a technical procedural objection. In our view, also, the failure of the court or of counsel to give prior notice of the entry of judgment is an irregularity which is to be taken advantage of by motion under the following section, 4230.

The irregularity having been waived by failure to move to set aside the judgment, and appellant having preserved his objections in another way, we see no merit in its contention of error.

[**2-4**] Appellant's further claims of error in the judgment are stated under one head, as follows:

"That there is no evidence to support finding No. 5 made by the court, and there is affirmative record evidence, to wit, the abstract of title, * * * showing that the deed from the plaintiff herein to C. R. Redington contained the restrictions sought to be enforced herein, and the record evidence affirmatively shows also that the property in question was never conveyed to the defendant, M. Show, by the plaintiff company, and there is no evidence that the plaintiff corporate entity waived the restrictions or that any officer by and instrument competent to bind the plaintiff company, ever waived such restrictions."

Appellant bases its contention that there is no substantial evidence to support the finding to the effect that the equitable title of the lots was in the plaintiff, upon the claim that its objection to the testimony of witness Turner was improperly overruled. This was the question put to the witness:

"Q. Do you know whether or not that lot was really the property of the company or of Mr. Reddington?"

The objection was in this language:

"Object to that; the deed is the best evidence."

The objection urged in the brief is not that the deed was the best evidence, but that it was an attempt to contradict by parol the deeds already in evidence from plaintiff to Potts, and from Potts to Ridington. Thus, the objection urged at the trial is not the objection

now urged. There is, of course, a distinction between the best evidence rule and the parol evidence rule. We are unable to see, however, that either rule would be violated by parol evidence tending to show that, though the legal title was in Ridington, he was in reality holding in trust for the plaintiff. As no authority is cited in support of the contention, we presume that none can be found.

It is next urged that the evidence clearly shows that at the time of the sale of the lots to appellee, Ridington was no longer an officer of the corporation, and that the court erred in finding to the contrary. We do not understand the court so to find, but rather, that he was such officer at the time of the conveyance from Potts to Ridington. Appellant's remaining argument is introduced by the following statement:

> "The real question before this court in this case is whether or not a covenant running with the land can be waived by parol and if so, can a salesman of a corporation or a person who has been the secretary of a corporation waive such restrictive covenant without a corporate act authorizing it."

It is to be observed that the sufficiency of the findings to support the conclusions of law and the judgment is not attacked, and was not questioned in the trial court. We cannot, therefore, concern ourselves with that question. Had the sufficiency of the findings been questioned, other findings might have been made. In this situation, it is our duty liberally to construe the findings in support of the judgment. Baker v. Trujillo De Armijo, 17 N. M. 383, 128 P. 73; Fraser v. Bank, 18 N. M. 340, 137 P. 592. The record being doubtful or deficient, we should indulge every presumption in favor of the correctness and regularity of the decision. Sandoval v. Unknown Heirs, 25 N. M. 536, 185 P. 282. And it is not our duty to search for reasons to reverse the judgment. Reymond v. Holt (N. M.) 141 P. 156 (not officially reported.)

Reverting now to appellant's statement of the issue: It is not clear whether the trial court reached the conclusion it did on the theory of waiver or on the theory

of estoppel. Appellant assumes that it was on the theory of waiver. Appellee assumes that it was on the theory of estoppel. Both waiver and estoppel are recognized defenses in such a case as this. Berry's Restrictions on the Use of Real Property, §§ 378 et seq. 390. Either waiver or estoppel may be proved by parol. Union Trust & Realty Co. v. Best, 160 Cal. 263, 116 P. 737.

[5] Appellant assumes by his statement of the issue that the waiver was made by the salesman or by a person who had been the secretary of the corporation, and was not supported by any corporate act. This cannot be the true question, because the court, as seen, found (finding No. 6) that the sale and the representations and the delivery of the deed were the acts of Turner, the agent, under authority and instruction from appellant, through its officers. We might dismiss the matter here, upon the ground that, since neither the sufficiency of this finding nor the sufficiency of the evidence to support it has been questioned either here or in the court below, it is conclusive upon us. From the course of appellant's argument, however, we take it that the real proposition upon which he relies is that a waiver of the restriction here in question could only be shown by formal resolution of the board of directors. It is impossible to determine from the findings upon just what theory the court concluded that the waiver of the restriction was a corporate act. It must have been, however, because of appellant's conduct, as no resolution of its board of directors was shown. The conduct of the directors of a corporation may be such as to lead to the legitimate inference that the agent actually possesses the authority by consent, or it may be such that third parties dealing with the corporation through the agent justifiably believe that the agent actually possesses such authority. In either case, the act of the agent becomes binding upon the corporation. Whether so binding is often dependent upon a number of circumstances, one of which is likely to be the nature of the business in which the corporation is engaged. 3 Fletcher Cyc. of Corps. §§ 1916 et seq. It is not

true, of course, that any officer of a corporation has inherent power to make contracts disposing of its real estate. The power to do so must be derived from some corporate act or acts. Here, however, we have a corporation engaged in the business of disposing of lots in a subdivision. It is not to be supposed that the board of directors concerns itself with the details of each transaction. The business can be conducted practically only by investing its managing officers with powers more or less general. Whether the court inferred the actual possession of power from appellant's conduct, or whether he deemed the conduct of the appellant such as to estop him from denying the power, we do not know. In neither event would the exhibition of a resolution by the board of directors be essential.

Judgment was given against appellant for $100 as attorney's fees. As this was not objected to, we do not question its correctness. Stalick v. Wilson, 21 N. M. 320, 154 P. 708. But appellee asks that if we affirm the judgment, a further allowance of attorneys' fees be made by us. 14 R. C. L. p. 488, is cited, but is obviously not in point. We know of no statute, rule, or practice under which such an allowance is warranted.

Overruling, as we must, all argued assignments of error, the judgment is to be affirmed, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2854. Sept. 21, 1925.]

TENORIO v LEYBA

SYLLABUS BY THE COURT

1. Pleading over to the merits waives the right to object to an adverse ruling on demurrer.

2 A demurrer based on the statute of frauds is not well taken unless the complaint shows affirmatively that the contract is an oral one. Alexander v. Cleland, 13 N. M. 524, 86 P. 425, followed.

3. The overruling of a motion for default for failure to

reply to affirmative matter in the answer and for judgment on the pleadings, such reply being on file at the time of acting on the motion, is equivalent to prior permission of the court to file the reply.

4. A condition precedent in a contract, that one should guarantee another "with his patents (his ranches) to cover the above specified sum," construed by the trial court as requiring giving of security on ranches, and not satisfied by mere deposit of patents. **Held**, no error in this construction.

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

Action by Roman Tenorio against Macario Leyba. Judgment for plaintiff, and defendant appeals. Affirmed.

E. P. Davies, of Santa Fe, and T. P. Rapkoch, of Las Cruces, for appellant.

George W. Prichard, of Santa Fe, for appellee.

OPINION OF THE COURT

WATSON, J. Appellee (plaintiff) sued appellant (defendant) upon a contract, by the terms of which appellant was to have the use, increase, and profit from 128 ewes delivered to him, to return a like number of ewes at the end of three years, and to pay therefor $1.25 per head per year. Appellant failed to pay part of the rent, failed to return the ewes, and had enjoyed one wool clip and certain lamb increase since the expiration of the term, upon all of which items of damage judgment was rendered against him.

[**1**, **2**] Error is assigned upon the overruling of the demurrer to the complaint, the ground of the demurrer being that, as the complaint was silent as to whether the contract was in writing, it was presumably oral, and hence void under the statute of frauds. Upon the overruling of the demurrer appellant answered, and by thus pleading over waived the right to claim error in this respect. People v. Orekar, 22 N. M. 307, 161 P. 1110. Further, the demurrer is without merit. Alexander v. Cleland, 13 N. M. 524, 86 P. 425.

[**3**] By the answer the affirmative defense of nova-

tion was set up. The reply became due July 21, 1922, but was not filed until August 2, 1922. In the meantime, on July 28, 1922, appellant moved for the entry of default for failure of reply, and for judgment on the pleadings. This motion was overruled by order dated January 24, 1923, and ordered to be filed nunc pro tunc as of August 3, 1922. It thus appears that when the motion was brought to the attention of the court the reply was already on file. Appellee contends that it was within the discretion of the court to permit the filing of the reply. Appellant grants this, but contends that the reply could be filed after the expiration of the statutory limit only by permission of the court, which permission does not appear. He argues that a reply thus filed is a nullity. It is doubtless true that permission of the court is requisite to the proper filing of a reply after the time for filing has elapsed. Lacking such permission, the reply might be stricken. It does not follow, however, that it must be stricken, nor does it follow that in acting on a motion for the entry of default and for judgment on the pleadings the belated reply filed without permission must be ignored. We think we ought to indulge the preseumption that the motion was denied, because the reply was already on file. This recognition of the reply by the court we court we deem equivalent to permission to file it. While this court has not perhaps directly passed upon this question, such a holding would seem to be forecast by previous decisions. Riverside Sand & Cement Manufacturing Co. v. Hardwick, 16 N. M. 479, 120 P. 323; Armstrong v. Concklin, 27 N. M. 550, 202 P. 985. There is nothing in Clute Bros. & Co. v. Hazleton, 51 Iowa, 355, 1 N. W. 672, cited by appellant, at all in conflict with these views.

[4] There are numerous assignments based on the rejection of offered testimony and the refusal of requested findings and conclusions. We think it unnecessary to discuss these in detail. We are satisfied from the record that the whole case turns upon the trial court's construction of a written contract, which, although signed only by appellee and the Anton Chico

Mercantile Company, the court found, at appellant's request, to have been entered into by appellant as well. This contract we insert:

"Anton Chico, New Mexico, Nov. 28, 1919.

"The Anton Chico Mercantile Company, of Anton Chico, N. M., is hereby made itself responsible to pay to Roman Tenorio the stock which Macario Leyba owes him, which said stock is described as follows: 15 new ewes, 38 old ewes, 75 ewe lambs, six months old more or less.

"The ewes with the teeth have to be picked ewes; the old ewes and ewe lambs have to be stock or sheep turned to him as they come out of the corral, but it being understood that they have to be sheep in good condition, and without any defect whatever.

"The Anton Chico Mercantile Company hereby bind themselves to deliver the 15 new ewes and the 30 old ewes within 15 days from this date at the ranch of Nicolas Tenorio, in La Palma. The ewe lambs, six months old, they agree to deliver by the last day of September, 1920, at the Ranch of Roman Tenorio in La Gallina, county of Lincoln; it being understood that if the Anton Chico Mercantile Company wishes to deliver the said ewe lambs before the above mentioned date, and Roman Tenorio agrees to receive the same at any time before the last day of September, 1920.

"Furthermore, the Anton Chico Mercantile Company hereby agrees and compromises itself to pay the sum of said rent due by Macario Leyba for said sheep, said rent to be paid as soon as Macario Leyba has guaranteed the said Anton Chico Mercantile Company with his patents (his ranches) to cover the above specified sum.

"Also the Anton Chico Mercantile Company hereby agrees to pay to Don Justo Leyba the corresponding rent due him, after said land has been guaranteed by Macario Leyba, in favor of the Anton Chico Mercantile Company.

"[Signed] Anton Chico Mer. Co.,

"Nicholas Tenorio. By. E. Griego.
"Narciso Baca. Roman Tenorio."

Appellant contends that this contract, supplemented by certain evidence received and by other evidence offered and rejected, made out a novation. The court evidently took the view that, to sustain his claim of novation, appellant must show the performance of the condition of the contract, viz., that Macario Leyba has guaranteed the said Anton Chico Mercantile Company with his patents (his ranches) to cover the above

specified sum." This seems to be sound. "If the first debt does not depend on any condition, but the second agreement, intended as a novation, is conditional, the novation can only take effect by the performance of the condition before the debt is extinct. Therefore a novation will be prevented from taking place, not only by failure of the condition, but also by the extinction of the original debt before the condition is performed." 29 Cyc. 1134.

Further, the court apparently construed this condition as requiring the giving of security on the ranches, and not as being satisfied by the mere deposit of the patents. If the court was wrong in this construction, there may be error in the case properly reserved for review. If right, we do not think that any of appellant's assignments can avail him. From a careful inspection of the record, we find nothing to lead us to conclude that the contract was not correctly construed by the trial court.

Finding no error, we affirm the judgment; and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2860. Sept. 21, 1925.]

DEES v. DISMUKE et al.

SYLLABUS BY THE COURT

An owner leased premises for a term to three persons jointly. Before the end of the term two of the persons withdrew, and the remaining party discharged the lessee covenants with the exception of the payment of rent for one month due thereunder. The owner, at the expiration of the first term, leased the premises to the tenant in occupancy for a further term of years. **Held** that, the second was a new lease, and hence a mortgage of personal property made by such continuing tenant during the first term, but prior to the commencement of the new term, created a lien superior to that of the landlord for rent of such second term, it being considered by appellant that the mortgage lien is inferior to that of the landlord for the rent under the original term.

Appeal from District Court, Socorro County; Owen, Judge.

Suit by C. M. Dees against W. B. Dismuke and another to foreclose a chattel mortgage. From the judgment, plaintiff appeals. Reversed and remanded, with instructions.

Chas. H. Fowler, of Socorro, for appellant.

J. A. Lowe, of Socorro, for appellees.

OPINION OF THE COURT

BICKLEY, J. The plaintiff (appellant) brought suit in the district court of Socorro county to foreclose the chattel mortgage described in the complaint. He joined as defendants W. S. Dismuke, the maker of the mortgage and the note secured thereby, and J. A. Montoya, who claimed an interest in the mortgaged property by virtue of an alleged landlord's lien.

By appropriate pleadings the issues are joined between the plaintiff and the defendant J. A. Montoya, as to the priority of liens. The record shows that the facts were agreed upon by the parties, and show that prior to the giving of the mortgage to the plaintiff, C. M. Dees, by the defendant, W. S. Dismuke, the premises in question were leased by the defendant, Montoya, to W. S. Dismuke, Hank Thurman, and W. J. Tennyson; that prior to the giving of the mortgage Tennyson and Thurman withdrew from the business, and the premises remained under the charge and control of Dismuke. About the beginning of the year 1921, Dees came in for the purpose of buying one-half interest in the property of Dismuke, but the arrangements never were completed, it appearing that Dees put $2,000 into the business, and it was to secure the payment of this money that the notes and mortgage were given by Dismuke on August 5, 1921. The lease heretofore mentioned from Montoya to Dismuke and others expired in November, 1921. At the expiration of the aforesaid mentioned lease, Montoya made a new lease of the premises to Dismuke alone. Dismuke held under this new lease through the remaining months of 1921, all of 1922, and up to February 1, 1923. There is due under the old lease to Dismuke, Thurman, and Tenny-

son the sum of $100, being rent for the month of October, 1921, all other rents due under the original lease having been paid. The plaintiff admits that the $100 due under the old lease is a lien in favor of Montoya superior to his chattel mortgage lien, but claims that his chattel mortgage lien is superior to other amounts due to Montoya under the second lease. The plaintiff took the chattel mortgage with knowledge that the first lease was existing at the time, and Montoya knew that the mortgage was in existence and in force and effect when the second lease was made.

The court rendering judgment stated that the parties in the presence of the court had stipulated as to all the facts involved in the issues of the cause, and concluded from such facts that the landlord's lien, claimed by the defendant Montoya upon the goods and chattels, the subject-matter of the suit, is a prior and superior lien to the mortgage sought to be foreclosed by the plaintiff, Dees, and rendered judgment against the defendant Dismuke for the sum of $1,040, being apparently the amount of rent due from Dismuke to Montoya under both of the leases in question, ordering a foreclosure of said landlord's lien, and also rendering judgment in favor of the plaintiffs against Dismuke for the sum of $2,000 with interest and attorney's fees in addition thereto, and that the chattel mortgage aforesaid be foreclosed, subject, however, to the landlord's lien theretofore in the said judgment referred to.

The case now is here on appeal.

The appellant in his brief states that the errors assigned may be reviewed under two points: (1) That no landlord's lien is established; and (2) that the landlord's lien, if established, is not superior to the mortgage lien to the full extent of the debt of Dismuke to Montoya. Under the first point, appellant argues that the defendant Montoya, who answered setting up by way of affirmative defense the existence of his landlord's lien, fails to show by the evidence that he had not waived his lien by the taking of collateral security for the rent due to him under the leases in question.

From examination of the record, it would appear that the appellant is not in a situation to urge this point on account of certain admissions made by him at the trial concerning the existence of a landlord's lien, at least to the extent of $100, being for rent due under the original lease, and for this and other reasons we will not consider the proposition advanced by appellant under his first point. Otherwise we think that the appellant should prevail to the extent of the relief he demands.

The lien of landlords is provided for in article 2 of chapter 57, Code of 1915, as amended. Section 3334, being a portion of said chapter, provides:

"Landlords shall have a lien on the property of their tenants which remains in the house rented, for the rent due, and said property may not be removed from said house without the consent of the landlord, until the rent is paid or secured."

But chapter 65, Session Laws of 1917, section 19 thereof, amended the section quoted above to read as follows, the underscored words being the portion added by amendment.

"Landlords shall have a lien on the property of their tenants which remains in the house rented, for the rent due, or to become due by the terms of any lease or other agreement in writing, and said proerty may not be removed from said house without the consent of the landlord, until the rent is paid or secured."

It will be observed that an entirely new element was injected into the landlord lien law by this amendment. Prior thereto the landlord only had a lien for the rent due. By the amendment, rent thereafter to become due under the tenancy is protected by the lien, provided, however, that this amendment shall not apply to tenancies created by parol but only to such tenancies as are created by "lease or other agreement in writing." The reason for this is apparent—strangers to the agreement of tenancy having dealings with the tenant may ascertain upon the initiation of such dealings as to whether or not any rent is due from the tenant to his landlord. If the landlord is to have a lien for rents for a period not yet accrued, creditors of the tenant should at least be advised of the terms

and period of the tenancy in order to be advised of the extent of the rights of the landlord to claim a lien for rents which are to become due. Therefore the Legislature provided, with respect to the lien for rents yet to become due that they must be fixed by the terms of a lease or agreement in writing.

Appellant acknowledged the superiority of the landlord's lien over the mortgage lien to the extent of the rent which was due under the lease existing at the time his rights accrued under the mortgage, but claims that his mortgage became a lien superior to the lien of the landlord under the second lease. Appellee contends that the second lease was merely a renewal lease, and that the relation of landlord and tenant existing between Montoya and Dismuke was a continuing one, and that the lien for rent was a continuing one. There is nothing in the facts stipulated which indicates that there was any covenant in the original lease for a renewal thereof, and nothing in the record to show that the second lease was a renewal of the first lease. In fact, the circumstances indicate otherwise, because the first least was made to Dismuke, Thurman, and Tennyson, whereas the second lease was made to Dismuke alone. The rule as to priorities between the lien on the mortgage and the lien of the landlord under such circumstances is stated in 11 C. J. at page 658, as follows:

"**Effect of Renewal of Tenancy.** A valid mortgage lien created during one term of a lease is superior to a landlord's lien, existing during a second term of lease to the same tenant, that had not begun or been contracted for when the mortgage was executed. * * *"

We have read the cases cited by the textwriter, and they sufficiently support the text.

In Gasnick v. Steffensen, 112 Iowa, 688, 84 N. W. 945, an owner leased a farm for one year to two parties jointly, with the privilege of continuing the lease. Before the end of the first year the parties concluded to no longer work the farm together, one of them securing the lease for the following year. It was held that the second was a new lease, and hence a mortgage of personal property, made by such continuing tenant

prior to the commencement of the new term, created a lien superior to that of the landlord for rent of such term under Code, § 2992, providing that only such property as was used during the term shall be subject to the landlord's lien. The statute cited reads as follows:

"A landlord shall have a lien for his rent upon all crops grown upon the leased premises, and upon all other personal property of the tenant which has been used or kept thereon during the term and not exempt from execution. * * *"

In the course of the opinion, the court said:

"The original lease was to Steffensen and Mathiesen jointly and did not lease a moity to each. They took possession of it, and worked it in common. Under the terms of the lease hey together might exercise the privilege of continuing three or five years longer, but there was no stipulation therein that either one alone might claim that right, and, in the absence of such an agreement, it cannot be claimed that the lessor would be bound to grant such extension to either one alone. It can make no difference that Steffensen and Gasnick agreed that the former should work the place on the terms contained in the written lease, for they were at perfect liberty to adopt them and make them the basis of their agreement, but the agreement itself was a new one, and for a new term. The written lease expressly fixed the term at one year, and it would have terminated at the end thereof, in the absence of some act or declaration on the part of the joint tenants indicating a desire to continue it. There was never anything of this kind done."

That was a stronger case for the landlord than the case at bar, because it does not here appear that the first lease contained any covenants of removal even to the joint lessees.

In passing upon a case similar to the present one and in construing an act of the same import as our own, the Court of Appeals of Kentucky (Lyons v. Deppen, 90 Ky. 305, 14 S. W. 279), quotes the act, and comments as follows (the underscoring is ours):

"'Section 13. A landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture and other personal property of the tenant, or undertenant, owned by him, after possession is taken under the lease; but such lien shall not be for more than one year's rent due, or to become

due, nor for any rent which has been due for more than one hundred and twenty days. But if any such property be removed openly from the leased premises, and without fraudulent intent, and not returned, the lien of the landlord shall be lost as to it, unless the same be asserted by proper procedure within fifteen days from the day of removal.' Gen. St. 1888, c. 66, art. 2, § 13.

"The landlord has a lien upon property of the tenant, described in section 13 in virtue alone of an express or implied contract of lease, **and when the period of such lease ends, the lien that is an incident of it necessarily terminates,** except that by express provision it can be enforced as to property to which it had already attached, within 120 days after the rent becomes due, which might be at the same time the lease expires. But such lien does not prevail against any other valid lien created before the beginning of the term of lease, or before the property is carried upon the leased premises. It thus results that a **valid mortgage lien created during one term of a lease must, under the statute, be regarded as superior to the landlord's lien existing during a second term of lease to the same tenant, that had not begun, nor was contracted for when the mortgage was executed.** Otherwise, a mortgage valid in all respects, and enforceable between the parties to it, might be rendered inoperative at the mere *will of a third party, who had,* before expiration of the first term of lease, indicated no intention to lease for a second term, nor by contract bound either himself or the tenant for a second term. For protection of the landlord intervening mortgages are not permitted by the statute to prevail against his lien existing under contract of lease already made. **But for protection of other creditors the statute, according to fair import of the language used, as well as reason, makes a mortgage lien created before execution of a contract of lease superior to a** landlord's lien existing under such contract," Lyons, etc., v. Deppen, 90 Ky. 305, 14 S. C. 279.

In the case of Upper Appomattox Co. v. Hamilton, 83 Va. 319, 2 S. E. 195, the syllabus of the court briefly states the facts and the decisions as follows:

"A tenant under a lease for a term of years, which contained no covenant or stipulation for a renewal, executed a deed of trust which conveyed the machinery and other personalty on the premises. Thereafter, but before registration thereof, an agreement for a renewal of the lease was entered into. Held, that possession under the agreement of renewal was to be treated as a new tenancy; and that under Code Va. 1873, c. 134, §§ 11, 13, which provide that if the goods of a lease, when carried on the leased premises, are subject to a lien which is valid against the lessee's creditors, his interest only in such goods shall be liable to distress for rent, the lien of the trust deed took priority

over the landlord's lien for rent accruing after the expiration of the original term."

In the opinion of the court, the fact that the original lease contained no covenant for a renewal or for the privilege of a further term was emphasized, and the court said:

"But, taking it to be a lease, and to have bee nintended as such, it clearly is not a 'renewed and extended' lease, as contended for by the learned counsel for the appellant; for it was not made in pursuance of any covenant or stipulation contained in the original lease, and it not only created a new term, after the regular expiration of the first, but it prescribes terms and conditions materially different in several particulars from those contained in the original lease of January 23, 1873. The tenancy created by it was therefore not the same tenancy in existence when the deed of trust to Baldwin was executed, the result of which is that the lien created by the deed of trust is prior in time to the commencement of the tenancy under which rent is claimed by the appellant in the present case. In other words, to use the language of the opinion in City of Richmond v. Duesberry [27 Grat. (68 Va.) 210], supra, the property conveyed by the deed of trust 'must be held subject to the same conditions as if, when carried on the leased premises, it was subject to a lien valid against the creditors of the Petersburgh Cotton Mills."

Appellee cites the case of Otero v. City of Albuquerque, 22 N. M. 128, 158 P. 798, as supporting his contentions. We do not think that case avails appellee anything. The case there was between the original parties, and the question arose as to the effect of a holding over. It is therein stated that, where a tenant holding over after the expiration of his lease, without any express agreement, but with assent of his landlord, he holds on the same terms as those of the original lease, including all the covenants thereof, unless made inapplicable by changed conditions. And the court quoted from a New York case the phrase:

"The holding over constitutes merely an enlargement of the term, and the lease is applied thereto with the same force as though it had been re-executed."

That is doubtless good law as to the original parties to the lease, but here the rights of a third party are involved, and there is no holding over, but a new, distinct, entire, and separate written lease made and

executed between parties not identical with those of the first lease.

Even in case of mere holding over, where the rights of a third party were involved, it was held by the Supreme Court of Virginia in the case of Richmond v. Duesberry, 27 Grat. (68 Va.) 210, that the holding over by a tenant was under a new lease, and, the lien in favor of the mortgagee having been upon it when that lease commenced, such lien is valid against the landlord's lien for rent after the expiration of the original term. In the opinion, the court said:

"Now, Cobb having leased for one year, and Mosely, who took his lease, having held over after the expiration of the lease without any further contract, the tenancy must be regarded as a tenancy from year to year. Archbold on Land, and Tenant, 65, 66, and 68. (marg.); Sherwood v. Philipps, 13 Wend. [N. Y.] 479, and cases cited in the opinion of the court.

"It follows, therefore, that the lease of Cobb of which Mosely was the assignee termined on the 1st day of January, 1872. On that day a new term commenced. The rent for the whole year 1871 had been paid. The deed of trust to Call was executed and recorded on the 10th of March, 1871. At the commencement of the new tenancy, to wit, on the 1st January, 1872, not a dollar of rent was due, nor was any due in arrear until the latter part of 1872. The lien on the furniture was therefore created before the commencement of the tenancy. That furniture was on the leased premises, subject to a lien created before the tenancy for the year 1872 commenced, and not after—and in contemplation of the statute, construing both sections together, must be held subject to the same conditions as if when carried on the leased premises it was subject to a lien valid against the creditors of Mosely.

"The liability for the rent in this case came long after the lien was created; and the tenancy during which the lien was created had expired and every dollar due under that lease had been paid. A new tenancy had commenced with an existing lien upon the furniture created and recorded long before it began."

From all of the foregoing, it appears that the judgment of the trial court must be reversed and remanded, with instructions to enter judgment in accordance with the view herein expressed, and it is so ordered.

PARKER, C. J., and WATSON, J., concur.

[No. 3083. Oct. 10, 1925.]

STATE ex rel. HANNETT et al. v. GRAHAM, State Treasurer.

SYLLABUS BY THE COURT

State checking depositories, designated by the state board of finance, are not entitled to receive deposits of public funds from the state treasurer until they first have security for the same, and the state treasurer is not compellable by mandamus to make such deposits until such requirements are complied with.

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

Mandamus by the State, on the relation of A. T. Hannett and others, as members of the State Board of Finance, against Warren R. Graham, as State Treasurer. Judgment for defendant, and plaintiffs appeal. Affirmed.

J. W. Armstrong, Atty. Gen., and James N. Bujac, Asst. Atty. Gen., for appellants.

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

OPINION OF THE COURT

PARKER, C. J. The state board of finance (appellant) brought mandamus to compel Warren R. Graham, as state treasurer (appellee), to deposit state funds in the First National Bank of Santa Fe and the First National Bank of Roswell, which banks had been designated by appellant as "checking account banks." Appellee answered the alternative writ, setting up that the said banks had not filed bonds or deposited securities for such state deposits, and that, consequently, he was not authorized to make such deposits. It was stipulated that appellee had on hand such funds available for depositing in said banks as checking accounts, and that the said banks were in all respects qualified to receive said deposits, except that they had failed to give bond or deposit securities to secure said state checking accounts. The court rendered final judgment discharging the writ of mandamus from which judgment appeal was taken and perfected.

It is apparent that the whole question is to be determined upon the statutory provisions concerning the care and custody of the public moneys. A public moneys act was first enacted in 1915 (chapter 57, Laws 1915). Section 9 of that act provides:

"No public moneys in the custody of the state treasurer or the treasurer of any county, city or town in this state, or in the custody of any board in control mentioned in section 7, shall be deposited in any bank until such bank is qualified to receive deposits of public moneys by giving a bond or other securities as required by this act."

This provision, in the same form, was brought forward into section 8 of chapter 76, Laws 1923. Section 10 of the latter act, however, exempted checking accounts, which are therein first provided for, from the requirements of the act as to the amount of deposits allowable, the payment of interest thereon, and the giving of security therefor, but authorized the state board of finance to impose such requirements in this regard as in its discretion might be deemed advisable. At that time then no security or payment of interest was required by the banks carrying checking accounts, unless ordered by the state board of finance.

This act was amended by chapter 123, Laws 1925. Section 1 of this act reiterates the general provision in regard to security for public moneys, as follows:

"That section 8 of chapter 76 of the Session Laws of 1923, be, and the same hereby is amended to read as follows:

"Sec. 8. No public moneys in the custody of the state treasurer or the treasurer of any county, city or town in this state, or in the custody of any board in control mentioned in section 6 hereof, shall be deposited in any bank (except as otherwise herein provided) until such bank is qualified to receive deposits of public moneys by depositing collateral security or by giving bond as provided by this act."

Section 2 of the latter act provides for the amounts and kinds of bonds and securities which may be received for this purpose. Section 3 of the latter act amends section 10 of chapter 76, Laws 1923, in several particulars. It creates the office of fiscal agent of the state, and provides for the appointment of a bank as

such agent, and requires a bond or securities in the sum of $250,000, and exempts deposits up to $150,000 from the payment of interest, by way of compensation for the services of such fiscal agent in attending to the business of the state. Then appears the following:

"The state board of finance may also designate not more than two other banks doing business in this state as state checking depositories in which moneys necessary to meet the current obligations of the state may be deposited as temporary checking accounts. No bank shall be so designated unless it has an unimpaired capital and surplus of at least $150,000.00; and not more than 20 per cent. of all money of the state on hand shall be on deposit in all such checking accounts and the checking account with the fiscal agent for a time longer than may be required to distribute the moneys in excess of such percentage to qualified depository banks applying therefor. Nothing herein contained shall prevent any bank so designated as a state checking depository from also qualifying as a state depository under the provisions of this act."

The following provision of section 10 of chapter 76, Laws 1923, is omitted, namely:

"Such checking accounts shall not be subject to the requirements of this act relative to the amount of deposits, the payment of interest thereon and the giving of security, but said board shall make such requirements as to the handling of said checking accounts, the giving of security therefor and the payment of interest thereon as in its discretion may be deemed advisable; and provided that nothing herein contained shall prevent any bank as so designated as a state clearing depository from also qualifying as a state depository under the provisions of this act."

This omission clearly indicates the legislative intention to depart from the former plan of exemption of checking accounts from the requirements in regard to security for the same, and to put them into the same class with other deposits of public money. It is equivalent to saying that checking accounts shall no longer be exempt from interest charges and security as they formerly had been.

There is another consideration which is persuasive in this matter. It has long been the public policy of the state, as declared by its legislation, to require security from depositories having the custody of the

public funds of the state. That this is a wise public policy, calculated to safeguard the interests of the state, is not to be questioned. Before the public moneys are to be placed in the hands of private institutions without security, there should be a plain legislative declaration to that effect. It would be a departure from sound business practices, which could be justified only in such cases as in the discretion of the Legislature might seem to be required or to be expedient. Until the Legislature has so declared in unequivocal terms there would seem to be no just reason to add to the statute by interpretation what the Legislature has failed to make plain.

The argument of the Attorney General, if we understand it, is to the effect that because the Legislature did not provide in terms for the giving of security for the checking accounts that none is required. This is an incorrect way of approaching the subject it seems to us. With section 1 of the Act of 1925 providing for the giving of security for all public moneys, it would seem to require some specific provision exempting checking accounts before that condition of affairs could result, the general policy of the state being to require security for all public moneys. That the interpretation of the statute is not free from difficulty is to be admitted. But in the interest of the safety of the public funds of the state, we deem this conclusion justifiable and required. In this connection it may be said that no doubt the public funds deposited in these two checking account banks would be as safe without security as with it. but that is not the question. The question is whether funds in checking accounts have been exempted from the requirement of security, and we hold that they have not.

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.

BICKLEY and WATSON, JJ., concur.

[No. 3014. Aug. 3, 1925. Rehearing Denied Sept. 2, 1925.]

BACA v. VILLAGE OF BELEN et al.

SYLLABUS BY THE COURT

1. A married woman, being otherwise a qualified elector, owning with her husband community property in the village of Belen, whose husband had paid the tax assessed against such community property during the year preceding an election to authorize the issuance of the village bonds to procure funds for the construction of a sewer system for such village, was qualified to vote upon the question of the issuance of such bonds; she thereby having paid a property tax within the contemplation of the provisions of section 12, art. 9, New Mexico Constitution.

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

Injunction suit by Venceslado Baca against the Village of Belen and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

R. P. Barnes, of Albuquerque, F. C. H. Livingston, of Belen, and C. J. Roberts, of Santa Fe, for appellants.

A. B. McMillen and L. F. Lee, both of Albuquerque, for appellee.

OPINION OF THE COURT

BICKLEY, J. [1] This is an appeal from a judgment of the district court of Valencia county, enjoining and restraining the village of Belen and its board of trustees from issuing sewer bonds of said village, in a suit instituted by Venceslado Baca, a taxpayer of said village. The board of trustees of the village of Belen, on the 18th day of February, 1924, adopted an ordinance providing for the submission to the qualified electors of said village at the ensuing regular election for trustees on the 1st day of April, 1924, the question as to whether or not said village should issue $100,000 of sewer bonds for the purpose of constructing a sewer system for said village. On

the face of the returns, there were cast in favor of the proposition 184 votes, and against it 123 votes.

The trustees were proceeding to issue the bonds, and on the 1st day of July, 1924, Venceslado Baca, the appellee, filed suit in the district court of Valencia county against the village of Belen and the trustee of said village for the purpose of enjoining and restraining said board from issuing said bonds. A temporary restraining order was issued on the same day, and appellants were required to show cause, on the 11th day of July, as to why said temporary order should not be made permanent. A motion was filed, resulting in the filing of an amended complaint, in which it was set up that there were 124 illegal votes cast at said election, that the majority received for the bond issue was 61 votes, and that there was not a sufficient number of legal votes cast at said election in favor of said bond issue to legally authorize the same. The names of the claimed illegal voters were set out, all but 17 of them being married women. The complaint also set up that it was impracticable to construct a sewer system in the said village, because there was no public water supply. Appellant filed an answer and return to the order to show cause, which set up that the married women whose names were set out in the complaint were qualified electors at said election by reason of the fact that said married women were the owners of community property with their husbands, that said community property had been returned for taxation and the taxes upon said property had been paid. As to 15 of the other alleged illegal voters, the answer set up, on information and belief, that they were each duly qualified electors of said village and entitled to vote. The answer admitted that two of the voters set out in the complaint were not entitled to vote, and that their votes were received and counted. There was a denial of the charge that there was not a sufficient number of legal votes cast at said election in favor of said bonds to legally authorize the same, and set up that a ma-

jority of the legal voters voted in favor of said proposition.

The answer questioned the legal sufficiency of the complaint to state a cause of action as to the impracticability of the sewer system, and set up further that the sewer system was practicable, and denied that its construction would constitute a waste of public funds. It was further set up in the answer that, even if said married women, by reason of their community property interests, were not entitled to vote, only 79 of said married women voted for the issuance of the bonds, and 54 voted against it, and that the proposition to issue said bonds received a majority of the qualified votes of the village. It also set up that 19 persons, not qualified voters of the village, had voted at said election against the issuance of said bonds.

A reply was filed denying the new matter set up in the answer. On the 9th day of August, 1924, findings of law and final judgment were filed by the court. On the disputed issues by the case, the court found that 126 votes were cast at said election by persons who had not paid a property tax within the village of Belen during the preceding year. Finding No. 7 is as follows:

"The court further finds that at the trial of said cause the defendants, by their attorney, offered to prove that 124 voters out of the 126 voters at said election, found by the court to have not paid a property tax within the village of Belen during the preceding year, were each, respectively, a married woman, whose husband had paid a tax on community property within the preceding year, to which offer to prove, the plaintiff, by his attorneys, objected as incompetent, irrevelant, and immaterial, which objection was sustained by the court, to which ruling of the court, the defendants, by their attorney, excepted."

The court found, as a matter of law, as follows:

"The court finds as a matter of law that the 126 votes received at said election, of persons who have not paid a tax within the preceding year, were each illegal and left the result of said election in doubt, and that said bond issue was not legally authorized in the manner required by law, and that the relief prayed for in plaintiff's amended complaint should be granted."

Upon these findings and conclusions of law, judgment was entered, making the injunction perpetual.

Errors were assigned which, as appellee states in his brief, present two propositions: The first is that a married woman who is a qualified elector of a city, town, or village, whose husband has, during the preceding year, paid a property tax on community property belonging to said married woman and her husband, is entitled to vote on the question of incurring a debt by such city, town, or village. In view of the conclusion we reach concerning this proposition, it is not necessary to consider the second proposition raised by the assignments of error.

The debt-contracting power of a municipality is regulated by section 12 of article 9 of the state Constitution. In so far as material, it reads as follows:

"* * * No such debt shall be created unless the question of incurring the same shall, at a regular election of councilmen, alderman or other officers of such city, town or village have been submitted to a vote of such qualified voters thereof as have paid a property tax therein during the preceding year, and a majority of those voting on the question by ballot deposited in a separate ballot box, shall have voted in favor of creating such debt."

It appears from finding No. 7 that the appellants offered to prove that 124 voters, found by the court to have not paid a property tax within the village of Belen during the preceding election, were each, respectively, a married woman whose husband had paid a tax on community property within the preceding year. It is thus apparent that the trial court was of the opinion that the payment of a tax upon community property, owned by the community, within the village of Belen, by the husband, did not entitle such married woman to vote upon the question of the issuance of bonds, although she was otherwise a qualified elector.

Such is appellee's contention, and he argues that community property is not assessed to a married woman, and that no tax receipts are issued to her,

and that she would hold no tax receipts which would be evidence of her having paid a property tax, and that anything else, excepting a tax receipt, would be inadequate proof to show the payment of a tax, and that the election judges must rely upon the tax record, and cannot go beyond such tax records, and that to do so would create great confusion in conducting bond elections, and that only such qualified electiors as have actually and individually paid a property tax, evidenced by a properly issued tax receipt to the person claiming the right to vote, is entitled to vote at such bond election.

Section 203, c. 133, Laws of 1921, provides:

"Every person, firm, association or corporation shall, in each year, make a list of all property subject to taxation of which he is the owner or has the control or management. * * * "

Section 206 of the same chapter provides:

"The property of a ward is to be listed by his guardian; * * * of a married woman, by herself or husband. * * * "

Chapter 84, Laws of 1915, is 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 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."

In this state we have the community property system taken from the civil law, under which a wife's interest in property is quite different from the majority of the states in the Union, which have patterned their statutes after the common law, in which the wife has only a dower right in the property acquired by the husband after marriage. In such property she has

no present vested interest, but only an expectancy. Here however, she has a present, existing, vested interest, equal in all respects to the interest of the husband. In the case of Beals v. Ares, 25 N. M. 459, 185 P. 780, the question was fully considered by the court and the conclusion reached was:

"From the foregoing, the following propositions may be accepted as settled: (1) That under the law in this jurisdiction, the wife's interest in the community property is equal with that of the husband; that while he is by statute made the agent of the community and given dominion and control over the community property during the continuance of the marriage relation, his interest in the property by reason of such fact is not superior to that of his wife."

[2] The effect of the statute of 1915, quoted supra, was not considered in the Beals v. Ares Case. It is not necessary to go to the extent of saying that, since the amendment of section 2766 of the Code by chapter 84, Laws of 1915, the husband is no longer the head of the community, and, as such, the manager of the community property. The change intended to be effected by the legislation doubtless was that the husband should no longer, after the amendment, have the absolute power of disposition of real property of the community. Beyond that, the husband acts as a sort of agent of the community. McKay, in his work on Community Property (2d Ed.) §§ 46, 47, states that the true doctrine is that as head of the community the husband acts in a representative capacity with respect to the wife's interest in community property, and that this power is found in the law of the family. By section 2745 of the Code, the status of the husband as the head of the family is specifically preserved. We think his position as head of the family warrants his payment of taxes levied upon community property out of the proceeds of community personal property of which he has the management and control, and during coverture the sole power or disposition other than testamentary. In so doing he would not be acting as an interloper or volunteer with respect to the payment of the taxes, which might be, strictly speaking, a burden upon the wife's interest in such community prop-

erty. A tax upon community property is a community debt, subject to satisfaction out of community property, and it seems that it would be proper for the husband, as agent of the community, to pay the tax on community property in order to forestall interest, penalties, liens, and foreclosures which might follow in the event of the taxes being permitted to become delinquent.

As appellee attaches some importance to the fact that no property was assessed to the married woman individually in this case, we call attention to the rule laid down in many well-considered cases, that property which is held jointly by several owners should be jointly assessed. And in Fleischauer v. West Hoboken Township, 40 N. J. Law, 109, it was held that an assessment for taxes will not be declared invalid simply because it is made in the name of only one of two tenants in common. Section 222 of chapter 133, Laws of 1921, contemplates that, where a tract of land is claimed by several persons, having or claiming an undivided interest therein, the same may be listed by any one of such persons. As we understand the system of taxation in this state, the lien of taxes is against the property as a whole and not against undivided interests therein.

"The qualification of voters at such an election (bond election) may be fixed by either constutional provision or legislative action and the privilege of voting limited to the taxpayers, the male taxpayers, qualified voters, freeholders, or such other classes as may seem advisable," Abbott Public Securities, § 135.

As the question presented here has never been discussed or passed on by this court, and as it involves matters of great importance to the public generally, we will quote at some length from some of the cases showing illustrations of constitutional and statutory limitations upon voting and the construction which has been placed upon such provisions by the courts, as these may serve to point the way to a rule of action under our Constitution and laws.

In Re District Attorney of Dauphin County, 11 Phila. (Pa.) 645, is available because the opinion discusses earlier cases, and is regarded by later writers as a leading case. The constitutional provision under consideration, in substance, is that every citizen over the age of 21 years, having resided in the state 2 years next before the election, and within that time paid a state or county tax, which shall have been assessed at least 2 months before the election, shall enjoy the rights of an elector. The court said:

"The nonpayment of taxes by the voter, according to the provisions of the constitution, is the ground mainly relied on for annulling the election of Mr. McPherson to the office of district attorney. The petition avers that a large number of votes, to the number of ———, were received and counted for the respondent, in the different wards and townships particularly described, given by electors who had given no state or county tax, according to the requirements of the constitution, but that the tax on which they voted was paid for them by another, to the petitioners unknown, without the knowledge or previous authority of the persons whose votes were so received and counted in the general return, and should have been stricken from the general computation.' Is this a sufficient ground for rejecting the votes? It is not averred that the electors were not assessed in due time, in proper form, and by the lawful officer; but the complaint is, that the tax was paid by some one for the delinquent, without his knowledge or previous authority. Had it been stated that the name of the citizen was inserted in the tax list, subsequent to the first day of August, without his personal application to the assessor, it might show a violation of the second section of the act of January 30, 1874, which, if it did not render the assessment void so far as it confers the right of suffrage, would certainly subject the officer to a severe penalty. If the tax was received and receipts given, when there was no assessment, it would confer no right of suffrage, as the same must be made at least two months, and the tax paid one month, before the election.

"It is contended that the tax must be paid by the voter in person, and cannot be done for him by another, without his previous request, and to prove that such is the true construction of the constitutional provision, we are referred to the case of Catlin v. Smith, 2 Serg. & R. 267, which as we understand it, proves nothing of the kind. The position assumed in that case was, that if the tax itself was imposed on the county or city six months before the election, and paid at any time, it gave the right of suffrage; but the Court held that a proper construction of the Constitution required that it should be assessed on the individual at least six months prior to the election. This was under the Constitution of

1790, but we have no doubt but that of 1873 will bear the same construction, substituting two months for six.

"The case of Humphrey v. Kingman, 5 Metc. [Mass.] 162, is relied on to establish the principle that the tax cannot be paid through an agent, yet that case proves that where the agency is recognized, the voter acquires the same right as if payment were made by his own hand. Some expressione are used by the judge in delivering the opinion, which would indicate that where the party declined to repay the tax, or only acquiesced in the payment in order to obtain the right of suffrage it would not confer it. But we must bear in mind that the case was a hard one—a suit against the election officers who had probably been misled by the shuffling ways of the intended voter and, also, that the statute of Massachusetts may be differently worded from our Constitution. Taking the whole case it rather proves that a man can pay through an agent with the same effect as when done personally.

"From the adoption of the Constitution in 1790, down to the present time, the practice to pay taxes through an agent has always been held as good and valid, as when done by the voter in person; and the presentation of the receipt at the pay rolls, and claiming the right to vote by virtue of it, has always been considered sufficient evidence of the adoption of the agency. It is averred, however, in the petition, and when that is demurred to, we must take it to be true, that these voters had their taxes paid without their knowledge, or previous authority conferred on the person paying. We must hold in this as in other cases, that a subsequent ratification is equivalent to an original command according to the legal maxim, 'Omnis ratihabitio retrotrahitur et mandato equiparatur.' This has been applied to almost all kinds of cases. A sale of property void for want of authority is valid if afterwards ratified, 7 Wright, 226. So goods purchased by an agent contrary to the instruction in his power of attorney is binding when acquiesced in, or ratified by the principal. 14 P. F. Smith, 247. And a principal not promptly disavowing the act of the agent, makes it his own. 19 P. F. S. 426. He must promptly disavow it as soon as made known; If not done, silence if proof of acquiescence. 4 Wh. 314. He must declare his dissent in a reasonable time, or will be presumed to have ratified. 3 Harris, 229; 4 Casey, 22. Where one without authority acts for another, the latter may ratify by assuming its burdens, and thus entitle himself to its benefits. 6 P. F. Smith, 23. And a stranger has no right to object that an agent has exceeded his authority. 12 Harris, 23.

"The only doubt which can exist on this branch of the case arises out of the constitutional mandate, that the tax must be paid at least thirty days before the election, and whether the voter is obliged to show that he assumed and acknowledged the payment by the agent before that time. On careful consideration we are satisfied that the ratification adopts the act as of the time of its performance. It is thus

carried back by relation to that period. Such is the doctrine laid down by ancient and modern writers, and by judicial decisions. See 18 Viner's Abt title Ratihabitio, pages 157, 158, and a host of authorities there cited."

The decision is the case of U. S. v. Foster et al. (C. C.) 6 F. 247, is stated in the syllabus as follows:

"'An amendment to the Constitution of the state of Virginia (article 3, § 1) provided that in order to entitle a citizen to vote he shall have paid to the state, before the day of election, the capitation tax required by law for the preceding year; and the Penal Code, (chapter 8, § 26) provided that 'if any person, directly or indirectly, gave to a voter in any election any money, goods, or chattels, or pay his capitation tax, under an agreement, expressed or implied, that such voter shall give his vote for a particular candidate, such person shall be punished by a fine of not less than $20 nor more than $100; and the voter receiving such money, goods or chattels, or having his capitation tax paid in pursuance of such agreement, shall be punished in like manner with the person giving the same.' Held, that the payment of such capitation tax by another qualified the citizen to vote, whether the Penal Code had been violated or not."

The following is the statement of a decision from a Delaware case as found in the American Digest; we have not been able to find the original report:

"Where the county taxes have for several years been assessed against the land of one who died intestate, and paid by one of his sons who owned the land as coparceners, held, that another son might vote, so far as payment of said tax is required to qualify him." State v. Livingston, Houst. Cr. Cas. 109.

In the case of State ex rel. Attorney General v. Dillon et al., 32 Fla. 545, 14 So. 383, 22 L. R. A. 124, the act under consideration provided:

" * * * Prior to the holding of the first city election as provided herein, there shall be given to each person who was entitled to qualify himself as an elector at the last state election by registration and the payment of his poll taxes for the years 1890 and 1891, and failed to do so, an opportunity to qualify by registering and **himself paying his own poll taxes** for such years, more than two weeks before said first city election." (Underscoring ours).

It was provided that the commissioners of election who prepared a list of persons authorized to vote at the election; such list to be revised so as to contain "all

and only the names of persons at that time residents of said city, and who were at the time of the last general state election qualified electors of the election districts in said city, or who have since that time registered and **themselves paid their own poll taxes** due for the years 1890 and 1891." The court said:

"Our construction of the provisions mentioned is, that they do not deprive the voter of his right to pay his poll taxes through an authorized agent, and that a payment made by such agent would be a valid payment under the terms of the act. A liberal construction should obtain in favor of the voter's right to make the payment through another, and the act does not in terms deny such right. It is true [that] it says 'himself paying his own poll taxes' for the years mentioned, but the general principle, **'qui facit per alium facit per se'** should apply and the payment through an authorized agent would be the payment by the voter himself."

The cases seem to be uniform that a person may pay his taxes through the agency of another, but the claim is made in some cases that it must be shown that it was the taxpayer's money which ultimately went to pay the tax in order to qualify him as an elector. The Pennsylvania court, in the case of Gillen et al. v Armstrong, 12 Phila. (Pa.) 626, did not consider that the question of whose funds the tax was paid with was a controlling factor. The court said:

"Secondly, I indorse the views so clearly expressed by Mr. Justice Pearson, in the contested election of District Attorney of Dauphin county (32 Legal Intell. 59), that a citizen may vote upon the payment by another of the proper tax for him. If the official of the law receives the tax for the voter's account it is of no importance whose hand or whose money pays it. The payment discharges the tax and qualifies the voter. Whatever claim the party paying may have against the voter ratifying the act, it is quite clear that the state or county cannot say the tax has not been paid after receiving it for the voter's account."

In the case of In re Griffiths, 1 Kulp. 157, the Pennsylvania court held that, even where the taxes were paid by a political committee or other person, and such payment is not made the means of influencing the voter, a subsequent ratification of the act of the voter is equivalent to the giving of prior authority. In the case of Groves v. Commissioner of Rutherford County

et al., 180 N. C. 568, 105 S. E. 172, it was decided that, where a registered voter was absent in military service, his father's offer to pay the poll tax, without physically tendering the money, was a sufficient tender to qualify the son as a voter.

Attention is called to the case of Whittaker v. Watson, 68 Ark. 555, 60 S. W. 652, because there the Constitution required the voter to exhibit a receipt or other evidence that he had paid his poll tax next preceding the election before being entitled to vote. It might be observed that, if our Constitution makers had desired to make the presentation of a tax receipt the only evidence of the payment of the tax and the qualification of the elector to vote, they would have done so, and the failure so to do would be an omission which would be significant in construing the terms of the Constitution. In that case the court said:

"The Constitution of this state declares that 'every male citizen of the United States, or male person who has declared his intention of becoming a citizen of the same, of the age of twenty-one years, who has resided in the state twelve months, in the county six months, and in the precinct or ward one month, next preceding any election at which he may propose to vote, except such persons as may for the commission of some felony be deprived of the right to vote by law passed by the general assembly, and who shall exhibit a poll tax receipt or other evidence that he has paid his poll tax at the time of collecting taxes next preceding such election, shall be allowed to vote at any election in the state of Arkansas.' etc. Const. Amend. art. 21. The * * * evidence of the payment of the poll tax is to make the payment of the tax by the elector a condition upon which he shall be allowed to vote, and to prohibit him from voting until he does so. We conceive the object and intent of this provision of the Constitution to be not only to induce the citizen to whom the support of the common schools, for which the tax is levied, but to exclude from voting the citizen who does not take an interest in the welfare of his country or value his vote sufficiently to pay a poll tax. He, however, need not pay the tax in person, but may in good faith authorize another to pay it for him, or, if another has done so without having been previously authorized, he may adopt or ratify the act; but he must do so with a bona fide intent and promise to reimburse him. In this way only can the voter be secured in the free and untrammeled exercise of his right of suffrage. The acceptance of the payment of a poll tax as a gift tends to induce him to so vote as to please the partisan, candidate or

other person who paid the same for him. This is contrary to the spirit of the requirement of the Constitution. In re White's Election, 4 Pa. Dist. R. 363, 372, 373; Humphrey v. Kingman, 5 Metc. (Mass.) 162; McCrary, Elect. (4th Ed.) §§ 109, 110."

On the question of the manner of assessment of the property as having a bearing upon the qualifications of the taxpayer to vote, attention is called to the case of Commonwealth ex rel. Underwood v. Shrontz, 213 Pa. 327, 62 A. 910. There the court said:

"On the admitted facts the appellee was a qualified elector, entitled to vote at the election, and therefore eligible to office. He was a natural-born citizen, upwards of 21 years of age, and, having regard to the substance of the qualification by payment of a tax, he had complied with that requirement. The appellant argues that there was a defect in the form of the assessment which destroyed its efficacy. The tax was assessed against certain property in the name of Shrontz Bros., but it was admitted that Shrontz Bros. were the appellee and his brother, who were owners as tenants in common of the land assessed. It also appeared that this fact was known to the assessor and was intended to be truly set forth in the assessment. Even without this, however, the conclusion would have been the same. No error of the assessor, accidental or othewise, could deprive an elector of his right, if in fact he was qualified. The distinction is well taken by the learned judge that the appellee's vote might have been properly refused at the election because he was not armed with the proper evidence of his right; but in a judicial inquiry into the existence of the right the court is not debarred from ascertaining the actual facts no matter what the prima facie dase presented by the tax receipt. The Constitution regards substance, not mere form. It makes no requirement that the tax shall be assessed against the elector by name, or personally, or as owner of property in severalty. If it is against ascertained property, and he, being in fact the owner, pays it, the requirement is fulfilled. As the learned judge below said, if the assessment had been in the names of John F. Shrontz, Jr., and Clark Shrontz individually as tenants in common, there could have been no question about the tax payment, and if the expression Shrontz Bros. in fact meant the same thing the result would be the same. A blunder of the assessor in the form of the assessment could not deprive the elector of his constitutional right."

The case of Saxton v. Mayer and Council of Delaware City et al. (Del. Ch.) 88 A. 605, answers several contentions of appellees. In this case it was decided that each of two devisees of land was entitled to vote, though the land was assessed to the testator, and it was

also decided that it was not necessary that the name of the taxpayer appear on the assessment list as a taxpayer in whose name property had been assessed, on which the tax assessed had been paid. Also the court answers the argument that there would be great and disastrous confusion in the conduct of elections if the election officers were not provided with an arbitrary test of determining who is a taxpaying elector. The qualification for voting under consideration was that, being a resident of the town, "he or she shall have paid all taxes heretofore levied and assessed against him or her, and shall produce a tax receipt for the same when demanded by any person entitled to vote at said election." The court said:

"As to the eligibility of the several persons named in the bill, there seems to be no rule applicable to all of them. It was the manifest object of the law under consideration to give to the resident taxpayers of the town, who bear the burden of taxation, the right to decide whether the bonds should be issued. Two qualifications are imposed on each voter: (1) Residence; and (2) the payment of all taxes assessed against him. The defendants urge that there is another qualification, viz. that the name of the voter must appear on the assessment list as a taxable, in whose name property has been assessed and on which the tax assessed has been paid. But this is taking the act too literally and overlooking its real purpose, as above stated. Unless a tax be assessed to him (i. e. in his name), and the tax be paid, a property owner resident in the town is, according to this view, disqualified. The only principle of general application in this case is one which disapproves that conclusion. It is urged that the assessment list is the only sure guide and that otherwise the election of officers must decide questions of law as to titles to land, the respective rights of trustee and cestui que trust, and the like, and that at the polls there is no suitable opportunity to hear and decide such questions, which may be complicated. But there is nothing to prevent them from ascertaining in advance of the election day the qualification of voters by means of an antecedent registration, or investigation by inquiries in doubtful cases, or some other reasonable method. Then, again, there is no real reason why all the questions as to eligibilty which have in fact arisen, as appears in the bill in this case, should not have been rightly determined by the election officers at the polls on the day of election by the advice of counsel. Endless confusion would not necessarily result from this course, and it would not be quite impossible under such conditions to hold the election, as claimed by the defendant's counsel. Besides it would not be just to a resident owner of land in the

town to deprive him of his opportunity to voice his wishes effectively, because of mistakes of others in the manner of assessing his property, over which mistakes he has no control. A liberal, rather than a strict rule of qualification of voters representing property should prevail at an election, when those who pay the debts through the taxation of their property or voting whether the debts shall be contracted. It seems necessary, then, to consider, apart from the contents of the assessment list, the right of each of the five persons named in the bill to vote."

In this connection, we call attention to the fact that section 2006 of the New Mexico Code provides that:

"When any person offers to vote, whose qualifications are not personally known to any of the judges, he may be examined under oath as to said qualifications and those who take a false oath shall suffer the penalty prescribed by law for perjury."

So it would appear that the Legislature has provided a means for the election officers to examine a voter as to his qualifications.

The community property relation is sometimes spoken of as being analagous to a partnership. In King et al. v. Board of Canvassers and Registration of City of Providence, 37 R. I. 254, 92 A. 569, the Supreme Court of Rhode Island decided (syllabus):

"Const. art. 2, § 2, provides that no person shall vote in the election of councilmen, etc., unless he shall have paid a tax assessed on his property valued at least at $134. Laws 1910, c. 640, § 22, provides that no person who claims the right to vote on the payment of a tax assessed against him on property for councilmen, etc., shall vote unless on production of a certificate from the collector of taxes that he has paid the tax assessed against him. Gen. Laws 1909, c. 8, § 32, authorizes the board of canvessers and registration to summon witnesses and compel the production of documents to determine questions arising before the board. A partnership consisting of two equal partners was assessed and paid a tax on personal property valued at $1,200 under Gen. Laws 1909, c. 57, § 9, as amended by Laws 1921 c. 769, § 39, taxing partnership property to the firm as an entity. Held, that the partners though paying no other tax, having a property interest in the firm of more than $134 on which a tax was paid, were entitled to vote, and it was no objection that a partner's interest might not be determinable, since the board had the power to determine it."

Even in those states having constitutional or statutory provisions restricting the voting privilege to those

who have "in person" paid, or who "personally pay" a tax, the courts have held that these phrases do not require that the voter be physically and bodily present when the tax is paid, but only that his taxes are paid by him out of his own funds, though it be through an agent.

In the case of Tilton et al. v. Herman, Treasurer, et al., 109 Va. 503, 64 S. E. 351, the Supreme Court of Virginia said (syyabus):

"Const. 1902, § 20, art. 2 (Code 1904, p. ccxii), provides that male citizens who have personally paid poll taxes for three years shall be entitled to register, and section 21 (Code 1904, p. ccxii), gives each person the right to vote if he has personally paid such poll tax at least six months prior to the election. Held, that the phrase, 'personally pay', in section 21, does not require that the voter be physically and bodily present when he pays his tax, but only that his tax be paid by him out of his own funds, though the amount be sent by check or through an agent."

And in Wallis et al. v. Williams, 50 Tex. Civ. App. 623, 110 S. W. 785, the court said (syllabus):

"The constutional right of suffrage does not depend upon the payment by the voter of his poll tax 'in person', all that is required being that he should pay his poll tax on or before a stipulated day, and hence, though the statute relating to the payment of poll taxes as a condition to the right of suffrage directs the voter to pay the tax in person or give a written order therefor, a voter would not be deprived of his right of suffrage by reason of the payment of his tax by another person without written order, where the receipt obtained by him from the tax collector was regular upon its face, and where the statute did not expressly provide that a failure to obtain this receipt in the manner directed by the statute would disfranchise the voter."

It will be seen that our constitutional provision is less restrictive than many of those in the illustrations cited. We would not undertake to lay down any hard and fast rule for the guidance of election officers hereafter, but we think that, from the arguments in the cases cited, our constitutional provision under consideration permits a husband or wife who owns community property in the city, town or village, being qualified electors thereof, who have paid a property tax therein upon such community property during the year pre-

ceding the election, either with his or her own hand, or by an agent, may vote at an election to authorize such city, town or village to incur a debt for a lawful purpose. It is our opinion that it is immaterial whether such community property stands assessed on the tax records in the name of her husband or wife, or both, and that, if the husband pays the taxes on community property without any specific grant of power from the wife, the law will imply authority in him to do so by virtue of his family relation, particularly unless it is shown that it is done contrary to the expressed wishes of the wife. Because our statutes provide that "husband and wife contract toward each other obligations of mutual respect, fidelity and support," we think that if the wife, with the acquiescence of the husband, pays the taxes on community property, the husband and wife, in so far as the tax paying requirement is concerned, are entitled to vote.

For these reasons, 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.

PARKER, C. J., and WATSON, J., concur.

MURRAY v. MURRAY, et ux.

[No. 2915, Sept. 10, 1925.]

SYLLABUS BY THE COURT

1. An action by a married woman against the parents of plaintiffs husband for alienation of her husband's affections will lie, even though plaintiff's husband has not completely and in a literal sense abandoned her.

2. The presumption that the advice of a parent to his child is made in good faith is overcome, where interference is shown, and no reason or excuse for the same can be deduced from the circumstances.

3. Where court, over objection, permitted plaintiff to testify as to the contents of a letter of the parent to the husband of plaintiff, the objection being upon the ground that the letter was not sufficiently accounted for to allow secondary evidence of its contents, the error, if any, of the court, was

technical and immaterial, in view of the testimony of the parent that no such letter was ever written.

4. Letters written to plaintiff by her husband, showing a deep affection for her, were admissible to rebut claim of defendants that no affection existed between them and hence none to be lost; such communications not violating the priviliged communication or the hearsay evidence rules.

5. In an action by the wife for alienation of her husband's affections, statements of her husband would not be competent evidence of affirmative hostile actions on the part of the defendants, but, so far as such statements tend to show the condition of her husband's mind and feelings toward the plaintiff at the time, and the effect of the conduct of the defendants upon the affections of her husband for her, they are competent for this limited purpose.

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

Action by Adelaide Murray against D. E. Murray and wife. Judgment for plaintiff, and defendants appeal. Affirmed, and remanded with directions.

Hanna & Wilson and George Lougee, all of Albuquerque, for appellants.

E. W. Dobson, of Albuquerque, for appellee.

OPINION OF THE COURT

PARKER, C. J. The appellee (plaintiff) brought an action for damages against appellants (defendants) for the alienation of plaintiff's husband, and recovered a verdict and judgment for $12,500. The defendants are the father and mother of plaintiff's husband. Counsel for defendants argue that there was not sufficient legal evidence to support the verdict.

[1, 6] 1. It is first urged that the gist of the action for the alienation of the affections of a spouse is the loss of consortium. It is then argued, quoting from the testimony of the plaintiff, that she had already herself broken the conjugal relation by locking the husband out of her room. This is a misconception of the scope and meaning of consortium. Consortium means much more than the mere sexual relation, and consists also in that affection, companionship, conjugal love, fellow-

ship, and assistance so necessary to a successful marriage relation. Rott v. Goehring, 33 N. D. 413, 157 N. W. 294, L. R. A. 1916E, 1086, Ann. Cas. 1918A, 643; 13 R. C. L. "Husband and Wife," § 517; 30 C. J. "Husband and Wife," § 979.

The real happiness of marriage may be destroyed by the loss of the spouse's affection, kindness, and friendship, and yet the parties may, for reasons of convenience, expediency, welfare of children, or public opinion, submit to and continue the relation, although the principal joy and happiness thereof has been destroyed by the wrongful action of some third person. It follows, therefore, that counsel are in error in this contention.

[2] 2. Counsel for defendants argue generally that, laying aside all questions of admissibility, the evidence is insufficient to support the verdict. The proofs of plaintiff show that the parties were married and living in Santa Fe when the mother came to visit them on account of the illness of the son, plaintiff's husband. The mother at once showed a marked dislike of plaintiff, and stated to her son that she could not see why he had married a Southern girl; that he had been raised differently; asked her son if he would not be glad to get home and have some of mother's good cooking; that plaintiff should do the work of the household without a servant. This visit, lasting about three weeks, terminated in considerable ill feeling between the two women. Plaintiff next saw defendants at their home in Big Rapids, Mich., in the fall of 1917. While there, she overheard a conversation between her husband and his father, in which the father told his son that he had just as well get rid of his wife; that his mother disliked plaintiff, and that she had a disposition to have her way, and that she would in time force the husband to leave his wife; that the son had better divorce the plaintiff before he left for overseas, as she would not be faithful to him while he was gone. All of the parties went from Michigan to Washington, D.

C., and stayed a while with plaintiff's mother in a suburb of the city. They next met in the Palmer House in Chicago, where the mother stated that she would not stay under the same roof or in the same building with plaintiff, and left the hotel, going to a hospital for treatment. The plaintiff's husband went overseas with the American Expeditionary Forces, and plaintiff went to live with her mother near Washington, D. C., where she gave birth to a child, which died at birth. During this time, defendants gave plaintiff no aid or consolation whatever. Upon the husband's returning home from overseas plaintiff and he went directly to Silver City, N. M., where they resided for some time.

In the fall of 1919, the mother wrote the son a letter to Silver City in which she accused plaintiff of being "common white trash," and a woman of immoral character, and threatened that they (both parents) would disinherit the son if he did not get rid of plaintiff. The son showed the letter to plaintiff, and it was read by others, but it was not produced at the trial, the son having kept it. In June, 1922, both defendants came to Albuquerque, to which place plaintiff and her husband had removed. They came unannounced and registered at a local hotel. They phoned the son, and plaintiff and her baby were invited by the son to accompany him to the hotel, while, as he said, he was making a professional call. He went into the hotel, met the defendants and visited with them for an hour or so, plaintiff and the baby remaining in the car. The three then came out of the hotel to where plaintiff was in the car. The son asked defendants to get into the car and all drove to the home of plaintiff, and the son and defendants remained until about 10 o'clock that night. About two or three days later, plaintiff and the son were in their car and met defendants on the street, picked them up and all went for a ride.

Plaintiff next saw defendants at her home, where she had invited them to dinner. When her husband came in over an hour late for dinner, he was in an angry mood, and told plaintiff if she had anything

against his parents, the defendants, to go right in and have it out with them. He pushed her into the room where they were, and she told the mother that, as she had been the cause of all the trouble between her and her husband, she could not expect to entertain the family. The defendants and the son, plaintiff's husband, left the house, and the son did not reappear for three or four days. Then he came for one meal a day at 5 p. m., and slept at the house, coming in from 10 p. m. to midnight. He frequently used brutal and profane language to plaintiff, using the "white trash" expression of his mother, said he did not love plaintiff, and he was going to leave her and live with defendants. This condition of affairs continued until July 8, 1922, when plaintiff filed her complaint in this case. The husband thereupon softened much in his demeanor toward plaintiff, but in about ten days left her and their baby, and was not seen again by them until the day of the trial, where he was present but did not testify.

The testimony of defendants is simply a denial of the charges of the plaintiff. They also produced witnesses to show that plaintiff and her husband frequently quarreled and did not live very happily together, but no effort was made to show that plaintiff was not a good wife or that there was any reason why her husband should separate from her, or any reason or excuse for the alleged conduct of defendants. Under all these circumstances, it is clear that, if the jury believed the testimony of the plaintiff, as they undoubtedly did, they might well find for the plaintiff. There was, according to her testimony, no occasion for any interference by defendants with plaintiff's relations with her husband, and such interference not being traceable to any just cause, it is to be attributed to a willful determination to break up plaintiff's home.

We are aware, in this connection, of the presumption that the advice of a parent to his child is made in good faith and in the child's interest as the parent sees it.

Birchfield v. Birchfield, 29 N. M. 19, 217 P. 616. But in a case like this, where the interference is shown, and no reason or excuse for the same can be deduced from the circumstances, there is nothing to which it can be attributed except malice of the parents. 13 R. C. L. "Husband and Wife," § 525; Weber v. Weber, 116 Minn. 494, 134 N. W. 124; Cornelius v. Cornelius, 223 Mo. 1, 135 S. W. 65.

[3] 3. The defendants complain of the action of the court in permitting plaintiff to testify to the contents of the letter of the mother to the son, heretofore referred to, and to admit the deposition of her aunt to the same effect. The objection is upon the ground that the letter was not sufficiently accounted for to allow secondary evidence of its contents. Plaintiff testified that her husband showed her the letter, and that she and her aunt read it; that her husband took the letter and that she did not know what became of it, and had made no effort to get it. No demand was made to produce it, and no subpoena duces tecum issued. The husband, to whom the letter was written, was in attendance at the trial, and was sworn as a witness for the defendants, but did not testify. The mother testified she wrote no such letter. The letter was the property of the plaintiff's husband, and he was in attendance, not as a friend or partisan of the plaintiff, but as the witness and partisan of the defendants. He had once before denied the receipt of the letter when plaintiff confronted the mother with the writing of it. It was a writing which would not, in ordinary course, be preserved, as it had failed, at that time, to accomplish its purpose. At any rate, if the letter was in existence and different from plaintiff's testimony, the husband was there to produce it, and, if it was never received by him, he was there to say so. He did neither, and the defendant mother contented herself by simply denying the writing of the letter.

It may be that, according to the strict general rule, a notice to produce or a subpoena duces tecum should

have been served before secondary evidence should have been allowed; still, inasmuch as, according to the only evidence of defendants in the case, no such letter ever existed, it would seem that the error of the court was technical rather than substantial, and the defendants suffered no legal injury. If no such letter was written, of course none could be produced. In such case, the error, if there was error, becomes immaterial. See Jones on Evidence, "Civil Cases" (3d Ed.) § 224; Bickley v. Bickley, 136 Ala. 648, 34 So. 946; Boyd v. Warden, 163 Cal. 155, 124 P. 841; and other cases cited by Mr. Jones.

[4] 4. The defendants stressed the alleged fact that there was no affection between plaintiff and her husband, and therefore there was none to alienate. They put on evidence of third persons to the effect that the parties quarrelled more or less constantly as indicative of that condition. Plaintiff, in rebuttal, introduced a number of letters received by her from her husband while he was in France, showing deep affection for the plaintiff. Objection was interposed by defendants upon two grounds: The first ground was that the letters were privileged communications, and as such were incompetent. The argument is founded upon a misconception of the law. Laying aside the question as to whether the principle is applicable at all in this case, the husband not being a party to the action, it would seem clear that the doctrine is wholly misapplicable here. A spouse, at common law, was disqualified to testify for or against his spouse. This disqualification has been removed by statute. See section 2165, Code 1915. So husband and wife may now testify for or against each other, the same as if unmarried, with the exceptions to be noted. By section 2167, Code 1915, one spouse may testify for, but not against, another in a prosecution for crime. By section 2168, Code 1915, one spouse may testify against the other in prosecutions for sexual crimes, such as adultery, but may not be compelled against his will to do so. Section 2174 upon which counsel for defendants rely, provides that

neither spouse may be compelled to disclose confidential communications between them, but does not prohibit the disclosure of the same. It thus appears that the wife may testify against the husband in any case, if she so chooses, except in cases of prosecution of the husband for crime other than sexual crimes. Some of these sections were considered in U. S. v. Meyers, 14 N. M. 522, 99 P. 336.

5. A further objection to the letters is made on the ground that they are hearsay. So far as they relate to the affection existing between the plaintiff and her husband, they are clearly not hearsay. They were written at a time when the husband was in the army, and no reason existed to cause him to make a self-serving declaration, or one in favor of plaintiff, unless the statements were true. They were the expressions of the husband's feelings, as natural as anything could be. They are as competent as any other action from which the affections of a man for a woman might be inferred. That such evidence is competent for such purposes, see 13 R. C. L. "Husband and Wife." § 526; Leucht v. Leucht, 129 Ky. 700, 112 S. W. 845, 130 Am. St. Rep. 486; Fuller v. Robinson, 230 Mo. 22, 130 S. W. 343, Ann. Cas. 1912A, 938; Ash v. Prunier, 105 F. 722, 44 C. C. A. 675; Jameson v. Tully, 178 Cal. 380, 173 P. 577; Harringer v. Keenan, 117 Wash. 311, 201 P. 306; Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485. See also 3, Wigmore on Evidence (2d Ed.) § 1730, where the philosophy of the admissibility of such evidence is explained. The same is to be said of the conversation between plaintiff and her husband when he first informed her he was going to leave her. This showed the change in his affections, after the advent of the defendants in Albuquerque.

[5] 6. Objection is made to two of the letters and to some conversations between plaintiff and her husband, on account of the fact that there are contained therein references by the husband to the conduct tending or designed to alienate the husband's affections. This

presents the most serious question in the case. It requires no argument or precedent to demonstrate that the actual conduct of the defendants, in a case like this, could not be shown by allowing the plaintiff to relate what her husband told her they had done. This would be hearsay pure and simple. But such statements may be admissible for the purpose of showing the attitude of the alienated spouse toward the plaintiff from time to time as the process of destruction goes on, finally culminating in complete domestic disaster. When the acts of the defendants are otherwise shown, such statements may be admissible, it is said, to show that the alienation was the result thereof, rather than some other cause. The situation is that such evidence is admissible for one purpose and not for another in which case the remedy is to limit the effect of the evidence by proper directions to the jury. Upon this subject, see Melcher v. Melcher, 102 Neb. 790, 169 N. W. 720, 4 A. L. R. 492, and exhaustive note, where all the cases seem to be collected.

It is apparent that this class of evidence is dangerous unless it is carefully guarded by directions to the jury. The trial court in this case appreciated this, and carefully instructed the jury not to consider this evidence for the purpose of determining what the conduct of defendants really was, but only in regard to the attitude of plaintiff's husband toward her, and what might have caused the separation. This was all the court could do and was correct.

7. Further objection is made to the testimony of plaintiff in regard to a conversation with Mr. Lougee, in regard to the order of proof by plaintiff, and the exclusion of certain evidence by Mr. Hodges, but we find no error in the action of the court in this regard.

It follows from all of the foregoing that there is no error in the record, and that the judgment is correct and should be affirmed, and the cause remanded, with directions to proceed accordingly, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[Nos. 2893, 2899, Sept. 26, 1925.]

STATE TRUST AND SAVINGS BANK et al. v. HERMOSA LAND AND CATTLE CO.

HERMOSA LAND AND CATTLE CO. v. STATE TRUST & SAVINGS BANK, et al.

SYLLABUS BY THE COURT

1. Circumstances of a case may sometimes require a court of equity to ignore the separate entity of a corporation, and to look to the sole owner of its capital stock as the real party in interest.

2. In a contract of sale, tainted with constructive fraud. if the vendee elects to retain the property and recoup his damages, the doctrine of "unclean hands" cannot serve to deprive the vendor of the equitable remedy of foreclosure of the mortgage securing a part of the consideration.

3. A contract of sale specified, among other properties, "6,000 head of neat cattle, more or less, being all of the cattle owned by the H. L. & C. Co. and bearing one or more of the brands hereinafter set forth, and contracted to be conveyed." As an inducement to the sale the vendor surreptitiously paid to the vendee's agent having charge of the negotiations a substantial sum of money, **held:**

(1) While this language imports in law a mere estimate, it imports an estimate in good faith.

(2) If there is fraud or bad faith in making the estimate, the expression cannot be considered a mere estimate, but is to be treated as an actionable representation.

(3) The surreptitious dealing with the vendee's agent was a constructive fraud.

(4) Such constructive fraud has the same effect as actual fraud, negatives the essential element of good faith, in the estimate, leaving an actionable representation.

4. By waiving the right to rescind an executed contract of sale tainted with constructive fraud, the right of recoupment not necessarily waived.

5. Specific findings of fact, supported by substantial evidence, are conclusive on appeal.

6. Error in sustaining demurrer waived by answer over.

7. A contract of sale of ranches and live stock specified among the properties to be conveyed "250 miles of wire fence wherever situated." Proof that there was only 50 miles of fence, and that the vendee had, after taking possession, constructed certain 4-wire fence at a cost of $200 per mile, was insufficient to warrant substantial damages.

8. Review is for correction of erroneous result, rather than merely to approve or disappove the gounds on which it is based.

9. Cause not reversed for error in refusing damages for shortage of fence contracted to be sold, on the ground of laches in making demand therefor, where the proofs of the amount of such damages were too uncertain to warrant allowance of substantial damages.

10. One recovering judgment on promissory notes, but reduced in amount by damages awarded in recoupment, is the "prevailing party" within the meaning of section 4282, Code 1915, and should recover costs.

11. Where judgment is rendered on promissory notes, but for a balance, after deduction of amount allowed in recoupment, an allowance of attorney's fees at the rate per cent. specified in said notes, computed upon such balance, is proper.

12. The fact that a demand is unliquidated is not conclusive against allowance of interest as damages from date of default.

13. In a suit for purchase price, where damages are awarded in recoupment because of shortage in cattle sold, an allowance of interest on the sum recouped from date of default in delivery, as damages, not erroneous, where the date of default is certain, and the demand is of a nature reasonably ascertainable in amount; there having been no objection to such allowance except that the demand was unliquidated.

Error to District Court, Sierra County; Owen, Judge.

Action by the State Trust and Savings Bank as trustee, and another, against the Hermosa Land & Cattle Company, in which defendant filed a claim in recoupment. Judgment for plaintiffs, and both parties bring error. Cases consolidated in proceedings in error. Reversed and remanded, with direction.

E. W. Dobson, of Albuquerque, for plaintiffs in error in No. 2893 and defendants in error in No. 2899.

John F. Simms, of Albuquerque, and Snyder, Henry, Thomsen, Ford & Seagrave, of Cleveland, Ohio, for defendant in error in No. 2893 and plaintiff in error in No. 2899.

WATSON, J. September 28, 1921, State Trust & Savings Bank, as trustee, and Anna W. Hopewell com-

menced suit against Hermosa Land & Cattle Company, a New Mexico corporation, upon three promissory notes bearing date August 11, 1917, in the principal sum of $25,000 each, maturing, respectively, October 1, 1920, October 1, 1921 and October 1, 1922, bearing interest at 6 per cent., and the usual provision for attorney's fees. These notes were given by Hermosa Land and Cattle Company to Willard S. Hopewell, trustee, and were secured by a mortgage given by this company to said State Trust and Savings Bank, as trustee, under its former corporate name of American Bank & Trust Company. In the lower court, defendant was allowed to recoup damages in the sum of $33,635, with 6 per cent. interest from the date of the notes, and judgment was rendered for plaintiffs for the difference between the principal and interest of the notes and the principal and interest of the recoupment, and for 10 per cent. of such difference as attorney's fees, for the amount of which judgment foreclosure of the mortgage was decreed. Both parties have brought the case here by writs of error; the cases, Nos. 2893 and 2899, having been consolidated. The parties will be referred to herein as plaintiff and defendant as in the court below.

Some time prior to the execution of the notes and mortgage, Mr. J. A. Wigmore, then residing in New York, desiring to purchase a ranch and cattle, became acquainted with W. G. Hamilton, whom he commissioned to find a ranch for him. Among the properties examined by Mr. Hamilton were those of the Hermosa Land & Cattle Company, situated in Sierra county, N. M. At that time plaintiff Hopewell was the majority stockholder in defendant corporation, of which Col. W. S. Hopewell, her husband, was the president.

As the result of negotiationss between Col. Hopewell representing the defendant corporation, and Hamilton, representing Mr. Wigmore, a contract was signed on June 20, 1917, by defendant corporation, by Col. Hopewell as its president, and by Wigmore, by Hamilton, his agent. The contract provided for the sale by the de-

fendant corporation and the purchase by Wigmore of the ranches and cattle of the corporation for $225,000, of which $10,000 was to be and was paid in cash, and $90,000 was to be paid upon the delivery of abstracts showing good title to the lands. The deferred payments were to be represented by five promissory notes of $25,000 each, maturing one each year for five years thereafter, and to be secured by mortgage on the property conveyed.

The title to said property proving satisfactory, and the $90,000 having been paid, Mr. Wigmore, through Hamilton, his agent, interposed the objection that he did not wish to give his personal notes for the unpaid purchase price, and it was thereupon agreed that, instead of a conveyance of the properties in question from the corporation, Wigmore should receive transfer of all of the corporate stock of the corporation, and that thereupon the notes and mortgage in question should be executed by the corporation. This agreement was carried out, and the notes were made payable to W. S. Hopewell, as trustee, for the old stockholders. From that time until the trial, Mr. Wigmore remained the holder and owner of all the stock of defendant corporation, except two shares held by others that they might qualify as directors.

While negotiations were proceeding between Hopewell and Hamilton, the former paid to the latter a substantial sum of money, about $10,000, as an inducement to bring about the sale. Hopewell had knowledge of Hamilton's agency for Wigmore, but Wigmore had no knowledge of this payment to Hamilton.

The first two of the notes were paid at about the time they matured, together with the accrued interest on all of the notes, but, when the third note matured on October 1, 1920, and payment was demanded, it was refused; it being claimed that, by reason of false representations as to the number of cattle and the quantity of fence, damages had been suffered which must be adjusted before further payments would be made. Be-

fore the maturity and payment of the second note, Mr. Wigmore had learned of the payment of the commission to his agent, and had become satisfied that there was a substantial shortage of cattle, and, as the trial court found, knew, or should have known, that there was a shortage of fence. Mr. Hopewell died August 13, 1919, prior to which time Wigmore had made claim that there was a shortage of cattle, but had never mentioned any shortage of fence; no claim as to the fence having been made until about 2½ years after the date of the contract. Further facts and the contentions of the parties will be hereinafter stated.

The written contract out of which this litigation arises was in form an agreement by Hermosa Land & Cattle Company to sell to J. A. Wigmore certain ranch properties, improvements and cattle. However, in closing the trade it assumed a different form. There was no conveyance of the properties, the subject-matter of the original contract; but, instead, all of the capital stock of the corporation was transferred to Wigmore. The deferred payments, originally to have been represented by Wigmore's notes and secured by mortgage on the properties to have been conveyed to him, were, in the closing, represented by the notes of the corporation and secured by its mortgage on the properties, the legal title to which was not affected by the transaction.

From the form which the transaction finally assumed, as just stated, counsel, respectively, claim far-reaching results. Defendant contends that, since the corporation received nothing which it did not already possess, there was no consideration for the notes it gave or for the mortgage which it placed on its assets. It contends that the consideration of the notes and mortgage was the transfer of the stock to Wigmore, and that it was ultra vires the corporation to agree to pay his individual debt. On the other hand, it is contended by plaintiffs that, since the assets of the corporation were exactly the same, after as before, the transfer of the stock, any false representations concerning those assets worked no damage to the corporation, but affected

only the value of the stock, and damaged Wigmore only, and that his damage is not to be considered in a suit solely against the corporation. They contend also that it was the corporation that made the representations, through Col. Hopewell, its president, and that, if Wigmore has suffered damage through their falsity, his cause of action is against the corporation. If such are the necessary results of the transaction, it is apparent that the parties have involved themselves in a legal maze which it is hardly to be supposed they intended, and from which it will be difficult, if not impossible to extricate them.

Before proceeding to consider the principle which we think is controlling of these several contentions, let us take note of the substantial rights and the practical situation of the parties. The real subject-matter of the trade was the ranches, improvements, and cattle. While the title to this property did not change, the control and beneficial enjoyment did. Wigmore wanted to buy a ranch. Col. Hopewell wanted to sell one. Those objects were accomplished in practical effect. The trade assumed the final form it did simply because of Wigmore's objection to becoming personally liable for the deferred payments. The transfer of the stock instead of the properties was a device to eliminate such liability. We think it may be safely said that the parties at least tacitly agreed that Wigmore should not be individually liable. If that is true, and the plaintiffs cannot recover from the corporation because of lack of consideration or because its promise was ultra vires, and cannot recover from Wigmore because his liability is excluded by the contract, from whom may they colllect the deferred payments? On the other hand, may plaintiffs urge in the same breath that the transfer of the stock to Wigmore was consideration for the corporation's notes and mortgage, and that damages which Wigmore suffered through false representations affecting the value of that stock is not a partial failure of that same consideration, which may be re-

couped? All of these difficulties grow out of the doctrine that a corporation is an entity, distinct in the eyes of the law from the person or persons who, for the time being, own its stock. That doctrine, in its general application, is not to be questioned. Convinced, however, that it trammels the doing of equity in this case, we are led to inquire whether it is universal in its operation. If we may ignore it, and say that really Wigmore purchased these properties, became the owner of them, and pledged them to the former owners for the balance of the purchase money, and that really he is being sued here for the enforcement of that pledge and that in such suit he is seeking to recoup the damages he claims to have suffered because of false representations or breach of warranty, then we have disposed of all these troublesome questions so ably and ingeniously presented by counsel, and which stand in the way of, or seriously embarrass, an equitable adjustment of the rights of the parties.

[1] We find at once that a court of equity is not always bound to regard the legal status of a corporation as an existence in itself, regardless of its stockholders. In Cook on Corporations, §6, it is said:

"* * * A corporation is an entity, an existence, irrespective of the persons who own all its stock. * * * But there are occasions where the courts will ignore the corporate existence and will hold that its acts are the acts of its stockholders and vice versa the same as in a partnership. * * * The New York Court of Appeals have said: 'We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth.'"

In Thompson on Corporations, § 10, it is said:

"The proposition that a corporation has an existence separate and distinct from its membership has its limitations. It must be noted that this separate existence is for particular purposes. It must also be remembered that there can be no corporate existence without persons to compose it; there can be no association without associates. This separate existence is to a certain extent a legal fiction. Whenever necessary for the interests of the public or for the protection or enforcement of the rights of the membership, courts will disregard this legal fiction and operate upon both the corporation and the persons composing it."

In Fletcher Cyc. Corp. vol. 1, p. 56, it is said:

"Practically all authorities agree that in certain cases and at certain times a corporation is to be regarded as a legal entity and personality. There is also substantial agreement that at certain times the fiction of corporate entity is inapplicable. Sometimes a corporation is looked upon as a unit, at other times as a collection of persons. The doctrine of separate existence may be carried too far, and it is properly disregarded in cases of fraud, circumvention of contract or statute, public wrong, monopoly and like instances. 'If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons' (citing U. S. v. Milwaukee Refrigerator Co. [C. C.] 142 F. 247). It has been aptly said: 'This distinction between a corporation as being an impalpable entity, and the corporaton as being the living persons of whom it consists, is for many purposes a substantial distinction, necessarily involved in the creation and use of corporations, but for some purposes it is not only a fiction, but a useless and unreasonable fiction; and it is a settled principle that in certain cases where the fiction can serve no purpose but to accomplish injustice, and to screen the corporation from the just consequences of its wrongs, the court will not permit this legal fiction to prevail against real substance'—citing Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n, 77 Conn. 83, 58 A. 467."

Again, in Cook on Corporations, §§ 663, 664, after alluding to exceptions to the general rule that a corporation is a legal entity, the author says:

"The chief application of this statement of law is in cases of fraud, but there is a line of cases which apply this rule where there is no fraud, and where the owner of the stock is held liable merely because he owns all the stock of the corporation."

The Supreme Court of Nebraska, in an able opinion, after reviewing many authorities, formulated the following rule, to be applied in the case before it:

"Where a corporation is proceeding at law, or where it is asserting a title to property, or the title to property is involved, the corporation is regarded as a person separate and distinct from its stockholders, or any or all of them. But where it is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a re-

covery, and if the stockholders have no standing in equity, and are not equitablly entitled to the remedy sought to be enforced by the corporation in their behalf and for their advantage, the corporation will not be permitted to recover." Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716.

The principles applied in the foregoing case are quite suggestive as to the proper disposition of the present case. It was in part a suit by a corporation to recover from a former stockholder and manager for illegitimate profits made by him in dealing with the corporation funds. The then stockholders had acquired their stock from the defendant, and had paid therefor what it was actually worth in view of the financial condition of the company at the time of the transfer. In the court's view, a recovery would have been inequitable because (1) it would have resulted in giving to the then stockholders benefits and values for which they had not bargained and had not paid, and (2), at the time when defendant was illegally profiting at the expense of the corporation, he was himself the owner of a large amount of its stock, and thus was appropriating, proportionately to such ownership, what was in reality his. There was an undoubted wrong to the corporation viewed as an entity. If there had been any stockholders who were such when the wrong was committed, thus suffering from it, the result must have been different. In such case there would have been no escaping the legal status of the corporation as an entity. But, there being none such, and, as the recovery by the corporation would result in unearned and undeserved advantage to its stockholders, and in doubly penalizing the defendant, it was deemed a proper occasion for ignoring the corporate organization. A further quotation from the opinion will perhaps be instructive:

"To permit persons to recover through the medium of a court of equity that to which they are not entitled, simply because the nominal recovery is by a distinct person through whom they receive the whole actual and substantial benefit, and that nominal person would, in ordinary cases, as representing beneficiaries having a right to recover, be entitled to

relief, is a preversion of equity. It turns principles meant to do justide into rules to be administered strictly without regard to the result. It is contrary to the very genius of equity. When the corporation comes into equity and seeks equitable relief, we ought to look at the substance of the proceeding, and, if the beneficiaries of the judgment sought have no standing in equity to recover, we ought not to become befogged by the fiction of corporate individuality, and apply the principles of equity to reach an inequitable result."

In a California case, one Rowley had, by way of renewal of his own note, made and delivered the note of a corporation. Later he became the executor of the payee, by reason whereof, under the California statute, he became chargeable in the inventory with the amount of any indebtedness to his testator. At the time of suit, the note, as against the corporation, was barred by limitation, but, if there was any liability on the part of Rowley it was not barred, because of the change in the character of his obligation due to his intervening fiduciary capacity. The court said:

"Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First that the corporation is not only influenced and governed by that person, but there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice."

After determining that the first requirement had been met, and in discussing the second, the court said:

"It is not necessary, as defendants contend, that the complaint allege actual fraud; it is sufficient if the facts set forth disclose that the dealings were in form with a corporation but in reality with an individual and that a refusal to recognize this fact will bring about inequitable results."

and held that Rowley could not "avoid the incidents of his fiduciary relationship solely by reliance upon the fiction of the independent existence of an organization which was in effect nothing more than a form assumed by him in his business dealings." Minifie v. Rowley, 187 Cal. 481, 202 P. 673

In Pott v. Schmucker, 84 Md. 535, 36 A. 592, 35 L. R. A. 392, 57 Am. St. Rep. 415, it was held that the trustee of an insolvent banking house could not participate with other creditors in the proceeds of the sale of the assets of an insolvent corporation of which one of the banking partners was the sole stockholder. The court first demonstrated that if the overdraft upon which the claim was based had been the individual obligation of the partner, and the partner insolvent, the firm could have no claim upon the assets of the insolvent partner until after satisfaction of his other creditors. It then declared:

"We need not go beyond the limits of Maryland for adjudged cases sustaining the right of a creditor or others in an appropriate case and in furtherance of the ends of justice, to treat the debtor corporation and the individual owning all its stock and assets as identical."

In Swift v. Smith, 65 Md. 428, 5 A. 534, 57 Am. Rep. 336, the doctrine was announced that the sole owner of the capital stock of a corporation was in equity the owner of its assets and that his individual act in mortgaging them was good in the absence of prejudice to creditors. This is an extreme view. It is doubtless out of line with the weight of authority. In Home Fire Ins. Co. v. Barber, supra, it was commented upon as follows:

"The case of Smith v. Smith has been criticized, as we think with some reason, so far as it deals with the sole stockholder as if he had some title to the property. But, so far as it sustains the proposition that, between the corporation and the stockholder, the latter is to be recognized as the real beneficiary, and consequently that equitable rights and remedies, the benefit thereof would inure solely to the shareholder, are to be regarded as exercised by him for the corporation, and not as something belonging to it independently, the decision is in accord with the authorities."

In Southern Pac. Co. v. Bogert, 250 U. S. 483, 39 S. Ct. 533, 63 L. Ed. 1099, the Supreme Court of the United States, in order to do equity, recognized the substantial identity of two corporations, one of which owned all of the capital stock of the other.

In Chicago, M. & St. P. R. Co. v. Minneapolis C. Q C. Ass'n, 247 U. S. 490, 38 S. Ct. 553, 62 L. Ed. 1229, it was held that—

"Where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company, so that it may be used as a mere agency or instrumentality of the owning company or companies, * * * the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

See also, Southern Pac. Co. v. Lowe, 247 U. S. 330, 38 S. Ct. 540, 62 L. Ed. 1142; Perkins v. Trinity Realty Co., 69 N. J. Eq. 723, 61 A. 167; Norma Mining Co. v. Mackay, 241 F. 640, 154 C. C. A. 398; Ark. River Land, Town & Canal Co. v. Farmers' Loan & Trust Co., 13 Colo. 587, 22 P. 954.

The cases in which corporate organization was resorted to to accomplish fraud, or to defeat public justice or to circumvent statutes, are numerous, but they need not be cited. The foregoing are illustrative merely of situations more or less similar to that in the case under consideration, where the courts have looked beyond the corporate entity, not because it was fraudulent in itself, but merely because to recognize it in the particular case would result inequitably.

[**2**] Defendant contends that plaintiffs are not entitled to equity, either generally, or with respect to the special defenses of lack of consideration and ultra vires, because their hands are unclean by reason of the fraudulent representations made, and of the accomplishment of their fraudulent purpose through corruption of Wigmore's agent. "This, then," they say, "is the theory of our defense: That legally there was no consideration for the notes and mortgage sued upon; legally the defendant was not authorized to execute these notes and mortgage here in question, and its attempt so to do is ultra vires; and, morally, because of the uncleanness of the hands of these plaintiffs, because of the iniquit-

ous conduct 'inseparably connected with' the subject-matter of this suit, the plaintiffs should not be heard to say that we are seeking to avoid their claim on purely technical grounds, but that equity and good conscience demand that these plaintiffs be left to whatever remedies at law they may have, and to no other."

The doctrine of "unclean hands" is well established and not to be questioned when invoked in a proper case. Its usual application is to defeat enforcement or cancellation of a contract originating in iniquity, frequently a promise to reconvey property conveyed without consideration and in fraud of creditors. But there is no iniquity inherent in this contract. The sale of the property, either by conveyance or by transfer of the shares, and the giving of the notes and mortgage, are all legitimate. The claims of fraud relate merely to representations as to the value and quantity of the property and to the dealing with the buyer's agent, whereby the buyer was deceived as to these matters. These claims are substantial, but they relate to incidental and collateral matters. True, they are sufficient to have vitiated the whole contract had defendant chosen to rescind, but it did not so choose. It has affirmed the contract, thus limiting itself to such remedies as equity affords under such circumstances. It cannot retain the benefits and at the same time repudiate the consideration. It seems plain that there is no case here for the application of the doctrine of "unclean hands." Indeed, we do not understand defendant to urge seriously that it should be applied to the extent of barring plaintiffs from the relief of foreclosure, but rather that it should have effect to let in their defenses of ultra vires and lack of consideration. We have indicated our views as to the equitable principle which should govern with respect to these defenses. We hold that we should ignore in this case the legal distinction between the defendant corporation and Mr. Wigmore, the owner of all its stock, and treat them as identical. Therefore we overrule defendant's exceptions to the sustaining of the demurrers to its defenses of ultra vires and lack of con-

sideration, and for the same reason overrule plaintiffs' exceptions to the overruling of their motion to strike the defense of recoupment.

[3] A part of the property which we have found to be the real subject-matter of the contract was a herd of cattle described in the contract as follows:

"Six thousand (6,000) head of neat cattle, more or less, being all of the cattle owned by the Hermosa Land & Cattle Company, and bearing one or more of the brands hereinafter set forth, and contracted to be conveyed."

Defendant claimed that there were less than 6,000 cattle in the herd at the time of the transaction, and was allowed by the trial court to recoup for the shortage. Plaintiffs contend that the language does not, in law, import a warranty, as to the number of the cattle, but merely an estimate. They cite a number of cases, relying particularly on Day v. Cross, 59 Tex. 595, and U. S. v. Brawley, 96 U. S. 168, 24 L. Ed. 622. These cases undoubtedly support the contention, and we will assume that they correctly state the rule.

Defendant, while admitting that the language used imports no more than an estimate, contends that it imports a good-faith estimate, and that, in the absence of good faith, or fraud being present, we have, instead of a mere estimate, an actionable representation. It points out that in both cases, supra, relied upon by plaintiffs, as well as in the authorities cited, good faith in the stating of the estimate is presupposed. With this rule we are compelled to agree. Neither the words "more or less," nor the fact that the sale was in gross can preclude inquiry as to whether there was fraud or deceit in the representations as to the number of the cattle. Dargan v. Ellis, 81 Tex. 194, 16 S. W. 789; Leicher v. Keeney, 98 Mo. App. 394, 72 S. W. 145. Admitting that the language used imports an estimate, it cannot be maintained that the agreement of the parties simply to estimate the number gives license to the seller to estimate it falsely. In fact, as we conceive, if he did not give the buyer the benefit of his honest

judgment in the matter, it cannot be said that he estimated them.

We are convinced, therefore, that, if there was a willful misrepresentation of Col. Hopewell's honest judgment as to the number of the cattle, the language used in the contract does not stand in the way of relief. The trial court, however, refused to find that Col. Hopewell intended "to willfully perpetrate a fraud." He did find that Col. Hopewell knew that Hamilton was Wigmore's agent in the purchase of the ranch property, and that Hamilton received from Hopewell a substantial sum of money, about $10,000, as an inducement to bring about the sale. The question is whether this conduct, known as "double dealing" by the agent, to which the seller was a party, when shown, precludes the plaintiffs from claiming that there was no representation as to the number of cattle, but a mere estimate.

There is no more effective means of committing a fraud in a case of this kind than to corrupt the buyer's agent. The buyer relies upon the judgment and watchful care of his agent to protect his interests. In the transaction of purchase and sale, each party seeks a bargain. An agent cannot serve both parties, because in serving one he betrays the other. Mr. Wigmore had a right to expect fidelity. Hamilton had no right to sell it, nor Col. Hopewell to buy it. Conceding that Col. Hopewell's estimate was honest, Wigmore did not rely upon that alone, but thought he was receiving the benefit of the honest judgment of his agent. If that judgment had been left free from corrupting influences, Hamilton's estimate of the number of cattle might have differed materially from that of Hopewell.

The authorities leave no doubt that a surreptitious dealing between one principal and the agent of the other is a constructive fraud on the latter which courts will not countenance. Mechem on Agency, §§ 2137, 2138, and 2139; Clark and Skyles, Agency, § 553; Pan-

ama, etc., Tel. Co. v. Indian Rubber, etc., Co. L. R. Ch. App. 515; Atlee v. Fink, 75 Mo. 100, 42 Am. Rep. 385; Harrington v. Victoria Graving Dock Co., [1877-78] 3 Q. B. Div. 549; Shipway v. Broadwood, [1899] 1 Q. B. 369; Bollman v. Loomis, 41 Conn. 581; Miller v. Louisville R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722; Henninger v. Heald, 52 N. J. Eq. 431, 29 A. 190; Jacobs v. George, 2 Ariz. 93, 11 P. 110; City of Findlay v. Pertz, 66 F. 427, 13 C. C. A. 559, 29 L. R. A. 188; Fish v. Leser, 69 Ill. 394; Alexander v. Weber, [1922] 1 K. B. Div. 642.

But plaintiffs contend that, since defendant recognized and affirmed the contract by paying one of the notes after discovery of the fraud, it has waived, not only its right to rescind, but the right to rely upon the fraud, either offensively or defensively. They contend particularly that, the fraud having been waived, it cannot have the effect to destroy the quality of the language under consideration as a mere estimate.

[**4**] On the other hand, defendant contends that its optional and defensive remedy of recoupment cannot be deemed waived merely by its failure to resort to its other optional but affirmative, remedy of recission.

Plaintiffs quote from Black on Recission and Cancellation, § 590, passages which, on reading, seem to support their broad contention that fraud, once waived, is waived for all purposes. A reading of the context and of the numerous cases cited by the author leaves us in doubt as to the meaning of the text. It is plain, however, that the decisions cited lend no support to plaintiffs' position.

Plaintiffs also cite Alger v. Anderson (C. C.) 92 F. 696; McLean v. Clapp, 141 U. S. 429, 12 S. Ct. 29, 35 L. Ed. 804; Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798. The former merely holds that in a suit for recission of a contract for the purchase of land, or, in the alternative, for damages for breach of covenant of warranty of title, if it be found that the remedy of rescis-

sion is not available because of election to abide by the transaction after knowledge of the fraud, the court of equity may not entertain the claim for damages, because such claim is the proper subject of a suit at law. The latter cases merely hold that one may not have the remedy of rescission after having once waived it.

The question of jurisdiction in equity, decided in Alger v. Anderson, supra, is of course of no importance in this state, where legal and equitable remedies are available in the same court and cause. Nor are other federal cases favorable to plaintiffs' contention. Richardson et al. v. Lowe et al., 149 F. 625, 79 C. C. A. 317; Friedricksen v. Renard, 247 U. S. 207, 38 S. Ct. 450, 62 L. Ed. 1075.

Doubtless a purely executory contract may be so ratified by performance after discovery of the fraud as to effect a waiver of damages. See cases reviewed in note: "Waiver of Right of Action for Damages for Fraud or Deceit." L. R. A. 1918A, 106. Some cases apparently hold that continued performance of an executed contract, after discovery of fraud, constitutes waiver of right of action therefor; but these seem to be opposed to the weight of authority. We know of no authority for plaintiffs' broad position that fraud, once waived as a ground for rescission, is no longer available for any purpose.

"When a party, after the making of a contract, but before its performance, discovers the fraud of the other, and still goes on and performs his part, he is thereby precluded from the equitable remedy of cancellation, and also from the remedy of recovering back the consideration, but not from the legal remedy of damages for deceit." Pomeroy's Eq. Juris., § 897, note 1.

"A party who has knowledge that he has been defrauded and yet subsequently confirms the original contract by making new agreements or engagements respecting it, or by any acts which manifest an intention of treating it as a valid subsisting contract, thereby waives the fraud and abandons all claim to equitable relief based on the fraud. * * * Where a party is injured by fraudulent representations, his accepting and holding on to the property concerning which the fraudulent representations have been made, after ascertaining their falsity, produce neither a waiver nor does it operate

as an estoppel to prevent his suit for damages. He waives nothing by accepting what is offered, although not what he traded for." Smith on the Law of Fraud, § 136.

It has been said many times that, in case of such constructive fraud as we have here in question, the wronged principal may rescind, or if he choose to ratify, may have such other relief as equity affords. Mechem on Agency, § 2137; Clark and Skyles, Agency, § 553; Panama, etc., Tel. Co. v. Indian Rubber, etc., Co., supra; Kuntz v. Tonnele, 80 N. J. Eq. 373, 84 A. 624; Cunningham v. Holcomb, 1 Tex. Civ. App. 331, 21 S. W. 125; City of Findlay v. Pertz, supra; Alexander v. Webber, supra. And in many cases recovery of damages has been allowed. Mayor, etc., of Salford v. Lever [1891] 1 Q. B. Div. 168; City of Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629, 15 Am. St. Rep. 230; Kuntz v. Tonnele, supra; Herringer v. Heald, supra. Actions will lie against both the corrupted agent and the corrupting principal. Mayor, etc., of Salford v. Lever, supra; Glaspie v. Keator, 56 F. 203, 5 C. C. A. 474. It is immaterial whether the bribe actually induces disloyalty of the agent to his principal. Harrington v. Victoria Graving Dock Co., supra; Shipway v. Broadwood, supra; Henninger v. Heald, supra; Jacobs v. George, supra; note to Potter's Appeal, 7 Am. St. Rep. 281; City of Findlay v. Pertz, supra; N. Y. Cent. Ins. Co. v. National Protective Ins. Co., 14 N. Y. 85.

"Constructive fraud is merely a term applied to a great variety of transactions, having little resemblance either in form or in nature, which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as those granted in cases of real fraud." Pomeroy's Eq. Jur. § 922.

We therefore hold that, upon the establishment of the constructive fraud, the requisite element of good faith disappears. The language in question becomes a representation rather than an estimate, and defendant may recoup for any shortage which it can establish.

The trial court found that 5,039 head of cattle were delivered under the contract, a shortage of 961 head,

for the value of which defendant was allowed damages in recoupment. Both parties assign error.

The court, at plaintiffs' request, found:

"(17) The court finds from the evidende the rule or ratio of calves branded to the whole number in the herd, as 1 to 4, and adopts such as the fact, so far as it applies to the Hermosa ranches.

"(18) The court further finds from the evidence, that the total number of calves branded for the year 1916, and tallied during said year, and to the end of the year 1916, was 1,123 head.

"(19) That during the year 1916, the reports of the cattle sanitary board show that there were 388 head of cows and calves shipped during the year 1916, which number should be deducted from the total number in the herd.

"(20) The court further finds that during the year 1917, up to the date of the execution of the notes and mortgage, there were 935 calves branded, which number should be added to the number in the herd as heretofore found."

The court refused plaintiffs' requested finding No. 21, as follows:

"(21) From the facts found in findings Nos. 17, 18, 19, and 20, the court further finds that, at the close of the year 1916, there were 4,492 head of cattle of all kinds, ages, and sexes in the herd, and, adding thereto the calf crop of 1,123 head, amkes the total of 5,616 head, and deducting therefrom 388 head, the number sold during the year 1916, would leave 5,227 head, and then adding thereto the calves branded in 1917 up to the time of the execution of the notes and mortgage, as found by finding No. 20, which was 935 head, would make the herd at said time consist of 6,162 head."

Plaintiffs contend that, admitting findings 17, 18, 19, and 20, there is no escaping requested finding 21. The result reached by the plaintiffs varies from that reached by the court because of a difference in their interpretations of finding 17. Plaintiffs urge that the ratio of 4 to 1 is that between the branded calves and the adult animals in the herd, while the court applied the ratio, just as stated in the finding, to the whole number in the herd. Both base their computations upon 1,123 calves of 1916. Multiplying this number by 4, the court determines the whole number in the herd at the close of 1916 as 4,492. Plaintiffs insist that

this number represents only the adult cattle, to which the 1,123 calves must be added. Thus they support their claim of 5,615 head in the herd at the close of 1916.

Plaintiffs contend that the lower court overlooked and forgot to add in the 1916 calves. They urge that this mistake or error is so plain, and can be so mathematically demonstrated, that we should correct it here. That the court did not inadvertently act we are satisfied. In his written opinion he sets out his computation, disclosing every step. He refused requested finding 21, based upon plaintiffs' theory, and plaintiffs excepted. While plaintiffs' proposed finding 17, they say in their brief that it is based on the court's written opinion. The court, of his own motion, made this finding:

"That all the findings of fact in this cause, made by the court upon the request of either of the plaintiffs or the defendant, are intended to be taken in conjunction with the written opinion of the court filed in this cause, which is hereby adopted as a finding of fact and a conclusion of law upon the matters therein covered."

In his opinion he said:

"The court is asked by the defendant to determine the fact as to the number of cattle, by means of the application of a rule claimed to be customarily used by cattle growers in this locality—of multiplying the annual average calf crop over a period of years by 3, or the average annual steer sales by 6, or the whole number of the herd upon a cattle range being operated as a going concern. * ** The court is of the opinion that the statements of the witnesses of the several parties, rather than be taken as antagnostic to each other, may be harmonized by adopting the ratio of calves branded to the whole number of the herd, as 1 to 4, and adopts this as a fact."

Since the language used, "the whole number of the herd," is sufficient to include the calves, it would seem that, if there was inadvertence, it was not of the court in applying its own rule, but of plaintiffs in accepting it and proposing it as a finding. That plaintiffs were themselves confused as to the rule claimed is clear from an analysis of their proposed finding 21.

They ask the court to find "that at the close of the year 1916, there were 4,492 head of cattle of all kinds, ages, and sexes in the herd." That is exactly what the court did find by multiplying 1,123 branded calves by 4. If all kinds, ages, and sexes were already included, why should calves be included again?

Plaintiffs contend that the testimony shows conclusively that the witnesses who testified to the 3 to 1 rule meant thereby that 3 adult animals would produce one calf, and that, when the court adopted the 4 to 1 rule he must be held to have meant that, on the Hermosa ranches, 4 adults would produce one calf. The court, as seen, did not say so in his opinion nor in finding 17. He correctly applied the rule which he expressed. It might be urged, of course, that plaintiffs are concluded by having proposed finding 17. Technically, they should have excepted to it. But, waiving that, the court did not apply the 3 to 1 rule. He determined that it fell "far short from being customarily applied." He adopted a rule of his own, "harmonizing" the statements of witnesses, and taking into consideration "the variations in climatic conditions on the Hermosa range itself, the diversity between it and adjacent ranges, the wide difference in annual calf or steer crops, and the differences in productivity between the so-called lowlands and mountain districts, with the fluctuating number of cattle in each as testified to, with the many other elements which may enter into the theory for the rule." Admitting that those who supported the 3 to 1 rule by their testimony would add the calves to the quotient to determine the whole number in the herd, it does not folllow that the court, after rejecting the rule, as not established as of general application, and as not applicable to the particular conditions shown to exist in the case, must be held to the same interpretation of his own rule. If the court had adopted the 3 to 1 rule, and had then applied it contrary to the evidence as to its meaning, the question would be different.

The 4 to 1 rule, as applied by the court, results exactly as would the 3 to 1 rule as applied by the plaintiffs. While the court rejected the 3 to 1 rule, he said that the evidence supporting it was "impressive." References by plaintiffs to the evidence indicate that it was at least substantial. It is thus inferable that, if the court had adopted the 3 to 1 rule with the interpretation contended for, thus reaching the same result, it would have been unimpeachable because sustained by substantial evidence.

[5] Defendant, on the other hand, complains that the real shortage was much greater than the court found. Its computation is based upon testimony tending to show the ratio between calves branded and adult female stock, and reaches a result nearly 1,000 greater than the shortage found by the court. The evidence to which defendant directs our attention would perhaps have supported the finding of such a shortage. However, on conflicting evidence, the court found otherwise. Such finding, being supported by substantial evidence, is controlling here.

We conclude, therefore, that all objections to the amount allowed in recoupment on account of shortage in cattle must be overruled.

The trial court disposed of the claim of recoupment on account of shortage of fence by holding that, because of delay in complaining and of continued performance after discovery, all damages arising therefrom were barred by laches or waiver.

The refusal to allow damages on this account is complained of by defendant on three grounds, which we now consider.

[6] It is first urged that the court erred in sustaining plaintiff's demurrer to the answer on the ground that it did not allege sufficient diligence in discovering and complaining of the alleged shortage. The defendant answered over, thereby waiving the error, if any there was. Rogers v. Crawford, 22 N. M. 671, 167 P. 273.

[7] It aso urges that the court erred in his finding of laches or waiver, contrary to the evidence; and, as matter of law, in refusing to allow recoupment based on findings 16 and 17, made at defendant's request, which findings are as follows:

"(16) At the time of the making of the said contract and the transfer of the management of the defendant company to said J. A. Wigmore, there was not more than 50 miles of fence, the property of the defendant company upon said company's ranch and range.

"(17) The actual cost of construction of said fence at said time was about $200 per mile."

[8] Our review is for the correction of an erroneous result, rather than merely to approve or disapprove the grounds on which it is based. Hayne, New Trial and Appeal § 284. Should we reverse the cause, holding that the court erred in respect to his conclusion of laches or waiver, it must be remanded for the purpose of fixing the damages. If the record does not warrant damages, it would be idle to reverse. We pass, therefore, to the latter question, assuming, for the purpose of the discussion, that the court did err in respect to the former.

The question was raised at the argument as to the proper measure of damages; whether, as plaintiffs claim, the difference in the value of the ranches with and without the fence, or, as defendant claims, the cost of supplying the missing fence. This we think may be disregarded.

[9] In addition to the findings we have the fact that the contract of sale included "250 miles of wire fence, wherever situated." Does this record furnish any data for fixing damages? The literal effect of the findings is that at the date of the transfer of the property there was not more than 50 miles of fence, the actual cost of construction of which, at that time, was about $200 per mile. This, of course, gives us no basis for an estimate of the cost of construction, or of the value to the real estate, of 200 miles of imaginery

and undescribed fence. It seems to be fairly agreed, however, that the findings are based upon evidence tending to show, not the cost of the 50 miles of existing fence, but of other 4-wire fence constructed by defendant after the transfer. For present purposes we may give defendant the benefit of such construction of its findings. It is still apparent that there is uncertainty not that damages result from the breach, but as to the amount of damages compensatory of it. If the lower court had awarded substantial damages on this record, could we have sustained him?

There is inherent difficulty due to infirmity in the contract. There is no stipulation as to the number of wires, the frequency of posts, the age of the fence, nor its condition of repair or delapidation. A 3-wire fence 25 years old, with infrequent and decaying posts, would have met the terms to which the parties agreed. Of what avail, then, to show merely the cost of constructing a new 4-wire fence? Suppose the contract had called for a house. Would it, in such a case, be permissible to base damages on a showing that there was no house and that the purchaser had expended $10,000 in erecting one?

We find no case decided in this jurisdiction dealing with the question of uncertain damages for breach of contract. But, in Palma et al. v. Weinman et al., 15 N. M. 68, 103 P. 782, an action in tort, by a tenant, a merchant, to recover from his landlord for an eviction, it was held that there was not sufficient evidence to sustain a verdict for loss of profits. The court thus described the evidence:

"There is, however, no evidence of loss of profits except the bald statement of the witness Ruppe as to the net profit per month during the time he occupied the Weinman premises, and at the location to which he removed his stock after the wall fell. True, the record shows that he referred to some memorandum to refresh his memory, but it nowhere appears what the memorandum was, nor when or by whom it was made; nor does he state that he knows or even believes it to be correct."

It seems to us that the evidence in the case at bar is no more satisfactory.

But there is a clear distinction, in this respect, between tort and contract. 17 C. J. 756. For apparently good reasons, the rule as to certainty is much more liberal in a tort case. This is well expounded in the leading case of Allison v. Chandler, 11 Mich. 542, where it was said:

"There are some important considerations which tend to limit damages in an action upon contract, which have no application to those purely of tort. Contracts are made only by the mutual consent of the respective parties; and each party, for a consideration, thereby consents that the other shall have certain rights as against him, which he would not otherwise possess. In entering into the contract the parties are supposed to understand its legal effect, and, consequently, the limitations which the law, for the sake of certainty, has fixed for the recovery of damages for its breach. If not satisfied with the risk which these rules impose the parties may decline to enter into the contract, or may fix their own rule of damages when, in their nature, the amount must be uncertain. Hence, when suit is brought upon such contract, and it is found that the entire damages actually sustained cannot be recovered without a violation of such rules, the deficiency is a loss, the risk of which the party voluntarily assumed on entering into the contract, for the chance of benefit or advantage which the contract would have given him in case of performance. His position is one in which he has voluntarily contributed to place himself, and in which, but for his own consent, he could not have been placed by the wrongful act of the opposite party alone.

"Again, in the majority of cases upon contract, there is little difficulty from the nature of the subject, in finding a rule by which substantial compensation may be readily estimated; and it is only in those cases where this cannot be done, and where, from the nature of the stipulations, or the subject matter, the actual damages resulting from a breach, are more or less uncertain in their nature, or difficult to be shown with accuracy by the evidence, under any definite rule, that there can be any great failure of justice by adhering to such rule as will most nearly approximate the desired result. And it is precisely in these classes of cases that the parties have it in their power to protect themselves against any loss to arise from such uncertainty, by estimating their own damages in the contract itself, and providing for themselves the rules by which the amount shall be measured in case of a breach; and if they neglect this, they may be presumed to have assented to such damages as may be measured by the rules which the law, for the sake of certainty has adopted. * * *

"None of these several considerations have any bearing in an action purely of tort. The injured party has consented to enter into no relation with the wrongdoer by which any hazard of loss should be incurred; nor has he received any consideration, or chance of benefit or advantage, for the assumption of such hazard; nor has the wrongdoer given any consideration, nor assumed any risk, in consequence of any act or consent of his. The injured party has had no opportunity to protect himself by contract against any uncertainty in the estimate of damages; no act of his has contributed to the injury; he has yielded nothing by consent and, least of all, has he consented that the wrongdoer might take or injure his property or deprive him of his rights, for such sum as, by the strict rules which the law has established for the measurement of damages in actions upon contract, he may be able to show, with certainty, he has sustained by such taking or injury. Especially would it be unjust to presume such consent, and to hold him to the recovery of such damages only as may be measured with certainty by fixed rules, when the case is one which, from its very nature, affords no elements of certainty by which the loss he has actually suffered can be shown with accuracy by any evidence of which the case is susceptible. * * *

"Since from the nature of the case, the damages cannot be estimated with certainty, and there is a risk of giving by one course of trial less, and by the other more than a fair compensation—to say nothing of justice—does not sound policy require that the risk should be thrown upon the wrongdoer instead of the injured party?"

The opinion from which we have so liberally quoted involved like our case of Palma v. Weinman, supra, damages for loss of profits because of eviction from a store building. The rule in the Palma Case rejects for uncertainty proof of damages against a wrongdoer for an injury not contemplated, and for which the injured party was in no wise responsible. We surely cannot require less certainty in the case at bar; one in which the defendant agreed to a stipulation uncertain in itself, and for the breach of which the damages must be uncertain. An illustrative case, where the contract itself was uncertain, is Hart v. Georgia R. Co., 101 Ga. 188, 28 S. E. 637. But we need not, and do not hold that, because of the uncertainty of the stipulation, damages were not susceptible of proof. We do hold that any damages awarded upon this record would have been speculative and could not be sustained. Sedgwick on Damages § 170; Knowles v. Leggett, 7 Colo. App.

265, 43 P. 154; Sullivan v. McMillan, 26 Fla. 543, 8 So. 450; Findlay Brick Co. v. Am. Sewer Pipe Co., 18 Ga. App. 446, 89 S. E. 535; Baylies v. Bent, 185 Ill., App. 437; Mayer v. Mitchell, 59 Ill. App. 26; Louisville Bridge Co.v. L. & N. R. Co., 116 Ky. 258, 75 S. W. 285; Friedland v. McNeil, 33 Mich. 40; Hubbard Specialty Mfg. Co. v. Minneapolis Wood-Designing Co., 47 Minn. 393, 50 N. W. 349; Wittenberg v. Mollyneaux, 55 Neb. 429, 75 N. W. 835; Beck v. B. & O. R. Co., 233 Pa. 344, 82 A. 466; Fessler v. Love, 48 Pa. 407; Loder v. Jayne (C. C.) 142, F. 1010.

The lower court having reached the same result, though on different grounds, the judgment with respect to the shortage of fence is not erroneous.

[**10**] Plaintiffs complain that as the prevailing party they should have recovered costs. On the other hand defendant complains that the recoupment awarded cleared up its default, so that neither costs nor attorney's fees should have been awarded against it. It is to be noted, in this connection, that the recoupment allowed is greater than the principal and interest of the only note which according to its terms, was due at the time of commencement of suit.

With respect to costs, plaintiff's contention must be upheld. Section 4282, Code of 1915, provides:

"For all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law."

In re Marron & Wood, 22 N. M. 501, 165 P. 216, points out that this provision has been a part of our statute law since the Kearney Code; that it is the exact duplicate of the provision in Missouri, which, in turn, was no doubt copied from Massachussetts. In Smith v. Wenz, 187 Mass. 421, 73 N. E. 651, it was held:

"Where but one judgment is rendered in the action, the prevailing party is the one in whose favor that judgment is entered."

See, also, New Haven & Northampton v. Northampton, 102 Mass. 116.

[**11**] Under this rule there can be no question that plaintiffs prevail within the meaning of the statute. We have examined the cases cited by defendant, but they do not seem to be applicable. If the statute allowed discretion in the matter of awarding costs, defendant's argument that its default was cured by the recoupment might be tenable. Attorney's fees were allowed in accordance with the contract, and we can see no error therein.

Plaintiffs contend that the court erred in allowing interest at 6 per cent. on the sum recouped from August 11, 1917, the effective date of the contract, when delivery of the property was made and the notes given. They urge:

> "But why should the defendant in error be allowed interest on something which he had never paid?. The defendant in error had never paid the $33,635. It was never out said amount, and why should it be allowed interest upon money it had never paid or parted with? If there was an actual shortage of 961 head of cattle on August 11, 1917, when said contract was consummated in the manner hereinbefore shown, the defendant in error had not been out any expense in caring for said 961 head, because they were not in existence, and he had not paid out any money on account of the purchase of cattle that were not in existence."

We are not impressed with the force of these arguments. Considering the essence of the transaction, on August 11, 1917, defendant had settled in full for the property purchased. He had paid $100,000 in cash and $125,000 in negotiable interest-bearing notes. This settlement of $225,000 included the consideration for 961 head of cattle which defendant never received and plaintiffs never delivered. It seems to us that in every sense material to this inquiry defendant had paid for the property. The recoupment is approximately 15 per cent. of the purchase price. Then $15,000 of the cash payment and $18,635 of the notes represented the consideration for the 961 head of cattle. Defendant paid the interest on all the notes accruing from

August 11, 1917, to October 1, 1919. Fifteen per cent. of this interest payment was on account of the missing cattle. The decree provides for a recovery by plaintiffs of the remaining $75,000 and the interest thereon from October 1, 1919, reduced only by the amount of the recoupment and its interest. On plaintiffs' theory, defendant would be required to pay interest on $18,635 from August 11, 1917 to June 1, 1923, date of decree, and be out the use of $15,000 for 8 years or more, all without consideration. The decree of the court awarding interest on the recoupment serves to correct this situation and is clearly equitable.

If there is any equity in the argument that consideration should be given to the fact that defendant has been spared the expense of caring for 961 head of cattle, it cannot avail here. There is no finding as to the amount of such expense, no error assigned in that respect, and the matter was apparently not brought to the attention of the trial court.

[**12**] In so far as plaintiffs base their objection on equitable grounds, it is clearly without merit, and is to be overruled. A more difficult question arises, however, upon their contention that interest cannot be allowed on the recoupment because it was an unliquidated claim. In considering this question, it is to be borne in mind that it is not interest in the ordinary sense which the decree allows. It is interest as damages, an essential component, as we have seen, of just compensation for defendant's loss. Do the rules of law operate to forbid this means of restoring to defendant more than $2,500 of excess interest actually paid, of offsetting about the same amount of excess interest which the decree requires that he still pay, and of compensating him for the loss of the use of $15,000 excess principal, paid 8 years ago?

It is true it has often been said that interest cannot be recovered antedating the liquidation of the claim. In seeking the foundation and authority for this sup-

posed rule of law, we were struck with the force of the observation of Dodge, J., in Laycock v. Parker, 103 Wis. 161, 79 N. W. 327:

"The question of interest is one much more often passed upon than carefully considered by courts. It is usually presented only incidentally to much more important issues, and often decided one way or the other at the close of exhaustive investigation of the other questions, and with the perhaps unconscious feeling that it is not of sufficient magnitude to justify further serious labor. Again, the elements involved in determining the question are many of them so elastic in their application that cases may be rightly resolved in different ways without the distinction being apparent from the statement of them."

The distinction between liquidated and unliquidated demands is perhaps an important one; useful as a first consideration; determinative in some cases, but often not so without resort to further classification. Where a sum certain becomes due at a fixed time—an undoubted liquidated claim—it is generally considered that interest is recoverable as an element of damages, regardless of contract or statute. On the other hand, where the damages are wholly at large, as for assault and battery, slander, or personal injury—undoubtedly unliquidated—it is generally considered that interest as damages may not be recovered. So far, the distinction pointed out and relied upon operates successfully and is supported by the authorities, but, as remarked in Sedgwick on Damages, § 299:

"Between these two extreme cases the whole body of the law lies, and it will be found that in this middle ground the demands approach or depart from the type of a liquidated demand in different degrees."

The reason of the rule allowing interest as damages on liquidated claims is plain. It is essential to compensation, and compensation is the fundamental principle of damages. The reason generally given for refusing interest on unliquidated claims is that, where the amount is wholly unascertainable until verdict, neither party could have arrived at the amount necessary to satisfy the claim, and hence it cannot be said that there has been a wrongful detention. Where the damages

are wholly at large, it is also considered that the jury, having such latitude, has probably made allowance for all features of the case bearing upon just compensation, including the lapse of time. These are just objections to the allowance of interest on claims wholly at large, and those where the amount and date of accrual are unascertainable. They must prevail where the law can do no better.

The "unsatisfactory character of the test" is thus pointed out in Sedgwick on Damages, § 300:

"There is no reason why a person injured should have a smaller measure of recovery in one case than the other. There is no reason why the damages to be paid by the defendant should be mitigated or reduced by the circumstance that his tort or breach of contract was of such an aggravated or cunningly perfidious character as to make a liquidation of the claim against him difficult. On general principles, once admitted that interest is the natural fruit of money, it would seem that wherever a verdict liquidates a claim and fixes it as of a prior date, interest should follow from that date."

This distinguished author then proceeds to lay down the test for further classification as follows:

" * * * First is whether the demand is of such a nature that its exact pecuniary amount was either ascertained or ascertainable by simple computation, or by reference to generally recognized standards such as market price; second whether the time from which interest, if allowed, must run—that is, a time of definite default or tort-feasance—can be ascertained."

As to the second of these tests, no discussion is required. It is clear that, if defendant is to have interest by way of compensation, the date fixed by the trial judge is correct. As to the first of the tests, the leading case seems to be Van Rensselaer v. Jewett, 2 N. Y. 135, 51 Am. Dec. 275. This case, as well as the other New York cases and the earlier Wisconsin cases is reviewed in Laycock v. Parker, supra. Here is briefly traced the development of the law, both by enactment and by decision, from its ancient "abhorrence" and outlawry of interest, called "usury," through its forced recognition of it, and to the acceptance finally of the doctrine of interest as damages. It is there said:

"* * * The old reasons and principles have been departed from in deference to modern business methods and views of commercial equity and upon which the law has progressed in a steady development away from the early precedents Sedgwick on Dam. § 297."

In Bernhard v. Rochester German Ins. Co., 79 Conn. 388, 65 A. 134, 8 Ann. Cas. 298, it was said:

"Courts are more and more coming to recognize that a rule forbidding an allowance for interest upon unliquidated damages is one well calculated to defeat that purpose in many cases, and that no right reason exists for drawing an arbitrary distinction between liquidated and unliquidated damages. * * * The determination of whether or not interest is to be recognized as a proper element of damage, is one to be made in view of the demands of justice rather than through the application of any arbitrary rule."

Any considerable reference to the authorities would unduly extend this opinion. Suffice it to say that the old distinction between liquidated and unliquidated damages seems to be discredited by the weight of modern decisions and texts.

[**13**] In the case at bar there were two essentials to the determination before judgment of the amount necessary to satisfy the defendant's claim of recoupment—the number of cattle in question and their market value. Clearly the market value could have been easily ascertained. As to the number, it is true there was dispute and probable doubt, but, as said in Laycock v. Parker, supra:

"More difference of opinion as to amount is, however, no more reason to excuse him from interest than difference of opinion whether he legally ought to pay at all, which has never been held an excuse."

It does not follow from the dispute and doubt as to the number that it was not ascertainable, perhaps readily, from data in plaintiffs' possession, or at their command. Ordinarily one owning and selling and agreeing to deliver personal property would be presumed to know the quantity. It might be urged that the court's refusal to find that Col. Hopewell intended to perpetrate a fraud is equivalent to finding that he did not know the extent of the shortage, or even that there was

a shortage. Giving full weight to that suggestion, it does not follow that he had not the means or the data to enable him to ascertain at least the approximate number of cattle on the range. In any event, since the trial court allowed the interest, we should presume that he did so on the correct theory. The interest awarded was attacked in the lower court and attacked here only on the ground that the damages were unliquidated. This we find not a sound proposition. Counsel did not choose to attack the award on the ground that the damages were not readily ascertainable, and so that question is not involved.

Under the title "Vendor and Vendee," it is laid down in Sutherland on Damages, § 671:

"As the paramount principle is to give compensation commensurate with the loss or injury the rule on the subject of warranties is always stated, when the case requires it, so as to include interest if the price has been paid. * * * "

And Sedgwick declares, section 313a:

"Where property is paid for in advance and the seller fails to deliver it, the purchaser recovers interest on the value from the time it should have been delivered. And so in case of any failure to deliver property."

These principles seem quite applicable here and are well supported. The exact procedure followed in this case finds authority in Sedgwick on Damages, § 314b, thus stated:

"If one claim is liquidated in amount, interest will run on that claim, though the counter claim is unliquidated; but in such a case interest is allowed on the balance only, from the time the counterclaim accrued, or, what amounts to the same thing, interest is allowed on both sides of the account."

There are numerous decisions to the effect that, while equity generally looks to the law for the rule of damages, it will not refuse interest on unliquidated claims where justice requires its allowance. We do not base our decision on that ground, because satisfied that the present decree is to be sustained by the better rules recognized at law. The doctrine of damages in the nature of interest on unliquidated demands is not unknown to the law of this state.

"The jury on the trial of any issue or inquisition of damages may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure." Section 4208, Code of 1915.

This statute is not invoked as legislative support of this particular decree; but there is no more inherent difficulty in ascertaining, in advance of the verdict, the amount of damages for a conversion than for a breach of contract to deliver.

On these considerations we are satisfied with the correctness of the decree as to interest, at least as against the objections urged by the plaintiffs here and in the court below.

Finding no error in the record, except with respect to costs, the judgment will be reversed, and the cause remanded, with direction to tax the costs in the lower court against the defendant, and to modify the decree by including such costs in the amount for the satisfaction of which the mortgaged property may be sold. Plaintiffs will recover their costs in this court, and it is so ordered.

PARKER, C. J. and BICKLEY, J., concur.

(No. 3013. October 1, 1925.)

WELLS v. COE et al.

SYLLABUS BY THE COURT

1. Trial judges are without jurisdiction to extend time for settling and signing bills of exceptions, unless it shall appear from the records and files in the office of the clerk of the district court that the appellant or plaintiff in error has, within 30 days after appeal taken or writ of error sued out ordered the transcribing of the testimony, to be included in his bill of exceptions.

2. Where all assignments of error relate to matters shown only by bill of exceptions, and the latter is stricken, judgment affirmed.

Error to District Court, Lincoln County; Ed. Mechem, Judge.

Action by Mrs. Martha Wells against Will T. Coe and wife and others. Judgment for defendants, and plaintiff brings error, and defendants move to strike plaintiff's bill of exceptions. Motion sustained and judgment affirmed.

W. T. Brothers, of El Paso, Tex., for plaintiff in error.

A. H. Hudspeth, of Carrizozo, for defendants in error.

OPINION OF THE COURT

WATSON, J. The writ of error in this case was sued out November 11, 1924. January 27, 1925, an order was made by the district judge extending the time for settling the bill of exceptions, which was finally settled February 27, 1925. The transcripts were filed in this court March 17, 1925.

Defendant in error moves to strike the bill of exceptions on the ground that the extension was unauthorized, because it did not appear from the record and files in the office of the clerk of the district court that within 30 days after the writ of error was sued out the plaintiff in error had "ordered the transcribing of the testimony, to be included in his bill of exceptions." Section 36, c. 43, Laws of 1917.

There is nothing in the record before us to show that the stenographer was ever ordered to transcribe his notes. The praecipe, filed November 18, 1924, covers merely the record proper.

In Security Ins. Co. v. City of Socorro, 25 N. M. 200, 179 P. 748, it was held that failure to file praecipe within 30 days was fatal to the jurisdiction to extend time. There was pointed out the purpose of the statute to require diligent prosecution of appeals. In this case, however, the praecipe for the record proper was filed in time. The fault is in failing to order the transcribing of the testimony. The effect of such failure has not been decided.

Plaintiff in error urges that the statute does not, in terms, require the order for the transcribing of the testimony to be in writing, nor require the filing of the original or a copy of such order in the clerk's office, and that it would be illogical, in the praecipe filed with the clerk, to call for a bill of exceptions not up to that time settled or filed.

[1] Whenever review is sought involving questions raised at the trial, two things are necessary before the transcript can be filed here. The clerk must transcribe the record proper, and the stenographer must transcribe the proceedings of the trial. Delay is likely to occur in either. The same reason exists for setting the stenographer in motion as in the case of the clerk. We cannot impute to the Legislature an intent to require no diligence or show of diligence in the one case, while providing so strictly in the other. Counsel for plaintiff in error, while insistent that the proviso does not require record showing of the ordering of the transcript, makes no suggestion as to any other reason for its incorporation in the statute. As interpreted and acted upon in this case, it is a nullity. Counsel, in applying for the extension, did not even state that he had ordered the transcript of the testimony. To adopt counsel's view would destroy the statute. The two requirements complement each other to effect a practical and useful result. If one fails the other is valueless. While the proviso is not framed with entire grammatical precision, we think it is clearly apparent that the record and files must show the ordering of the stenographer's transcript.

It is the office of the praecipe to instruct the clerk exactly what to include in the transcript to be filed here. If, when the praecipe is filed, the bill of exceptions has not been settled, it may be referred to as "the bill of exceptions hereafter to be settled and to be included when filed," or in equivalent language. Such is the usual practice, and it seems unobjectionable.

The motion to strike the bill of exceptions must be sustained.

[2] Defendant in error further moves for an affirmance of the judgment, because the errors assigned relate to matters shown only by the bill of exceptions, citing Security Ins. Co. v. City of Socorro, supra. Plaintiff in error does not contest this point, and it seems to be well taken.

The judgment will therefore be affirmed, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

(No. 2876. October 9, 1925.)

In re CHICAGO, ROCK ISLAND & P. RY. CO.

SYLLABUS BY THE COURT

1. This is a suit to recover taxes because of levies made which produce on the face of the county tax roll an amount more than 5 per cent. in excess of the amount produced on the face of the tax roll by the tax levies during the year preceding, it being claimed that the approval thereof by the state tax commission was not upon special written request by the county commissioners, and therefore illegal. The county commissioners made a written request to the state tax commission for permission to make levies necessary for the production of funds in accordance with the budget estimate submitted therwith, "pursuant to the provisions of section 310 and 311, c. 133, Laws of 1921." This budget did not embrace the school budget, which was sent direct to the state tax commission by the state educational auditor, with a written request for permission to levy taxes "in excess of 5 per cent. over last year for the general school fund and school districts." **Held,** that these budgets and accompanying requests were sufficient to invoke the discretion of the state tax commission to authorize the increase.

2. If the trial court enters an order sustaining a demurrer to an entire pleading, which alleges three causes of action separately stated, and the demurrer assails two of such causes of action and does not put in issue the other, it is the duty of counsel to call the court's attention to the error so made, so that the same may be corrected, and where the record shows nothing more than a general exception to the order sustaining the demurrer to the whole petition and a general exception to a judgment sustaining motion to dismiss

the petition after failure to amend, the appellate court will not consider an assignment of error based upon such order, in so far as the unassailed cause of action is concerned, when such mistake was not called to the attention of the trial court.

Appeal from District Court, Quay County; Hatch, Judge.

Ex parte proceeding by the Chicago, Rock Island & Pacific Railway Company to recover taxes paid under protest. From a judgment dismissing the petition, petitioner appeals. Affirmed.

W. A. Hawkins and H. H. McElroy, both of El Paso, Tex., for appellant.

OPINION OF THE COURT

BICKLEY, J. This proceeding was instituted ex parte by the Chicago, Rock Island & Pacific Railway Company to recover taxes alleged to have been erroneously and illegally charged against it and paid by it under protest. The grounds for recovery, as set forth in appellant's petition, may be summarized as follows:

(1) It was alleged in the petition that in making tax levies for the county of Quay and for various school districts in said county there was a failure to comply with the requirements of sections 310 and 311 of chapter 133 of the laws of 1921, providing that no county or school district shall in any year make tax levies which will in any such county or school district produce on the face of the tax roll an amount of more than 5 per cent. in excess of the amount produced on the face of the tax roll by tax levies therein during the year preceding, except that in case it is desired to make tax levies which exceed 5 per cent. of the amount produced by the tax levies the preceding year, such fact shall be set forth in the form of a special written request filed with the state tax commission and in case the state tax commission approves such proposed increase it shall specifically authorize the same, and if it disapproves, it shall so state with its reasons therefor, and its decision shall

be final; and the petition specifically alleged facts showing that the tax levies for the county of Quay as a whole and for several of the school districts thereof for the year 1921 were in an amount of more than 5 per cent. in excess of the amount produced on the face of the tax roll by tax levies therein during the preceding year, and that no written requests for authority for such excess levies were filed with the state tax commission by the board of county commissioners of the county of Quay, by the authorities of either of said school districts, or by any other person authorized to make such written requests, and that by reason of such unauthorized excess levies, the appellant was compelled to suffer such illegal assessments and required to make over its protest the tax payments complained of.

(2) It was alleged in the petition that a certain tax levy was made for interest and sinkinig fund for bonds of school district No. 34 of Quay county, N. M., upon the property in school district No. 80, which was not subject to taxation for nor liable to payment of the interest and sinking fund for the bonds of school district No. 34.

Apparently by way of anticipation of the defense made by the authorities of Quay county, it was further alleged in the petition that about the 26th of July, 1921 the board of county commissioners of Quay county submitted to the state tax commission its budget estimate for county levies for said county; that the budget so submitted did not contain any budget whatever for school maintenance or for the county school fund, or for special school district levies; and that attached to said budget estimate was a written request for permission to make levies necessary for production of funds in accordance with the budget estimate so submitted, which request is as follows:

"July 26, 1921.

"To the State Tax Commission:

"Pursuant to the provisions of section 310 and 311, chapter 133, Laws of 1921, request is hereby made for permission to make the levies necessary for the production of funds in ac-

cordance with the budget estimate herewith submitted, Quay county.

"W. R. Rector,

"Chairman or Member Board of Co. Com."

It was further alleged that the request so made was limited to the budget submitted therewith, and that the same did not cover the budget for school maintenance or for special school district levies which were not submitted therewith; that the budgets for school maintenance and special school district levies were not made by the board of county commissioners, but were made thereafter by the state educational auditor; that the state educational auditor submitted said school budgets directly to the state tax commission, and that the same were not at any time submitted to the state tax commission by the said board of county commissioners; that at the time the board of county commissioners of Quay county, N. M., made the request for permission to make levies in accordance with the budget submitted by the state educational auditor to the state tax commission, it was not advised of the amount of the school budget estimate for said county, and was not so advised until about the 11th day of October, 1921, when said school budgets were returned to it with the approval of the state educational auditor; that in making the school budgets for the said county, the state educational auditor had submitted the said school budget for Quay county to said state tax commission, he making a written request without authority from the board of county commissioners to said state tax commission for permission to levy a tax in excess of 5 per cent. over the preceding year for the school fund, which request is as follows:

"John Joerns, State Educational Auditor.

Santa Fe, New Mexico, October 7, 1921.

"State Tax Commission, Santa Fe, New Mexico,

"In the matter of Quay County School Levies.

"Gentlemen: Request is hereby made for permission to levy a tax in excess of 5 per cent. over last year for the general school fund and for the school districts as shown in the attached certificate.

"Yours very truly,

"JJ-FJ John Joerns, Educational Auditor."

A demurrer was filed to the said petition by J. C. Compton, assistant district attorney for the Ninth judicial district within and for the county of Quay. The demurrer states that the petition does not allege facts which constitute a cause of action, because upon the face of the petition it appears that the board of county commissioners of Quay county made a written request to the state tax commission for authority pursuant to law to make levies necessary for the production of funds in accordance with the budget estimate therewith submitted for Quay county. For further cause, it is shown upon the face of the petition that the educational auditor of the state of New Mexico made a special written request for authority from the state tax commission of the State of New Mexico for a tax levy in excess of five per cent. over the year 1920 for general school purposes and for school district budgets, and that the state tax commission, in pursuance to said request, approved said school fund budget and said school district budget.

In the order sustaining the demurrer the court, after describing the hearing thereon, declared:

"It is therefore ordered by the court that said demurrer be and the same is hereby sustained. To which action of the court the petitioner did accept."

Thereafter the appellant, having elected to stand upon its petition, and the time for filing an amended petition having expired, the district attorney made a motion for final judgment dismissing the petition, and, upon hearing of said motion, the court entered final judgment whereby it was ordered and adjudged that the appellant is not entitled to the relief prayed for in its petition, and that it be denied any relief in the preises; and that the defendant be dismissed herein with judgment against the plaintiff for its costs in this behalf expended, "to which final judgment the petitioner duly excepted."

By proper proceedings the case is now here on appeal.

Appellant, for the purpose of presenting its argument, grouped the errors assigned under three general propositions:

"(1) The right to recover under the petition taxes wrongfully and illegally assessed and collected against the property of school district No. 80, for interest and sinking fund for the bonds of school district No. 34.

"(2) The sufficiency of the petition to sustain the recovery by appellant of excess taxes upon its property produced by the total levies for Quay county in an amount of more than 5 per cent. of the amount produced on the face of the tax roll during the preceding year, without authority prescribed by the statute.

"(3) The efficiency of the petition to sustain the recovery by appellant of excess taxes upon its property in various school districts produced by total levies of said school districts respectively in an amount of more than 5 per cent. of the amount produded on the face of the tax roll during the preceding year, without authority prescribed by the statute."

Appellant says in its brief that generally the arguments applicable to the second proposition apply to the third. We will, therefore, discuss propositions 2 and 3 together and first.

[1] Appellant contends that the state educational auditor was not authorized by the board of county commissioners of Quay county to make a request to exceed the levies of the preceding year by more than 5 per cent., and says that the exact questions to be decided are:

"(a) Whether the state educational auditor has, ex officio, the authority to request of the state tax commission authorization to make such excess levies for Quay county, and

"(b) Whether the request made by the educational auditor 'to levy a tax in excess of 5 per cent. over the year 1920 for the general school fund' is a compliance with the requirement of the statute providing that, 'in case the amount desired to be produced by tax levies is more than 5 per cent. greater than the amount produced by tax levies in the year preceding, such fact shall be set forth in the form of a specific written request, filed with the state tax commission.' "

Appellee contends that, as section 311, c. 133, laws of 1921, does not say who may file the required written request with the state tax commission any one having

interest in the matter might make the request. Appellant disputes this, and says that, even though the statute does contemplate that anyone having a proper interest in the matter could make the request, no proper request was made, because in the form of a request for permission to levy the excess tax for the general school fund and for school districts, and not a request for permission to levy in excess of 5 per cent. of the amount produced on the face of the tax roll during the year preceding for all county purposes, including school district purposes Appellant says that the law did not contemplate that it would be necessary to have the authority of the state tax commission to exceed by more than 5 per cent. the amount of the levy for each or any particular fund, but that the limitation applied to the total of all levies of the taxation district, each municipal unit mentioned in the statute, to-wit, the county, city, town, village or school district being under this limitation upon its levies as a whole and having the right, free of this limitation, to adjust its particular levies to suit its needs so long as such levies in total do not exceed the limitation prescribed.

While admitting the importance and the wide scope of the duties of the state educational auditor, the appellant seems to feel that the board of county commissioners of the county who ultimately make the levies, being elected by the people of the county, are more closely in touch with their desires and needs and more representative of their wishes, and that no request for an increase over the inhibited limitation should be acted upon by the state tax commission unless specifically approved by such board of county commissioners.

Before discussiing the relations of the state educational auditor to the school system and to the county commissioners and to the state tax commission, we notice the fact that the written request made by the board of county commissioners set out in the petition and quoted above states that:

"Pursuant to the provisions of section 310 and 311 of

chapter 133, Laws of 1921, request is hereby made for permission to make the levies necessary for the production of funds in accordance with the budget estimate herewith submitted."

We are not advised by the record what the requirements of the budget estimate were. It is apparent from the petition that the tax levies for 1921 would produce on the face of the tax roll an amount more than 5 per cent. in excess of the amount produced on the face of the tax roll by tax levies during the year preceding, but whether this was accomplished by the increase in the levies for school purposes requested by the state educational auditor, or by the budget estimate submitted by the county commissioners, or by both combined, is not apparent. Sections 310 and 311, c. 133, Laws of 1921, are as follows:

Sec. 310. **Tax Rate Limited to Five Per Cent. Increase Each Year.**

"No county, city, town village or school district shall in any year make tax levies which will in any such country, city, town, village or school district, produce on the face of the tax roll, an amount more than five per cent. in excess of the amount produced on the face of the tax roll by tax levies therein during the year preceding, except as hereinafter provided.

Sec. 311. **Increases greater than Five Per Cent. May Be Made With Approval of Tax Commission.**

"In case the amount desired to be produced by tax levies is more than five per cent. greater than the amount produced by tax levies in the year preceding, such fact shall be set forth in the form of a special written request filed with the state tax commission. In case the state tax commission approves such proposed increase, it shall specifically authorize the same; if it disapproves, it shall so state with its reasons therefor, and its decision shall be final."

As these sections which are specifically referred to in the request made by the county commissioners to the state tax commission refer only to levies to be made in excess of the inhibited limitation, it seems to us that this request in itself could be properly construed as a special written request to be permitted to make the excess levies. We assume that the county commissioners would not have made their written request pursuant

to sections 310 and 311, c. 133, Laws of 1921, unless the budget estimate required levies for the production of an amount in excess of the restricted 5 per cent, increase of the preceding year.

We are not impressed with appellant's argument that the state tax commission may authorize the increase in the tax rate under the provisions of section 310 and 311 of chapter 133, Laws of 1921, only upon the specific written request of the board of county commissioners. An examination of the powers given to the state tax commission and the state educational auditor by the Laws of 1921 creates the opinion that these officers are created and invested with powers to protect the interest of the taxpayers just as much as the county commissioners.

The county commissioners, at the time this cause of action arose, had no power over the levies for school purposes. No levies could be made by them for school purposes until after the revised and approved estimate of the state educational auditor was certified to such county commissioners, "and all levies for such purposes shall be made in conformity to the estimates of said auditor; provided, however, that nothing contained herein shall be construed as limiting the power of the state tax commission with respect to levies for school purposes." Section 3, chapter 190, Laws of 1921. The matter resting thus with the state educational auditor and the state tax commission, we see no reason why the state tax commissioners should not act upon the written request of the auditor, coming directly from him. An examination of sections 310 and 311 in connection with chapter 190, Laws of 1921, indicates that, for the purpose of fixing the amounts of the levies for school districts and for school funds, school districts are units separate from counties and municipalities, and that the state tax commission, upon the written request of the state educational auditor, could revise upward the levies for school purposes, even though the result would be to increase the total levies

in a county in which the school districts were situated in an amount in excess of 5 per cent. increase over the amount produced during the preceding year. The increase in the levies for school purposes might or might not require an increase in the total levies of the county beyond the prohibited 5 per cent. increase; if it did not, there would be nothing to invoke the exercise of the discretion of the state tax commission. If, on the other hand, it did demand such an increase, the written request of the auditor would be sufficient to invoke the exercise of such discretion.

Subsection 8 of section 507, c. 133, Laws of 1921, defining some of the powers of the state tax commission, is as follows:

"Have power and be charged with the duty of requiring the officers or governing body of all counties, municipalities, school districts or any other district having the power of taxation or authority to expend public moneys, to furnish and file with the commission, on or before the first Monday of August of each year, a budget showing in detail the financial condition of such district and containing an estimate in detail of the financial needs of such districts for which taxes must be levied by or through the boards of county commissioners at their meeting on the first Monday in October or otherwise as required by law. Such budget shall be in such form and contain such information as shall be prescribed by the commission. Such budgets shall be examined by the commission who shall have power and are charged with the duty to amend, revise, correct and approve the same as amended, revised or corrected, and certify the same to the board of county commissioners of each county, on or before the first proved by the commission shall be binding on all tax officials of the state."

It will be seen that the commission has power to amend, revise, correct the budgets of counties, municipalities, and school districts.

Whether the power granted to the commissioners permits it to increase the total levies of the county so that the same will produce an amount more than 5 per cent. in excess of the amount produced during the year preceding without a written request, if it is necessary to decide. But if the county budgets and the school budgets are both before the state tax commission show-

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The only other proposition argued by the appellant in its brief is that the demurrer did not present an issue as to certain allegations of the petition as follows:

"The sum of $442.06, being the proceeds of the levy by interest and sinking fund made in school district No. 34 and raised on the valuation of school district No. 80; the property in said district No. 80 not being subject to taxation for the bond of said school district No. 34. Val'n Dist. No. 80, $1,142.28. Levy made, .0037. Excess tax, $442.06.

"That the action of the county assessor, the board of county commissioners, and state tax commission in failing and refusing to recognize the existence of school district No. 80 in said county and in failing and refusing to prepare a tax roll for said district but in placing a description of the property therein and extending taxes there against on the tax rolls under district No. 34 is arbitrary, void, and is an attempt to require the taxpayers in said district No. 80 to pay to said district No. 34, taxes belonging to said district 80, and further, that said appropriations and levies, so far as they pertain or apply to said district 80, are absolutely void, in that the local board of education, the board of county commissioners, the state educational auditor, and the tax commission, and each of them, failed to make a budget or appropriation for said district No. 80."

[2] In its brief appellant amplifies the allegations made in the petition but claims that the petition

was sufficient as stating ultimate facts. Appellant assigns as error the absence of a demurrer to this particular cause of action, and that the demurrer should not have been sustained against that part of the petition or as against the petition as a whole. The demurrer is directed to the petition as a whole, but does not, among the grounds thereof, assail the cause of action above quoted. After the court has sustained the demurrer, and within the time allowed for amendment or further pleading, the appellant might have taken steps to have preserved its cause of action, which it is claimed was not put at issue by the demurrer and its right to liquidate such matters would have been preserved, but when it failed to do so, and made merely a general exception to the order sustaining the demurrer, without calling particular attention of the trial court to the matters now assigned as error, and went to hearing on the motion to dismiss the petition without calling the attention of the court to such particular alleged error, and merely made a general exception to the judgment, it is not in a position to now complain. See Garcia v. Silva, 26 N. M. 421, 193 P. 498; Wallis v. Mulligan, 20 N. M. 328, 148 P. 500; and Cook v. City of Socorro, 22 N. M. 507, 165 P. 341, where the court decided:

"Where a trial court inadvertently enters an order sustaining a demurrer to a pleading to which no demurrer has been filed, it is the duty of counsel to call the court's attention to the error so made, so that the same may be corrected, and where the record on appeal shows that an order was made by the trial court sustaining a demurrer to an answer to a counterclaim, where a demurrer was filed only to the reply, the appellate court will not consider an assignment of error based upon such order in so far as the answer to the counterclaim is concerned, where such mistake was not called to the attention of the trial court."

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

PARKER, C. J., and WATSON, J., concur.

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Instruction limiting self-defense to one in pursuit of affairs **held** not erroneous.
State v. Smith, 364

Necessity, Requisites, and Sufficiency of Instructions.

Refusal to instruct that evidence of accused's good character is sometimes sufficient to create reasonable doubt, when otherwise none would exist, is not error, in view of correct instruction.
State v. Burkett, 382

Defendant cannot complain of instructions which as a whole fully protect his legal rights.
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Refusal of requested instructions inapplicable to issues raised not erroneous.
State v. Jackson, 309

Accused entitled on written request to instruction on reasonably supported facts establishing his theory of defense.
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Instructions should cover whole case.
Id.

Instruction relative to weight to be given to statements by accused **held** not prejudicial.
State v. Smith, 364

Instruction in general terms as to principals held not erroneous in view of following instruction.
Id.

Instruction that part of persons jointly charged with crime not necessarily joint in nature may be convicted and the others acquitted **held** proper.
State v. Ward, 111

Requests for Instructions.

Refusal of requested instruction, stating in different form substance of that declared in given instructions, not erroneous.
State v. Abeyta, 59

Refusal of instructions sufficiently covered by general charges not error.
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After correctly instructing as to unlawful homicide and self-defense, refusal of further instructions as to effect of entertaining design to kill prior to shooting and as to effect of express malice was not error.
Id.

After correct instructions as to reasonable doubt, refusal of instructions as to reasonable doubt, refusal of instructions calculated to impress on each juror duty in this respect, without regard to conclusions reached by others, was proper.
Id.

Refusal of requested instruction covered by other instructions **held** proper.
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Party complaining of instruction because of misleading term has duty to request instruction defining term.
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Not erroneous to permit jurors, in presence of court, defendant, and counsel, to smell liquor.
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Motion for new trial for newly discovered evidence held not to affirmatively show due diligence.
Id.

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Failure to request limiting instruction precludes complaint that admissible evidence may have been considered for improper purpose.
State v. Quintana, 348

Instruction limiting right of self-defense not reviewable in absence of proper exception.
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Ordinarily, general objection of immateriality of evidence not clearly apparent raises no question for review; immateriality not being clearly apparent.
State v. Stewart, 227

Admission of testimony subsequently withdrawn, with instructions not to consider, not ground for appeal, in absence of motion for mistrial, where not prejudicial.
Id.

Questions other than jurisdictional cannot be raised for the first time on appeal.
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Where record shows final judgment and sentence, assignment of no due process because verdict not disclosed not considered.
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Refusal to permit witness to answer question not reviewed, where court not informed as to what answer was expected.
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Verdict supported by substantial evidence not disturbed.
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Trial court's discretion in admission of evidence of preliminary hearing witness not disturbed except for abuse.
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Evidence offered generally without limitation presumed offered and received for its legitimate purpose.
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Verdict supported by substantial evidence not disturbed.
Id.

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State v. Smith, 364

Granting or refusing severance of trial discretionary and not reviewed, except for abuse of discretion.
Id.

Ruling on motion to strike unobjected to testimony not reviewable, except to determine whether discretion abused.
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Ruling on facts for the jury not disturbed unless gross abuse of discretion appears.
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Fact that demand is unliquidated **held** not conclusive against allowing interest as damages from date of default.
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NATURE AND REQUISITES.

To establish implied or common-law dedication to public use, proof must be clear, convincing, and unequivocal.
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On findings of court and evidence equally supporting intention to devote property to private use, and to dedicate it to public use, latter conclusion is error.
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Finding that deed sought to be set aside was without consideration **held** supported by evidence.
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Presumption of regularity insufficient to overcome appellee's assertion of want of notice of time of settling and signing bill of exceptions.
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Requiring all material portions of letter, portion of which was offered by plaintiff, to be read, within trial court's discretion.
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Testimony with reference to statements made in negotiations for compromise inadmissible, unless of independent fact.
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Admitting letter containing self-serving statements, without proof that it had not been answered, **held** error.
Martin v. New York Life Ins. Co. 400

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Letters written to wife by husband, showing affection for her, **held** admissible to rebut claim by defendants, sued for alienating his affections, that no affection existed between them; such communication not violating hearsay evidence rule.
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Trial judge has no power to extend time for settling and signing bill of exceptions, unless praecipe for record has been filed within 30 days after appeal taken.
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Trial judge has no power to extend time for settling and signing bill of exceptions, unless application therefor is made at least 10 days prior to return day of appeal.
Id.

Notice of time of settling and signing bill of exceptions to one party insufficient to bind another party having separate interest in litigation.
Stoneroad v. Beck, 202

Matters misleading counsel as to parties represented by opposing counsel held not sufficient to excuse want of notice of signing and settling bill of exceptions to interested party.
Id.

Extension of time for settling and signing bill of exceptions, dependent on including testimony therein.
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Proceeding supplemental to execution is action independent of original case.
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New statutory summons in proceedings supplemental to execution necessary.
Id.

Summons in proceedings supplemental to execution must be returnable 10 days from issuance and service.
Id.

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Seller's surreptitious paying buyer's agent **held** constructive fraud.
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Estimate in contract to sell cattle, if made in bad faith, **held** actionable.
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Demurrer based on statute is not well taken unless complaint affirmatively shows that contract is oral one.
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General words in statute denouncing gambling **held** not restricted to banking or percentage games.
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Game of solo offense under statute.
Id.

HABEAS CORPUS.

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Awarding custody of illegtimate children to parents, by adoption, in habeas corpus proceedings, by putative father. **held** not bar to proceedings, under Neglected and Dependent Children's Act.
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Killing by person engaged in commission of felony murder in first degree.
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Killing by person engaged in commission of felony murder in first degree, on his part and on part of companion present, aiding and abetting commission of felony.
Id.

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Admissibility in General.

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Specific acts of violence by deceased, brought to knowledge of accused, were admissible to show apprehension of accused for his life.

Evidence as to movements of defendant's wife just before shooting, and shortly thereafter, and that accused told her deceased would never insult her again **held** admissible.
Id.

Evidence of conversation **held** not admissible to explain flight of accused, in view of opportunity to explain on stand.
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Evidence tending to establish illicit relation of female defendant with male defendant and deceased admissible on question of motive.
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Dying Declarations.

Statement to be admissible as dying declaration must be shown made when declarant was conscious of impending death.
State v. Stewart, 227

Admission of dying declaration does not deprive defendant of any constitutional right.
Id.

Where sole evidence of declarant's consciousness of impending death was character of wound and state of illness, **held** not admissible as dying declaration.
Id.

Ambiguities of written instrument, offered as dying declaration, caused by interlineations, should be explained, if testimony procurable.
Id.

Weight and Sufficiency.

Evidence **held** sufficient to sustain conviction for murder in second degree.
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Evidence **held** to sustain conviction for murder.
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Instructions.

Refusal to instruct that one having reasonable grounds to anticipate attack has right to arm himself to resist **held** error.
State v. Burkett, 382

Requested instruction as to right of threatened person to arm himself for defense, omitting element of reasonable apprehension, properly refused.
Id.

Accused woman entitled, on written request, to special instruction on her claim of defense of chastity.
State v. Martinez, 178

Accused entitled to instruction on self-defense even where supporting evidence slight, or sustained by own testimony only.
Id.

Instruction **held** not erroneous, as failing to require establishment of conspiracy before defendant not shooting could be convicted.
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Submission of degree of homicide not within proofs, over defendant's objection, is reversible error.
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Sentence of 90 to 99 years for murder in second degree **held** not excessive.
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Husband acts in representative capacity in controlling wife's interest in community property.
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Husband's promise to execute mortgage on community real estate, not joined by wife, not basis for equitable mortgage.
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ENTICING AND ALIENATING.

Action by married woman against parents of husband for alienation of his affections will lie, even though he has not in literal sense, abandoned her.
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Presumption that advice of parent to child is made in good faith **held** overcome on showing of interference between husband and wife without excuse or reason.
Id.

Statements of husband showing condition of his mind and feelings toward wife **held** competent to show effect of conduct of his parents, sued by wife for alienating affections.
Id.

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NECESSITY OF INDICTMENT OR PRESENTMENT.

"Offense," as used in penalty provision of prohibitory law, defined.
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REQUISITES AND SUFFICIENCY OF ACCUSATION.

Information in proceeding relating to neglected and dependent children in language of statute, not being demurred to, held sufficient to support jurisdiction.
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Exception in penal statute, if necessary part of offense, must be negatived.
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Where exception separable from offense charged, it need not be negatived.
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JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

Penal statute making it criminal to do certain thing in different ways charges only one offense, and count of indictment may charge each method.
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Motion to quash indictment reaches only such defects or irregularities as appear on face of record.
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Proof of commission of offense at any time prior to filing information or return of indictment and within limitation period, sufficient.
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Penal statute making it criminal to do certain thing in different ways charges only one offense, and count of indictment may charge each method, and proof of one method sufficient.
State v. McKinley, 54

One indicted as principal in first degree may be convicted on evidence establishing guilt as principal in second degree
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Venue of proceedings, under Neglected and Dependent Children's Act, is in county where child is found.
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In proceeding under Neglected and Dependent Children's Act, order for temporary care and custody, and restricting communication with parents by adoption, **held** not abuse of discretion.
Id.

Court, finding child to be neglected and dependent, may permit it to be adopted by non-resident of state.
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Statute **held** not to prohibit employment of children during nonsession of school
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Finding of theft by employee of innkeeper sustained.
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Id.

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Provision for forfeiture on default of payment of premium may be waived by insurer.
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Insurer has burden of showing that check was received for collection and not as payment.
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Separate counts in information, each charging unlawful sale to same person on same day, do not necessarily charge same offense.
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Evidence of liquor found in restaurant adjoining defendant's soft drink parlor admissible, where defendant's control of restaurant at issue.
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Opinion based on rumor does not disqualify juror who unequivcally states that he can lay it aside and commence trial with mind unprejudiced.
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