REPORTS

of

CASES DETERMINED

in the

SUPREME COURT

of the

STATE *of* NEW MEXICO

1926 - 27

By C. C. CATRON
Law Clerk and Reporter

VOLUME 32

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(32 N. M.)

MAR 27 1929

PROCEEDINGS IN COMMEMORATION OF THE JUDICIAL SERVICE OF MR. CHIEF JUSTICE PARKER

On the first day of the regular term of the Supreme Court of the State of New Mexico, begun and held at Santa Fe on the eleventh day of January, 1928, the Honorable Edward R. Wright, on behalf of the bar, suggested to the court that the date was the thirtieth anniversary of the original appointment of Chief Justice Frank W. Parker as an Associate Justice of the Territorial Supreme Court, and that it marked the completion of thirty years of continuous distinguished service as a Territorial Associate Justice, and as a State Justice and Chief Justice; and, thereupon, he moved the court that a committee be appointed to draft and present suitable resolutions in commemoration of such service.

Thereupon, Mr. Justice Bickley for the court, pursuant to said motion, appointed the following committee:

Honorable Herbert B. Holt of Las Cruces, lifelong friend of the Chief Justice;

Honorable John R. McFie of Santa Fe and Honorable Clarence M. Botts of Albuquerque, both of whom had served as justices of this court in association with Chief Justice Parker.

And, on the second day of said term, being the twelfth day of January, 1928, said Committee presented in open court and moved the adoption of the following resolutions:

WHEREAS this date marks the thirtieth anniversary of the accession of the Honorable Chief Justice, Frank W. Parker, to the Supreme Bench of New Mexico; and

WHEREAS a committee has been appointed to draft appropriate resolutions expressive of the sentiments of the Bench and Bar toward New Mexico's most distinguished jurist:

NOW, THEREFORE, we the undersigned members of said committee respectfully submit the following report:

Chief Justice Parker graduated from Ann Harbor Law School in 1880.

He was admitted to the Bar at Socorro, New Mexico, in 1881, by Associate Justice Samuel C. Parks, then presiding judge of the Second Judicial District of New Mexico.

Immediately thereafter he opened his first law office at Mesilla, Dona Ana County, New Mexico.

In 1882 he removed to Kingston, in what is now Sierra County; and in 1883 he removed his law office from Kingston to Hillsboro, which has been the county seat of Sierra County since its organization.

There Judge Parker enjoyed a large and lucrative practice for many years, during which time he achieved an enviable reputation as a successful lawyer and splendid citizen.

On January 10, 1898, he was commissioned as an associate justice of the Territorial Supreme Court of New Mexico by President William McKinley.

In 1902, and again in 1906, he was recommissioned by President Theodore Roosevelt; also again in 1910 by President William H. Taft.

In 1910 he served with distinction as a member of the State Constitutional Convention.

In 1911 at the first state election he was elected a member of the State Supreme Court, drew the long term of nine years, and was re-elected in November, 1920.

Since statehood he has served over seven years as Chief Justice, which position he now occupies.

Throughout the many years of his practice as an attorney he at all times acquitted himself as an exponent of the highest ideals and ethics of the great profession which he adorns. He was ever zealous in protecting the interests of his many important clients and was uniformly successful as a practitioner.

His long career upon the bench has now approached the maximum period of such service in the history of our country.

The length of his term of service constitutes the strongest possible evidence of the great esteem in which he is held by the Bar and by the citizens of the state: and his record will constitute the most enduring and lasting monument to the high quality of his service.

No member of the Court has ever been more deeply beloved or more universally respected, as a man, as a citizen, or as a lawyer and judge than Chief Justice Parker.

The citizens of New Mexico and the Bench and Bar have been most fortunate and highly blessed by reason of having so long enjoyed the faithful services of this preeminently able jurist.

We therefore recommend the adoption of the following resolutions, and that they be spread upon the records of this Court; to-wit:—

WHEREAS thirty years ago, on January 10, 1898, Honorable Chief Justice Frank W. Parker was first commissioned by President William McKinley as an Associate Justice of the Supreme Court of the then Territory of New Mexico; and

WHEREAS Chief Justice Parker has since continuously served with distinguished talent and ability as a member of the Supreme Court of New Mexico, having been thrice reappointed prior to statehood and having been twice elected since statehood, and having served in his present capacity as Chief Justice for more than seven years; and

WHEREAS he is a man who is not only an honor to his profession and to the Bench, but one whom the Bench and Bar and the citizens of the state delight to honor, and of whose distinguished career they are justly proud:

THEREFORE, BE IT RESOLVED: That we congratulate the people of the great commonwealth of New Mexico upon the high character, profound learning and great ability of this eminent citizen; that we congratulate the Bench and Bar upon having enjoyed the privilege and benefit of his erudition and great ability as a jurist; that the Bench, and particularly the Bar, welcome this opportunity permanently to record this expression of their esteem and regard for the subject of these resolutions, and in so doing voice the universal opinion that no more able, fair and impartial judge has ever graced the Bench of this or any other commonwealth; that we congratulate Chief Justice Parker upon his long and splendid record, and express the hope that he may long continue in the high position which he now occupies.

H. B. HOLT
C. M. BOTTS
JNO. R. McFIE, SR.

Thereupon, Mr. Justice Bickley, speaking for the court, made the following remarks:

More than ten years ago, our beloved Chief Justice and I were discussing the professional attainments of a member of this bar, and Judge Parker said:

"Above all, he is a good man, which lies at the foundation of his being a good lawyer, for no man can be a great lawyer without being a good man."

No man could be as great a jurist as is the Chief Justice without being first a good man.

During the proceedings leading up to the adoption of these resolutions, we have listened to a score of addresses, lauding the wisdom, learning and legal attainments of Chief Justice Parker, and I observed that each speaker during his remarks expressed his kindliness and sympathetic human qualities. It was to be

observed how these tributes touched the emotions of our friend, and we can readily appreciate his feeling when he said that these expressions contributed to make the occasion the happiest of his life.

In almost equal degree, these tributes to our associate have given pleasure to Mr. Justice Watson and me, who through our three years of daily association have had added to our already high esteem a higher degree of appreciation of those rich qualities of mind and heart which make him the great man and great jurist the members of the bar present have pronounced him. We extend our thanks to you for saying the things we would say.

It would be an agreeable thing to recount the praise so richly deserved, which has been here bestowed upon the Chief Justice, who has so abundantly given of his great talents to our commonwealth during the formative period of its jurisprudence. Space will not permit, but I may say that they may be summed up into the sentiment that Chief Justice Parker during his thirty years of service has lived the precepts of the law as pronounced by Justinian:

> "To live honorably, not to injure anyone, and to give to everyone his due."

We thank the Committee for having so fittingly expressed the thoughts of all of us and the Committee is discharged; and

IT IS ORDERED that the said resolutions be received and spread in full upon the Journal of the Court; that an engrossed copy thereof be transmitted to Chief Justice Parker and that the Proceedings be published in the forthcoming Volume thirty-two of the New Mexico Reports, as a permanent memorial.

THE SUPREME COURT OF THE STATE OF NEW MEXICO

Present Personnel

FRANK W. PARKER ..... Chief Justice

HOWARD L. BICKLEY .... Justice

JOHN C. WATSON ..... Justice

JOSE D. SENA ..... Clerk

C. C. CATRON ..... Law Clerk and Reporter

ROBERT C. DOW ..... Attorney General

FRANK PATTON ..... Assistant Attorney General

The term of the Supreme Court of New Mexico begins on the second Wednesday in January. Oral argument sessions are fixed by the Court. Except for oral arguments, the Court is always in session.

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For meeting of Board see Rules of Supreme Court adopted January 1, 1928.

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RULES OF APPELLATE PROCEDURE

The following rules of appellate procedure are hereby adopted; and all former rules of this court are hereby repealed. This order shall take effect March 1, 1928; Provided, that the rules hereby repealed shall continue to apply in appeals taken and writs of error sued out prior to said effective date; Provided, further, that Rule XII, section 1, shall not apply in any case pending in a district court prior to said effective date.

For convenience of reference and citation, the unrepealed provisions of the appellate procedure act (Laws 1917, ch. 43) are herein included and designated rules, their statutory origin and authority being shown by reference.

The thanks of the court are due to Messrs. Carl H. Gilbert, E. R. Wright, C. J. Roberts, Francis C. Wilson and J. O. Seth, who, as a committee of the New Mexico State Bar Association, have given valuable assistance and advice in formulating these rules.

Ordered January 7, 1928.

FRANK W. PARKER,
Chief Justice.

HOWARD L. BICKLEY,
Justice

JNO. C. WATSON,
Justice

For convenience in preserving the connection between these and former rules and decisions thereon, references are given to the Rules of 1919.

RULE I.

SUPREME COURT TO MAKE RULES.

1. The Supreme Court shall make rules for the government of the practice in writs of error and appeals, which rules shall not conflict with any laws in force in this state.

Laws 1917, chapter 43, section 43.

RULE II.

THE RIGHT OF APPEAL

1. Within six months from the entry of any final judgment in any civil action, any party aggrieved may appeal therefrom to the Supreme Court of the state.

Laws 1917, chapter 43, section 1.

2. Appeals shall also be allowed to (by) the district court, and entertained by the Supreme Court, in all civil actions, from such interlocutory judgments, orders or decisions of the district courts, as practically dispose of the merits of the action, so that any further proceeding therein, would be only to carry into effect such interlocutory judgment, order or decision. Appeals shall also be allowed by the district court, and entertained by the Supreme Court, from all final orders affecting a substantial right made after the entry of final judgment.

Any person aggrieved by the judgment of the court in any proceeding for civil contempt, and any person convicted of criminal contempt, except contempt committed in the presence of the court, shall have an appeal from such judgment or conviction to the Supreme Court, to be prosecuted and decided in the manner herein prescribed for appeals in civil cases.

In Habeas Corpus proceedings, where the petitioner is held upon an order, warrant or commitment of any court, and is ordered discharged and released from custody by any district court, the officer having the custody of such petitioner, or the district attorney of the district wherein the proceedings are instituted, on behalf of the state, may appeal to the Supreme Court from such order of discharge, but such appeal shall not operate as a stay of execution. If the order of the district court or judge thereof, be reversed, the officer from whose custody such petitioner was ordered released, or his successor, or any other peace officer of the state, shall rearrest such person, and hold him for trial, or commit him to jail or imprisonment as directed by the original order, warrant or commitment.

Application for allowance of appeal under the provisions of this section must be made within twenty days from the entry of the judgment, order, decision, or conviction appealed from.

Laws 1917, chapter 43, section 2.

3. The procedure on appeals and writs of error in criminal cases shall be governed by the procedure on appeals and writs of error in civil cases except as otherwise specified by law or rule of the Supreme Court.

Laws 1917, chapter 43, section 46, as amended.

4. The state shall only be allowed an appeal or writ of error in criminal cases when an indictment, complaint or information is quashed, or adjudged insufficient upon an interlocutory motion, or judgment is arrested.

Laws 1917, chapter 43, section 50, as amended.

RULE III.

ALLOWANCE OF APPEAL.

1. Appeals, as provided by law, shall be allowed upon application to the district court in which the judgment is rendered.

Laws 1917, chapter 43, section 3, as amended.

See Rule V, section 2, infra.

RULE IV.

ALLOWANCE OF WRITS OF ERROR.

1. Writs of error to bring into the Supreme Court any cause adjudged or determined in any of the district courts as provided by law, may be issued by the Supreme Court or any justice thereof, if application therefor be made within the time provided by law for the taking of appeals.

Laws 1917, chapter 43, section 4, as amended.

RULE V.

CITATION

1. Upon the docketing of an appeal or the suing out of a writ of error, a citation shall be issued by the clerk of the Supreme Court and mailed by him to the attorney of record for the opposite party in the court below. The clerk shall note upon his docket the date of so mailing such citation, and the person to whom the same is mailed. Said citation shall be directed to and shall cite the opposite party to appear in the Supreme Court and answer such appeal or writ of error within thirty days after receipt of the brief of appellant or plaintiff in error.

2. Within five days after taking an appeal, the appellant shall give written notice thereof to the attorney of record of the opposite party or parties. Proof of service of such notice shall be filed and shall be a part of the record proper. Provided; that an appeal, applied for less than twenty days before the expiration of the statutory time prescribed for taking appeals, shall be allowed only on proof of service upon the attorney of record of the opposite party or parties of notice of intention to apply for such appeal.

RULE VI.

PARTIES.

1. If there be several parties entitled to sue out a writ of error or take an appeal, and any of them shall have separate interests in the judgment, or if the judgment,

though joint in form, is substantially against one; or if some of the parties in the court below have no interests in reversing or maintaining the judgment; or if upon notice and request to join in such writ of error or appeal, they shall fail or refuse to do so, it shall not be necessary to join such parties in such writ of error or appeal, and the Supreme Court may, on affidavits or from the record. determine whether or not the parties omitted should have been joined therein.

Laws 1917, chapter 43, section 5.

2. If any person named in the notice provided for in the preceding section do not appear at the time therein specified and join in such writ of error or appeal, upon filing due proof of the service of such notice he shall thereby be forever precluded from bringing any writ of error or appeal on the same judgment, order, decision or conviction, and the cause shall proceed in the same manner as if such person had been named in such writ of error or appeal and in the proceedings thereon.

Laws 1917, chapter 43, section 6.

3., When the name of any person out of this state or incapable of giving consent to the bringing of a writ of error or taking an appeal, shall be omitted in such writ of error or appeal, and the cause shall proceed without such name, the rights of such person shall not be impaired by the judgment on such writ of error or appeal, but he may bring his writ of error or appeal in the same manner, separately, as if no such former writ or appeal had been brought.

Laws 1917, chapter 43, section 7.

4. Any person who ought to join in a writ of error or appeal may be permitted to do so on his application, on such terms as the court shall impose, and the writ and proceedings shall be amended by inserting his name and shall proceed as in other cases.

Laws 1917, chapter 43, section 8.

5. If a judgment shall be rendered against several persons and one or more of them die, a writ of error or appeal may be brought thereon by the survivor or survivors.

Laws 1917, chapter 43, section 9.

6. If any party or parties to an appeal or writ of error die after appeal is taken or writ of error sued out and before final judgment thereon, the writ of error or appeal shall not abate thereby but such death shall be suggested to the Supreme Court by any party to such appeal or writ of error in such manner and within such time as may be

provided by the rules of the Supreme Court and such proceedings shall thereupon be had as the Supreme Court may fix by rule.

Laws 1927, chapter 93, section 3.

See section 7.

7. If one or more of the appellants or plaintiffs in error, or of the appellees or defendants in error die before judgment in the Supreme Court, the appeal or writ of error shall not thereby abate but in either of such cases such death shall be suggested on the record, and the cause shall proceed at the suit of the surviving appellant or plaintiff in error, or against the surviving appellee or defendant in error as the case may be; or the same may be revived as against or in favor of the heirs or personal representatives of any such deceased party in the same manner in which suits may be so revived in district courts.

8. 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.

Laws 1917, chapter 43, section 14.

RULE VII.

SUPERSEDEAS AND STAY

1. There shall be no supersedeas or stay of execution upon any final judgment or decision of any of the district courts in which an appeal has been taken or writ of error sued out unless such appellant or plaintiff in error shall, within sixty days from the date of entry of such judgment or decision or some responsible person for him, execute a bond to the adverse party in double the amount of such judgment complained of, with sufficient sureties, 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 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. PROVIDED, HOWEVER, that the district court, for good cause shown, may grant the appellant not to exceed thirty days additional time within which to file such bond, and a like extension of time may be granted by the Supreme Court in cases of writs of error, upon a like showing. In case the decision appealed from or from which a writ of error is sued out, is for a recovery, other than a fixed amount of money, then the amount of such bond, if an appeal is taken, shall be fixed by the district court or the judge thereof, and in case of a writ of error, by the Chief Justice or any

Justice of the Supreme Court, conditioned that the appellant or plaintiff in error shall prosecute such appeal or writ of error with due diligence in the Supreme Court and that if the decision of the court below be affirmed or the appeal or writ of error dismissed, he will comply with the judgment of the district court and pay all damages and costs adjudged against him in the district court and in the Supreme Court on such appeal or writ of error. Upon the approval of the bonds herein provided for in this section, and upon filing the bond, in case of appeal, with the clerk of the district court, and in case of writ of error with the Clerk of the Supreme Court, 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.

In all cases where an appeal has been taken or a writ of error sued out against any judgment, order, decision or conviction of any district court under the provisions of section two (Rule II, section 2) of this act, supersedeas may be granted under the provisions of this section: PROVIDED, HOWEVER, that the bond shall be filed within thirty days from the date of entry of such judgment, order, decision or conviction, as the case may be, and, PROVIDED, FURTHER, that no extension of time for the filing of such bond shall be granted in excess of ten days beyond the original thirty days allowed by law.

Laws 1917, chapter 43, section 17.

2. 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.

Laws 1917, chapter 43, section 18.

3. In all actions of contested elections, mandamus, removal of public officers, **quo warranto** or prohibition, it shall be discretionary with the court rendering judgment, or the Supreme Court, to allow a supersedeas of such judgment, and if said appeal or writ of error shall be allowed to operate as a supersedeas it shall be upon such terms and conditions as to the court may seem meet and proper.

Laws 1917, chapter 43, section 19.

4. After writ of error is allowed, if the plaintiff in error, within the time limited by law after rendition of judgment in the court below, shall file the bond required for supersedeas or stay of execution, the clerk of this court shall, upon approving such bond, immediately certify the fact of his having received and approved said bond to the clerk of the district court wherein the judgment was rendered, and thereafter the judgment, or any execution which may

have issued thereon, shall be stayed until the decision of this court is had in the premises.

See rule XII, section 1.

5. All appeals and writs of error in criminal cases shall have the effect of a stay of execution of the sentence of the court until the decision of the Supreme Court upon the said appeal or writ of error. Whenever the sentence of the district court shall be that of death or imprisonment for life, the party convicted shall remain in close confinement until the decision of the Supreme Court shall be pronounced; in all other cases the party taking the appeal or suing out the writ of error shall be entitled to be released on bail by filing a bond in the sum and with conditions to be fixed by the district court upon the allowance of such appeal or upon receipt of such writ of error, which bond shall be sufficient to secure the due execution of the sentence of the court in case the judgment of the court be affirmed by the Supreme Court.

Laws 1917, chapter 43, section 58, as amended.

6. If an appeal be granted (on application of the state), the district court shall order the defendant to be committed or recognized and the commitment or recognizance shall be to the same effect as when the defendant himself is appellant.

Laws 1917, chapter 43, section 51.

RULE VIII.

RETURN DAY

1. All appeals, writs of error, bonds, summonses, citations and other process in the Supreme Court upon appeal or writ of error from any final judgment, shall be returnable in the Supreme Court not more than ninety days after such appeals are taken and writs of error sued out, and the court shall have jurisdiction to hear and determine and dispose of all such appeals, writs of error, bonds, summonses, citations and other process, from and after such return days.

All appeals, writs of error, bonds, summonses, citations and other process in the Supreme Court upon appeal or writ of error from any judgment, order, decision or conviction in section two of this act provided for, shall be returnable in the Supreme Court not more than sixty days after such appeals are taken and such writs sued out, and the court shall have jurisdiction to hear and determine and dispose of all such appeals, writs of error, bonds, summonses, citations and other process, from and after such return days.

The appellant or plaintiff in error may perfect any appeal or writ of error in the Supreme Court in less time than the time herein provided, and the court shall have jurisdiction thereof and have jurisdiction of the parties to such action after the same shall have been regularly docketed.

Laws 1917, chapter 43, section 21.

RULE IX.

ABANDONMENT.

1. Where an appeal has been taken, or a writ of error sued out, and the appellant or plaintiff in error desires to abandon the same, and the cause has not been docketed in the Supreme Court, and no supersedeas bond has been given, he may do so by filing with the clerk of the district court, in case of appeal, notice of such abandonment; and in case of a writ of error, by filing with the clerk of the Supreme Court such notice of abandonment; and in the event of an appeal, the district court shall enter an order vacating the order allowing the appeal, and in the event of a writ of error, the Supreme Court will enter an order vacating the allowance of the writ, and a certified copy of such order shall be transmitted to the clerk of the district court to which the writ of error was directed.

2. After abandonment of appeal, no writ of error, and and after abandonment of writ of error, no appeal, shall be allowed to the same party unless such appeal or writ of error shall be applied for within ten days after the entry of the vacating order.

RULE X.

THE TRANSCRIPT.

1. The appellant in case of appeal, and the plaintiff in error in case of writ of error shall file in the office of the clerk of the Supreme Court, on or before the return day of any appeal or writ of error, as perfect and complete a transcript of the record and proceedings in the case as shall be necessary to enable the court to properly review it, together with two copies thereof. If he fails to do so the appellee or defendant in error may produce and file in the Supreme Court at any time after such return day, a written or printed transcript containing the judgment, order, decision or conviction appealed from, and the order allowing the appeal therefrom, and in case of a writ of error, a certificate showing the suing out of said writ of error, together with a certificate of the clerk of the Supreme Court, showing that no transcript has been filed by the appellant or plaintiff in error in said cause in the Supreme Court, and may upon five days notice to the opposite party, move the court to docket said cause and affirm said judgment,

order, decision or conviction. Upon the hearing of such motion the court may either affirm such judgment, order, decision or conviction, or permit the appellant or plaintiff in error, as the case may be, to perfect such appeal or writ of error upon such terms as may seem proper to the court.

2. Whenever this court has determined and remanded a cause for further action by the trial court, necessitating the rendition of a new judgment by the trial court, and an appeal has been taken or writ of error sued out in such cause from the judgment so subsequently rendered, it shall only be necessary for the party seeking a review of such proceedings and judgment to file with the clerk of the Supreme Court, on or before the return day of such appeal or writ of error, as perfect and complete supplemental transcript of the record and proceedings in the cause as shall be necessary to enable this court to properly review the questions arising subsequently to such determination and remand, together with two copies thereof, and such supplemental transcript, together with the transcript originally filed, shall be deemed a sufficient record upon which the proceedings and judgment may be reviewed.

3. Either party to a cause after the trial thereof may file a praecipe for the transcript of such cause with the clerk of the district court, who shall thereupon prepare such transcript in accordance with the said praecipe.

4. In all causes, whether called for by the praecipe or not, the transcript of record shall contain a copy of the judgment, order, decision or conviction appealed from, the opinion of the court below when filed, the praecipe for record, and, in cases of appeal, the order granting the appeal, if not incorporated in the judgment or decree appealed from.

5. Typewritten transcripts must be prepared in accordance with the requirements specified in section 7 of Rule XV for briefs.

See Rule IV, section 1.

6. When a party elects to print the transcript, the same must be prepared in accordance with the requirements specified in section 2 of Rule XV for printed briefs.

See Rule IV, section 2.

7. All transcripts shall be completely indexed at the beginning, and the pages consecutively numbered at the bottom. Unless so indexed and paged they shall not be filed.

8. After once setting out in full the title of the case and the names of the parties, titles, headings and verifications in full shall thereafter be omitted. In lieu of a full

statement of the verifications of pleadings the transcript shall show where the paper was verified and that it was verified in the usual form, naming the person verifying the same and the date of the verification, unless the praecipe shall direct that the record be not abbreviated in this manner.

See Rule IV, section 3.

9. If documents have been attached to a pleading as exhibits and appear in the record proper, and are introduced in evidence by either or both of the parties, the same need not be copied in full in the bill of exceptions or case stated, but shall be referred to; such reference being to the page of the transcript where the same may be found in the record proper.

10. No charge shall be made by the clerks of the district courts for the insertion in the record of matter required to be abbreviated in Section 7 hereof, nor any charge made by the stenographer for the insertion of matter required to be omitted under Section 8 hereof, unless the praecipe requests the clerk not so to abbreviate said matters, and no costs shall be taxed in this court or the district court against the unsuccessful party based upon the insertion of such matter so required to be abbreviated or omitted.

See Rule IV, section 4.

11. When appeals or writs of error are taken by both parties to the cause, but one transcript of record shall be required, and such appeals or writs of error shall be heard as a consolidated cause. In such case, the parties whose appeal or writ of error is subsequent in time need file no transcript, unless the party first appealing or suing out a writ of error shall fail to file his transcript within the time specified in these rules, or within such extension of time as may have been granted. In case of such failure, the party subsequently appealing or suing out a writ of error shall have ninety days thereafter within which to file transcript.

See Rule IV, section 5.

12. Whenever a party shall consider that original papers, or exhibits of any kind, in a cause should be inspected by this court, the district judge shall make proper order for the safe-keeping, transportation and return thereof, and this court will receive and consider such papers or exhibits in connection with the record of said case; Provided, however, that this section shall not be construed to dispense with the necessity of incorporation of copies of such papers in the transcript.

See Rule IV, section 8.

13. Voluminous exhibits and exhibits which are important only as to the fact of their existence, or as to portions

of their subject matter, or as establishing a negative, shall not be included in full in the record, unless the trial judge otherwise orders; but a statement of their existence or substance, with so much of their contents as shall be necessary to a proper presentation of the point at issue shall be agreed upon by the parties, or settled by the trial judge, and included in the record in lieu of exhibits in full.

See Rule IV, section 9.

14. Certiorari for diminution of the record may be issued of the court's own motion, for the correction, completion, perfecting or recertification of the record. The writ may also be awarded on the written motion of a party, showing good cause, and verified by affidavits, unless the facts set up as cause be admitted. The court may, in its discretion, deny such motion in case of neglect or unreasonable laches of the moving party. Such terms may be imposed and such costs taxed or awarded to the opposite party as the court may deem just, whether the writ be issued on the court's motion or on motion of a party.

15. When an appeal or writ of error has been granted, the trial court shall retain jurisdiction of the cause for the purpose of hearing motions suggesting a diminution or correction of the record of the trial court, and of acting thereon.

RULE XI.

RECORD PROPER, BILL OF EXCEPTIONS AND CASE STATED.

1. All pleadings, motions, entries, orders, and rulings of record in the clerk's office and all papers filed in a cause with a clerk of the district court, including all objections ruled upon, whether the filing thereof be required by law or not, shall be considered a part of the record proper in such cause.

2. The judge who tried the cause, or any other district judge by him or by the Chief Justice, by order, designated, shall have power to settle, sign and seal the bill of exceptions or case stated, and to extend the time therefor, and for filing transcript in the Supreme Court. Such power may be exercised at any place within the state.

3. The testimony, all rulings of the court, objections made and proceedings had at the trial shall be taken down by the court stenographer. A party to the cause desiring to settle a bill of exceptions may require the said court stenographer to transcribe his notes and any documentary exhibits offered in evidence, and to file the same in the cause.

When such transcript cannot be obtained, the party may,

in lieu thereof, prepare a statement of facts, and file the same in the cause.

After the filing of such transcript or statement of facts, the party shall give the opposite party five days notice that at a time and place to be specified he will apply to have such transcript or statement of facts settled as a bill of exceptions. Upon such notice, and upon making such corrections and additions as may be proper, the judge shall attach to such transcript or statement of facts so previously filed his certificate of settling, signing and sealing the same as a bill of excepions, and the same shall be thereupon refiled as a part of the record proper.

Due notice given will be presumed from the fact of settlement, in the absence of a contrary showing. The verity to be imputed to a recital of notice contained in the certificate of settlement may be overcome only by admission of the party or certificate of the district judge.

4. If the appellant or plaintiff in error desires to take up less than the entire record, he shall file in the office of the clerk of the district court a praecipe setting forth the questions he desires to have reviewed, and calling for those portions of the record and proceedings he deems necessary for such review, and he shall serve opposing counsel with a true copy of the praecipe so filed within five days after filing the praecipe in the office of said clerk; and upon receipt of said praecipe the attorney for the appellee or defendant in error may file a supplemental praecipe to include such portions of the record and proceedings which may have been omitted from the praecipe for the appellant or plaintiff in error, as he may deem necessary for the proper review of such questions, and in the event the matters included in the supplemental praecipe shall be deemed by the Supreme Court unnecessary for a proper review of the case, the cost of the record and proceedings included in the supplemental praecipe shall be taxed against appellee or defendant in error. If no supplemental praecipe is filed by the appellee or defendant in error within fifteen days from the date of the filing of the praecipe for the appellant or plaintiff in error, then the appellee or defendant in error shall be deemed to have consented to the record as made up by the appellant or plaintiff in error on the praecipe first filed.

If a party so served with such praecipe shall himself have taken an appeal or sued out a writ of error, or intends to take the benefit of Rule XV, section 2, he may, by filing a supplemental praecipe setting forth the questions he desires to have reviewed, cause to be included such additional portions of the record and proceedings as he may deem necessary for the determination of his appeal or writ of error; he paying in the first instance the costs of such additional portions so included.

Supplemental praecipes and *certiorari* for *diminution* of the record shall be allowed in any cause at the discretion of the court and in furtherance of justice.

5. The parties to an appeal or writ of error may agree upon such statement of the case, and of the facts proven, with or without copies of any part of the proceedings, as shall, in their opinion, be sufficient to enable the Supreme Court to determine whether there has been error; and if the judge shall approve and certify such statement, it shall be filed as a case stated and become a part of the record proper, in lieu of a bill of exceptions.

RULE XII.

RESERVING QUESTON FOR REVIEW.

1. None but jurisdictional questions shall be first raised in the Supreme Court. Formal exceptions shall not be required in any case; but to preserve the question for review, it must appear that a ruling or decision by the trial court was fairly invoked.

2. It shall not be necessary to file a motion for a new trial in any cause in order to preserve for review errors committed by the trial court.

RULE XIII.

APPEARANCES.

1. The respective parties to an appeal or writ of error shall, before they shall be entitled to be heard in this court, file with the clerk a written appearance in the cause.

See Rule III, section 1.

2. Counsel not admitted to practice law in this state shall not be heard in this court in any matter, unless resident counsel shall be associated with him or them.

See Rule III, section 2.

RULE XIV.

MOTIONS.

1. Motions shall be typewritten and one copy shall be filed with the clerk.

See Rule X, section 1.

2. A motion filed in a case, directed to matter which may substantially affect the disposition of the case, must be supported by a separate brief. Four copies of such brief and answer brief, if the adverse party elects to file an

answer brief, must be filed in the cause and one copy thereof served on the adverse party within five days after the same has been filed. A motion of such a nature, not supported by a brief as aforesaid, will not be considered by the court.

See Rule X, section 2.

3. No motion to dismiss an appeal or writ of error, strike a bill of exceptions or otherwise dispose of any cause except upon its merits, where such motion is based upon other than jurisdictional grounds, will be granted except upon a showing, satisfactory to the court, of prejudice to the moving party, or that the ends of justice require the granting thereof. No such motion will be entertained unless filed before the movant has filed his brief on the merits.

RULE XV.

BRIEFS.

1. No assignments of error need be filed in any cause, but, in his opening brief, after making such statement of facts as he may desire, and before commencing upon his argument, the appellant or plaintiff in error shall make a concise statement of the points upon which he relies for a reversal of the case. The court may, in its discretion, decline to review any points not so specified.

2. In causes tried without a jury, the appellee or defendant in error may point out in his brief any errors the court may have committed against him, and this court will consider whether notwithstanding error against appellant or plaintiff in error, the judgment should be affirmed; or, because of the errors committed against appellee or defendant in error, he may be entitled to a new trial.

3. Briefs may be printed or typewritten at the option of the party filing the same.

See Rule VI, section 1.

4. When a party elects to file printed briefs, the same shall be legibly printed in black ink, in ten point type, on good unglazed paper thirteen and a quarter inches long and eight and one-half inches wide, with inside margin not less than one inch wide and with double leaded text and single leaded quotations. Quotations may be unindented in eight point type or indented in ten point type. The pages shall be consecutively numbered at the bottom thereof. Each printed brief shall be bound with paper of heavier weight than the stock, upon the cover of which shall be printed the title of the court and the cause, the number of the case, the designation of the brief and the name and residence of counsel for the party filing the same, and shall

be printed on one side of paper only and bound at the top.

See Rule VI, section 2.

5. Every brief shall contain, on its front fly leaves, a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to the pages of the brief where the cases are cited. The pages of the transcript where exhibits, referred to in the briefs, are to be found and where the same are offered or received in evidence, shall in all cases be shown in the briefs.

See Rule VI, section 2 1-2, Rules 1919, adopted April 6, 1926.

6. When briefs are printed ten copies thereof shall be filed with the clerk and two copies shall be served upon adverse counsel within ten days after filing the same, and proof of service thereof shall be filed with the clerk.

See Rule VI, section 3.

7. Typewritten briefs must be written upon paper thirteen inches long and eight and one-half inches wide and weighing not less than thirteen pounds to the ream, folio base seventeen by twenty-two inches, with left hand margin not less than one and one-half inches wide, the text to be double spaced. Each copy shall have a cover page entitled, in typewriting, in manner specified for printed briefs, to be typed on one side only, and bound at the top, pages to be numbered consecutively at the bottom thereof.

See Rule VI, section 4, Rules 1919, as amended April 6, 1926.

8. When briefs are typewritten, four copies thereof shall be filed with the clerk and one copy shall be served upon adverse counsel within ten days after filing the same, and proof of service thereof filed with the clerk.

See Rule VI, section 5.

9. Briefs in chief of appellant or plaintiff in error shall be filed with the clerk within thirty days after the filing of the transcript of record in this court.

See Rule VI, section 6.

10. Briefs in chief of appellant or plaintiff in error shall be prepared in substantially the following form:

(1) Index and Table of Cases.
(2) Statement of the case.
(3) Statement of facts.
(4) Points relied upon for reversal.
(5) Points, authorities and argument.

See Rule VI, section 7.

11. Where the appellant or plaintiff in error fails to file his brief within the time required by these rules, the court of its own motion, or upon motion of the adverse party, may dismiss the appeal or writ of error, and such dismissal shall not be set aside except for good cause shown and upon application made within twenty days of date of such dismissal.

See Rule VI, sections 8 and 9.

12. Answer briefs shall be filed with the clerk within thirty days after service of briefs in chief on adverse counsel.

See Rule VI, section 10.

13. The order of treatment in the answer brief shall be as follows:

(1) Index and Table of Cases.

(2) Any objections to the statement of the case by appellant or plaintiff in error.

(3) Any objections to the statements of facts by appellant or plaintiff in error.

(4) Answer to the points, authorities and arguments of appellant or plaintiff in error in the order presented by appellant or plaintiff in error and in separate paragraphs.

(5) Other propositions and arguments relied upon.

See Rule VI, section 11.

14. Where the appellee, or defendant in error, fails to file his briefs as required herein, the appellant or plaintiff in error may submit the cause upon his brief and the appellee or defendant in error shall not be heard. For the purpose of enforcing this rule cases will be considered by the court any time after the return day.

See Rule VI, section 12.

15. Appellant or plaintiff in error may file a reply brief any time within ten days after being served with brief of appellee or defendant in error.

See Rule VI, section 13.

16. A proposition of fact urged in the briefs by counsel for either party to a cause, will be disregarded by the court where the brief does not specifically refer to the pages upon which such matter appears in the transcript.

See Rule VI, section 14.

17. No extension of time to file briefs will be granted except upon reasonable notice to the adverse party. When extensions are granted the attorney securing the same shall

notify the adverse counsel of such extension within five days after the same is granted.

See Rule VI, section 15.

18. Stipulations and understandings between counsel covering subject of extending time to file briefs, not of record and approved by the order of the court, shall be without force and effect.

19. Filing motion to dismiss case or appeal and all motions or pleadings of a dilatory nature will toll time for filing briefs or pleadings, or taking other action in the case until disposition is made of such motions or pleadings. Time to file briefs or take other action, in such events, shall begin to run from date of disposition of such motions or pleadings and proceedings shall thereafter be governed as other cases under these rules.

See Rule VI, section 18.

RULE XVI.

TERMS, SESSIONS AND HEARINGS.

1. The Supreme Court shall hold one term of court each year, commencing on the second Wednesday in January, and shall be at all times in session at the seat of government; PROVIDED, that the court may, from time to time, take such recess as in its judgment may be proper.

Laws 1917, chapter 43, section 20.

2. Oral arguments will be heard at such times as the court shall direct.

See Rule VII, section 1.

3. Except as otherwise specifically ordered, a session will be held on the Wednesday after the first Monday of each month for hearing motions. All motions as to which the time for filing briefs has expired will be heard on such motion days or be deemed submitted on briefs.

4. Either party, at or before the filing of his first brief on the merits, may file written request for oral argument. In the absence of such request, oral argument will be deemed waived, and the cause will stand submitted on the briefs unless the court shall otherwise direct.

See Rule VII, section 3.

5. The court will order oral arguments, without application therefor, in such cases as it deems such arguments essential.

See Rule VII, section 2.

6. Two or more cases involving the same question may be heard together, by leave of the court.

See Rule VII, section 4.

7. Criminal cases and cases involving matters of general public interest or policy may be advanced for oral argument or decision by leave of the court and upon the motion of either party.

See Rule VII, section 5.

8. Oral argument of one hour will be allowed to each side, unless the time shall be extended by the court. Not more than two counsel on each side shall be permitted to speak.

See Rule VII, section 6.

9. Appellant or plaintiff in error shall open and close the argument. Where there are two or more appeals, the plaintiff in the court below will open and close the argument.

See Rule VII, section 7.

10. Causes pending in the Supreme Court shall be placed upon the calendar and heard in such order and at such times as the court may from time to time direct.

11. Cases which are argued or submitted in the Supreme Court during any term or session thereof, may be decided in vacation by a judgment in writing filed by the judges thereof, and thereupon the clerk shall enter such judgment nunc pro tunc as of the terms at which such cases were argued and submitted.

RULE XVII.

DISPOSITION OF CAUSE.

1. The Supreme Court in appeals or writs of error shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to it shall seem agreeable to law, and said Supreme Court shall not decline to pass upon any question of law or fact which may appear in any record either upon the face of the record or in the bill of exceptions because the cause was tried by the court, or judge thereof, without a jury, but shall review said cause in the same manner and to the same extent as if it had been tried by a jury.

Laws 1917, chapter 43, section 38.

2. Upon the affirmation of any judgment, or decision the Supreme Court may award to the appellee, or defend-

ant in error, such damages, not exceeding ten per cent of the judgment complained of, as may be just.

Laws 1917, chapter 43, section 39.

Where it shall appear that appeal was taken or writ of error sued out merely for delay and that the same has delayed proceedings on the judgment of the trial court, damages shall be awarded to the appellee or defendant in error in a sum not in excess of ten per cent of such judgment.

See Rule XIII, section 1.

3. The Supreme Court, on the determination of the cause on appeal or error may award execution to carry the same into effect, or may remit the record with its decision to the District Court from which the cause came, and such determination shall be carried into effect by such District Court. And when any writ of execution sued out of the Supreme Court of this state shall be placed in the hands of any officer for levy or collection and such officer shall fail to find any property whereof the same may be made or satisfied, such officer shall notify all persons who may be indebted to the defendant named in said writ, not to pay said defendant, but to appear before the District Court from which said cause was originally taken by appeal or writ of error to said Supreme Court, and in said District Court make true answer on oath concerning his indebtedness; and thereupon the like proceedings shall be had in such District Court as in case of garnishees summoned in suits originating by attachment in said District Courts.

Laws 1917, chapter 43, section 40.

4. If the judgment of the appellate court be against the appellant or plaintiff in error, the Supreme Court shall either render judgment against him and his sureties, in the appeal or supersedeas bond, or remand the cause with directions to the district court to enter judgment against him and his said sureties on such bond, and execution may issue on any such judgment against the said principal and his said sureties either jointly or severally.

Laws 1917, chapter 43, section 41.

5. When final disposition shall have been made of a civil case, mandate will issue upon the payment by either party of the unpaid costs in this court. Issuance thereof will not be withheld, unless good cause be shown therefor.

See Rule IX, section 1.

6. When an appeal is taken or a writ of error sued out by the defendant in a criminal case, if the Supreme Court affirm the judgment of the district court, it shall direct the sentence pronounced be executed and the same shall be executed accordingly; if the judgment be reversed the

Supreme Court shall direct a new trial or that the defendant be absolutely discharged according to the circumstances of the case.

Laws 1917, chapter 43, section 55, as amended.

7. When an appeal has been taken or writ of error sued out by the state in any criminal case, if the judgment of the district court be affirmed the party shall be discharged; if reversed, the Supreme Court shall direct the district court to enter up judgment on the verdict rendered; or when no judgment has been rendered to proceed to trial on the indictment.

Laws 1917, chapter 43, section 56, as amended.

8. The district court to which any criminal cause shall be remanded for new trial shall proceed thereon in same manner as if said cause had not been theretofore tried.

Laws 1917, chapter 43, section 57.

RULE XVIII.

REHEARINGS

1. A motion for rehearing must briefly and distinctly state its grounds, and will not be granted or permitted to be argued orally, unless a justice who concurred in the judgment desires it and a majority of the court so determine.

See Rule VIII, section 1.

2. A motion for rehearing may be filed any time within twenty days after the date of the rendition of the opinion of the court. The motion may be printed or typewritten and one copy thereof shall be filed with the clerk. One copy shall be served upon the adverse party or counsel in the time and manner required for the service of briefs.

See Rule VIII, section 2.

3. At the time the motion for rehearing is filed, a separate brief supporting the same must be filed. Such brief may be printed or typewritten. Four copies thereof shall be filed with the clerk and one copy served on adverse counsel or party in the time and manner required for briefs generally.

See Rule VIII, section 3.

4. Within ten days after the service of such motion and brief on the adverse party, the latter may file a printed or typewritten brief questioning the sufficiency of motion or meeting the merits of the motion. Four copies thereof shall be filed with the clerk and one copy served on the

adverse party in the time and manner required for the service of briefs generally.

See Rule VIII, section 4.

5. Oral argument on motions for rehearing will be granted only by special application to and leave of the court.

See Rule VIII, section 5.

6. When a motion for rehearing is granted the court will set a time for oral argument or filing briefs, or both, as the court may determine.

See Rule VIII, section 6.

7. No second motion for rehearing filed by one party to the cause will be entertained, unless the court grants special leave to file the same.

See Rule VIII, section 7.

RULE XIX.

COSTS.

1. The Supreme Court is hereby authorized and empowered to fix by rule what shall be taxable costs on appeals and writs of error.

Laws 1917, chapter 43, section 16.

2. In all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party: PROVIDED, HOWEVER, that in all cases triable in the Supreme Court in the first instance, or removed to the Supreme Court upon appeal or writ of error, the taxation of costs shall be in the discretion of the Supreme court, except in those cases in which a different provision is made by law.

Chapter 45, Laws 1917.

3. The clerk of the district court shall be allowed 10c per folio for making out and certifying the original copy of the record on appeal or writ of error and 3c per folio for each additional copy thereof required and he shall be allowed $2.00 for certifying the bill of exceptions which may have been furnished by the stenographer, to be paid by the party suing out the writ of error or taking the appeal.

Laws 1917, chapter 43, section 24, as amended.

4. The stenographer shall be compensated for taking down testmony (except testimony taken in term time, where the court stenographer acts) at the rate of ten dollars per day, and shall be allowed for transcribing the same fifteen cents per folio for the original copy, and five per folio for each additional copy.

Laws 1917, chapter 43, section 28, as modified by Laws 1921, chapter 199, section 2 and Laws 1927, chapter 42.

5. No bond for costs shall be required upon any appeal or writ of error.

6. Upon filing the transcript in appeal cases and the praecipe in cases of writs of error, the appellant or plaintiff in error shall deposit with the clerk the sum of twenty dollars, as advance costs, the same to be applied to the payment of costs as they accrue. Additional sums shall be paid by said party, upon request of the clerk, as the money on deposit for costs becomes exhausted. Upon the final determination of cases the balance of the deposits not consumed as costs shall be refunded to the party depositing the same.

See Rule II, section 1.

7. The record in all causes in this court will be bound after final disposition has been made thereof, and the clerk shall tax as costs in every case a sum not in excess of $2.00 for the purpose of defraying the expenses incident to such binding.

See Rule I, section 7.

8. Except as otherwise provided, the following shall be taxed as costs:

(1) For preparing and filing three transcripts of record at 16 cents per folio thereof, and 15 cents per folio additional for transcript of stenographer's notes contained therein.

(2) Clerk's fees as prescribed by statute.

(3) For binding record under section 7 of this rule.

RULE XX.

DUTIES OF CLERK.

1. The clerk of this court shall reside and keep his office at the seat of state government. He shall not practice law in any of the courts of the state.

See Rule I, section 1.

2. The clerk shall not permit original papers or records to be taken from his office, or from the court room, without a court order.

See Rule I, section 2.

3. The clerk will make up the calendars for oral arguments of cases giving attorneys at least five days notice

of the setting of cases in which they appear as record counsel.

See Rule I, section 3.

4. Unless otherwise directed by counsel, the clerk will wire, collect, one attorney of record on each side of a case of the result of the decision of the court therein.

See Rule I, section 4.

5. Immediately after an opinion is rendered in a case, the clerk will transmit one copy thereof to one counsel of record on each side of the case, without charge.

See Rule I, section 5.

6. The clerk will enter cases on the docket in the order in which the transcripts on appeal and the order granting writs in cases of writs of error are filed in his office. The date of the allowance of the appeal or the issuance of the writ of error, together with the name of the judge who tried the case, will also be entered on the docket by the clerk.

See Rule I. section 6.

RULE XXI.

PROOF OF SERVICE OF PAPERS.

1. Proof of service of briefs and papers shall be made by a statement in writing of the attorney, or other competent evidence thereof in writing and shall be filed in this court.

See Rule XI, section 1.

RULE XXII.

REMOVAL FROM STATE CORPORATON COMMISSION.

1. When any cause is removed from the State Corporation Commission to this court and docketed, the party against whom the order has been entered, shall file four copies of a typewritten or printed brief with the clerk of this court and serve a copy of the same upon the opposite party or his attorney within thirty days from the date of filing of such order of removal in the clerk's office. The opposite party shall file and serve briefs in like manner within thirty days thereafter. Reply briefs shall be filed and served within ten days thereafter, whereupon said cause shall be placed upon the calendar for hearing.

See Rule XIV, section 1; Article XI, section 7 N. M. Constitution.

RULE XXIII.

PREROGATIVE WRITS.

1. In any application made to the court for a writ of habeas corpus, mandamus, quo warranto, or for any prerogative writ to be issued in the exercise of its original jurisdiction and for which an application might have been lawfully made to some other court in the first instance, the petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it necessary or proper that the writ should issue originally from this court, and not from such other court, and the sufficiency or insufficiency of such circumstances so set forth in that behalf will be determined by the court in awarding or refusing the application. In case any court, justice or other officer, or any board or other tribunal, in the discharge of duties of a public character, be named in the application as respondent, the petition shall also disclose the name or names of the real party or parties, if any, in interest or whose interest would be directly affected by the proceedings, and in such case it shall be the duty of the applicant obtaining an order for any such writ, to serve or cause to be served upon such party or parties in interest, a true copy of the petition and of the writ issued thereon, and to file in the office of the clerk of this court evidence of such service.

See Rule XV, section 1.

2. Writs of prohibition shall be applied for upon petition duly verified in the manner required for the verification of petitions in other cases. Such petition shall state in concise form the ground upon which the application is made and shall be presented to the court, or a justice thereof. If the cause shown appears to the court or justice to be sufficient, a writ shall thereupon issue, which shall command the respondent to desist and refrain from further proceedings in the action or matter specified therein until further order of the court thereon, and to show cause on some day to be fixed in the writ, why he should not be absolutely restrained and prohibited from any further proceedings in such action or matter.

See Rule XV, section 2.

3. The court or justice shall in said writ designate the answer-day and direct the manner of service thereof: Provided, however, the day fixed for the answer of the party to whom the writ is directed shall not be less than ten days after service shall be made; and provided, further such service shall be by copy of the writ.

See Rule XV, section 3.

4. To the writ issued in accordance with section 3 of this rule, an answer shall be made by the party against whom the writ issues; Provided, however, that in lieu of such answer such party may by demurrer or motion question the sufficiency of the petition filed, subject to the rules of pleading governing other proceedings under the Code of Civil Procedure.

See Rule XV, section 4.

5. Upon the filing of the answer, demurrer or motion of the respondent, the court shall set a day for the hearing and also fix a day for pleading to such answer, if such pleading is not already filed. Upon such hearing, the parties may introduce such evidence by affidavits, original files of the trial court or otherwise as they may desire or as may be required by this court.

See Rule XVII, section 5.

6. The court, after hearing the proofs and allegations of the parties, shall render judgment, either that a writ of prohibition absolute, restraining the respondent, shall issue, or that such writ be denied, and may make and enforce such order in relation to costs and charges as may be deemed just.

See Rule XVIII, section 6.

7. Writs of certiorari shall be allowed upon application therefor, in writing, duly verified, unless the facts be admitted by the opposite party. Such writ shall be served and made returnable in such manner and within such time as the court shall order.

See Rule XVIII, section 7.

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REPORT OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE STATE OF NEW MEXICO

JANUARY TERMS, 1926, 1927

[No. 3005. Sept. 20, 1926.]

YRISARRI v. CLIFFORD.

[249 Pac. 1011.]

SYLLABUS BY THE COURT

As against a stranger and wrongdoer, a bailee, gratuitous or otherwise, may sue and recover the entire damages done to personal property in his possession, and such an action or recovery bars a subsequent action by the bailor.

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

Action by Edward Yrisarri against Louis Clifford. From a judgment of dismissal, plaintiff appeals. Reversed, with directions for a new trial.

T. J. Mabry, of Albuquerque, for appellant.

E. W. Dobson, of Albuquerque, for appellee.

OPINION OF THE COURT

BICKLEY, J. Suit by one assumed to be a gratuitous bailee of an automobile for damages to the said automobile alleged to have been negligently caused by defendant in a collision. Plaintiff was "then and there

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[1] 6CJ p. 1149 n. 43, 44; p. 1166 n. 86, 87, 88; p. 1168 n. 27, 31; 34CJ p. 851 n. 3.

controlling, driving, and operating" the bailed automobile. At the close of the case, the court on motion of the defendant, dismissed the complaint on the theory that the plaintiff could not maintain the suit regardless of who was to blame for the collision. If a gratuitous bailee may maintain an action for injuries by a stranger and wrongdoer to the article bailed while in his possession, the judgment must be reversed. The allegations of the complaint were sufficient to show the connection of the plaintiff (bailee) with the article of which he was not the owner. See 6 C. J. "Bailments," § 181, and Mizner v. Frazier, 40 Mich. 592, 29 Am. Rep, 562, holding that an allegation that a carriage injured was then and there lawfully used and driven by plaintiff was sufficient in the absence of a demurrer. Nor do we think the allegations of the complaint that plaintiff, at the time of the collision, "was then and there controlling, driving, and operating" said automobile was an allegation of general ownership; consequently there was no variance between the allegations and proof.

The law seems to be well settled that the bailee of personal property may recover compensation for an injury to the article bailed while in his possession. See 3 R. C. L. "Bailments," § 49.

"There are some authorities, mostly of an early date, which seem to consider it as at least questionable whether a mere naked bailment, for safe-keeping, gives the bailee such a right as to enable him to maintain an action, in case the goods are taken from him. Courts supporting such a view proceed on the theory that a merely gratuitous bailee has no property right, either general or special, in the chattels taken that can be the basis for a suit. It now seems, however, to be well settled that, as against a mere stranger or wrongdoer who can show no better right, bare possession is sufficient to maintain trespass for an injury to, or the taking of, a chattel, and that, therefore, a naked or merely gratuitous bailee, from whose actual and exclusive possession a chattel is wrongfully taken, may recover in his own name, the same as any other kind of bailee." 3 R. C. L. "Bailments," § 50.

The nature of the bailee's right to sue is thus explained in Lawson on Bailments, p. 34:

"He who has the title to a chattel has what is known in the law as the general property. The bailee not having the title, nevertheless has, in addition to the possession of the chattel, a special, limited or qualified property in it which gives him a right of action against any one, whether the bailor or a stranger, interfering with his possession or doing damage to the bailed article. He is, in a certain sense the agent of the bailor, charged with the execution of a trust connected with the custody of the property delivered to him; and in this capacity he is clothed with the rights necessary to the fulfillment of his duties under the trust."

In the case of Stotts v. Puget Sound Traction L. & P. Co., 94 Wash. 339, 162 P. 519, L. R. A. 1917D, 214, the court had under consideration the right of a conditional vendee to sue, and said:

"The right of the vendee, as against third parties, may well be likened to that of a bailee, and we see no reason why the same rules should not apply, especially when we consider the several statutes relied on by defendant. 'The law seems to be well settled that the bailee of personal property may recover compensation for any conversion of or any injury to the article bailed while in his possession. * * * Where a suit is brought by a bailee against a third person for loss or injury to the subject of the bailment, the former's right to damages is not limited to his special interest in the property, but the general current of authority appears to hold that the bailee is entitled to damages commensurate with the full value of the property taken or the degree of injury sustained.' 3 R. C. L. § 49, p. 127; 6 C. J. 1168, § 184.

"The theory of the law being that the bailee being bound to restore the property or to answer for its value, the action is maintained for the benefit of the bailor, and bars a subsequent action by him."

In Little v. Fossett, 34 Me. 545, 56 Am. Dec. 671, the court decided that the bailee may recover compensation for any conversion of or injury to the property bailed while in his possession. The court cited authorities dealing with gratuitous bailments and held that, if the suit were against a stranger, he was entitled to recover the value of the property, holding the balance beyond his own interest, **in trust for the general owner.**

In a note to Union Pacific R. R. Co. v. Meyer, 76 Nebr. 549, 107 N. W. 793, 14 Ann. Cas. 634, the note

writer, discussing the right of a bailee to recover for injury to property, says:

"The decisions are unanimous in holding that a bailee in possession of personal property may recover for injuries to or the loss of such property caused by the acts of persons other than the owner."

An examination of the note disclosses that in many of the cases cited the plaintiffs were gratuitous bailees. For later cases, see note to Central R. R. of N. J. v. Bayway Refining Co., Ann. Cas. 1912B, 77.

In a later case (Herries v. Bell, 220 Mass. 243, 107 N. E. 944, Ann. Cas. 1917A423) it was decided that:

"Where plaintiff, with consent of his wife, had possession of her dog, and defendant enticed the dog away and detained it under a claim of ownership, plaintiff could sue for conversion."

In 6 C. J. "Bailments," § 172, it is said:

"The bailor and the bailee both having an interest in the property, the same act of a third party may entitle either the bailor or the bailee to sue; but a recovery by either party of the entire damages to the property will be a full satisfaction and a bar to any subsequent suit by the other."

In the notes to the above text, cases are cited affirming that the bailee may maintain his action by virtue of his possession and that possession of the bailee is sufficient title as against a wrongdoer.

In Walsh v. U. S. Tent & Awning Co., 153 Ill. App. 231, the court decided that a bailee may sue and recover the entire damages done to personal property in his possession. The court said:

"A bailee, having a special property, may recover the whole value of the property, holding the value beyond his own interest in trust for the general owner, and the judgment recovered by the bailee may be pleaded in bar to any action that might be afterwards brought by the general owner for the same property"—citing 2 Hilliard on Torts, 571; Sedgw. on Dam. 569, and cases.

In Gross v. Saratoga European Hotel & R. Co., 176 Ill. App. 160, it was decided that:

"A guest of a hotel who had possession as bailee, gratuitous or otherwise, of articles that he properly entrusted to hotel keeper, is entitled to maintain an action for their value.

"Where an innkeeper loses articles entrusted to his care by a guest, a bailee, the guest is not restricted to the recovery of the value of his special interest in the property, but can recover the whole value and will hold the amount so recovered in excess of his own interest for the general owner."

The foregoing authorities should serve to allay the apprehension of the appellee that he might be required to also respond in an action brought by Mrs. Yrisarri, the owner of the car, as well as being an answer to other of his contentions.

Were the judge who tried the case now the judge of the court from which the appeal was taken, it would only be necesary to remand the case with directions to proceed to a decision on the merits. The trial judge, however, having been succeeded by another, it is necessary that the judgment be reversed, with directions for a new trial; and it is so ordered.

PARKER, C. J., and WATSON, J., concur.

[No. 2936. July 19, 1926. Rehearing Denied Oct. 21, 1926.]

ALBUQUERQUE LUMBER CO. v. TOMEI et ux.

[250 Pac. 21.]

SYLLABUS BY THE COURT

1. An executory contract for the sale of land, reserving legal title in the vendor until payment, does not create a vendor's lien.

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[1] 39Cyc p. 1794 n. 87. [2] 38Cyc p. 1402 n. 19. [3] 40CJ p. 111 n. 77, 82. [4] 39Cyc p. 1303 n. 19 New. [5] 3CJ p. 718 n. 50. [6] 40CJ p. 125 n. 3; p. 127 n. 55 New. [7] 4CJ p. 1020 n. 77. [8] 40CJ p. 114 n. 7. [9] 40CJ p. 487 n. 4 New.

2. If evidence is admitted "subject to objection" and later ruled out without objection by the party offering it, he is deemed to acquiesce in the ruling.

3. Recission of executory contract reserving legal title, for vendee's default, after a material-man's lien has attached to the equitable interest, does not result in extending the lien to cover the fee.

4. The vendee's interest under an executory contract for sale of land, wherein title is reserved, is not a fixed or determinable undivided interest therein.

5. Theories of the case, not brought to the attention of the trial court, cannot be considered, on appeal.

On Motion for Rehearing.

6. Code 1915, § 3327, requiring disclaimer of liability by the owner of an interest in land upon which an improvement is being made, applies only to the particular contract or scheme of improvement in progress or contemplation at the time.

7. Not prejudicial error, in case tried without jury, to exclude newspaper items, offered as bearing upon the owners' knowledge of an improvement, where the owners testified that they had not read them.

8. Code 1915, §§ 3319, 3321, 3327, relating to liens, construed, and **held** that, where the vendee in an executory land contract is the builder merely in the sense that he is the person who causes the improvement to be made, he is not the vendor's agent to bind the vendor or his property.

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

Suit by the Albuquerque Lumber Company against Frank Tomei and wife to foreclose a materialman's lien. From the judgment, both parties appeal. Affirmed and remanded, with directions.

George S. Klock and M. J. McGuinness, both of Albuquerque, for appellant.

Rodey & Rodey, of Albuquerque, for appellees.

OPINION OF THE COURT

WATSON, J. In this cause there are an appeal and

a cross-appeal from a judgment foreclosing a materialman's lien. As appears by the findings of the trial court, the facts are as follows: The Albuquerque Lumber Company furnished materials between July 14 and July 23, 1921, to William Kruegel, who, during said time, was in possession of the premises in question under a duly recorded executory contract for the purchase thereof from Frank Tomei and wife, which contract was on said July 23, in full force and effect, and upon which there had been paid the sum of $1,680. The materials were ordered by said Kruegel and used by him in constructing a dance hall upon the property. The vendors, Tomei and wife, had no knowledge that Gruegel was engaged in the construction of the building until July 23, 1921, and within a few hours after obtaining such knowledge posted nonliability notices on the property. The complaint sought judgment against Kruegel and against Tomei and wife, foreclosure of the materialman's lien, and sale of the property improved. The trial court, having found the facts aforesaid, rendered judgment establishing a lien upon the equitable interest of Kruegel, foreclosing the same, and ordering the same sold, subject to the legal title and to all the contract rights of Tomei and wife. From such judgment, the Albuquerque Lumber Company, plaintiff below, has appealed, and Tomei and wife, defendants below, have taken a cross-appeal.

While appellant assigns 43 errors and discusses them under nine heads, we think its contentions may be deduced to two main propositions: (1) Appellant should have been given a lien upon the Tomei interest in the property; (2) if not entitled to a lien upon the Tomei interest, appellant was entitled to a lien upon an undivided interest in the premises in the proportion which the payments actually made by the vendee bore to the whole agreed purchase price.

[1] Before proceeding to determine the questions raised, we pause to note that both parties, as well as the trial court seem to have treated the vendors'

interest in the property as a vendor's lien. In this we think they are in error. The contract reserved the legal title in the vendors until payment of the agreed price. Had the actual interest been a vendor's lien, the situation would have been quite different. Stearns-Roger Mfg. Co. v. Aztec Co., 14 N. M. 300, 93 P. 706. This matter seems, however, to have little practical bearing on the case. Such as it has will be hereinafter referred to. While the court, by finding 12, held that "the defendants * * * have a prior and superior lien under the said land contract * * * to the materialman's lien" and in the decree adjudged the same, it was also provided in the decree that—

> "Nothing in this decree contained shall affect the rights and remedies of the defendant Frank Tomei by reason of his legal ownership of the property * * * under and by the terms of the real estate contract."

Thus, despite the technical inaccuracy, the case was disposed of on the correct theory.

In contending that appellant should have been given a lien upon the vendors' interest, it is first urged that it appears from the evidence that the vendors had knowledge of the improvement in question. This was a question of fact upon which the evidence was conflicting. The trial court found to the contrary. As we consider that finding supported by substantial evidence, it cannot be disturbed.

[2] On this question of knowledge, it is urged that the court erred in excluding certain news items appearing in Albuquerque papers, which prominently mentioned the improvement being made, and to which newspapers the vendors admitted being subscribers. This evidence, when offered, was admitted "subject to objection." The cause, having been submitted, was taken under advisement for several days, and the court then announced his disposition of the case and his findings substantially as thereafter filed. In this announcement the court sustained the objections to the news

items. Appellant made no objection and took no exception to the ruling, and must be deemed to have acquiesced in it.

[3] There was evidence to the effect that about July 23, the day the nonliability notices were posted by the vendors, Kruegel, the vendee, absconded and abandoned the premises, and that appellees thereupon took possession of them and still retained it at the date of the trial. The court refused appellant's request to find these facts, and to conclude therefrom that the vendors had elected to rescind the contract. Urging this as error, appellant argues that the vendors could not both rescind the contract and enforce the payments; that the effect of the decree is to force appellant, if it would protect its lien, to make the remainder of the payments; that the vendors' lien grows out of the contract and ceases to exist when the contract is rescinded. Whatever might be the merit of the argument if we were really concerned with a vendor's lien, it seems plain that it is inapplicable when we consider, as we must, that the vendor's interest involved is not a lien, but the legal title. Whether, by a declaration of forfeiture warranted by the terms of the contract, the vendors could have cut off appellant's lien, it is unnecessary to consider. We know of no principle, however, upon which a rescission, or an attempted rescission, could be held to enlarge or extend the rights of the materialman. The decree leaves the contract in force just as it was when the materialman's lien accrued. This could not, in our view, have prejudiced the rights of appellant.

It is further urged that the court, having expressly found, at appellant's request, that Kruegel, the vendee, "was the builder and in charge of the construction of said dance hall," erred in refusing further to find that Kruegel was the agent of the vendors in contracting for the materials, and in using them in the construction of the dance hall. We do not think that

the court intended to find that Kruegel was the "builder" in the sense that the term is used in Code 1915, § 3319. That would be inconsistent with his other findings.

[4] This brings us to the consideration of the second of the contentions above set forth. Appellant complains of the refusal of the court to fix the value of the equitable interest to be sold at $1,680, arguing that, because this amount had been paid upon the purchase price, the vendee had obtained an interest to that extent in the property, and that the court should have ordered a sale of an undivided interest in the property, bearing the same proportion to the whole interest that the amount paid bore to the whole purchase price. While making this argument, appellant disclaims the right to extend its lien beyond the equitable interest of the vendee. We must therefore conclude that it misapprehends the nature of that interest. The vendee's right under the contract was to obtain title to the property by completing the deferred payments. This right according to the contract, might be lost by failing to make the remainder of the payments. In that case, the payments which had been made were to be retained by the vendors as liquidated damages. This is the interest upon which appellant's lien attached under Code 1915, § 3321. Upon this interest, the court recognized the lien and decreed foreclosure and sale. Appellant demanded, in effect, that the court find the vendors' interest to be so much on account of the balance they were still entitled to receive, and the vendee's to be so much on account of the payments already made. To have acceded to this would have been to set aside the contract and make a new one, under which, as each payment was made, the vendee would obtain a proportionate, undivided, indefeasible interest in the property. No authority is cited to this proposition, and we do not think it sound. Appellant points out the reluctance of equity to enforce a forfeiture. There is no doubt about that. The court's decree, however, does not enforce a forfeiture. It orders a sale of the equitable interest. It

recognizes it as subsisting. What that interest may be worth was not for the court to say, but for a purchaser to determine. The court found the sum which had been paid. The value of the interest would be determined by consideration of the worth of the premises in comparison with the payments which the purchaser must still make. At a sale, if there were outside bidders for the equitable interest to the amount of the lien, appellant would be fully protected. If none, he could, for the amount of his lien, step into Kruegel's shoes, and obtain the privilege of completing the payments and perfecting title. Had the court adopted appellant's theory, appellant would have had a lien, not only on Kruegel's interest, but on a substantial part of Tomei's. Having found as it did on the facts, the court could give no lien on the vendors' interest.

Finding no error to appellant's prejudice, we proceed to a consideration of the cross-appeal.

Tomei and wife, vendors, complain of the action of the court in refusing to give them affirmative relief upon a cross-complaint to which appellant, Albuquerque Lumber Company, Kruegel, the vendee, and J. A. Hubbs, Kruegel's trustee in bankruptcy, were made defendants. In the cross-complaint, the executory contract was set up, allegation was made of default on the part of Kruegel and his trustee in bankruptcy under the contract, and the court was asked to adjudge the default, declare the contract void, forfeit all payments and quiet title as against all of the defendants.

Cross-appellants tendered findings of fact and conclusions of law. They therein adhered strictly to the theory of their pleadings, the answer, and the cross-complaint. That theory was (1) that the materialman's lien never attached to the vendors' interest in the property, because the vendors had posted the property as soon as they obtained knowledge of the improvement; and (2) that the vendee's default and the declared forfeiture left no interest to which said lien

could attach, or, if it had attached before forfeiture, it was thus cut off.

[5] In argument here, counsel for cross-appellants now take the position that the "vendor's lien" is superior to the materialman's lien, and that the decree should have provided for a sale of the fee for satisfaction, first, of the vendor's lien, and, second, of the materialman's lien; any surplus to have gone to Kruegel, the vendee, or his trustee in bankruptcy. They thus fall into the error mentioned at the outset as to the true nature of the vendors' interest in the property. Their contention in the trial court that their title should be quieted as against the materialman's seems to have been abandoned. They now advance a theory of the case not brought to the attention of the trial court. Such new theory we cannot consider. Cadwell v. Higginbotham, 20 N. M. 482, 151 P. 315.

Counsel for appellant bring to our attention, by the reply brief, a situation which might have raised an important question. Kruegel's trustee in bankruptcy, having been made a defendant in the cross-action, filed a document in which he disclaims interest in the subject-matter of the suit and in the relief sought by any of the parties, and "shows that he has received from Frank Tomei for the benefit of said bankrupt's estate a valuable consideration for the equity of said bankrupt in and to the said premises, and that this trustee on account of such consideration relinquishes any and all claims of right or interest in and to said premises." Counsel now ask on what equitable principle appellant's lien could be cut off by a purchase of the vendee's interest by the vendors. The question is raised too late. The fact of such a purchase was not developed at the hearing, nor in any manner brought to the attention of the trial court, nor its legal consequences urged. Counsel then urged that rescission or attempted rescission in some manner operated to extend the materialman's lien beyond the equitable interest to the fee. They cannot now prevail upon the different and inconsistent

theory that, instead of a rescission of the contract whereby the vendee's interest was destroyed, there was really a purchase of it, and that such purchase was necessarily subject to the lien upon it.

Having found no error to the prejudice of either the appellant or the cross-appellants, we affirm the judgment. The cause will be remanded to the district court, with direction to enforce its decree, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

On Appellant's Motion for Rehearing.

WATSON, J. It is urged that, in holding that there was substantial evidence to support the court's finding that appellant had no knowledge of the improvement being made, we overlooked important testimony. Prior to the furnishing of the materials in the present case, appellees had been served with process in another suit to establish a lien upon the same premises. That suit reached this court and is reported as Weggs v. Kruegel, 28 N. M. 24, 205 P. 730. The record in that case was in evidence in the present case. According to the complaint in the Weggs Case, the lien was sought under a contract made May 20, 1920, by Kruegel, to alter and repair the building on the premises by installing a new front complete, installing beaver board ceilings, patching floors, and by otherwise repairing and altering the said building, which improvement was completed June 9, 1920. According to the complaint in the present case, the materials were furnished between July 14 and July 23, 1921, to be used, and they were used, in the erection of a dance hall on the westerly end of the premises.

It is argued that it thus conclusively appears that appellees had knowledge in a general way that the premises had been, and were to be, improved. It is also urged that it is not required that knowledge be shown

of each of the steps in the making of improvements, or of each separate contract for labor or materials contributing to them. This may be admitted, without concluding that knowledge of repairs and alterations upon a building on the premises when it was sold necessarily imputed knowledge of intent to erect a new building.

[6] Appellant cites only Raisch et al. v. Helfrich et al., 47 Cal. App. 494, 190 P. 848. This case does not seem to bear upon the question, nor have we found a case in point. On the question of knowledge generally, see 40 C. J. 147. We think that the statute, in requiring disclaimer of liability, has reference to the particular contract or scheme of improvement in progress or contemplation at the time, and that, for instance, knowledge that a vendee intended to erect, or was erecting, a garage on the premises, would not impute knowledge of intention to erect, or erection of, a dance hall on the same premises under a different contract.

[7] It is contended that we were wrong in concluding that appellant acquiesced in the ruling excluding from evidence excerpts from the Albuquerque press relative to the improvement in question. Reconsidering the matter of this evidence, there is perhaps a better reason for overruling the assignment regarding it. We may admit (though not deciding) that these accounts of the improvement appearing in newspapers to which appellees subscribed were competent evidence bearing upon the question of knowledge, and that, if it had been a jury case, it would have been error to exclude them. But this case was tried to the court. Appellees not only testified that they had no knowledge whatever of the improvement being made, but specifically denied having read the newspaper accounts in question. This was no doubt the reason, and the only reason, that the trial judge ruled them out. So long as the court believed the evidence of appellees, the newspaper accounts were entirely unimportant. Whether he ruled them out, or left them in and disre-

garded them, had no bearing upon the result. The ruling, if erroneus, was clearly not prejudicial.

It is contended that, even if Kruegel was not, in the first place, the agent of the appellees in purchasing the materials, appellees' subsequent purchase from Kruegel's trustee in bankruptcy of the vendee's interest was a ratification, having the effect of an original authorization. This contention we cannot consider, as no such theory was suggested in the trial court.

[8] Is is again strongly urged that the finding that Kruegel "was the builder and in charge of the construction of said dance hall" is conclusive that he was the agent of the appellees in what he did. To aid understanding of this point, we here insert pertinent sections of the Code:

"Sec. 3319. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road or aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this article."

"Sec. 3321. The land upon which any building, improvement, or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing the materials for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien."

"Sec. 3327. Every building or other improvement mentioned in the second section of this article [section 3319], constructed upon any lands with the knowledge of the

owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this article, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvements situated thereon."

While section 3319 provides that the "builder * * * shall be held to be the agent of the owner for the purposes of this article," we cannot admit counsel's point. That the builder is to be deemed the agent of the person causing the building to be constructed seems quite plain. We think that the word "owner," in section 3319, has reference to the person causing the building to be constructed. That section contemplates no division of estates as between lessor and lessee, or vendor and vendee. It is sections 3321 and 3327 which contemplate such a situation. It is plain from the latter section that, if an interest is owned by one who did not cause the construction of the building, his interest is not to be subjected to the lien if, within three days after obtaining knowledge of it, he posts notices disclaiming liability for the improvement. That intention is controlling over any apparent inconsistency with section 3319. There is no such inconsistency, however, when the two sections are properly construed. In finding as the trial court did, we think he meant no more than to find that it was Kruegel who caused the building to be constructed. His refusal to find that Kruegel was appellees' agent for such purpose clearly indicates such meaning. If we were to go with counsel's contention, that where the vendee is the builder he is necesasrily the vendor's agent, we should, in such a case, nullify the plain provision of section 3327.

We think, therefore, that this case was properly dis-

posed of, and the motion for rehearing will be overruled. The costs of this appeal will be taxed against appellant, and the costs of the cross-appeal will be taxed against appellees and cross-appellants. The costs of this motion will be taxed against appellant; and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2976. Oct. 13, 1926.]

STATE v. GAUNT.

[250 Pac. 634.]

SYLLABUS BY THE COURT

Evidence set forth held to support conviction for embezzlement, under Laws 1919, ch. 120, § 13.

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

John R. Gaunt was convicted of embezzlement, and he appeals. Affirmed.

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

John W. Armstrong, Atty. Gen., and James N. Bujac, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

WATSON, J. John R. Gaunt, charged, under Laws 1919, c. 120, § 13, with embezzling $25,196.75 of the funds of the Reserve State Bank, was convicted, and appeals.

Appellant was, during the time in question, cashier of the Reserve State Bank. $30,000 of bonds of school district No. 53 of Catron county had been issued and intrusted to said bank for sale. The negotiations for

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[1] 17CJ p. 255 n. 55; 20CJ p. 486 n. 60.

their sale were carried on by the appellant. The sale was effected February 2, 1922, to the Bankers' Trust Company of Denver, which, pursuant to instructions from appellant, gave its check, in the sum above mentioned, being the proceeds of the sale of the bonds, to the First National Bank of Denver, for the credit of the State National Bank of Albuquerque, for the Reserve State Bank; and, on that date, notified appellant by wire, that it had done so. On February 4, the State National Bank of Albuquerque credited the Reserve State Bank with said sum, and notified said bank by letter. The credit also appeared on the regular monthly statement sent by the State National Bank to the Reserve State Bank. The sum was never debited on the books of the Reserve State Bank to the State National Bank of Albuquerque, and was never credited to the treasurer of Catron County. The State National was a regular correspondent of the Reserve State, and daily transactions of deposit and withdrawal took place during the time in question. On February 4, after the credit aforesaid, the books of the State National showed a credit in favor of the Reserve State of $52,571.75. That balance varied, up and down, between that date and April 3, 1923, when the Reserve State suspended business, at which time there remained a balance of $1,770. Appellant, as cashier, and two assistant cashiers had authority to draw and did customarily draw upon this account. One of the assistant cashiers testified; the other did not. He who testified had charge of and kept the general ledger in which appeared the account with the State National. He testified that he never had any knowledge of the credit in question, and that he did not attempt reconciliation of his account with the statements received, from time to time, from the State National. In cross-examination of this witness, by appellant's counsel, some use was had, and references were made to the draft register, and to the canceled and returned drafts. The former was introduced in evidence, but no part of it appears in the transcript. The latter were not introduced in evidence. So we are in the dark as to whether the particular

drafts or checks by means of which the money in question was withdrawn appear among those exhibited to the witness, or whether they are listed in the draft register. The books of the State National do not disclose any one withdrawal in that exact or the approximate amount.

It was the state's theory that appellant possessed himself of and appropriated the said amount. This theory is supported by the admission of the appellant in a letter to N. B. Smith, the assistant cashier, who testified, written on May 11, 1922, from El Paso, Tex. The material part of the letter follows:

"I have the proceeds from the sale of the district 53 bonds, $26,436.62. On account of the trouble existing down there, I am placing this money in escrow here, until such time as they agree how the money is to be spent. During this time, I am not going to let them know that the sale has been made, unless an injunction is filed. Out of the above amount, I am to have credited to my account $902.50, which takes care of the interest due on coupons, as per the attached receipt, and for which I remitted, so as not to impair the above amount."

In connection with the letter, it may be observed that on March 29th, preceding, the balance of the Reserve State at the State National fell below the amount in question, never again equaled it, and, on May 11, when appellant wrote the letter, it was under $4,000.

It was the theory of the defense that the amount was drawn out and used in the regular course of business, from time to time, in meeting the obligations of the bank. Counsel for appellant places great reliance upon an affirmative response to this suggestive question put to the witness Smith, on cross-examination:

"Then, Mr. Smith, if this credit of twenty-five thousand odd dollars was given by the State National Bank to the Reserve State Bank, so far as the banking records show, it was absorbed by the business of the Reserve State Bank until the time of the closing of the Reserve Bank, leaving a small balance there at that time. Is that correct?"

Under further examination, however—redirect, recross, and by the court—this witness made it plain that

he was utterly unable, from the books of the Reserve State, to explain or show the absorption of the amount in question, or any part of it, and that he meant only to say that it had disappeared.

Counsel for appellant contends that the evidence set forth does not justify the verdict, that the trial court should have directed a verdict for appellant, and that he should have granted a new trial. It is admitted that, under the well-established rule, the judgment is not to be disturbed if the verdict is supported by substantial evidence. It seems to us that the case made by the state comes well within the rule.

The judgment must therefore be affirmed, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3201. Oct. 15, 1926.]

JARAMILLO, County Clerk, etc. v. State ex rel. BOARD OF COUNTY COM'RS OF SANDOVAL COUNTY.

[250 Pac. 729]

SYLLABUS BY THE COURT

1. Conklin v. Cunningham, 7 N. M. 445, 38 P. 170, examined, and **held** that the controlling considerations in the decisions reached were the fact that the Governor possessed the recognized power to remove the sheriff and thus to create a vacancy, behind which executive act the court could not go in mandamus proceedings; and the further fact that the prior incumbent had admitted of record, by institution of proceedings in quo warranto, that he was not a de facto officer.

2. Territory ex rel. Vaughn v. Eldodt, 10 N. M. 141, examined and **held** that the controlling consideration in the decision reached is the fact that the term of

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[1] 38CJ p. 708 n. 57. [2] 38CJ p. 708 n. 57. [3] 15CJ p. 970 n. 30, 31; 38CJ p. 706 n. 40, 41. [4] 38CJ p. 709 n. 62, 63, 64, 64 New; 29Cyc p. 1392 n. 62. [5] 38CJ p. 711 n. 2; 29Cyc p. 1415 n. 69 New; 32 Cyc p. 711 n. 2. [6] 29Cyc p. 1401 n. 44, 50 New, 55; p. 1402 n. 60; p. 1408 n. 18; p. 1437 n. 55. [7] 38CJ p. 705 n. 34, 35; p. 713 n. 27; 32Cyc p. 1420 n. 54. [8] 29Cyc p. 1415 n. 69 New.

the prior incumbent, Eldodt, had expired at the time of the appointment of Vaughn, and that the appointment to fill such vacancy by the Governor was supported by that fact.

3. In granting or refusing a peremptory writ of mandamus in respect of public officers, the court is actuated primarily by the necessity that the office be full, so that the public business may be transacted; hence, if the office is not full, the writ is granted to relator, if he show prima facie title. Such a title concludes the court, since mandamus is not allowable as a remedy to try title to public office.

4. Where the relator has a certificate of election from a duly constituted canvassing board and has qualified for the office, as required by law, and where the term of the prior incumbent has expired, the relator has the prima facie title to the office; the prior incumbent, under these circumstances, not being a de facto officer, but a mere recalcitrant intruder.

5. Where the Governor has the power to remove an incumbent from office, the exercise of such power in a particular case is not reviewable by the court in mandamus proceedings and must be taken as conclusive of the existence of a vacancy and the end of the term of the prior incumbent. Hence, a commission issued by the Governor to fill a vacancy created by such removal, he having the power to fill such vacancy as well as to create it, constitutes prima facie title to the same extent that a certificate of election does against one whose term has expired by operation of law.

6. Under the Constitution and laws of the state of New Mexico, the Governor is without power to remove an elective officer, and he may appoint to fill a vacancy only when the vacancy, in fact, exists. Nevertheless, a commission issued by the Governor to fill a vacancy, reciting that a vacancy exists, carries the presumption that the vacancy did, in fact, exist at the time of the appointment and that the commission is therefore valid and legal.

7. Notwithstanding this presumption in favor of executive acts, where it appears in mandamus proceedings that the office is full by a de facto officer holding under color of right, the writ will be refused for the reasons that the granting of the writ would be against public policy, inasmuch as it would admit a second person to an office already filled de facto by another to the confusion of the public business, the de facto officer not being a party to the suit; resort must still be had to further proceedings to test their disputed titles; the duty sought to be enforced is not clear and unmistakable, and the proper remedy is at law by quo waranto.

8. Where an office is full by a de facto officer, claiming under color of right, before the expiration of his term,

and he has not been removed by any court or tribunal authorized to remove him, such officer has prima facie title to the office.

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

Suit by the State, on the relation of the Board of County Commissioners of Sandoval County, for mandamus to be directed to Ramon Jaramillo, County Clerk and ex-officio Clerk of the Board of County Commissioners of Sandoval County. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with direction.

Mechem & Vellacot, Geo. S. Klock, and M. J. McGuiness, all of Albuquerque, and Carl H. Gilbert and C. J. Roberts, both of Santa Fe, for plaintiff in error.

Fred E. Wilson, Atty. Gen., and Dennis Chavez, of Albuquerque, for defendant in error.

OPINION OF THE COURT

RYAN, District Judge. [3] This is a writ of error sued out by Ramon Jaramillo, county clerk and ex officio clerk of the board of county commissioners of Sandoval county, against whom a peremptory writ of mandamus was granted by the district court for that county, commanding him as clerk of the board of county commissioners to record the minutes made at a purported meeting of the board attended by L. C. Mondragon, whose official status as county commissioner is not questioned, and Tomas Montoya, who had been appointed by the Governor to fill the office theretofore held by J. M. Sandoval.

J. M. Sandoval was elected county commissioner at the general election of November, 1924. A certificate of election was issued to him by the canvassing board for the county. He qualified as required by law and proceeded upon the performance of his official duties. On Juy 2, 1926, there was issued to Tomas Montoya, above referred to, by the Governor a commission appointing him to the office of county commissioner, de-

clared in the commission to have been vacated by J. M. Sandoval. The commission recites:

"Whereas, a vacancy is declared to exist in the office of county commissioner of the Second district of the county of Sandoval by reason of the removal and absence from the county of J. M. Sandoval."

Under this commission, Montoya undertook to qualify as county commissioner in place of J. M. Sandoval. On the 13th day of September, 1926, he and Mondragon affected to transact certain official business and demanded of the clerk that he enter the same in the minutes of the board of county commissioners. Upon the refusal of the clerk so to do, this action in mandamus was instituted against him in the lower court to compel the entry and recordation of the minutes so made.

In the answer which he filed to the writ, the respondent, the above-mentioned county clerk, denied that Montoya had been appointed a member of the board of county commissioners and that he had qualified as such; he further denied specifically every provision of the statute which defines the conditions under which a vacancy in the office of county commissioner may occur. And he alleged affirmatively the election and qualification of Sandoval, who, he further alleged, had been present at every meeting of the board, acting as a member thereof; that he was in full possession of the office; that he had never surrendered it; that he acted as commissioner on September 13, 1926, and participated in the meeting of the board at that time, and that he, the clerk of the board, had recorded the minutes made by such board.

The plaintiff in error, herein called the respondent, sets forth 19 assignments of error. We consider, however, only the basic question involved. The argument in the case was presented to us in this manner, and we assume the condition of the record justifies such presentation.

The relator urges, in support of the action of the

trial court in granting the peremptory mandate against respondent, that the rule first announced in Conklin v. Cunningham and Eldodt v. Territory, and approved in subsequent decisions, has become the settled law of this state. This rule, he maintains, is to the effect that where the Governor appoints to public office, the commission evidencing such appointment constitutes prima facie title in the appointee, and, in mandamus proceedings, is conclusive of the existence of the fact prerequisite to the appointment; that is to say, if the commission recites that the appointment is made by reason of a vacancy existing in the office, the recital is conclusive, since an issue made upon that point would be a collateral attack upon the validity of the commission and an effort to try title by mandamus proceedings; whereas, such title to public office can be tried only directly by an action at law by quo warranto. This rule thus rather concisely stated so far applies to the facts in this case that, he argues, the commission from the Governor to Montoya confers upon the latter prima facie title; and this is so, notwithstanding it might have been shown by the respondent that Sandoval was elected to the office of county commissioner, had a certificate from the proper canvassing board, had duly qualified as required by law, and was the actual incumbent, engaged in the performance of the duties pertaining to that office at the effective date of the mandate. Stated otherwise, with particular reference to the facts in this case, this rule is that the commission issued to Montoya, reciting that Sandoval had removed and was absent from the county of Sandoval, thereby vacating his office, this recital, in mandamus proceedings must be taken as equivalent in force and effect to the fact itself; the conclusion, therefore, being irresistible that the office was, in fact, vacant at the time of appointment; that the commission was prima facie title to the office, and that the prior incumbent, Sandoval, was, upon the qualification of Montoya, not a defacto officer, but a recalcitrant intruder. And we understand, relator concedes that the effect of the application of the rule, as contended for by him, would be, in

such cases as this is, to oust an incumbent in the position of Sandoval, and impose upon him the burden of establishing the fact that he is the de jure officer by quo warranto.

The pertinent inquiry is, therefore, Does the rule contended for by relator reflect the correct interpretation of Conklin v. Cunningham and Eldodt v. Territory? These cases are precedents to which this court adheres, but our adherence to them does not involve, necessarily, a comprehensive acceptance of everything therein stated discursively or by way of argument. We profess, on the other hand, a firm and clear regard for the essential facts which the court in the cases mentioned had before it for consideration. These facts, we conceive, not only persuaded the court to the decisions reached, but now elucidate the true meaning of them and impose proper limits to their application.

[1] Conklin v. Cunningham was a mandamus suit, brought by Cunningham to compel Conklin to turn over to the relator all the books, papers, property, and prisoners pertaining to the office of sheriff and ex officio collector of Santa Fe county. The facts before the court were that the respondent, Conklin, was the duly elected and qualified sheriff of the county; that on the 27th day of June, 1893, the Governor of the territory summarily removed him from office and appointed the relator, Cunningham, to fill the vacancy caused by such removal; that on the 30th of June, 1893, Cunningham qualified for the office, as required by law, and that the prior incumbent, Conklin, upon demand, refused to deliver to him the above-mentioned property and effects of the office. The respondent denied, argumentatively, that he had been removed from office, challenging the authority of the Governor in respect of such removal. He alleged his de facto and de jure possession of the office, and showed that on the 3rd day of July, 1893, he obtained from the district court for the county of Santa Fe an order in the nature of quo warranto upon the relator, Cunningham, to determine title to the said office of sheriff as between him

and Cunningham. The court held that the appointment of Cunningham constituted a commission that was prima facie evidence that he was entitled to the sheriffalty, and imposed upon the respondent, Conklin, the burden of showing a better title by an action in the nature of quo warranto.

To this conclusion the court was led by two considerations. They were: (1) That the respondent, by having recourse to the writ of quo warranto to establish title to the office involved, admitted that he had been deprived of the possession of said office by the order of the Governor removing him, and that it was in Cunningham by the appointment of the Governor at the date of the institution of the proceedings in quo warranto; that quo warranto, in its nature, involves a possession and user of an office by another than the relator; being without such foundation, such a writ should not be issued and cannot be maintained; that the institution of quo warranto proceedings amounted to the essential admission, which the court would take to be the existing fact, that Cunningham was the de facto officer in charge of the office at the time involved. (2) That the Governor of the territory removed Conklin from the office of sheriff by virtue of authority vested in him by statute, duly enacted by the Legislature of the territory, for cause shown by proof satisfactory to him; that it was a conclusive presumption that the executive, in making the order of removal, acted within the limits of his authority; and that, therefore, Conklin ceased to be sheriff by the one executive order, and Cunningham became prima facie such official by the other.

[2] Eldodt v. Territory was also an action in mandamus affecting public office. In the lower court, J. H. Vaughn, as relator, was granted a peremptory writ of mandamus against Samuel Eldodt, compelling the latter to deliver to him the books, papers, seals, insignia, and paraphernalia pertaining to the office of territorial treasurer. At the time involved, the office of territorial treasurer was not filled by election, but

by appointment of the Governor, by and with the advice and consent of the territorial council. Eldodt was appointed territorial treasurer by the Governor, by and with the advice and consent of the council on March 2, 1897, for the statutory term of two years, and, upon his appointment, duly qualified and proceeded to discharge the duties of the office. The Legislature for the year 1899—the term of Eldodt having expired by operation of law—adjourned without the confirmation by the council of any nominee of the Governor to the office; and on June 23 of that year the Governor appointed and commissioned Vaughn to be territorial treasurer, and Vaughn qualified for the office, as required by law; and, upon his demand, Eldodt, the prior incumbent, refused to deliver possession of the office.

The controlling consideration in this case we consider to be the fact that the term of Eldodt had expired at the time of the appointment of Vaughn, so that the vacancy in fact existed in this case by operation of law, as it did in the case of Conklin v. Cunningham, by executive action. We note the fact that the argument in Eldodt v. Territory does not place the emphasis upon the fact of vacancy arising from the expiration of the term of Eldodt that we do here. It is clear, however, that the Eldodt Case, in express terms, professes to base the decision reached upon the rule announced in Conklin v. Cunningham. Consequently the former case is to be interpreted in the light of the reasoning employed in the latter.

These two cases have been consistently approved by every subsequent decision handed down by this court to which they might furnish a precedent. We have analyzed all of these later cases carefully, and find nothing in any of them that might cast doubt upon what we consider as essentially controlling in the two precedents under examination.

Hubbell v. Armijo, 13 N. M. 490, 85 P. 1046, which was an injunction case brought by the elected sheriff

against the qualified appointee of the Governor to enjoin such appointee from disturbing the former in the possession and conduct of the office of sheriff, follows Conklin v. Cunningham, the facts being identical to the extent that the vacancy, to fill which the commission issued was created by the Governor, by an order summarily removing the elected sherifff.

Baca v. Parker, 13 N. M. 446, 87 P. 465, was an action in prohibition and presented the same facts as Hubbell v. Armijo.

In Territory v. Armijo, 14 N. M. 205, 89 P. 267, it is true, the court held against the asserted power of the territorial Governor to remove the sheriff during his term. That question was presented to the court in Conklin v. Cunningham and argued vigorously, we may assume, from the dissenting opinion filed therein; but it exerted no influence upon the conclusion reached, the court observing that neither the existence nor the manner of exercising such power was a matter for collateral inquiry.

In Vigil v. Stroup, 15 N. M. 554, 110 P. 830, and in Trust Company v. Bank, 18 N. M. 601, 139 P. 148, the Conklin v. Cunningham and Eldodt Cases were cited by the court, but obviously, the rule now being considered did not affect either the argument or decision of the court.

In Board of Commissioners of Guadalupe County v. Anaya (N. M.) 242 P. 335, which was an injunction suit on behalf of apparent de jure officers in possession against other pretended officers as intruders, the Eldodt and Cunningham Cases were cited with approval, but, since the plaintiffs were not only de jure officers, but incumbents in possession performing the duties of the office, such circumstances lifts this case from the application of the rule relator here argues for.

The factor in the Conklin v. Cunningham Case, noted above, that the respondent, by alleging the institution by him of proceedings in quo warranto, admitted that

he was not a de facto officer, we defer comment upon until later in this opinion.

[4] We point out, then, that, in both Conklin v. Cunningham and in Eldodt v. Territory, the terms of the prior incumbents were at an end, in the one case by executive order, and in the other by operation of law; and we hold that this not only imparts proper meaning to and accurately defines the scope of these precedents, but places them clearly within the whole current of authority to the precise point to which only they serve as precedents. This is:

"That one holding a certificate of election or a commission from an officer or tribunal authorized to issue the same, and who qualifies and properly demands possession, has the prima facie right of possession as against a recalcitrant intruder who holds over after his term expires." 38 C. J. 709.

The important consideration in the rule announced is the cessation of the term of the incumbent, whether it be by operation of law, by judgment of ouster in quo warranto, or by order of removal granted by the proper officer or tribunal. Where such is the case and the relator has a commission or a certificate of election, the prior incumbent is not a de facto officer holding under color of right, but is a mere intruder. 38 C. J. 709; People ex rel. Cummings, v. Head, 25 Ill. 287 People ex rel. Brewster v. Kilduff, 15 Ill. 492; Huffman v. Mills, 39 Kan. 577, 18 P. 516; Mitchell v. Carter, 31 Okl. 592, 122 P. 691; Stephens v. Carter, 27 Or. 553, 40P. 1074, 31 L. R. A. 342, and note; State ex rel. Ayers v. Kipp, 10 S. D. 495, 74 N. W. 440; State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025; State ex rel. Love v. Board of Freeholders, 35 N. J. Law, 269; Cotteral v. Barker, 34 Okl. 533, 126 P. 211; State ex rel. Love v. Smith, 43 Okl. 231, 142 P. 408, L. R. A. 1915A, 832.

This is the rule that Conklin v. Cunningham and Eldodt v. Territory are precedents for, and relator is in error in his contention that the rule may be invoked, as determinative of the facts before us in this case, in his favor.

[6] Accepting as true, for the purpose of argument, the position of the respondent asserted by him, Sandoval was in office by virtue of a proper certificate of election; he had qualified; his term had not expired; and he had not been removed by any officer or tribunal authorized to remove. Does, therefore, the rule in Conklin v. Cunningham and Eldodt v. Territory, as we have interpreted it, apply to him, upon these assumed facts? We think not. Under the Constitution and the laws of this state, the Governor is without power to remove an elective officer, and the exercise of such power by him, the record discloses, is in nowise pretended or asserted; he may appoint to an elective office when a vacancy exists, but a prerequisite to the valid exercise of the power is the existence of a vacancy in fact. It is the fact, and not the recital or declaration of it in the commission, that endows the appointment in such circumstances with validity. If the fact did not exist, the appointment is a mere nullity and confers no authority upon the appointee, either as a de facto or as a de jure officer. State ex rel. Attorney General v. Seay, 64 Mo. 89, 27 Am. Rep. 206; State ex rel. Addison v. Williams, 25 Minn. 340; State ex rel. Robinson v. McNeely, 24 La. Ann. 19; State v. Wrotnowski, 17 La. Ann. 156; Ewing v. Thompson, 43 Pa. St. 372; Troup on Public Officers, § 437.

This statement, however, is not to be interpreted as an assertion that, before the commission of appointment issued by the Governor may be valid for any purpose, the fact of vacancy upon which it was predicated must first be judicially settled. On the contrary, we clearly recognize that this is not so, and that it is presumed as a matter of law that an officer has correctly performed his duties, and, in the performance of them, has acted within the scope of his authority; and, where he has power to act only in a certain contingency, it will be presumed that the contingency existed. McCamey v. Wright, 96 Ark. 477, 132 S. W. 223; People v. Scott, 52 Colo. 59, 120 P. 126; McDowell v. Burnett, 92 S. C. 469, 75 S. E. 873; Slaughter v. Cooper, 56 Tex.

Civ. App. 169, 121 S. W. 173; Cahill Swift Mfg. Co. v. Hayes, 98 Kan. 269, 157 P. 1169; denying rehearing, 97 Kan. 740, 156 P. 735; Hamilton v. Erie R. Co., 219 N. Y. 343, 114 N. E. 399, Ann. Cas. 1918A, 928; affirming judgment, 170 App. Div. 901, 154 N. Y. S. 1125; Cotton v. White, 131 Ark. 273, 199 S. W. 116; Stoker v. Stoker (Tex. Civ. App.) 254 S. W. 398.

[5] But this presumption does not carry the conclusion claimed for it by relator. It is not evidence of prima facie title in the sense that this court used the term in Conklin v. Cunningham and Eldodt v. Territory. If the Governor appoint to fill a vacancy, the commission so far imports validity that, of its own force, it constitutes the appointee a de jure officer, where the office designated in the commission is not full by a de facto officer. But here the presumption ends; it is not prima facie title in mandamus proceedings to the extent and in the sense that a certificate of election is against one whose term has expired, or a commission is against one who has been ousted in quo warranto or removed from office by an authorized tribunal. In such cases, the prima facie title draws to itself complete de facto rights, and, as affecting the prior incumbent, renders the office corporeally as well as legally vacant, so that the prior incumbent, resisting, occupies the position of a recalcitrant intruder. Not so is the relation between the incumbent denying vacancy and the appointee under a commission which recites, but does not create, a vacancy. If the vacancy existed at the time of the appointment, the commission is valid, and the officer named, de jure. If not, the commission is nothing, and the incumbent the de jure as well as the de facto officer.

[7] Here the impropriety of mandamus, as a remedy sought by the appointee, becomes manifest. The mandate is grantable only where the duty, the performance of which is to be compelled, is clear and unmistakable. Necessarily, it cannot be so where determinable by conduct charged to the incumbent, which may or may not be established. Further, the prime concern

of the court is that the duties of the office be performed and that, therefore, there be a de facto officer whose official acts, as such, are clothed with full validity. This concern is satisfied on the ascertainment of the fact that there is an incumbent discharging the duties of the office under color of right; and placing another therein, does not protect but on the contrary imperils the interests of the public in the office involved.

[8] Confronted by such a situation as the record in this case presents, courts, uniformly hold that since the real issue is that of title to the office, it is to be tried between the parties themselves, and directly by quo warranto, which is the exclusive remedy to try title to public office. The incumbent holding office under a certificate of election during his term, and not legally removed, has the prima facie title, and this title and the rights of office pertaining to it may be set at naught by quo warranto, but cannot be disturbed collaterally by mandamus.

In Conklin v. Cunningham, the territorial Supreme Court said, with reference to the standing in mandamus of the relator Cunningham, in view of the answer filed by Conklin admitting institution by him of quo warranto proceedings in the district court:

"Cunningham was the de facto sheriff of said county in charge, of the office, on the 3rd day of July, 1893, according to the representation of Conklin in the proceeding to determine the title to the office, and he cannot be heard to contradict himself on the 7th day of July in a collateral pro-issue, not involving the title."

In the case of Delgado v. Chavez, 140 U. S. 586, 11 S. Ct. 874, 35 L. Ed. 578, brought to the United States Supreme Court by writ of error, speaking to this precise point, Mr. Justice Brewer said:

"It was enough in this case for the court to determine, and it must be presumed that the evidence placed before it was sufficient to authorize an adjudication, that the petitioners were commissioners de facto. As such, the clerk was bound to obey their commands and record their proceedings, * * * and it, as must be assumed from

the decision found that these petitioners rather than their contestants, were the commissioners de facto. * * * Who would doubt, if these petitioners were, the unquestioned commissioner of the county that mandamus would lie to compel the clerk to recognize them, and record on the county books their proceedings, as such? Does the fact that certain parties are contesting their rights as commissioners oust the court of jurisdiction, or forbid it to compel other county officers to recognize them? Must the office of county commissioners remain practically vacant, and the affairs of the county unadministered, pending a trial of a right of office between contestants? Surely not; public interests forbid. They require that the office should be filled; and that when filled by parties under color of right, all other officers should recognize them as commissioners until their right to hold the office has been judicially determined adversely, by proper quo warranto proceedings."

In High's Ex. Legal Rem. (3d Ed.) § 49, the learned author says this:

"And the rule may now be regarded as established by an overwhelming current of authority that when an office is already filled by an actual incumbent, exercising the functions of the office de facto and under color of right, mandamus will not lie to compel the admission of another claimant or to determine the disputed question of title. In all such cases the party aggrieved, who seeks an adjudication upon his alleged title and right of possession to the office, will be left to assert his rights by the aid of an information in the nature of a quo warranto, which is the only efficacious and specific remedy to determine the questions in dispute. And whenever it is apparent on the face of the pleadings that the issue presented involves a determination as to the person properly elected to an office or entitled to exercise its functions, the writ of mandamus will be withheld."

This text is supported by practically all American texts, and we cite, particularly, the following: State v. Dunn, Minor (Ala.) 46, 12 Am. Dec. 25; Ex parte Harris, 52 Ala. 87, 23 Am. Dec. 559; Kelly v. Edwards, 69 Cal. 460, 11 P. 1; City Council v. Ferguson, 19 Colo. App. 399, 75 P. 603; State ex rel. Addison v. Williams, 25 Minn. 340; State ex rel. Love v. Smith, 43 Okl. 231, 142 P. 408, L. R. A. 1915A, 832; Kimball v. Olmstead, 20 Wash. 629, 56 P. 377; Commonwealth v. Conroy, 267 Pa. 518, 110 A. 166; Ewing v. Turner, 2, Okl. 94, 35 P. 951; People ex rel. v. Asylum, 122 N. Y. 190, 25 N. E. 241, 10 L. R. A. 381; State of New Jersey ex rel. Leeds

v. Mayor, 52 N. J. Law, 332, 19 A. 780, 8 L. R. A. 697; State ex rel. Casey v. Chase, 64 N. J. Law, 207, 44 A, 872; Hartingh v. Iosco, Circuit Judge, 210 Mich. 568, 177 N. W. 982; French v. Cowan, 79 Me. 426, 10 A. 335; State ex rel. Jackson v. Thompson, 36 Mo. 70; Daugherty v. Flippinger, 177 Ill. App. 522; Bonner v. Pitts, 7 Ga. 473; City of Sanford v. Preston, 73 Fla. 69, 75 So. 619; Harrison v. Simonds, 44 Conn. 318; Black v. Board of Police, 17 Cal. App. 310, 119 P. 674; Drescher v. Board of Supervisors, 191 Cal. 234, 215 P. 902.

The court below granted the peremptory writ of mandamus upon the commission held by Montoya, regarding the same as evidence of prima facie title and, as such, foreclosing further inquiry. This was error.

The judgment of the lower court is reversed and the cause remanded, with direction to discharge the writ, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2971. Oct. 20, 1926.]

BUEL v. KANSAS CITY LIFE INS. CO.

[250 Pac. 635]

SYLLABUS BY THE COURT

1. Medical diagnosis made during treatment, and adhered to at the trial, is substantial evidence to support a finding as to cause of death.

2. Death from milk sickness or alkali poisoning from drinking milk from cows which had grazed on goldenrod is within the terms of a life policy indemnifying against death resulting "from the effects of an injury, through external, violent and accidental cause," even though such cause be considered an infectious disease, the product of a known bacillus.

3. A $2,000 life insurance policy provided double indemnity for accidental death. Disclaiming liability as for accidental death, but not for the $2,000, the insurer tendered and the beneficiary accepted that sum in full

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[1] 10J p. 505 n. 49. [2] 10J p. 432 n. 12, 14. [3] 10J p. 482 n. 16 New; p. 539 n. 74; p. 540 n. 75.

settlement. **Held**, not an accord and satisfaction," barring recovery for the balance.

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

Action by Luella Buel against the Kansas City Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Reid, Hervey & Iden, of Albuquerque, for appellant.

J. B. Atkeson and L. T. Atkeson, both of Artesia, for appellee.

OPINION OF THE COURT

WATSON, J. Appellee was the beneficiary in an insurance policy issued by appellant upon the life of appellee's son, in the sum of $2,000. Attached to the policy was a double indemnity rider, providing that—

"If * * * the death of the insured. * * * should result from the effects of an injury, through external, violent and accidental cause, * * * the amount payable herein will be four thousand dollars."

As to the cause of death, the trial court found as follows:

"(4) That the said Ralph E. Buell died on the 26th day of Sepember, 1922; that his death was the result of what is commonly known as 'milk sickness,' or alkali poisoning, which was caused by the said Ralph E. Buell drinking milk from a cow or cows that had grazed upon a weed known as goldenrod, from the effects of which said milk was contaminated in some manner, the drinking of which milk caused his death."

Proofs of loss having been furnished, appellant forwarded its draft for $2,000, which appellee accepted, surrendering the policy and signing the printed receipt thereon, to the effect that she received said $2,000 in full of all claims whatsoever under the said policy, and in consideration of said sum surrendered all her right, title, and interest in and to the same, and forever released appellant from all liability to her thereunder.

The circumstances concerning this payment and release were found by the trial court to be substantially

as follows: Soon after the death of the insured, appellee discovered the existence of the double indemnity rider, and thereupon caused inquiry to be made of three attorneys as to appellant's liability under the circumstances. Two of the attorneys were of opinion that she was not entitled to the double indemnity, and the other was of opinion that she was so entitled; all stating, however, that the question required investigation before giving an opinion that should be acted upon. Thereafter appellee and her husband met appellant's agent at the First National Bank of Artesia, where appellee did her banking business, and the $2,000 check was tendered to appellee and accepted by her. Appellant's agent and the president of the bank, of whom appellee inquired if she was not entitled to the double indemnity, stated that, in their opinion, she was not so entitled, although they did not know; the president of the bank advising her to accept the $2,000 check, and both advising her that, if she did so, she would not have any further claim against appellant. Appellant would not have delivered the $2,000 check had appellee not signed the receipt and delivered the policy; and appellee, in doing so, intended to accept said check in full payment of the policy. No fraudulent representations were made whereby appellee was induced to execute the release and surrender the policy.

Thereafter appellee commenced this suit to recover the additional sum of $2,000. She was awarded judgment therefor, from which this appeal has been perfected.

Three propositions are here advanced as error: (1) That there is no evidence to support finding 4 above set forth; (2) that finding 4 does not support a conclusion that appellant is liable under the double indemnity rider; (3) that the facts found by the trial court constitute accord and satisfaction. These propositions we shall consider in the order stated.

[1] Appellant contends that the evidence upon which the court made finding No. 4 is speculative, con-

jectural, and theoretical, and thus not such substantial evidence as is required to support a finding of fact. We have carefully reviewed the evidence, but do not think it would serve any good purpose to set it forth. Suffice it to say that the attending physicians at the time diagnosed the case in accordance with the court's finding. They remained of the same opinion at the time of the trial. It seems clear that such evidence is not to be considered unsubstantial.

[2] Evidence was adduced tending to show that milk sickness is an infectious disease; is considered a fatal disease; that it occurs in epidemics; that patients have relapses; that the germ causing such disease has been isolated, and is known to the medical profession as bacillus lactamorbi. Relying upon this evidence, appellant contended at the trial, and now contends, that the cause of death was shown to be an infectious disease like typhoid fever, and not the effects of an injury through external, violent, and accidental cause.

Referring to the memorandum of the trial judge, we find that it was his opinion that the medical authorities know but little about milk sickness. He did not reject the germ theory, but was evidently unconvinced by the evidence adduced to support it. He held that even if the germ theory is correct, the cause of death is within the provision for double indemnity.

Appellant does not seriously question the practically uniform holding that death from poison, unintentionally taken, would be within the terms of this policy. So we find it unnecessary to cite the many decisions to that effect. It does contend, however, that this policy does not contemplate liability for death from disease, and that if milk sickness is a recognized infectious disease, similar to typhoid fever, the judgment cannot be upheld. To support this contention the able counsel cite but one case: Bacon (Steadman) v. U. S. Mutual Accident Association, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. Rep. 748, decided in 1890, the opinion having been written by Mr. Justice Peckham.

We think, therefore, that we may safely dispose of this contention upon a consideration of that case, the principles therein discussed, and the later authorities. It was there held that death from anthrax caused by contact with putrid or diseased animal matter was not insured against.

We first note that this rather early decision has not escaped criticism. Joyce says (Insurance, § 2878) that it is not in line with the authorities. Not that anthrax or malignant pustule is not a disease. But, admitting it to be such, it was but a link in the chain connecting the death with external, violent, and accidental means (contact with the putrid matter or bacillus) causing the death.

It is also to be noted that the policy in question in the Bacon Case, while creating liability for death from "bodily injuries effected through external, violent and accidental means," expressly provided that benefits should not extend to any "bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease." As said in Hiers v. John A. Hull & Co., 178 App. Div. 350, 164 N. Y. S. 767, the court was dealing in the Bacon Case with the peculiar provisions of the policy, and it was also dealing with an occupational disease; it apparently being the view of the later case that disease contracted incidentally to one's ordinary occupation is not so readily to be classified as accidental as one otherwise contracted. The Bacon Case has been often referred to in the later decisions; generally to distinguish it.

In the case at bar there is no express exclusion of liability for death resulting from disease. Whether milk sickness is a disease is entirely immaterial, unless that fact of itself precludes a holding that it effected an injury through external, violent, and accidental cause. If we are to admit, as is generally held, that there is liability for death resulting from the introduction into the system of a poisonous substance, injuring

the body by causing lesions of the organs, what good reason is there for denying liability where the same final result is produced by toxins, perhaps generated within the body, but caused by bacilli introduced from without? Such a distinction is not warranted by the decisions.

Death from ptomaine poisoning has frequently been held within such terms as we are here considering. Johnson v. Fidelity & Casualty Co., 184 Mich. 406, 151 N. W. 593, L. R. A. 1916A, 475; U. S. Casualty Co. v. Griffis, 186 Ind. 126, 114 N. E 83, L R. A. 1917F, 481.

For blood poisoning cases, see note to Cary v. Preferred Accident Ins. Co. (127 Wis. 67, 106 N. W. 1055, 115 Am. St. Rep. 997, 7 Ann. Cas. 484) 5 L. R. A. (N. S.) 926.

Perhaps the strongest case against appellant's contention is Christ v. Pacific Mutual Life Ins. Co., 312 Ill. 535, 114 N. E. 161, 35 A. L. R. 730, in which death from typhoid fever, resulting from drinking polluted water, not knowing the same to be polluted, was held death from violent, external, and accidental cause.

In Sullivan v. Modern Brotherhood, 167 Mich. 524 133 N. W. 486, 42 L. R. A. (N. S.) 140, Ann. Cas. 1913A, 1116, the court dealt with a clause of indemnity against "total * * * loss of the sight of an eye by accident." Liability was there adjudged for loss of the eye caused by gonococci splashed into it with suds from a washtub.

Aetna Life Ins. Co. v. Portland Gas & Coke Co., 229 F. 552, 144 C. A. 12, L. R. A. 1916D, 1027, dealt with an employer's liability policy indemnifying against "bodily injury accidentally received or suffered," and held that typhoid fever from drinking polluted water was such accidental bodily injury.

H. P. Hood & Sons v. Maryland Casualty Co., 206 Mass. 223, 92 N. E. 329, 30 L. R. A. (N. S.) 1192, 138 Am. St. Rep. 379, dealt with a similar policy, and held

within its terms the disease of glanders, contracted in caring for horses suffering from it. Here the Bacon Case was distinguished because of the express provision against liability for injury, of which no external and visible sign appeared or happening directly or indirectly from disease.

In U. S. Casualty Co. v. Griffis, supra, although the policy did exempt from liability for injuries caused by disease, ptomaine poisoning was held within the term "bodily injury effected solely through external, violent, and accidental means."

Appellant admits that the courts have gone so far in their liberal construction of the term "violent, external and accidental" that it is difficult to draw the line between liability and nonliability. It urges, however, that, when it appears that the cause of death was a recognized infectious disease, there can be no liability. In Vennen v. New Dells Lbr. Co., 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273, Ann. Cas. 1918B, 293, decided under the Workmen's Compensation Act, it was held that typhoid fever contracted from drinking water was "a personal injury accidentally sustained." There the court endeavored to draw such a line of distinction. It places it "between disease resulting from accidental injury and disease which results from an ideopathic condition of the system, and not attributable to some accidental agency growing out of the employment." See, also, Brintons, Ltd., v. Turvey (House of Lords) 2 Ann. Cas. 137, the result of which is directly contrary to that of the Bacon Case.

The foregoing illustrations we think sufficient to show that the judgment of the trial court should not be overturned upon the ground here being considered, unless we are to get out of line with the later and more numerous decisions. Even if we entertained the opinion that the courts, following the rule of liberal construction applicable, had gone beyond proper bounds, we should feel that we ought to follow the great weight of authority in a case of this kind. The meaning of such

a policy has been developed gradually by a course of judicial decisions, which, it is not to be doubted, has been observed with interest by appellant and other corporations engaged in the same business; and, as they continue to issue such policies, it is but fair and reasonable to assume that they have contracted with reference to the meaning of the words they employ, as laid down by the courts. Such a view was expressed by Thayer, Circuit Judge, in Fidelity & Casualty Co. v. Lowenstein, 97 F. 19, 38 C. C. A. 29, 46 L. R. A. 450, and seems to be sound.

[3] The trial judge considered that the release, signed by the appellee, did not constitute an accord and satisfaction barring a recovery. His theory was that appellant's liability for $2,000, in any event, was not disputed and, that the payment of that sum was no consideration for a release of the additional sum.

It is the general rule that a receipt in full, given on payment of part of a liquidated and undisputed debt, does not of itself preclude recovery of the balance. Case note 5 Ann. Cas. 525; Armijo v. Abeytia, 5 N. M. 533, 25 P. 777; Frazier v. Ray, 29 N. M. 121, 219 P. 492. The theory is well understood; being that accord and satisfaction, like other contracts, requires consideration to support it; and that, if a debt is liquidated and undisputed, the payment of part of it is no consideration for the release of the balance.

Of recent years, some courts have questioned the wisdom of this rule, since it tends to unsettle and discourage transactions intended as compromises and settlements. It has been said that the slightest consideration discoverable will be seized upon as sufficient to uphold the release as an accord and satisfaction. 1 R. C. L. 184—186.

Where a part of a claim is conceded, and a part is in dispute, the authorities differ whether payment of the part conceded, received in discharge of the whole is good accord and satisfaction. It is said in case note to Melroy v. Kemmerer, 11 L. R. A. (N. S.) 1022, that the

present tendency is so to consider it. In commenting on that tendency, in case note to Demeules v. Jewel Tea Co., 14 L. R. A. (N. S.) 954, it was said to be "probably due, not to a perception of any logical distinction between such a case and one where part payment is made of a claim the whole of which is conceded, but rather to the growing dissatisfaction with the rule which holds that the part payment, even in the latter case, does not constitute a sufficient consideration for the release of the entire claim, and the disposition to grasp any fact or circumstance which will enable the court to take a case out of that rule." See, also, 1 R. C. L. 196.

The courts have had great difficulty with this question. It does not seem possible to harmonize the decisions. If the tendency be as stated, the resulting rule is illogical. It is influenced by the supposed importance of encouraging and upholding compromises. That is undoubtedly a proper consideration. But compromise implies mutual concession. When only one of the parties makes concession, there is, in reality, no compromise. Dissenting opinion of Mason, J., in Neely v. Thompson, 68 Kan. 193, 75 P. 117. So long as we adhere to the general rule that part payment of a liquidated or undisputed demand is not accord and satisfaction, we hesitate to accept the doctrine that payment of the conceded part of a claim is consideration for a release of the balance which is in dispute. Better, in our judgment (as suggested in Brown v. Kern, 21 Wash. 211, 57 P. 798, and as done in Clayton v. Clark, 74 Miss. 499, 21 So. 535, 22 So. 189, 37 L. R. A. 771, 60 Am. St. Rep. 521), repudiate the rule that destroys its operation by illogical distinctions. Some states have done so by statute.

No doubt it would be convenient to tighten the rule as to settlements; thus avoiding considerable litigation. It should not be overlooked, however, that the rule objected to does not affect any case of real settlement—mutual concession; and that if we were to follow the

so-called "tendency," we should smother under a rule of convenience many meritorious causes of action.

It is appellant's contention that but a single claim arose under this policy; that the amount was in dispute, either $4,000 or $2,000; that, according to the "tendency" of decision, the claim could be compromised by payment of the smaller sum. We have indicated our disapproval of the principle urged. Counsel also contend that the trial court incorrectly treated the settlement "piecemeal," distinguishing between the death loss and the double indemnity liability. As we view it, this is but another way of stating the same proposition, and needs no separate treatment. Admitting, for the purposes of this decision, that the claim is to be treated as a whole, we have to determine whether it was liquidated in the sense in which that term is employed in connection with accord and satisfaction, and whether there was in fact any consideration for the release of the additional liability.

Counsel cite Manhattan Life Ins. Co. v. Burke, 69 Ohio St. 294, 70 N. E. 74, 100 Am. St. Rep. 666, where it was considered that a life insurance policy is improperly classed as a liquidated demand because there may be, and often are, defenses to a recovery. The correctness of the result in that case we do not doubt. There was a dispute as to any liability. The payment made was a concession, and, hence, was consideration. If the mere possibility of a defense is to exclude a debt from the liquidated class, the statement is correct; but, according to that criterion, the class of liquidated debts would be small. In statements of the rule we find the word "undisputed" nearly always coupled with the word "liquidated." Hunt on Accord and Satisfaction, § 72; Frazier v. Ray, supra; Farmers' & Mechanics' Life Assoc. v. Caine, 224 Ill. 599, 79 N. E. 956; Harms v. Fidelity & Casualty Co., 172 Mo. App. 241, 157 S W. 1046; Northwestern Life Ins. Co. v. Blasingame, 38 Tex. Civ. App. 402, 85 S. W. 819; Rauen v. Prudential Life Ins Co., 129 Iowa, 725, 106 N. W. 198.

Joyce says ("Insurance," § 3465a), there is "not a liquidated demand * * * where there is a dispute whether liability under it exists." Without further citation, we think we may safely say that the word "liquidated" has usually been employed in a loose sense, and that the decisive question is not the possibility of a defense, but whether there was a controversy in good faith.

> "The word 'liquidated,' in the sense of the rule relied on by counsel" (with respect to accord and satisfaction) "signifies that the amount claimed has been ascertained and agreed on or fixed by operation of law." Swindell v. Youngstown Sheet & Tube Co., 230 F. 438, 144 C. C. A. 580.

If the general rule be considered as applying to all liquidated claims, then, as considered in Rauen v. Prudential Life Ins. Co., supra, an exception arises where liability is disputed. As we have seen, however, the general rule is usually stated as applying only to claims which are both liquidated and undisputed.

In the case at bar it cannot be questioned that the parties agreed, by the policy, upon the amount of the indemnity. There never was dispute as to liability for $2,000 because of the death of the insured. There was dispute as to any liability for accidental death, but none as to the amount to be paid if the death were accidental. By the payment made, appellee obtained nothing to which she was not entitled, and appellant gave up nothing it could rightfully retain. If the claims were to be considered separately, the death claim was liquidated and undisputed; the accident claim liquidated and disputed. If it be treated as a whole, the larger amount was liquidated, and the smaller amount paid was conceded. However viewed, we find it impossible to locate the consideration for the release of the amount here sued for. This conclusion we think well supported by authority.

In Goodson v. National Masonic Accident Assoc., 91 Mo. App. 339, the insured was a class-one member of the association. The certificate provided that for injury received while using firearms no greater benefit should

be paid than named in class 6. The death benefit for class one was $5,000; for class 6 $1,000. Death occurred from the accidental discharge of a pistol in the hands of the insured. The association disclaimed liability for more than $1,000. The beneficiary, acquiescing, settled for that sum, and gave receipt in full for all claims under the policy. Discussing the effect of the release, the court said:

"But defendant insists that when the payment of one thousand dollars was admitted that that was a consideration. We are not of that opinion. We have already seen that under the contract of insurance the defendant company owed Mrs. Graves the fixed sum of five thousand dollars. This was a liquidated sum and could not be discharged by the smaller amount unless there was some consideration for it. To say that the payment of the less sum was the cinsideration, is to argue in a circle. In determining whether there was a consideration the question is, What was the legal benefit to Mrs. Graves? or else, What was the loss to the defendant by the payment of one thousand dollars in discharge of five thousand? She certainly did not gain by it, and defendant did not lose by it, since it was only one-fifth of what it rightfully owed. And so it has many times been held that the payment of a sum less than a liquidated demand is no consideration for a discharge of the whole demand: Winters [Winter] v. Railway, 73 Mo. App. 173, 194; s. c., 160 Mo. 159, [61 S. W. 606]; Henson v. Stever, 69 Mo. App. 136. And this is true even though the creditor, as in this case, gives a receipt for the whole agreeing therein to receive it for the whole. Riley v. Kershaw, 52 Mo. 224.

"But the further insistence is, that when one is tendered a sum of money on condition that it be taken in full of the demand and he accepts the sum tendered he also, ipso facto, accepts the condition. We so ruled in St. Joseph School Board v. Hull, 72 Mo. App. 403. But that rule presupposes there is a dispute or disagreement, in good faith, as to the amount of the demand. The rule has no application where a part of a claim is accepted under the mistaken view that it was the whole claim. That was this case. Mrs. Graves was shown defendant's by-law which made her claim only one thousand dollars on account of the manner of her husband's death. There was no dispute about it. There was no tender coupled with a condition. Defendant said to her that it only owed her one thousand dollars and she, laboring under a mistake, thought defendant was right and took the money. Such state of facts leaves no room for the application of the rule stated above."

A similar case is Knights Templars & Masons Life

Ins. Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. Under the policy there in question, if the insured committed suicide, the beneficiary was entitled only to the return of premiums. If he did not commit suicide, the insured was entitled to the return of premiums and $5,000. On the theory of suicide, settlement was made by the return of the premiums. The court held that the release of liability for the additional $5,000 was without consideration. Tyler v. Odd Fellows' Mutual Benefit Assoc., 145 Mass. 134, 13 N. E. 360, was cited.

In Weidner v. Standard Life Accident Ins. Co., 130 Wis. 10, 110 N. W. 246, the policy provided for $3,000 to be paid in case of death from accident, but only one-tenth thereof if death should be due to injuries inflicted by others, except in case of assault committed for the sole purposes of burglary or robbery. The disputed question was the purpose of an assault causing the death of the insured. It was held that payment of $300 and full release was not accord and satisfaction.

In Prudential Ins. Co. of America v. Cunningham, 103 Md. 319, 63 A. 359, the dispute was as to the age of the insured. Under one contention $1,000 was payable; under the other, but $400. A receipt in full of all claims under the policy given on payment of the lesser sum was held not to bar recovery of the balance, since, being without consideration, there was no accord and satisfaction.

In Woodall v. Pacific Mutual Life Ins. Co. (Tex. Civ. App.) 79 S. W. 1090, it was said:

> "Payment by a debtor of a liquidated amount, presently due, and to which he has no defense that can be urged in good faith or with color of right, is not by itself a sufficient consideration to sustain a release by the creditor of other unliquidated claims against the debtor. * * *There being no consideration for the release, it is immaterial whether it was fraudulently obtained by the defendant, or whether the plaintiff knew of its contents, or failed to exercise reasonable diligence in ascertaining its import. * * *"

In Fire Insurance Assoc. v. Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. Ed. 860, plaintiffs were insured against loss by fire on a vessel. The adjuster sepa-

rated the loss into two classes; namely, the direct loss by fire and the incidental cost of raising the vessel, she having been scuttled and sunk to extinguish the fire. The insurer paid the exact amount adjusted for direct loss, and disclaimed liability for the incidental loss. The insured accepted the amount, and gave receipt in full satisfaction of claims for loss by fire, and agreed that "said policy is hereby canceled in full and surrendered to said company." It was held that, as to the claim for incidental loss, there was no consideration to support the release. The court considered the debt as two distinct and separate claims. It did not concern itself as to whether the debt, or part of it, could strictly be considered liquidated. It said:

> "If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

In Chicago, Milwaukee, etc., R. R. Co. v. Clark, 178 U. S. 353, 20 S. Ct. 924, 44 L. Ed. 1099, cited by appellant, Fire Ins. Co. v. Wickham, supra, was mentioned not disapprovingly. Although a different result was reached, and several of the cases upon which appellant relies were cited, it was not deemed necessary to overrule the Wickham Case. In the Clark Case, there was plainly consideration for the release for that part of the claim not paid.

Although unable to harmonize our conclusion with the decisions of some courts which, while admitting, deprecate, the general rule above stated, and seek to limit it; we are of opinion that the learned trial judge correctly applied it in this case, and that his ruling could not have been otherwise without departure from the true principles upon which the rule is based.

Unable to accede to any of appellant's contentions,

we affirm the judgment and remand the cause, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2961. Oct. 11, 1926. Rehearing Denied Nov. 10, 1926.]

STATE v. MARTIN.

[250 Pac. 842.]

SYLLABUS BY THE COURT

1. The indictment is framed under the first clause of section 1481, Code 1915, and is an indictment for assault with intent to murder. It being an indictment for assault with intent to murder, under the first clause of section 1481, and the punishment being fixed by that section, section 1480 of the Code has no application, and the sentence of the court, being within the limit prescribed by said section 1481, as amended, is not excessive.

2. Section 1481, Code 1915, is not void for uncertainty or indefiniteness, at least so far as the first clause thereof, pertaining to assault with intent to murder, is concerned.

3. The absolute right of peremptory challenge of a juror, after acceptance, is not allowed, but the court, in its discretion, may allow the right to be exercised in such case.

4. The admission of evidence cannot be challenged on appeal for reasons not stated in the trial court at the time the objection was made.

5. Error in the admission of evidence is not ground for reversal if not prejudicial to the rights of the complaining party.

6. Where a medical witness has given expert opinion evidence based upon his general knowledge and experience it is not error to refuse to strike testimony of two cases within the knowledge of the witness, wherein the results were in accord with the results likely to occur, as stated in such opinion evidence, even though such knowledge was acquired partly by hearsay, especially as such opinion was not based solely or principally upon such specific instances.

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[1] 30CJ p. 453 n. 55; p. 454 n. 64. [2] 16CJ p. 68 n. 8; 30CJ p. 453 n. 55 [3] 35CJ p. 417 n. 17, 18. [4] 17CJ p. 70 n. 43. . [5] 17CJ p. 317 n. 10; 40Cyc p. 2697 n. 20; p. 2698 n. 26. [6] 16CJ p. 880 n. 61, 68. [7[17CJ p. 183 n. 65, 65 New; 40Cyc p. 2476 n. 81; p. 2496 n. 47; p. 2517 n. 78.

7. While the right of cross-examination, thorough and sifting, should not be abridged, nevertheless, even upon cross-examination, where an answer to a question propounded to a witness is refused by the court, and such refusal is assigned as error, it must appear that counsel, on the trial, stated to the court, either what he expected to prove, or (if that is impracticable or impossible) what he desired to prove, by the answer to such rejected question. Upon failure of such statement to the trial court, this court cannot review the alleged error.

8. It is not, ordinarily, error for the prosecuting attorney to comment upon the failure of the defendant to produce a witness who is competent and cognizant of material and relevant facts.

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

Isaac Martin was convicted of assault with intent to murder, and he appeals. Affirmed.

O. E. Little, of Roswell, J. F. Kelton, of Ft. Sumner, and Fleming & Neal, of Santa Rosa, for appellant.

J. W. Armstrong, Atty. Gen., and J. N. Bujac, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

BICKLEY, J. The appellant, Isaac Martin, was convicted in De Baca county of assault, with intent to murder Aaron Martin. The verdict of the jury recommended clemency. The court sentenced appellant to serve a term in the state penitentiary of not less than 7 years, and not more than 10 years, at hard labor. The appellant was living on his ranch with his two sons, Aaron Martin, 12 years old, and Vearle Martin, 10 years old, and appellant's mother. Aaron Martin had been out watering the chickens and came into the house about 8 o'clock in the morning and his father, the appellant, came in shortly afterward, the appellant preparing to go to Ft. Sumner, which was approximately 30 miles from appellant's ranch. The appellant was the owner and possessor of a 32 Smith & Wesson revolver, an automatic revolver, a rifle, and a shotgun. He had been in the habit of hiding the two revolvers in different places about the house, which consisted of

one room, in order to keep people from stealing them. On the particular morning in question, he looked into a box that was on the foot of the bed and discovered that the automatic pistol was gone, whereupon he questioned his eldest son concerning it. Aaron Martin testified that he had taken the automatic pistol from the box that morning, intending to take it to school with him, and that, upon being questioned by his father and after his father had gone out again into the yard, he (Aaron) was attempting to replace the automatic pistol in the box when his father came into the house, whereupon he (Aaron) started to put it back into his pocket when the gun went off, and it seemed to him like "a bunch of fire and smoke and a crash and I didn't know anything." The appellant, Isaac Martin, testified that he leaned over the head of the bed to pick up the 32 Smith & Wesson, and, as he turned around to pick up the revolver, the automatic was pointed in his face by Aaron and went off, striking him in the middle of the chin, that he immediately lost consciousness and did not know anything further until his mother shook him, standing by the door; the younger brother, Vearle Martin, was in the room just prior to the shooting and had turned away and did not see the shots fired. There is no testimony regarding the whereabouts of the mother of appellant at the time of the shooting. Shortly thereafter, the appellant, Isaac Martin, went out into the yard to crank his Ford car to come to town, and Aaron Martin came out and, in response to a question by his father, replied that he had a broken arm, walked around the other side of the car into a gate post, and fell to the ground. According to appellant's testimony, Aaron was placed in the car by appellant and the younger son, and the mother of appellant also got into the car, the appellant driving to C. W. Walker's place, about 3 or 3½ miles from the Martin place, Walker getting into the car at that point to go to town with them. The appellant drove approximately 3 or 4 miles further on until they had passed the gates, explaining to Walker that the steering wheel held him up or supported him and he was unable to get out and open the

gate. After passing the second or last gate, the appellant turned over the wheel to Walker and he (Walker) drove the balance of the way to town, coming to Dr. Brassell's office, where the wounds of both appellant and Aaron were examined and treated by Dr. Brassel and Dr. Brown. The state and the defendant introduced and offered expert medical testimony.

The defense interposed by the defendant was that he was unconscious or insane at the time he committed the act charged in the indictment.

[1] Appellant relies for reversal upon five propositions. The first is that the judgment and sentence appears to be void and in excess of the jurisdiction of the court. This is based upon the claim that, under section 1481, a particular kind of assault with intent to murder is described, to wit, assault with intent to murder, under the circumstances and in the manner provided by section 1476 (Code 1915), and that this kind of an assault with intent to murder carries a greater degree of punishment than an assault with intent to commit murder, under section 1480. Appellant claims that it is apparent that the prosecution was under section 1480, because there is no mention in the indictment of the character of wounds inflicted upon Aaron Martin, or, in other words, that there is no description of the character of the acts constituting assault with intent to commit murder "in any of the ways mentioned in section 1476." We think that the appellant has misunderstood the purpose of section 1481. That section refers to two crimes—the first clause of the section refers to assault with intent to murder, and the subsequent clauses, refer to assault with intent to commit mayhem, which crime is defined in section 1476. Section 1476 is substantially the same as section 712 of the Compiled Laws of 1884, and section 1481 is the same, with exception of the punishment which has been changed by amendment, as section 713, C. L. 1884. In the case of Territory v. Vigil, 8 N. M. 583, 45 P. 1117, decided in 1896, the territorial Supreme Court, construing those

sections, in a case wherein the defendant was charged and tried for assault with intent to murder, said:

"The indictment is framed under the first clause of section 713 of the Compiled Laws of New Mexico and is an indictment for an assault with intent to murder. It being an indictment for an assault with intent to murder, framed under the first clause of this section 713, it was not necessary to allege in the indictment that it was the intent to kill and murder in any of the ways mentioned in section 712, for the indictment is not an indictment for an assault with intent to maim or disfigure, etc., as mentioned in section 712, but is simply an indictment for an assault with intent to murder."

We think the foregoing is the proper construction. There is a reason for defining the crime of assault with intent to maim or disfigure or injure a person in any of the ways mentioned in section 1476, because the nature of the injury is an important element of mayhem, this crime, at the common law, being the unlawfully and violently depriving of another of the use of such of his members as may render him less able, in fighting, either to defend himself or annoy his adversary. Whereas, if the intent were to murder, the manner of consummating the intent would not be important, provided it were of a character which might result in murder if the acts involved had not stopped short of their full effect. The resulting battery is not a necessary constituent element of the offense of assault with intent to murder. See State v. Martinez, 30 N. M. 178, 230 P. 379. Section 1480 is the section which provides for punishment for assaults with intent to commit certain crimes, where the punishment for such offenses is not prescribed in the article containing that section. See State v. Ballamah, 28 N. M. 212, 210 P. 391, 26 A. L. R. 769, where, also, it was contended that the sentence was excessive, and the court said:

"But section 1485, Code 1915, which creates the offense, governs the punishment, and not section 1480, Code 1915."

The appellant has, perhaps, been confused by the arrangement of the various sections by the compilers of the Code. The position of the sections in the original act and a consideration of the purposes of section 1480

will clear the matter up. Chapter 3 of the Laws of the Territory of New Mexico, Fourth Legislative Session 1853, p. 86, was entitled: "Of offenses against lives and persons." It covered homicide in various degrees, duelling, mayhem, assault while committing a robbery, assault with dangerous weapon with intent to rob, robbery by force and violence without being armed with a dangerous weapon, written and verbal threats of violence to persons and property, ravishment of female by force, attempt to ravish, and various kinds of violent assaults. Section 26 of said act, which corresponds to section 1481, prior to amendment, read as follows:

"If any person shall assault another, with intent to murder, or to maim or to disfigure, or injure his person, in any of the ways mentioned in the next preceding section, he shall be punished by imprisonment in the county jail or territorial prison not more than five years, nor less than one year, or by fine not exceeding one thousand dollars nor less than fifty dollars."

Section 27, which does not seem to have been carried forward into the Code, provided that:

"If any person shall attempt to commit the crime of murder, by poisoning, drowning, or strangling another person, or by any means, not constituting an assault with intent to murder, such offender shall be punished by imprisonment in the county jail or territorial prison, not more than ten years, nor less than one year."

We do not find that there was any section specifically providing for punishment for assault with intent to commit burglary. Section 25, which is substantially the same as section 1476 of the Code, defined the crime of mayhem. Section 28 (Code, § 1491) provided for punishment for robbery. Section 29 (Code, § 1483) provided for punishment for assault with intent to rob while armed with a dangerous weapon. Section 30 (Code, § 1492) provided for punishment for robbery by force and violence, the robber not being armed with a dangerous weapon. Section 31 (Code, § 1484) provided for punishment for assault with force and violence with intent to rob, where the robber is not armed with a dangerous weapon. Section 33 provided punishment for ravishment of a female of the age of 10 years

or more, by force. This section has apparently gone through the process of a number of amendments until it reached the Code as section 1493, which was repealed by the Laws of 1915, and chapter 51 enacted in lieu thereof, which was subsequently amended. Section 34 (Code, § 1495) covered carnal knowledge of female child under age of 10 years. Section 35 (Code, § 1485) covered assault with intent to commit rape. Section 36 (Code, § 1482) covered assault with intent to kill or injure any person by mingling poison with food, drink, or medicine. Then came section 37, which is the last section in the chapter and which is an omnibus section, intended to provide the punishment for assaults to commit any of the crimes mentioned in said section and also assaults with intent to commit any other crime amounting to a felony. Said section is as follows:

> "If any person shall assault another, with intent to commit any burglary, robbery, rape, murder, mayhem, or any felony, the punishment of which assault is not herein prescribed, he shall be punished by imprisonment in the territorial prison or county jail, not more than three years, nor less than six months, or by fine not exceeding one thousand dollars nor less than one hundred dollars."

As before seen, burglary had not been specifically provided for and therefore would fall within the punishment prescribed by this section. Different kinds and grades of robbery had been defined, but it is doubtful if all assaults with intent to rob had been covered. Mayhem had been defined, but the assault with intent to commit mayhem was not covered otherwise than in section 37. The punishment for assault with intent to commit murder was provided for in section 26 (Code, § 1481). The punishment for assault with intent to commit murder by poisoning, drowning, or strangling was provided for in section 27 (not in Code) and was more severe than that provided for in section 26. Section 36 (Code, § 1482) provided for still another punishment for attempt to murder by mingling poison with any food, drink, or medicine, and the punishment in this section was still more severe than that provided for in either of the other two sections. So, it is apparent that

the purpose of section 37 (Code, § 1480), being, as it was, the last section in the chapter, from its language and position, was intended to provide for the punishment for assaults with intent to commit offenses not otherwise provided for in that chapter.

[2] The foregoing is also an answer to the contention that section 1481 of the Code is void for indefiniteness because of the reference to a section of some statutes not named. The reference to section 1476, having no application to the offense of assault with intent to murder, is not involved in this case.

[3] The second point urged is:

"The trial court erred in denying the motion of defendant for permission to exercise a peremptory challenge upon petit juror, C. S. Melton."

The motion reads as follows:

"Mr. Kelton (in the absence of the jury). The defendant moves for permission to exercise a peremptory challenge upon the names of C. S. Melton and M. P. Carr, said motion being made before the jury is completed, for the reason that information has reached counsel from a reliable source since passing on said jurors that, if known to counsel at the time he passed said jurors, he would then have challenged them. From said information, counsel for the defendant are satisfied that the said jurors will not render a fair and impartial verdict in this case."

The district attorney objected that there were no efficient grounds for the motion set forth. The court ruled:

"The motion made by the defendant fails to disclose what information they have received relative to the jurors sought to be peremptorily challenged. For that reason, the court cannot determine in what connection the jurors are any less disqualified at this time than they were at the time they were accepted by both the defendant and the state. For these reasons, and for the further reason, as far as their voir dire examination is concerned, they appear to be qualified in every way, the motion will be overruled."

The Juror Carr was withdrawn by consent. In 35 C. J. "Juries," § 481, discussing peremptory challenges after acceptance, it is declared:

"In many states, the absolute right of peremptory chal-

lenge is allowed at any time before the juror is sworn, even if there has been an acceptance by the party challenging, or by both parties. In other states, the absolute right of peremptory challenge after acceptance is not allowed, but the court, in its discretion, may allow the right to be exercised in such case."

The New Mexico court is classified by the author as holding with the latter view, citing State v. Leatherwood, 26 N. M. 506, 194 P. 600. We agree with the author that such is the holding of that case.

Of course, a challenge allowable in the discretion of the court is not strictly peremptory. It requires some showing to invoke discretion. It might therefore be said that the acceptance of a juror puts an end to the right to challenge him peremptorily. Thereafter, in the interest of a fair trial, the discretion of the court may be moved to allow a challenge chargeable to a party as one of his peremptory challenges.

It is assumed by counsel for appellant that the mere statement of counsel that new information had been received which convinced them that the juror would not render a fair and impartial verdict was sufficient to entitle them to the requested challenge. That is, of course, upon the theory that the only showing necessary to restore to appellant the right to challenge the juror peremptorily, in the strict sense, was such as would satisfy the trial judge that counsel had been misled when originally accepting him. The authorities in those jurisdictions, which reject the rule that the right continues absolute until the panel is sworn, indicate that such a showing does not necessarily move the court's discretion, and there are a number of decisions holding that the court may require further showing of the reasons upon which counsel claim that the juror is prejudiced or otherwise unacceptable, and also of the facts and circumstances which caused the party moving to believe that an accepted juror is not acceptable. That, we think, is the correct rule. Appellant, having had his opportunity to challenge, need not be allowed thereafter to interfere with and set aside the orderly procedure of the trial, as prescribed by the statute,

from mere caprice or for frivolous reasons. His right to challenge is then limited and restrained by discretion. In addition to the cases cited in 35 C. J. "Juries," § 481, quoted supra, see Comeford v. Morwood, 34 N. D. 276, 158 N. W. 258; Drake v. State, 5 Tex. App. 649; Jones v. State, 166 Ark. 290, 265 S. W. 974.

What showing should move the court to grant the challenge need not be determined now. It is evident, under the rule, that there was no abuse of discretion in this case.

[4] Appellant's third point is:

"The trial court erred in permitting, over the objections of the defendant, the introduction of certain incompetent, irrevalent, and immaterial evidence, injurious to the defendant."

One question objected to, which was asked of the witness Vearle Martin, was as follows:

"Q. Did you point out to the sheriff where Aaron was standing at the time he was shot, or at the time of the shooting?"

This was objected to for the reason that it had not been shown that the witness was in the house and knew the position of the parties at the time. It is now urged that the evidence was inadmissable because it called for a conversation between third parties in the absence of the defendant. This objection, not having been urged in the trial court, is not available for consideration here. The admission of evidence cannot be challenged on appeal for reasons not stated in the trial court at the time the objection was made. See Cook v. State, 191 Ind. 412, 133 N. E. 137.

"It is well settled that this court can only consider objections made to the evidence at the time the ruling was made." Harris v. State, 156 Ga. 582, 119 S. E. 519.

[5] The other testimony elicited by the state from the witness Vearle Martin related to statements which the witness had theretofore made to the district attorney, concerning the whereabouts of one of the pistols

immediately prior to the shooting, which was inconsistent with the testimony given by the witness on the trial. The objection was that the district attorney was trying to impeach his own witness. The district attorney protested that the questions were only for the purpose of refreshing the memory of the witness. It being admitted by the defendant that he had picked up the gun and had turned to take it outside to the car, and, at the time he turned, saw another gun in his face and a flash and crash and noise, and did not know anything afterward until the shooting was all over, and it being apparently established that Aaron Martin was wounded by four distinct bullet wounds, such wounds being caused by bullets discharged from the pistol then and there held by the appellant, there being no self-defense claimed, and the only defense being made was that the defendant was unconscious during the time of the shooting by him, we are unable to see how the questions or answers, which involved principally the position of the gun on the bed and whether the gun was in a scabbard or not, were prejudicial. It is the questioning of the witness on this subject which the appellant objected to and now urges as error. The later questions of the district attorney concerning whether the witness had previously stated that his father was going to whip him and Aaron were not objected to. Also, it may be observed that, under section 2180, Code 1915, as construed in State v. Hite, 24 N. M. 26, 27, 172 P. 419, the court has a large discretion under such circumstances.

[6] Dr. Lancaster, a practicing physician engaged in medical practice for twenty years, with army experience in the late war as physician and surgeon, testified, in answer to a hypothetical question propounded by the district attorney, that, in his opinion, a man wounded by the bullet from a 32 automatic at close range, the ball entering about the center of the chin, coming out at the angle of the jawbone, would know what he was doing if he stood and shot four or five shots from a gun like the Smith & Wesson revolver. The witness gave thereafter a narrative of two cases

within his experience in the late war and otherwise, where a part of the jawbone was taken off by a high-powered gun or otherwise and the persons receiving the wounds, in both instances, remained conscious. There is nothing in the record to indicate that the witness based his opinion evidence entirely or principally upon these instances. On cross-examination, it developed that, in neither case, had the witness seen the injuries at the instant they were inflicted. In one instance, he got the history of the injury from the patient, and in the other he based his statement on what "others" told him, it not appearing whether the injured man was one of the "others." Defendant's counsel moved that the testimony as to these men remaining conscious be stricken for the reason that the information of the witness was based on hearsay. This was refused by the court, and the refusal is urged as error. In view of the fact that the witness had previously expressed his opinion, based upon his knowledge and experience generally, that a man so wounded would remain conscious while immediately thereafter standing and firing four or five shots, and in view of the law that a medical witness may be permitted to base his opinion, in part, upon the clinical history of a case given him by his patient, we do not think the court committed error in refusing to strike the testimony complained of.

[7] Appellant next complains that the trial court erred to the prejudice of the defendant in sustaining the objection of the district attorney to the introduction of certain relevant, competent, and material testimony sought to be introduced and elicited during the trial by the defendant in the matter of cross-examination of witnesses for the state.

(a) On the direct examination by the district attorney of the witness Walker, the witness was asked:

"Q. Upon leaving your place, who drove the car coming to town?"

The following then occurred:

"A. I can explain that in this way. As I went to get in the car I asked Ike, seeing the condition he was in, to get on the other side and let me drive it, and he said 'no,' that the steering wheel kind of supported him, in an indistinct way, and I cannot get out and open the gates; there was two gates, one about a mile from my house and another one possibly 2½ or 3 miles this way. He says, 'I can't open the gates, and I will drive on until we get through the gates and then you can drive.'

"Q. State whether or not he did drive. A. Yes, sir."

The district attorney claimed that the answer was explanatory and not responsive to his question and, when defendant's counsel, on cross-examination, propounded the following question:

"Q. You spoke of the condition Ike was in, and the statement that the wheel would brace him some and that he was not able to get out and open the gates. Describe to the jury the condition he was in."

—objected to it on the ground that it did not constitute proper cross-examination. Appellant says that the state could not "receive the benefit of an incompetent, irresponsive, prejudicial answer and then estop the defendant from cross-examining as to the facts and circumstances brought out." The answer referred to appears not to have been responsive to the question, and defendant did not object to it or move to strike it out. It did not seem so patently prejudicial as to require the district attorney to ask for its withdrawal. Appellant cites, as supporting his contention, 40 Cyc. § 2496, note 47, to the effect that:

"One who has brought out improper testimony on the examination in chief of his witness cannot complain of the cross-examination of the witness on the same subject."

The cases cited indicate that the witnesses were examined touching the matters to which they testified—they do not deal with voluntary statements made by the witness. We do not consider the authories cited in point.

(b) In the examination of Aaron Martin, the following question was asked, on cross-examination:

"Q. As you were going out of the gate, passing outside

the gate as you have just stated, did you hear any one say anything?"

It was objected to for the reason that it was immaterial and incompetent as to anything said after the occurrence, and because it was not proper cross-examination. Another question was:

"Q. What did your father say to you when he called to you?"

Objected to on the same grounds as the previous question. The ruling of the trial court indicates that the objections were sustained on the ground that the questions did not constitute proper cross-examination. We think the court was correct in this ruling. It is urged, however, by appellant that the testimony would have been proper as a part of the res gestae. There is much conflict and confusion in the cases as to the rules governing the admissibility of statements as a part of the res gestae, and, aside from the question of the admissibility of the testimony on cross-examination, it is not apparent how the trial court could determine whether the answers, if given, would come within the rules pertaining to statements claimed to be a part of the res gestae. It is not shown what the witness would have said in response to the questions. Therefore prejudicial effect of the refusal to allow counsel to propound the questions is not apparent. See Baldwin v. State, 119 Ark. 518, 178 S. W. 409. That the question was asked on cross-examination makes no difference, in this case.

"While the right of cross-examination, thorough and sifting, should not be abridged, nevertheless, even upon cross-examination, where an answer to a question propounded to a witness is refused by the court, and such refusal is assigned as error, it must appear that counsel, on the trial, stated to the court, either what he expected to prove, or (if that is impracticable or impossible) what he desired to prove, by the answer to such rejected question. Upon failure of such statement to the trial court, this court cannot review the alleged error." Jackson v. State, 1 Ga. App. 723, 58 S. E. 272 (syllabus 2).

(c) In an examination of the same witness, on cross-

examination, the defendant propounded the following question:

"Q. Well, if he (referring to the defendant) was mad at you, did you or not know it?"

The district attorney objected for the reason that it called for a conclusion of the witness, stating that the witness could testify as to what he saw or took place, but not as to what was in the mind or heart of any one else. Immediately prior to this, the following question and answer appears in the record:

"Q. On this morning after breakfast as you have testified to, was there any words or difficulty of any kind between you and your father on that morning? A. No, sir."

We find no error in the ruling of the court sustaining the objection.

(d) In the examination of Dr. A. F. Brown, a witness introduced on behalf of defendant, the defendant propounded the following question:

"Q. If the shot that caused the wound (referring to the wound upon the jaw of the defendant, Isaac Martin) was fired at a close range from a 32 automatic—was fired at close range and the impact of the bullet on the jaw or chin as described by you—what effect would that have had on Martin as to shock or otherwise?"

The district attorney objected for the reason that it was immaterial and incompetent at that time, and that it was not admissible for any purpose at that stage of the trial. Later, and after the defendant had testified, the same Dr. Brown was recalled as a witness for the defendant. After repeated questions sought to elicit an expert opinion from the witness as to the effect of a wound such as the defendant was said to have received, some of which questions were excluded, the following questions were asked and objection overruled:

"Q. In the experience that you have had that you have detailed to the jury, and the wound that you have described, taking it altogether, in your opinion, do you know the probable effect of that kind of a wound on a person?

A. No, sir; I don't know what effect it would have—no; I could not say.

"Q. You don't know the probable efect on any person? A. It would depend upon the temperament, his nervous temperament.

"Q. What effect would it have on a person of the ordinary or usual temperament? A. I am not expert enough to answer that, I don't believe. I couldn't say."

In view of the answers of the witness, we are unable to see how the refusal to permit him to express an opinion concerning the same matter at an earlier stage of the trial would be prejudicial to the defendant.

(e) In the examination of the defendant, the following question was asked by his counsel:

"Q. Is there any mark under your jaw there that was caused on account of that bullet?"

The district attorney objected as follows:

"Objected to for the reason that any mark would not be admissable; in fact, the question of the demonstration is not admissible. It was excluded from the jury from other witnesses by objection of counsel for the defense, and this does not go to explain anything to the jury.

"The Court: Objections sustained. You can prove about the wound, but I sustain the objection as to the demonstration of the defendant."

It is not clear how the question called for an exhibition of the wound to the jury, but apparently it was such exhibition that was objected to and excluded. In view of the fact that the record shows that the wound was fully described by the witnesses we fail to see how an exhibition of it five months after it was received would enlighten the jury substantially or how its exclusion was prejudicial.

(f) In the examination of Dr. W. M. Lancaster, a witness on behalf of the state, on rebuttal, the district attorney asked the following question:

"Q. From the experience that you have had as a general practioner, in addition to the other experience you have related, you may state if, in your opinion, that a man was wounded by the bullet from a 32 automatic at close range, the ball entering about the center of the chin, coming out at the angle of the jawbone, whether or not he would

know, (the party so wounded), what he was doing if he stood and shot a gun like this revolver four or five shots."

This was objected to by the attorney for defendant for the reason that the witness had not stated that from the experience that he had had, he would know the probable effect of such wound. The court overruled the objection. The witness answered:

"A. He would."

Immediately prior to giving this testimony, the witness had stated that he had observed and had experience with the effect that the shot produces upon the mentality of a wounded man. Appellant says, in his brief, that he sees no objection to the question, but that the answers should not have been received, because, as he claims, the court had excluded similar testimony offered by defendant to be elicited from Dr. Brassell, a witness on behalf of defendant. It is to be noted from the testimony, however, that Dr. Brassell was not able to testify as to the probable effect of the injury to the defendant, as appears by the following questions and answers:

"Q. Dr. Brassell, you think you would know the probable effect of such a shot on a person? A. In my opinion, they might vary.

"Q. And would vary as to the temperament of the person, would they not, Doctor?

"District Attorney: Objected to for the reason that it is leading and suggestive.

"The Court: Objection overruled.

"A. Yes, sir.

"Q. Then the average or ordinary person, do you think you would know the effect that would have on the ordinary or average person, the probable effect; I think you can answer that question yes or no; that is, if you think you would know the probable effect on the average or ordinary person of such a wound as you have described? A. Judge, I had considerable—

"The Court: Answer if you can, yes or no. He is asking if you know the probable effect.

"A. No."

We see no error in the court's admitting the testimony of Dr. Lancaster complained of.

[8] Defendant complains of remarks made by the district attorney, in the course of his argument, as follows:

"It is the first time I ever saw a witness come into a courtroom and be sworn, and then not go on the stand and corroborate the testimony of the defendant, and yet the record shows that she was on the scene, * * * and I will tell you why the state of New Mexico did not call her. It was because the state of New Mexico was up against the same adversity with her, * * * as with the two little boys. The testimony of Aaron Martin was to the effect, * * * but Aaron Martin told you where he had been making his home prior and subsequent to the time he received those wounds, with the exception of the time he was in the hospital or under the treatment of a doctor. Is it not natural, then, to presume why the state of New Mexico did not go and get any more witnesses than would be necessary to prove the allegations in the indictment?"

These remarks had reference to the defendant's mother who was sworn as a witness in this case and put under the rule and was in attendance upon the trial as such witness, but who was not called to testify by either the state or the defense.

Defendant argues that it was prejudicial error for the court to refuse to restrain the district attorney and admonish the jury that they were not to consider such argument. He cites 2 R. C. L. 429, as follows:

"The authorities are not in accord as to the propriety of comment on the failure of a defendant in a criminal prosecution to call certain witnesses in his behalf. It has been declared that, in exercising the right of summing up evidence, it is not proper for counsel for the prosecution to comment on the absence of witnesses for the defense. This rule is especially strong where the witnesses are equally available to both parties."

The author cites Bennett v. State, 86 Ga. 401, 12 S. E. 806, 12 L. R. A. 449, 22 Am. St. Rep. 465, and note, in support of the text. The basis of the decision in that case was the proposition that the character of a party accused of crime is presumed to be good until the contrary is proved, and that it was not proper to allow

counsel for the prosecution to argue against objection that want of testimony as to the character of the accused authorizes the jury to infer that his character was bad. While the authorities are in conflict, the general rule seems to be that it is not allowable for the prosecuting attorney to refer in his argument to the defendant's failure to produce evidence of his character, since he is presumed to have a good character. It is so stated in the note to Brown v. State (98 Miss. 786, 54 So. 305) 34 L. R. A. (N. S.) p. 811, another case cited in support of the above text and also relied upon by appellant. The foregoing statement by the note writer is in contrast, however, to the further statement in the same note to the effect that it is generally held that it is not, ordinarily, error for the prosecuting attorney to comment upon the failure of the defendant to produce witnesses to testify. The note cites a large number of cases in support of this latter statement, one illustration being as follows:

> "The court, in McGuire v. State, 2 Ohio C. D. 318, said: 'The question thus presented is this: Whether in a criminal case, where it appears that at the time of the alleged commission of the criminal act, a person jointly charged therewith was present, and might have been called by the defendant as a witness, and was not, this is a circumstance which may be referred to in argument or be considered by the jury. On this point the authorities differ. We think the rule as stated in Abbott's Trial Brief, 152, is reasonable and correct; viz., "The mere omission to call a competent and available witness who has some knowledge of the transactions, which, if the claim of the party omitting is correct, would be favorable, and who is not adversely interested or biased, is a circumstance which the jury may consider." See cases there cited. If this be so, it would seem, also, to be a legitimate subject of argument to the jury. Of course, if both sides refuse to call such witness, it might fairly be urged by either of the parties, and the weight to be given to it would depend upon the circumstances of each particular case, and largely upon the position which the witness occupies to each of the parties; for, if adverse in interest to one of them, such party would hardly be expected to call such witness."

It is worthy of note that the Georgia Supreme Court, discussing argument of counsel in a case not involving the character of the defendant, 15 years after the de-

cision in Bennett v. State, supra, in Morgan v. State, 124 Ga. 442, 52 S. E. 748, decided:

"The absence of a witness who is competent and cognizant of material and relevant facts is a proper subject of comment in the argument of counsel before the jury; and it is error for the court to give an instruction which entirely eliminates from the jury's deliberation the effect of such argument."

The court also remarked:

"In the argument of cases, counsel should be allowed considerable latitude of speech; and, so long as extraneous facts are not injected or improper language used, the trial judge should not interfere. The premises of the advocate should be founded upon some fact or group of facts brought to light upon the investigation; his conclusions, however absurd or illogical, goes to the jury as the result of his reasoning, and not as a statement of fact. The defendant's counsel insisted before the jury that the absence of the wounded man was a circumstance persuasive of the conclusion that, had he been present at the trial, he would have sustained the defendant's plea of self-defense. In anticipation of this argument, the solicitor had urged that no such inference could be drawn from the injured man's failure to appear to prosecute or testify. These conflicting deductions from the circumstance of his absence were peculiarly within the jury's domain and exclusively for their solution. 'It is customary to permit attorneys to comment upon the absence of witnesses, or their nonproduction, when they are shown to be cognizant of the facts in issue. It is a mere matter of argument and may be discussed by either side, trusting to the good sense of the jury to properly estimate the value of such arguments.' Chicago R. Co. v. Krayenbuhl [170 Neb. 766] 98 N. W. 44."

The attorneys for appellant have shown great zeal and industry in the briefs and arguments presented in behalf of appellant, but, from all the foregoing, it appears to us that there is no error in the record and that the judgment of the trial court must be affirmed, and it is so ordered.

PARKER, C. J., and WATSON, J., concur.

[No. 3051. Oct. 28, 1926.]

SOUTHWESTERN PORTLAND CEMENT CO. v. WILLIAMS et al.

[251 Pac. 380.]

SYLLABUS BY THE COURT

1. A bond to the state, conditioned for the performance by a highway contractor of the obligations of his contract, one of which obligations is to pay for materials used, may be sued on by a materialman, though the same bond indemnifies the state, and though no statute authorizes exacting such a contract or bond.

2. The liability of a professional paid surety is not construed strictissimi juris.

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

Action by the Southwestern Portland Cement Company against H. E. Williams and another. From a judgment for plaintiff, defendant Southern Surety Company appeals. Affirmed and remanded, with directions.

Francis C. Wilson, of Santa Fe, for appellant.

E. R. Wright, of Santa Fe, for appellee.

OPINION OF THE COURT

WATSON, J. [1] This appeal is from a judgment for the Southwestern Portland Cement Company, which had furnished materials to the contractor, used in the construction of a public highway known as federal aid project No. 82, against Southern Surety Company, surety on the contractor's bond, and against the contractor himself; the latter not appealing. In the specifications for the work appeared the following:

"The action of the engineer, by which the contractor is to be bound and concluded according to the terms of the contract, shall be evidenced by the final estimate, all prior estimates upon which 85 per centum payments may have been made, being merely partial estimates and subject to

[1] 29CJ p. 612 n. 49, 58, 65. [2] 32 Cyc p. 307 n. 92, 93. [3] 29CJ p. 611 n. 37, 40 New.

corrections in such final estimate. The engineer, when satisfied that the contractor shall have completed the work in accordance with the terms of his contract, shall certify the final estimate for payment. No money under this contract, or any part thereof, shall become due and payable, if the engineer so elects, until the contractor shall satisfy him that he has fully settled and paid for all materials used for all work and labor done in connection therewith, and the engineer, if he so elects, may pay any or all labor and material bills, wholly or in part, and deduct the amount paid from any monthly or final estimates. It is an essential part of this contract and bond furnished in connection therewith that the contractor is obligated to pay in full all just claims for labor, material, and supplies furnished for the construction and completion of this contract."

The contract provided that the specifications "are made a part of this contract and accepted as such." The bond, after reciting the execution of the contract, was conditioned thus:

"Now, therefore, the conditions of the foregoing obligation are such that, if the said principals shall well and truly perform all obligations under said contract, a copy of which is hereto attached and made a part of this obligation, and shall indemnify and save harmless the state of New Mexico against any damage or loss for which said state may become liable by the default of said principals, or by reason of any negligence or carelessness on the part of said principals, their agents, servants, or employes, or on account of any act or omission of said principals, their agents, or servants, in the performance of this contract, then these presents shall become void; otherwise, they shall remain in full force and effect."

It seems plain that one of the obligations assumed by the contractor was to pay all just claims for labor, material and supplies, and that the bond was conditioned upon his doing so. Some point is made that there is no express "promise" to make such payments, either in the contract or in the bond. It is true that the matter is not expressed in that language. The purpose of a contract is to define the rights and obligations of the parties. It cannot be material whether the draftsman or the parties choose the form of expression, "the party of the second part promises" to do so and so, or the expression that he "is obligated" to do so and so. The signing of the contract admitted the obligation. The clause in question is not a mere recital of an obligation

existing outside the contract. It created the obligation. The bond follows the form of expression used in the contract. It is to remain in full force and effect until the "obligations" of the contract shall have been well and truly performed. One of those "obligations" is to pay all just claims for labor, material, and supplies. That obligation of the contract and condition of the bond has not been performed. So, under the terms of the bond, the surety's liability has not been discharged.

It being plain that there has been a default in the contract, for which there is a liability on the part of the surety, it remains to determine whether the default is in respect to a duty owing to the appellee, and whether the liability of the surety therefor is to the appellee.

It was the rule at common law that suits might be had only by those who were parties to the contract, or by their successors in interest. Appellant does not, however, contend that such is the modern rule. It admits that in certain cases a third party, not named in the contract, and from whom the consideration did not move, but for whose direct and substantial benefit the contract was made, may sue to enforce the same, or for a breach thereof. It urges, however, that this case does not come within the modern rule.

The first and, as we conceive, the most important question, is the intent of the parties. Was the stipulation of the specifications, incorporated by reference in the contract, and thereafter in the bond, intended for the direct and substantial benefit of laborers and materialmen? This question involves the construction of the contract, which, of course, is to be interpreted in the light of the legal relations in which the parties stood to each other, under the circumstances in which they dealt.

It is first to be observed that no then existing statute, required the state highway commission, by bond, or otherwise, to obtain for, or afford to, laborers and materialmen any protection for, or aid in, collecting their claims against the contractor. Laws 1923, c. 136,

"relating to bonds of contractors upon public works," was subsequently passed, and is not involved here. It is also to be observed, as one of the circumstances surrounding the transaction, that the lien laws do not apply to public property, and that, unless the state highway commission, by sufficient contract provision, secured payment of the claims of laborers and materialmen, they could look only to the contractor himself; having no recourse against the state or its property.

It is apparent, therefore, that it was entirely immaterial to the state, considered as a party contracting in a business, rather than a political, capacity, whether the contractor paid for the labor and material. The mere fact that he furnished them, and by means of them was able to construct the highway, gave to the state every advantage it sought or required so far as concerned its own property and funds. In that respect, it lost nothing if the contractor failed to pay; it gained nothing if he did pay. Regardless of this lack of pecuniary interest, the state, acting through the highway commission, was at pains to stipulate as "an essential part of this contract" that the contractor should pay all such claims. It requires no argument to demonstrate that the appellee, and others similarly situated —prospective laborers and furnishers of material and supplies—would have a direct and substantial interest in such a provision. A provision so emphatically made must have been for the benefit of some one. If it could not directly benefit the state, and must directly benefit laborers and materialmen and no one else, the conclusion seems irresistible that it was incorporated in the contract for their benefit.

The event justifies the foregoing argument. The bond is still in effect, because there has been no performance of the condition of its becoming void. The obligee, the state, has suffered no damage by reason of the default which keeps the bond alive. It has no right of action. Under the terms of the bond, appellant is held and firmly bound to the state in a large sum, yet the state has no claim against it. If appellee,

and others similarly situated, may not recover, there can be no recovery. It discredits the good sense of the parties to suppose that they contracted for such an eventuality.

It is true that the contract contemplated another form of protection to laborers and materialmen. No money was to be due or payable under the contract, if the engineer should so elect, until satisfied by the contractor that all labor and materials had been paid for; and the engineer might, if he so elected, pay all such bills and deduct them from any monthly or final estimate. It is perhaps true that if the engineer had seen fit to make himself a collection agency, this provision alone would have afforded adequate protection to laborers and materialmen. But it does not, in our opinion, weaken, but rather serves to strengthen, the view that the provision was primarily intended for the benefit and protection of appellee and those similarly situated. The state highway commission did not agree, in favor of the surety, to make such payments and deductions. It merely reserved the right to do so, generally, or in a particular instance; the main reliance being on the bond.

We think, therefore, that, considering the contract in the light of circumstances of law and fact, a clear intent appears to create an obligation for the direct and substantial benefit of a class in which the appellee is included. As supporting these views, we may cite La Crosse Lumber Co. v. Schwartz, 163 Mo. App. 659, 147 S. W. 501; Knapp v. Swaney, 56 Mich. 345, 23 N. W. 162, 56 Am. Rep. 397; Lyman v. City of Lincoln, 38 Neb. 794, 57 N. W. 531; King v. Downey, 24 Ind. App. 262, 56 N. E. 680; Baker v. Bryan, 64 Iowa 561, 21 N. W. 83; Road Supply & Metal Co. v. Kansas Cas. & Surety Co. (Kan.) 246 P. 503; Mosher Mfg. Co. v. Equitable Surety Co. (Tex. Com. App.) 229 S. W. 318; Snider v. Greer-Wilkinson Lbr. Co., 51 Ind. App. 348, 96 N. E. 960; Royal Indemnity Co. v. Northern Granite & Stone Co., 100 Ohio St. 373, 126 N. E. 405, 12 A. L. R. 378.

Statutes have been passed requiring the giving of bonds for the protection of laborers and materialmen in contracts for public works. Courts have readily perceived the purpose of such statutes to afford, by bond, the protection, in public contracts, which lien laws give in private contracts. United States, to use of Hill, v. American Surety Co., 200 U. S. 203, 26 S. Ct. 168, 50 L. Ed. 437; U. S. F. & G. Co. v. United States, 191 U. S. 416, 24 S. Ct 142, 48 L. Ed. 242; United States v. Ansonia Brass & Copper Co., 218 U. S. 452, 31 S. Ct. 49, 54 L. Ed. 1107; United States v. National Surety Co., 92 F. 549, 34 C. C. A. 526. It is impossible to disguise the same purpose in the contract and bond in question. Mosher Mfg. Co. v. Equitable Surety Co., supra.

Of course, the surety is bound only by his agreement. If the condition of the bond, construed with the contract, does not fairly cover payment for labor and materials, the surety cannot be held. So, in a public works contract, if the contractor agrees merely to furnish the material and do the work, and the bond is conditioned merely for performance of the contract, there is no liability on the part of the surety to laborers or materialmen, even though the officials responsible for making the contract failed to observe a statute providing that such a bond should be exacted. Such was the situation in United States v. Stewart (C. C. A.) 288 F. 187; Babcock & Wilcox v. American Surety Co. (C. C. A.) 236 F. 340; United States v. Montgomery Heating & Ventilating Co. et al. (C. C. A.) 255 F. 683. Among other cases cited by appellant, distinguishable because the intent was not fairly to be found in the contract, are Village of Argle v. Plunkett, 226 N. Y. 306, 124 N. E. 1; Electric Appliance Co. v. U. S. F. & G. Co., 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609; Builders' Material & Supply Co. v. Evans Construction Co., 204 Mo. App. 76, 221 S. W. 142; Eau Clarie-St. Louis Lbr. Co. v. Banks, 136 Mo. App. 44, 117 S. W. 611; Coffeyville Brick & Tile Co. v. Dudley Construc-

tion Co., 108 Kan. 21, 194 P. 316; State Board of Agriculture v. Dimick, 46 Colo. 609, 105 P. 1114; Montgomery v. Rief, 15 Utah 495, 50 P. 623; Scharbauer v. Lampasas County (Tex. Civ. App.) 214 S. W. 468; Hunter v. City of Boston, 218 Mass. 535, 106 N. E. 145.

Some courts, in holding that such a provision as we are dealing with here was really for the benefit of the public, rather than for laborers and materialmen, have suggested that the latter will do more efficient work and furnish better materials if the credit of the contractor is assured and they have no doubt as to the payment of their claims. Among such cases are City of Lancaster v. Frescoln et al., 203 Pa. 640, 53 A. 508; City of Erie v. Diefendorf, 278 Pa. 31, 122 A. 159. But when once the courts have held that such a provision really affords no protection, the supposed advantage to the state is, of course, immediately lost. Moreover, any such advantage to the state is merely indirect and uncertain; while advantage to laborers and materialmen is direct and definite.

It has also been suggested that, where there is but one bond claimed to serve the double purpose of indemnifying the public against loss, and of guaranteeing payment of laborers and materialmen, the claims of the latter might exhaust the penalty of the bond; leaving the state without indemnity. So it is suggested the state cannot be presumed to have stipulated, or to have intended to stipulate, contrary to its own interest. City of Lancaster v. Frescoln, supra; Fosmire v. National Surety Co., 229 N. Y. 44, 127 N. E. 472.

While this is a matter for serious consideration by the responsible officials in fixing the penalty of the bond, we do not consider it particularly important in arriving at the intent of the parties. The question will be noticed again when we come to consider the power of the board to exact such a bond.

Time does not suffice to point out all of the distinguishing features of cited cases. However, we mention some cases decided on the ground that the contract or

bond, or both, were drafted on the mistaken theory that a lien could be had against public property, and in terms provided for indemnifying the public against liens or claims. Electric Appliance Co. v. U. S. F. & G. Co., supra; Builders' Material & Supply Co. v. Evans Construction Co., supra; Eau Claire-St. Louis Lbr. Co. v. Banks, supra; Coffeyville Brick & Tile Co. v. Dudley Construction Co., supra; Lion Bonding & Surety Co. v. Trussed Concrete Steel Co. (Tex. Civ. App.) 204 S. W. 1176; Eureka Stone Co. v. Church, 86 Ark 212, 110 S. W. 1042.

There are decisions opposed to the conclusion we reach on the question of intent. Board of Education v. Bass. Bonding & Ins. Co., 252 Pa. 505, 97A. 688; Parker v. Jeffery, 26 Or. 186, 37 P. 712; Brower & Thompson Lbr. Co. v. Miller, 28 Or. 565, 43 P. 659, 52 Am. St. Rep. 807; Searles v. City of Flora, 225 Ill. 167, 80 N. E. 98; Skillman v. U. S. F. & G. Co (N. J. Err. & App.) 130 A. 564. The decision of the New York Supreme Court, in Eastern Steel Co. v. Globe Indemnity Co., quoted and followed in Sturtevant Co. v. F. & D. Co. of Maryland (C. C. A.) 285 F. 367, seems to have been put squarely on the question of intent. It was affirmed, without opinion (Sup.) 172 N. Y. S. 888. The appellate division, in passing on a motion for appeal to the Court of Appeals (Sup.) 174 N. Y. S. 98, placed its approval of the decision on lack of privity—a different question. These cases do not persuade us to yield our views, and the authorities as a whole seem to support us in them.

[2] In a number of cases supporting appellant's contention, as well as in many of those which have seemed to us distinguishable in their facts, the principle has been invoked that the liability of a surety is strictissimi juris. This principle has seemed to result in an interpretation of the contract doing violence to the apparent intention of the parties. Appellee contends, and we agree, that the principle that a surety is a favorite of the law has no proper application in the case of a company organized for the express purpose of

acting as surety for compensation. Hill v. American Surety Co., supra; Royal Indemnity Co. v. Northern Granite & Stone Co., supra. In a note to the latter case, 12 A. L. R. 382, it is said that this is well settled except in one jurisdiction, and that the contract is regarded as more in the nature of insurance, and to be governed by the rules of construction applicable to insurance policies.

Appellant further contends that, if it be conceded that the state highway commission intended to stipulate, primarily and directly for the benefit of laborers and materialmen, it was, in the absence of an enabling statute, without power to do so. It is pointed out that the only statutory requirement regarding a bond is Laws 1917, c. 38, § 9, which requires that—

> "The successful bidder shall be required to furnish satisfactory bond, in such amount as may be determined by the state highway commission."

Here it is urged that the possibility of exhaustion of the penalty of the bond in responding to the claims of laborers and materialmen is conclusive; that the statute contemplates indemnity for the state, and makes it the duty of the board to obtain it; and that a further condition of the bond, calculated to defeat the legislative purpose, is not only beyond the power of the board, but in violation of its duty. Support is lent to this contention by Fosmire v. National Surety Co., supra, and by Buffalo Cement Co. v. McNaughton, 90 Hun, Hun, 74, 35 N. Y. S. 453. Lancaster v. Frescoln, supra, is also cited to this proposition. In considering the latter case, it is to be noted that the ordinances of the city of Lancaster avoided the complication feared, by providing for separate bonds, one for the indemnity of the city, and the other as security for laborers and materialmen. The authorities took but one, claimed to be designed for both purposes.

There is, unquestionably, force to the contention here made. In theory it is somewhat persuasive. Yet we think that the apprehended danger may be easily

exaggerated. As a matter of legislative policy, it is, no doubt, wise to provide, as the city of Lancaster did, for two separate bonds; or, as the federal statute does (Ill. Surety Co. v. United States, 240 U. S. 35, 36 S. Ct. 321, 60 L. Ed. 609), for priority of the government's claim. Yet it is manifest that ordinary prudence, exercised by the responsible officials in fixing the penalty of the bond, and in supervising the work, may easily avoid any loss, either to the public or to laborers and materialmen.

Appellant's able counsel also urges broadly that the powers of public corporations, created by the Legislature, are limited by the express provisions and necessary implications of statutes; and that the power in question, not being so referable, is not possessed. There is authority supporting, or tending to support, this contention. Constable v. National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. Ed. 903, may be so construed. We think, however, that the great weight of authority is to the contrary.

Perhaps the leading case is Knapp v. Swaney, supra, where it was said by Judge Cooley:

"The purpose of the stipulation is very manifest. It is that a contract the county has made shall not be the means of mischief to those who, though not contractors with the county, may perform labor or furnish materials in reliance upon the moneys to be paid under it. It would seem that to prevent such mischief was a proper object to be had in view by any public board when entering into a public contract. It would seem that there was a moral obligation in the case which the board might well recognize even though not compellable to do so. And individuals clothed with public functions, even when constituting a corporation, are no more excused from moral obligations than when acting in a private capacity.

"A corporation when constructing a public building or other public work is chargeable with moral duty, as an individual would be, to see that it is so constructed that people may not be injured in coming near to or making use of it in a proper manner. In some cases they may not be legally responsible for failure to perform this duty; but, where the moral obligation exists, it cannot be said that any provision for its performance, not improper in itself, is ultra vires. A county may go to great pains and great expense to make its courthouse unquestionably safe, that

individual citizens may not suffer injuries consequent upon its construction; but, if it may do this, it would be very strange if it were found lacking in authority to stipulate, in the contract for the building, that the contractors, when calling for payment, shall show that they are performing their obligations to those who supply the labor and materials, and that the county is not obtaining the building at the expense of a few of its people. We cannot think such is the case."

Similar views are expressed in St. Louis Public Schools v. Woods, 77 Mo. 197. We are in accord with the reasoning of these cases. They have been widely cited and followed, and have been approved by the great majority of the courts. See case note, 11 L. R. A. (N. S.) 1028; case note, 172 Ind. 97, 87 N. E. 976, 27 L. R. A. (N. S.) 573, subdivision VII, p. 581; case note, 18 A. L. R. 1227.

The right of appellee to sue upon this bond is challenged upon a further ground. It is said that it is not every stranger to a contract who may sue upon it, even though it may have been directly and primarily for his benefit; but that there must be a privity arising out of a duty or obligation of the promisee to the third person. Such is, unquestionably, one view of the law. 2 Elliott on Contracts, § 1413. This point is not argued philosophically. Counsel contents himself with citing authority. Our reading has not informed us of the reason for so restricting the right. Some courts have laid it down and have continued in adherence to it. Those courts not recognizing it have usually ignored it. Among the influences which have produced the modern American doctrine of the right of the intended beneficiary to enforce the contract, Elliott (Contracts, vol. 2, §§ 1411, 1412) mentions the abolishment of forms of action; that courts here have never been so completely dominated as in England by the common-law theories of action; the adoption of statutes recognizing the doctrine to a greater or less extent; and the provision of the Codes that actions are to be prosecuted in the name of the real party in interest. The common-law doctrine is not followed in New Mexico. Mer-

chants' National Bank v. Otero, 24 N. M. 598, 175 P. 781.

We do not think it incumbent on us to consider whether in any case it lies in the mouth of one, who, for a consideration, has promised a benefit to a third person, to question whether the promisee, from whom the consideration moved, was actuated by duty or by mere benevolence; or, if by duty, whether it was legal or moral. We are satisfied that, by weight of authority, the moral obligation of the state, or its agencies, to make provision for payment for the labor and materials of which it receives the benefit, is sufficient to satisfy the requirements of privity. 2 Dillon's Munic. Corp. (5th Ed.) § 820. Nor have we any answer to the reasoning of Macfarlane, J., in the leading case of St. Louis v. Von Phul, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695. He said:

"It is the policy of the law in this state to give security and protection to those who expend labor or supply material in making improvements for the benefit of private persons. This is done by securing to them by express law a lien upon the improvements upon which the labor was done and in which the materials were used. The right to such security does not depend upon the character of the contract between the owner and contractor, under which the improvements were made.

"That these lien laws are founded upon principles of equity and right cannot be questioned. The principle is that the labor expended and the material employed create the improvements, and the one benefited thereby should see that compensation therefor is made.

"Through considerations of public policy, the law has made no provision, by lien, or otherwise, for the protection of the laborers, and materialmen for labor employed or material used in improving the public streets. But it cannot be denied that the same equity exists, and that the same moral obligation rests upon the city to protect those who improve its streets as rest upon those making private improvements. 'Individuals clothed with public functions, even when constituting a corporation, are no more excused from moral obligations than when acting in a private capacity.' Knapp v. Swaney, 56 Mich. 350 [23 N. W. 162] 56 Am. St. Rep. 397."

A recent case supporting this view is Roads Supply & Metal Co. v. Kansas Cas. & Surety Co., supra. As

remarked before, the particular question has not been frequently raised. It is necessarily involved, however, in the innumerable decisions which, after construing the contract and bond, and finding them to have been intended for the benefit of laborers and materialmen, have permitted recovery. A number of eminent courts have gone the other way—notably New York, Pennsylvania, and Oregon—in decisions hereinbefore cited. But we are not convinced by anything therein suggested.

Having considered all that has been urged against the judgment, and finding no error, it will be affirmed, and the cause remanded, with direction to enforce it, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2992. Nov. 10, 1926.]

STATE v. APODACA.

[251 Pac. 389.]

SYLLABUS BY THE COURT

The fact that a slot machine always pays the player the value of his money in chewing gum does not exclude it from the operation of the anti-gambling law. Chapter 86, Laws 1921.

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

Alvino Apodoca was convicted of playing a game of chance with a slot machine, and he appeals. Affirmed and remanded, with directions.

Herron & Posey, of Las Cruces, and Croom, Goldstein & Croom, of El Paso, Tex., for appellant.

John W. Armstrong, Atty. Gen., and James N. Bujac, Asst. Atty. Gen., for the State.

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[1] 27CJ p. 989 n. 66, 67.

OPINION OF THE COURT

WATSON, J. Appellant was convicted under section 1, c. 86, Laws of 1921, which reads as follows:

"It shall hereafter be unlawful to play at, run or operate any game or 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."

The particular charge is that he unlawfully played a game of chance with a slot machine. By stipulation, the slot machine in question is described as follows:

"Every time you put a nickel in the slot machine the indicator shows exactly what you get with the nickel, in the way of chips as well as gum. Each time you put in a nickel you get gum, and each time the indicator will show the number of additional chips you get with the particular nickel you put in, and if you deposit chips in the machine you may get additional chips if the indicator so shows, but do not get gum; the indicator at all times showing what you get whether playing a chip or money, each chip having a purchasing power of five cents at the place only where the slot machine is operated."

Appellant first contends that this case involves different principles, and is not controlled by Territory v. Jones, 14 N. M. 579, 99 P. 388, 20 L. R. A. (N. S.) 239, 21 Ann. Cas. 128. This may be conceded.

Appellant also urges upon us a large number of definitions of gambling or gaming, contending that the game in question is outside of such definitions. We do not admit this, but think it unnecessary to consider them in detail. The comprehensive character of the present gambling law of this state is remarked upon in Grafe v. Delgado, 30 N. M. 150, 228 P. 601. We do not think that this case is to be decided by a comparison of the game played with abstract definitions, or with definitions framed to meet particular states of fact.

The appellant contends that the player operating the machine in question is not engaged in a game of

chance, because, while he enjoys the possibility of winning, there is no chance of loss, since, for each nickel deposited, he is sure to obtain value in chewing gum. He argues, further, that while in the particular transaction the proprietor risks the loss of checks having a value in trade, such checks are only given to stimulate business and are no part of the transaction between the owner of the machine and the player. These contentions are presented with like ingenuity as has been devoted to the invention of devices to avoid the spirit of the anti-gambling laws. It would be profitless to follow appellant's reasoning. It seems clear to us, from every standpoint, that we are here dealing with a game of chance, the playing at which is prohibited by the statute. Every argument advanced by appellant finds answer in the cases cited by the state. Salt Lake City v. Doran, 42 Utah, 401, 131 P. 636; People ex rel. Verehereau v. Jenkins, 153 App. Div. 512, 138 N. Y. S. 449; City of Moberly v. Deskin, 169 Mo. App. 672, 155 S. W. 842; State v. McTeer, 129 Tenn. 535, 167 S. W. 121. We approve the reasoning of these able courts. See, generally, case note, "Operation of Slot Machine as Gambling," 20 L. R. A. (N. S.) 239, where the author says:

> "Although, on account of the difference in the statutes involved, the question is variously presented in the following decisions, the generally prevailing opinion seems to be that the operation of slot machines will be considered as gambling, or as coming within the inhibitions of statutes against lotteries or gambling, where the return to the player is dependent upon an element of chance, and this even though he is assured of his money's worth of some commodity, and hence cannot lose."

Finding no error in the record affecting this judgment, it will be affirmed and the cause remanded, with direction to enforce it; and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3033. Nov. 10, 1926. Rehearing Denied Dec. 1, 1926.]

STATE v. RILEY et al.

[251 Pac. 384.]

SYLLABUS BY THE COURT

1. There is substantial evidence in the record to support the verdict, and under the uniform holding of this court it will not be set aside.

2. It was not error to refuse an instruction that, although the jury believed that the defendants committed a burglary, yet they must also believe that the defendants committed larceny in the dwelling so burglarized before they could be convicted of the crime of larceny charged in the indictment, the court having fully charged as to the elements of the crime of larceny.

3. It was not error to strike the testimony of an impeaching witness, where the testimony was not the same as was anticipated in the foundation for impeachment.

4. The admission of evidence cannot be challenged on appeal for reasons not stated to the trial court at the time the objection was made.

5. Where two or more crimes are committed, at or about the same time, the whole transaction may be proven, even though the tendency is to prove a crime other than the one charged.

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

Birdy Riley and Ibb Howell were convicted of larceny, and they appeal. Affirmed.

Geo. W. Prichard, of Santa Fé, and T. M. Noble, of Fort Sumner, for appellants.

John W. Armstrong, Atty. Gen., and James N. Bujac, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

BICKLEY, J. [1] Appellants Birdy Riley and Ibb Howell were convicted of larceny of goods and chattels belonging to J. L. Mayfield. Mr. Mayfield and his

[1] 16CJ p. 924 n. 36; 17CJ p. 255 n. 55; 36CJ p. 899 n. 34. [2] 16CJ p. 1063 n. 85. [3] 40Cyc p. 2740 n. 23. [4] 17CJ p. 70 n. 43. [5] 16CJ p. 574 n. 56.

wife, on Sunday afternoon at about 2:30 o'clock, left their dwelling house, situated about four miles from Duero in De Baca County. They, driving a Ford truck, had gone a short distance from home, when they saw the defendants traveling slowly on horseback off the road near the Mayfield house. The defendants apparently sighted the Mayfields, and all at once went into a fast gallop. At a point where the Mayfields could last see the defendants they were about 150 yards from the house and on a hill, and they stopped and watched the Mayfields as they (the Mayfields) continued on their way in the truck; then the defendants dropped out of sight over the hill. The Mayfields drove on to Duero, and returned to their home about 6 o'clock the same afternoon. Upon their return home they observed that a chain and lock which had been used to secure the door of the house were out of place, and the lock had been broken. Entering the house, they found that it had been ransacked, and clothing and other property to the value of about $350 had been stolen. The sheriff was notified, and the following day, with the assistance of several other men, he examined the premises. Horse tracks and human tracks were found in the dooryard. Some of the human tracks—boot tracks—led up to the door of the Mayfield dwelling house. There were the tracks of two horses. These tracks had certain peculiarities which rendered the trailing of the horses as they left the premises efficient. The sheriff and his assistants followed the horses' trail away from the Mayfield house, and about a quarter of a mile therefrom found a lariat rope. Following the trail further they came to a dugout, where the horsemen had dismounted. Apparently they did not stay there very long, but the tracks were visible. A number of human tracks were seen in the dugout and on top of it. They then followed the trail further. The sheriff saw the defendants the same day at defendant Howell's home. He talked with the two defendants. Riley said the horse he had ridden was on that place, and Howell said the one he had ridden was on Riley's place. The sheriff found the horse Riley had ridden. The tracks

made by this horse were the same as those made in the yard of the Mayfield house and at the dugout. The boot tracks found near this horse's tracks were the same size and formation as those found in the dooryard at the Mayfields and along the trail leading therefrom. The sheriff asked Howell where his catch rope (lariat) was, and Howell answered: "I haven't had one for a week." It thus appears that the identification of the defendants as being the persons seen by the Mayfields in the close proximity to their home is strongly corroborated. As against this, the defendants sought to establish an alibi by the testimony of the defendant Howell and other witnesses. One of these witnesses admitted that he had pleaded guilty to the commission of a crime, and was not sure whether it was a misdemeanor or a felony, and against another witness called to aid the alibi impeaching evidence was introduced. The defendant Howell said that he and Riley were looking for stock, but did not go nearer than four miles to the Mayfield place, and said that Riley had a rope, but he did not have any. It is suggested that the rope found along the trail heretofore described belonged to Howell, and that the circumstance of the finding of the rope, coupled with the statement that this defendant was out gathering stock without a lariat, and other circumstances connected therewith, was a circumstance impeaching the alibi. The alibi was weak. If the jury believed the testimony of the Mayfields as to defendants being at their home as corroborated by the evidence of the witnesses who tracked the horses leading to the defendants' whereabouts, they also had a right to take into consideration the discrediting attempt of the defendants to pollute the current of justice by a fabrication of evidence to establish a bogus alibi, if they believed that such fabrication was attempted. In 3 Encyc. of Evidence, "Circumstantial Evidence," page 146, note, it is said:

"The defense of alibi is one peculiarly susceptible to fabrication, and the fact that fraud has been resorted to to establish this defense, if clearly established, may properly tell with great force against the accused. The weight to

be attached to such a circumstance is to be decided by the jury in view of the other evidence in the case."

A great many decisions are cited in support of the foregoing statement. In the same volume the following statement is made at page 150:

"The attempt to account for suspicious circumstances by giving false explanations is a circumstance indicative of guilt."

The sheriff and other investigators who examined the Mayfield's premises circled the house carefully at two distances therefrom, and were unable to find any horse tracks other than those made by the horses apparently ridden by the defendants, and could find no tracks made by humans, except those heretofore described. The jury was given the usual cautionary instructions concerning circumstantial evidence, and was otherwise fully and properly instructed, and we are satisfied, after a careful consideration of the whole record, that there is substantial evidence to support the verdict.

[2] The appellants requested the following instruction:

"The court instructs the jury that, although you may believe from the evidence that the dwelling house of the ——— Mayfields was, on the 14th day of September, A. D. 1924, broken into with burglarious intent, and although you may believe from the evidence that the defendants are the persons who did the breaking of such dwelling house, yet such evidence is not sufficient to convict the defendants of the crime charged in the indictment; and I, therefore, charge you that before you can convict the defendants of the crime charged in the indictment you must find, from the evidence, beyond a reasonable doubt, that the defendants took, stole, and carried away the goods, chattels, property and clothing of the said Mayfields as charged."

The court refused this instruction as commenting on the weight of the testimony, and because the proposition sought to be covered by the tendered instruction is fully included by the court's general charge. We find that the court fully instructed the jury as to the elements of the charge of larceny, and there is nothing therein which would cause the jury to suppose that proof of the crime of burglary by the defendants was

conclusive proof of the crime of larceny charged in the indictment. Of course, if the jury believed from the evidence and beyond a reasonable doubt that the defendants committed a burglary in order to effect the larceny, this was an evidentiary fact, which they had a right to consider, as well as all other facts and circumstances connected with the affair. We see no error in refusing the instruction.

[3] Appellants propounded the following question to Mayfield, a witness for the state:

"I will ask you if you didn't tell Dick De Graftenreid on Thursday or Friday after Sunday the 14th, when your house was broken into, in the presence of the station agent at Buchanan, N. M., that, when you saw Howell when you left home going to Duero on Sunday the 14th of September, he was about 400 yards from where you were, or words of like import?"

—to which the witness answered:

"No, sir; I don't remember telling that."

Appellants, on rebuttal, attempted to impeach said witness Mayfield by introducing the testimony of Joseph De Graftenreid to the effect that Mayfield had stated to him, in substance, that he recognized defendants at a distance of from 200 to 400 yards. The witness Joseph De Graftenreid said on cross-examination he did not say 200 to 400 yards, but it was either one or the other. We agree with the trial court that the testimony of the witness Mayfield was not the same as developed by the impeaching question asked of the witness Joseph De Graftenreid, and hold that the court committed no error in striking the testimony of the said witness De Graftenreid.

[4] Appellants urge that the trial court erred in allowing the state's attorney to cross-examine Ibb Howell as to the fight he had with state's witness Lanehart in Buchanan after the indictment and arraignment, and while the defendants were out on bond, and a day or two before the trial. The only reason urged in support of this assignment of error is that such testimony introduced proof of another and distinct crime of

the defendant Howell, which had no connection with the crime for which he was on trial. The objection urged in the trial court was that the incident was not a proper subject of cross-examination. The admission of evidence cannot be challenged on appeal for reasons not stated in the trial court at the time the objection was made. See State v. Martin, 32 N. M. 48, 250 P. 842.

[5] The remaining assignment of error is that the court erred in permitting the crime of burglary to be proved, as it is not covered by the indictment. In this case the evidence was that the owners of a dwelling house left it locked, and on their return found the lock broken and a portion of the contents of the house taken away. The circumstances established indicated that the breaking of the lock and the taking of the property were parts of the same transaction.

"Where two or more crimes are committed, at or about the same time, the whole transaction may be proven, even though the tendency is to prove a crime other than the one charged." Territory v. Caldwell, 14 N. M. 535, 98 P. 167.

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

PARKER, C. J., and WATSON, J., concur.

[Nos. 3128, 3129. Nov. 13, 1926.]

FRANKLIN FIRE INS. CO. v. MONTOYA et al.
STATE ex rel. FRANKLIN FIRE INS. CO. et al. v. SAME.

[251 Pac. 390.]

SYLLABUS BY THE COURT

Section 69, c. 135, Laws 1925, prohibiting more than one agent of a fire insurance company in each town, offends due process and special privilege clauses of Constitution.

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[1] 32CJ p. 983 n. 26 New.

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

Suit for injunction by the Franklin Fire Insurance Company and for mandamus by the state, on the relation of the Franklin Fire Insurance Company and another, against Bonifacio Montoya and others, members of the State Corporation Commission, and another. From judgments for defendants in both cases, plaintiffs appeal. Cases consolidated on appeal. Judgments reversed and causes remanded, with directions.

E. R. Wright and C. J. Roberts, both of Santa Fé, for appellants.

Fred E. Wilson, Atty. Gen., and Simms & Botts, of Albuquerque, for appellees.

OPINION OF THE COURT

WATSON, J. An application to the superintendent of insurance by Franklin Fire Insurance Company and Theodore N. Espe for the issuance of a license to Espe, as agent for said company in Santa Fé, having been refused on the ground that the company already had a licensed agent in Santa Fé, and an appeal to the state corporation commission having failed, it was sought, by mandamus, to compel such issuance. The corporation commission threatening to cancel the company's license to do business in the state because of such application, said company sought, by injunction, to prevent such cancellation. Relief in both cases having been denied in the district court, both were appealed. As the same facts and law are involved in both cases, they have been submitted and will be decided together.

Chapter 135 of the Laws of 1925 is entitled: "An act relating to insurance and to codify the insurance laws of the state of New Mexico." It was no doubt intended as a comprehensive code to regulate insurance companies, both foreign and domestic, in their deal-

ings with the citizens of this state. Section 69, in so far as material to this inquiry, provides:

"It shall be unlawful for any company licensed to transact an insurance business in the state of New Mexico to appoint more than one agent in any city, town or village for each kind of insurance that the said company is licensed to transact, with power to issue or countersign insurance contracts, or otherwise obligate the company, and the superintendent shall not issue more than one license in the name of an agent of any individual company in each city, town or village for each kind of insurance that the said company is licensed to transact. * * *

"This section shall not apply to life insurance companies.

"Any company or agent violating the spirit or intent of this section shall have its license suspended."

Appellants predicate their right to the relief of mandamus and of injunction upon the unconstitutionality of this section. Counsel for appellees, the state corporation commission and the superintendent of insurance, concede that if section 69 is unconstitutional, appellants are entitled to the relief.

It is contended that section 69 is in violation of the due process of law provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, and of the similar provision (article 2 § 18), of the Constitution of this State, and that it is also in violation of article 4, § 26, of the Constitution of New Mexico, prohibiting the legislative grant of special rights, franchises, privileges, immunities, or exceptions. Appellees defend the section as a valid exercise of the police power to regulate fire insurance, as a business clothed with a public interest.

Northwestern National Ins. Co. et al. v. Fishback, 130 Wash. 490, 228 P. 516, 36 A. L. R. 1507, is cited and relied upon by appellants, and is the only case directly in point which has been brought to our attention. The majority of the court in that case held that a similar provision in the Washington Code was not an attempt to regulate the insurance business, but merely an unwarranted restriction sought to be imposed upon the occupation of insurance agent; that while it might be conceded that the insurance business in general was

clothed with such a public interest as to render it subject to reasonable regulation for the general welfare, it did not necessarily follow that the insurance agency business, considered separately, was not a strictly private business. It was held, therefore, that the section there in question, if permitted to stand, would deprive citizens of the state, without due process of law, of their right to engage in a lawful calling, and to enter into lawful contracts for their services, and would, at the same time, secure to other citizens of the state special privileges not inuring equally to all.

The dissenting opinion of Parker, J., representing the views of the minority, considers that no constitutional rights of the citizen there applying for the license were involved. It takes the view that the provision in question is a reasonable regulation of insurance companies for the public welfare, and that any incidental privilege to one citizen, and limitation of the right of another, resulting therefrom, is inconsequential. This is, in substance, the position taken by the appellees in the case at bar.

In German Alliance Ins. Co. v. Lewis, 233 U. S. 291, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, the Supreme Court of the United States held that the business of insurance is one clothed with a public interest, so that the states, in the exercise of the police power, may regulate their rates.

It was there pointed out that such business might be, and had been, regulated as to its dividends, its investments, form and extent of its policies by prohibiting discriminations, and rebates, and by limiting its risks. Such regulations, perhaps, do not exhaust the police power; but no case has been brought to our attention holding that the insurance agency business, as such, is subject to regulation. We are not called upon to decide whether it is or not. It is sufficient to say here that it is an ordinary business, familiar in every community. Hardly any fire insurance agent contents himself with the representation of one insurer. The larger ones represent many. An agency contract is

valuable property, and the right to enter into such a contract, and to engage in that business, is a valuable right. If, by law, those persons entrenched in the business with agency contracts are secured from competition, they have been granted a special privilege not enjoyed by other citizens not so entrenched. It may be conceded for the purposes of this case that constitutional provisions intended to preserve the rights of individual citizens may sometimes be forced to yield to the public welfare. It should first appear, however, that it is the public welfare which is involved, rather than the interests of a favored few.

A reading of chapter 135 discloses no reasonable connection between the scheme of regulating the business of fire insurance therein developed and the restriction in question. Many provisions are therein contained in the interest of the insured public. For the enforcement of these provisions, wide visitorial and supervisory powers are given to the superintendent of insurance. These powers seem to be ample for the enforcement of the provisions. As to the conduct of the business of fire insurance agencies, there are no regulations; no records are required to be kept by them, and no reports made. It seems to be contemplated that the insurance department of the state is to deal directly with the insurance companies. So we are not impressed with the soundness of appellees' argument that the regulation of fire insurance companies is made easier and less expensive by the provision that each company shall have but one representative in a town.

It is true that certain practices by insurance agents are prohibited under penalties and forfeiture of license. Most of these provisions relate, it appears, especially to life insurance. We find no restrictions upon the conduct of fire insurance agents seeming reasonably to require visitation and supervision of them, and we find nothing in the statute to satisfy us that the Legislature intended to establish any such control over them. In the dissenting opinion in the Washington case, it is pointed out that their statute requires the agent to keep

a complete record of all transactions. Such a provision furnishes some ground for arguing that the Legislature considered either that such record would aid in the supervision of the fire insurance business or that the agency business required supervision. We have no such provision here.

It is urged by counsel for appellees that there is a strong presumption in favor of the constitutionality of the statute, and that the reasonableness of a police regulation is a question, in the first instance, for legislative decision, and that, the Legislature having adopted such a regulaton, there is a presumption in favor of its reasonableness. Before these principles can operate, however, it should appear that the Legislature regarded the restriction as a reasonable police regulation. There are many provisions of chapter 135 the purpose of which is manifest. They contribute to and facilitate state supervision of corporations authorized to make insurance contracts with citizens of New Mexico. Wherein section 69 contributes to such general purpose does not appear from the act itself, is not satisfactorily shown in argument, and has not been discovered by us. It stands alone, apparently expressing legislative intent to deprive some persons of property without due process and to grant special privileges to others. No other purpose appears. No other substantial result follows. Not regarding it as an attempt to exercise the police power, we are not called upon to consider the extent of such power, nor the extent to which, when invoked, it will prevail over the constitutional limitations in question.

The arguments of counsel have taken a much wider range than here indicated. The conclusion we have reached, for the reasons stated and upon the authority of Northwestern National Ins. Co. et al. v. Fishback, supra, makes it unnecessary to consider the other interesting and ably presented points.

Holding that section 69 is unconstitutional in its present connection, it follows that the court erred in both of the cases, and that both judgments should be

reversed and the causes remanded, with directions in cause No. 3129 to grant peremptory writ of mandamus, and in cause No. 3128 to grant permanent injunction; and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2940. Nov. 19, 1926.]

MERSFELDER v. ROBERTS.

[251 Pac. 387.]

SYLLABUS BY THE COURT

Where appellant fails to include all evidence in the bill of exceptions, and has not set forth in his præcipe the questions he desires to have reviewed and the portions of the record and proceedings he deems necessary to such review, he cannot question the sufficiency of the evidence to support the findings.

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

Action by L. C. Mersfelder against C. J. Roberts. From a judgment of dismissal, plaintiff appeals. Affirmed and remanded.

T. J. Mabry, of Albuquerque, for appellant.
Marron & Wood, of Albuquerque, for appellee.

OPINION OF THE COURT

WATSON, J. Appellee, as surety, executed to appellant, as obligee, an employee's bond. A loss having occurred, appellant sued appellee upon the bond.

A defense interposed was that appellant had signed the bond upon a representation by his principal that another responsible surety would be obtained, and had placed the bond, after signing, in the hands of his principal to obtain the signature of such responsible surety, and to be delivered to the obligee (appellant) only after such additional surety had signed, and that the bond was so incomplete upon its face as to consti-

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[1] 4CJ p. 420 n. 43; p. 455 n. 57 New; p. 535 n. 8; p. 777 n. 70.

tute notice to appellant and put him on inquiry as to the conditional delivery thereof.

The trial court made specific findings of the facts as claimed in the said defense and thereupon rendered judgment dismissing the complaint, from which this appeal is taken.

The facts found by the court constituted a complete defense to the claimed liability under Hendry v. Cartwright, 14 N. M. 72, 89 P. 309, 8 L. R. A. (N. S.) 1056, and M. J. O'Fallon Supply Co. v. Tagliaferro, 29 N. M. 562, 224 P. 394.

Appellant first urges as error that the evidence was insufficient to support the court's findings. This proposition is met at the outset by appellee's contention that the record before us is so deficient as to preclude a review of the evidence and as to compel a presumption of the correctness of the court's findings. He cites Sandoval v. Unknown Heirs, 25 N. M. 536, 185 P. 282; Baca v. Catron, 24 N. M. 242, 173 P. 862; Loftus v. Johnson, 22 N. M. 302, 161 P. 1115; Baca v. Unknown Heirs, 20 N. M. 1, 145 P. 945, Ann. Cas. 1918C 612; Guaranty Banking Corp. v. Western Ice & Bottling Co., 28 N. M. 19, 205 P. 738.

Appellant's praecipe, so far as it is material, is as follows:

"You are hereby respectfully requested to prepare for purpose of appeal to the Supreme Court of the state of New Mexico, in the above-entitled cause, three (3) copies of the transcript of record containing the following: * * * 9. Bill of exceptions (to include all testimony, deposition, exhibits, except agent's contract, and the letters introduced). * * *"

The court reporter certifies that the transcript contains:

"* * * All testimony received; offers of testimony; motions, objections to said testimony, offers, and motions; proceedings, rulings of the court, exceptions taken; and true copies of Exhibits P5, D10, D11 (a) and (b), and D12 (being the exhibits called for in the præcipe filed in this cause), offered in evidence upon the trial of the above-entitled cause. * * *"

The judge's certificate is as follows:

"And for as much as the matters and things herein contained are not of record in said cause, plaintiff prays that this, his bill of exceptions, containing all the evidence, offers of evidence, motions, objections, proceedings, rulings of the court, and exceptions, upon the trial of said cause and copies of the exhibits called for in the præcipe on file herein, may be signed, sealed, and enrolled by the judge of this court as his bill of exceptions, and defendant having agreed thereto by stipulation filed in this cause, which is done this 31st day of January, 1924."

It thus appears that appellant has omitted from the record which he brought to this court certain exhibits received in evidence. It also appears that he failed to state in his praecipe the particular questions which he desired to have reviewed, and appears also that he failed to obtain from the trial judge any certificate as to the immateriality of the omitted evidence. It is this condition of the record which appellee insists renders it deficient, precludes a review of the evidence, and necessitates the sustaining of the court's findings.

Appellant extensively reviews the record before us for the purpose of identifying the missing exhibits, and to show their substance and purport, and the purpose for which they were used at the trial, seeking thus to show that they relate to points abandoned at the trial, and have no bearing on the findings or the judgment.

If we were permitted to follow counsel in such review, it is quite possible that we should agree with his conclusion as to the immateriality of the omitted evidence as respects the questions presented to this court for review. We think, however, that Laws 1917, c. 43 (the Appellate Procedure Act), as it has been interpreted, precludes such inquiry.

In Norment v. Mardorf, 26 N. M. 210, 190 P. 733, it was laid down that an appellant must either bring to this court a complete record, or else, desiring to omit portions thereof, proceed by agreement under section 30, by an agreed statement of the case and of the facts proven, under section 31, or by setting forth in his praecipe, under section 32, the question he desires to

have reviewed, and the portions of the record and proceedings deemed necessary thereto. See, also, Baca v. Unknown Heirs, supra.

It was also held in Norment v. Mardorf, supra, that, where appellant has chosen to bring up less than the whole record, otherwise than by agreement, or by agreed statement of the case, and has failed, as required by section 32, to give notice in his praecipe of the questions to be reviewed, and of the portions of the record deemed necessary for such review, he may not present any question in this court.

It seems to have been held that when proceeding under section 32, the appellant should procure from the trial judge a certificate that those portions of the proceedings omitted from the transcript are immaterial to the review of the questions set forth in the praecipe. Loftus v. Johnson, 22 N. M. 302, 161 P. 1115; Sandoval v. Unknown Heirs, 25 N. M. 536, 185 P. 282. Of course, to render such certificate appropriate or useful, the praecipe must set forth the questions for review.

In Sandoval v. Unknown Heirs, supra, all of the record, pleadings and proceedings in another case had been put in evidence in so far as the same might be material. A part of such record, pleadings, and proceedings was omitted from the bill of exceptions. Although the court reporter certified that the evidence included was all that was introduced, the failure of the judge to certify the immateriality of the omitted portions was considered fatal. In Loftus v. Johnson, supra, counsel for appellant, in preparing the abstract of the record, stated that the testimony submitted comprised all that taken at the trial bearing upon the points raised. This, it was urged, was a challenge to opposing counsel to show the incorrectness of the statement by exhibiting, as he might do under section 32, other portions of the proceedings bearing upon the questions. The court overruled this contention upon the ground that it was appellant's duty to bring up a proper transcript.

It thus appears that in the past this court has firmly adhered to the construction that it must affirmatively appear from the record that no evidence has been omitted which could have a bearing upon the question presented for a review. The only new question is whether we may follow counsel through a review of the record before us to determine for ourselves, in cases where that may be possible, and without the aid of any certificate from the trial judge, and in the absence of agreement or concession by the opposite party, that those portions of the evidence omitted would be immaterial.

It seems to be the theory of chapter 43 that the appellee, not being asked to agree to a statement of the case under section 31, nor to an omission of designated portions of the proceedings under section 30, nor advised by the praecipe, under section 32 of the questions to be reviewed, and the portions of the record and proceedings deemed necessary to such review, may rely upon it that the bill of exceptions will include all the evidence. It contemplates that appellee shall have a voice in the matter. If he is asked to agree to the bringing up of less than the whole, or to a statement of the case, he may exercise his judgment. If advised, under section 32, of the questions to be reviewed and the portions of the record and proceedings deemed necessary thereto, he may himself bring up other portions which he may deem necessary to the decision. In either case he is precluded thereafter from objecting that evidence not in the bill of exceptions has bearing on the questions. But, if an appellant may, without agreement or notice, omit portions of the proceedings, appellee is not thus precluded. As stated in Baca v. Unknown Heirs, supra, quoting Witt v. Cuenod, 9 N. M. 143, 50 P. 328:

> "The option granted of taking up only such part of the record as appellant or plaintiff in error deems 'necessary for a review of the judgment or decree,' instead of the whole record, was intended to lighten the burden of expenses, but not in any way to put the opposite party to any disadvantage, or change his position in any respect."

So far, this court has refused to admit any showing

as to the immateriality of omitted portions of the record, except the judge's certificate. Such a rule promotes orderly procedure and relieves this court of a laborious and time-consuming review of the record presented, to determine the materiality or immateriality of evidence or proceedings which may have been omitted therefrom. In many cases it would be impossible to determine that question. We think that the theory and purpose of the statute and the prior decisions of this court would be violated in their spirit, and a bad precedent set, if we were to undertake the inquiry which appellant requests. We are therefore constrained to hold that we have before us a doubtful and deficient record and to indulge the presumption of the sufficiency of the evidence to warrant the findings.

As the findings thus upheld are a complete defense to any liability on the part of the appellee, consideration of other propositions urged by appellant is uncalled for.

The judgment must be affirmed, and the cause remanded, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2953. Dec. 3, 1926.]

STATE TRUST & SAVINGS BANK v. OTERO et al.

[252 Pac. 167]

SYLLABUS BY THE COURT

Sureties upon a guardian's bond are discharged where a settlement between guardian and ward has been allowed to stand unchallenged for two years and ten months, during which time the sureties, knowing of the settlement and release and relying upon the same, have assumed new relations, incurred new liabilities and obligations, and have lost opportunity to obtain indemnity from the guardian.

Appeal from District Court, Sandoval County, Hickey, Judge

[1] 28CJ p. 1302 n. 66; p. 1303 n. 69, 70; 32Cyc p. 174 n. 39.

Suit by the State Trust & Savings Bank, administrator with will annexed of the estate of Grover W. Harrison ,deceased, against Fred Otero and others. Judgment for plaintiff, and the defendants appeal. Reversed and remanded, with directions.

M. J. Helmick and George C. Taylor, both of Albuquerque, for Appellants.

Marron & Wood, of Albuquerque, for appellee.

OPINION OF THE COURT

PARKER, C. J. This is a suit brought by the plaintiff (appellee) against the defendants (appellants) to fasten a lien upon their property. The lien was claimed by reason of a judgment obtained by plaintiff's testator in a suit against his guardian. The three Oteros (defendants) acquired the property from their father and mother by inheritance and devise, and their father was during his lifetime surety on the guardian's bond. The district court entered a decree establishing the lien and ordering sale of the property, from which decree this appeal has ben perfected

The facts in the case are that on May 5, 1890, one Mariano S. Otero executed a bond as surety. The bond was a guardian's bond of one George W. Harrison, his infant son. After the ward became of age, he executed a release to his guardian of all claims against him, said release being executed on or about March 31, 1908. Said release was induced by fraudulent representation and concealment on the part of the guardian. Shortly thereafter the ward became dissatisfied with the settlement he had received from his guardian at the time of reaching his majority, and employed counsel, who made an investigation of the affairs of the guardian and ward. As a result of that investigation, the guardian made further payment of $10,000 in cash and conveyed to the ward certain real estate in St. Louis, Mo., in full settlement of the matter, and the ward exe-

cuted a full release to the guardian on June 1, 1908, which release was promptly filed and entered of record in the probate court of Bernalillo county, where the guardianship was pending.

At the time this settlement was made, the ward and his counsel knew that the settlement was not full and fair, and was not based upon a full disclosure by the guardian. Just how great the disparity was between the amount due him and the amount he was receiving, and the various kinds of property to which he was entitled, neither he nor his counsel knew. But his counsel knew that no disclosure was made by the guardian, and was satisfied that he owed the ward many thousands of dollars more than was being paid. Such knowledge of counsel is clearly to be imputed to the ward in the absence of some showing that the ward was deceived by his counsel, which is not even hinted in the case. They made the settlement, however, rather than charge the father with the frauds which they knew had been practiced upon the ward. This settlement stood unchallenged from June 1, 1908, when it was executed, until March 31, 1911, when the ward brought suit in the district court of Bernalillo county against his guardian for an accounting of the property coming into his hands, and of his doings as such guardian, and to compel the guardian to pay over the amount found to be due. The guardian appeared and defended, and the case resulted on May 23, 1919, in a judgment against the guardian in a sum of more than $110,000. This suit resulted, in the first instance, in a judgment for the guardian, but upon appeal to this court (Harrison v. Harrison, 21 N. M. 372, 155 P. 356, L. R. A. 1916E, 854) the judgment was reversed. There was no discussion in that case as to the effect of the settlement and discharge of June 1, 1908, upon the liability of the sureties on the guardian's bond, the inquiry being confined to the question whether, as between the guardian and ward, the release might be set aside and a full accounting be had between them,

and it was held that it might Upon a retrial, the judgment for $110,000 resulted.

Mariano S. Otero, the surety, died February 1, 1904, leaving a will, devising his property, one-half to his wife absolutely, and one-half to her as trustee for their five children, including the defendants Oteros and their two sisters. The widow died intestate May 22, 1909. On December 29, 1909, the heirs made a contract among themselves whereby a partition was effected of the real and personal property of the estates of both father and mother. Deeds were exchanged between them effectuating the partition, and the property upon which the lien has been fastened by the decree came to the three defendants Oteros. On February 25, 1910, the three Oteros conveyed all of the property received by them under the partition to Otero Bros Company, the other defendant, which is a corporation organized by the Oteros for the purpose of taking over and holding the said property. At the time of the partition the Otero brothers assumed the payment of all of the debts of the estate of Mariano S. Otero, deceased, and the corporation, at the time of the conveyance to it of the said property, assumed the payment of all of said debts, amounting to about $50,000. Other persons became stockholders of the corporation. The Otero brothers knew of the settlement of June 1, 1908, between the guardian and ward, and one of them assisted counsel for the ward by urging the guardian to make a satisfactory settlement with the ward. He was present at a conference between counsel for the ward and the guardian and knew no disclosure was made by the guardian to the ward's counsel as a basis for the settlement. He communicated his knowledge to the other Oteros. The Oteros, however, relied upon the release as discharging their ancestor's estate from liability on the bond. They assumed a new relation to the other heirs, and assumed the payment of the debts of the estate upon the strength of the release.

This suit was commenced January 24, 1920, and the amended complaint, upon which the case was tried,

was filed May 28, 1921. It thus appears that this suit was instituted some 12 or 13 years after the settlement between the guardian and ward had stood unchallenged for 2 years and 10 months of that period, during which times all of the changes in the situation of the parties above recorded had occured. The defendants were not parties to any of the proceedings between the guardian and ward and had no notice of the same, so far as appears.

Defendants presented findings of fact covering the case as above outlined, which were refused, although they were supported by the undisputed evidence. They also presented conclusions of law to the effect that the ward's release discharged the sureties, and that the plaintiff was barred by laches in allowing the release to stand for 2 years and 10 months, which were refused. The court found that the ward disaffirmed the release within a reasonable time, but gave no consideration apparently, to the changed conditions of the defendants while they relied upon the release. In making this finding the court disregarded the only evidence in the case on the subject, which was that the ward at the time of making the settlement knew that he was being cheated by his guardian and knew that much more was due him than he was receiving in the settlement.

We have then a case where a settlement and release is had between a guardian and ward, not based upon a full and fair disclosure by the guardian; where the ward has knowledge at the time of the release and settlement that the guardian has made no full and fair disclosure as to the ward's property coming into his hands; where the ward allows the release and settlement to stand unchallenged for 2 years and 10 months without notice of any kind of an intention to repudiate the same; where during such period of acquiescence the heirs of the deceased surety on the guardian's bond relied upon said settlement and release, and made partition of their ancestor's estate with their fellow heirs, and assume the payment of all of the debts of the

estate; where said heirs, at the time of said settlement and release, had the same knowledge that the ward had concerning the lack of information from the guardian as to the true status of the ward's estate. The question is, then, whether under such circumstances, there can be any recovery against the heirs.

1. It may be said generally that where the surety upon a trustee's bond has not been misled by a settlement between the trustee and his cestui que trust, and where he has not lost opportunity to indemnify himself as against the trustee by reason of reliance upon the settlement or delay in attacking the same, and where he has not assumed new relations and obligations in reliance upon the settlement, there would seem to be no justice in saying that his liability had been terminated by reason, merely, of the fact that the settlement had been made. So long as the surety has not been injured, he cannot complain if his liability is held to remain in force until full settlement has been effected. But as in this case, where all, or most, of the conditions above mentioned are present, equity and good conscience would seem to require that the surety be held to be discharged. Upon this general subject, see 12 R. C. L., Guardian and Ward § 57; 28 C. J., Guardian and Ward, § 511.

In Aaron v Mendel, 78 Ky. 247, 39 Am. Rep| 248, the facts were similar to those in the case at bar. The release was unfairly procured, and the sureties were not shown to have any complicity in procuring the release knowing it to be fraudulent. The plaintiff was aware at the time she executed the release that it was unjust and ought not to bind her. She and her husband took legal advice on the subject, and were fully advised of their rights in the premises; yet they stood by apparently acquiescing in what she had done for four years after the release was executed, and for three years after her husband had attained his majority and after they were fully advised of their rights, and without any step to obtain relief, and without notice to the surety that they would not abide by what had been

done. The surety during the greater part of this time was aware that the release had been executed. The court said:

"The relation between a creditor and one known to him to be bound only as surety for another is one of trust and confidence, and demands the utmost good faith on the part of the creditor. Story's Equity, § 324; Burks v. Wonterline, 6 Bush, 20; Mount v. Tappey, 7 Bush, 617.

"Was the conduct of Aaron and wife such as good faith toward the surety demanded? As long as they failed to repudiate the settlement and release, the hands of the surety were tied. Their silence was equivalent to a declaration that they were satisfied, and the surety knowing that the release had been executed, was lulled into supposed security. He neither knew the necessity for seeking indemnity nor had the legal right to demand it. He had no right to pay the debt, and assume himself the position of a creditor. Until they should elect to avoid the settlement and release there was no debt to pay, and this they might never do; and, having kept him so long in a position in which he was authorized by their conduct to believe he was finally discharged, and in which he was deprived by them of all right to seek indemnity, they were guilty of such bad faith toward him as ought, in equity and good conscience, to prevent them from now recovering."

The court cites and quotes from Kirby v. Taylor, 6 Johns. Ch. (N. Y.) 248. In that case there was no fraud upon the part of the guardian. But the court held that acquiescence in the release for a period of 20 months was "a complete exoneration of the surety. He had a perfect right to regard the discharge as valid, and it deprived him in the meantime of the opportunity to obtain indemnity."

The Kentucky court goes on further:

"That there was fraud in this case and none in that can have no other effect than this: As long as the fraud was concealed the ward could take no step to avoid the release on that ground, and, consequently, nonaction on his part would do no wrong to the surety; but when the fraud becomes fully known, and the ward is fully advised as to his rights, the fraud can no longer present an obstacle to his proceeding to avoid the release, and the consequences should be precisely the same as if the release had been procured without fraud."

In Douglass v. Ferris, 138 N. Y. 192, 33 N. E. 1041,

34 Am. St. Rep. 435, the sureties on a guardian's bond were held not to be discharged by reason of a fraudulent settlement. This case is much relied upon by the appellee in support of the judgment. The case is not applicable to the facts in the case at bar. In that case the sureties did not know of the existence of the discharge, and consequently could not and did not act upon the faith of it, and were not misled or lulled into security by it.

In Greenup v. U. S. Fidelity & Guaranty Co., 159 Ky. 647, 167 S. W. 910, the plaintiff released her guardian, who was her husband, under circumstances showing duress, but did not bring suit upon the guardian's bond until 29 months after the settlement, and 20 months after she was divorced from her husband. The surety was held to be discharged. The court followed the case of Aaron v. Mendel, above cited, and quoted at length from the same.

In People v. Borders, 31 Ill. App. 426, the ward upon reaching majority gave a receipt in full to the guardian, but the guardian was never discharged. She brought suit after a lapse of six or seven years. The sureties did not know of the giving of the receipt, and as a matter of fact the money was not paid over. The sureties were held liable. The court said:

"An estoppel in respect of the element here involved, is where one, by acts or declarations, represents a certain state of facts to exist and thereby brings about a change of conduct in another, he cannot afterward be heard to assert a contrary state of facts if injury would result to the party who had acted, relying upon the truth of the representations. The guardian was not discharged. It does not appear that the sureties were lulled into inaction by the singing of this receipt. It is pertinent to inquire, what were these sureties led to do, or not to do, by the fact that this ward had signed a receipt to her guardian for the amount found due her? Nothing, so far as this record shows."

See also, Baum v. Hartmann, 226 Ill. 160, 80 N. E. 711, 117 Am. St. Rep. 246.

This case well illustrates the doctrine involved. If the sureties are in no way injured they cannot com-

plain of mere delay on the part of the ward in asserting his rights. But where, as in the case at bar, the sureties knew of the giving of the release, relied upon it, assumed new relations to their coheirs and assumed new obligations, it sufficiently appears that in equity and good conscience they cannot be held in this action. This case differs somewhat from any which have been cited, in this: Here both the ward and the heirs of the deceased bondsman knew the same facts, viz., that the guardian had made no full and fair disclosure of the amount of the ward's estate; they knew that probably the settlement was not full and fair, and consequently was subject as a matter of law to repudiation by the ward. But we cannot see how this can change the result. It was the duty of the ward towards the heirs to let them know, either by suit or notice, that he would not abide by the settlement. He made no move for 2 years and 10 months, during which time the heirs did simply what they had a right to do. They made the partition of the estate, assumed its debts, and conveyed their portion to the corporation. If they did not have the right to do this, then they would be compelled to await indefinitely upon the whim and caprice of the ward to ascertain his intention as to abiding by the settlement, or otherwise. This is a clear case of estoppel and prevents recovery.

Counsel for appellee does not discuss directly this proposition. He devotes much of his brief to the proposition that the question of the existence of laches rests in the discretion of the trial court, and the chancellor's decision will not be disturbed on appeal except for abuse of discretion. We do not deem this proposition of any avail in this case. The undisputed evidence shows that the ward, even before he executed the release, knew that he was being cheated and was not receiving a just settlement from his guardian, and that no disclosure of facts had been made by the guardian. In the face of that knowledge he executed the release and allowed it to stand unquestioned for 2 years and 10 months. In the meantime he gave no

notice of any kind to the defendants of his dissatisfaction with the settlement, or of his intentions to question the same. They proceeded in their business, relying upon the valdity of the settlement, and assumed large obligations personally and by and through their corporation, the other defendant, running into many thousands of dollars. They cannot now be restored to their former position, and they have lost opportunity to seek indemnity from the guardian. In such a case there is no room for discretion on the part of the trial judge. It was inexcusable laches on the part of the ward and bars recovery.

Counsel devotes a portion of his briefs to showing that the corporation defendant is not a bona fide purchaser for value. This may be admitted, but the Otero brothers were purchasers for value; they having assumed personally the payment of about $50,000 worth of debts of the estate of their father, relying upon the settlement.

Counsel for appellant presents some other propositions, which we do not deem it necessary to consider in view of our conclusion upon the more important consideration involved.

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 set aside the judgment, and to dismiss the complaint, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 2967. Dec. 3, 1926.]

FRANKLIN v. HARPER

[252 Pac. 170.]

SYLLABUS BY THE COURT

1. In foreclosure complaint, an express allegation of

[1] 21CJ p. 1068 n. 98; 41CJ p. 869 n. 50; 27Cyc p. 1598 n. 32, 33. [2] 31Cyc p. 256 n. 28; p. 257 n. 34; p. 258 n. 50.

mortgagor's ownership of mortgaged premises is unnecessary. It is to be implied.

2. Foreclosure complaint, containing no allegation as to mortgagor's title or interest, was answered by claim of invalidity of mortgage on grounds of lack of consideration and that the property was community estate, the mortgagor's wife not having joined, to which it was replied that the mortgagor was trustee of the title for another, who authorized the mortgage and to whom the consideration ran. **Held,** that the reply was a departure and should have been stricken on motion.

Appeal from District Court, Catron County; Owens, Judge.

Suit to foreclose mortgage, brought by the First National Bank of Magdalena, continued by W. C. Franklin, as its receiver, against A. J. Harper. From a decree of foreclosure and sale defendant appeals. Reversed and remanded, with direction.

Medler & Whatley, of El Paso, Tex., for appellant.

Nicholas & Bunton, of Magdalena, for appellee.

OPINION OF THE COURT

WATSON, J. The First National Bank of Magdalena sued A. J Harper for the foreclosure of a mortgage executed by the latter. From a decree of foreclosure and sale, Harper appeals.

The complaint may be said to have been in the usual form, setting up a copy of the mortgage. From the complaint and mortgage it appears that the mortgage was given to secure pre-existing indebtedness of one Henry Coleman. A demurrer to the complaint assigned among other grounds, that the pre-existing indebtedness of third parties was not good consideration for a mortgage, and that hence the mortgage was without consideration and void.

The demurrer having been overruled, an answer was filed, in which the defenses urged in the demurrer were carried forward, and, as further defense, it was pleaded that when appellant gave the mortgage he was a married man, and that any right, title, or interest

held by him in the mortgaged property was community estate, and that the mortgage was therefore void under chapter 84, Laws of 1915.

Replying to appellant's answer, appellee alleged that appellant, at the time of giving the mortgage ,had represented to appellee that he had authority to make the mortgage; that his claim that the real estate in question was community property was greatly prejudicial to appellee, and that appellant was estopped from asserting such claim; that at the time of the making of the mortgage appellee had commenced suit against said Henry Coleman in which suit an attachment had been issued against Coleman's goods, chattels, and property, and had been levied upon the real estate in question, by reason of which attachment appellant had entered into negotiations with appellee for extension of time and opportunity to liquidate said Coleman indebtedness, and, in consideration of such extension, and of an advance of $500, had given the mortgage in question, and that by reason thereof an equitable lien and mortgage was created, binding upon the community rights of both husband and wife; and that at the time said mortgage was given appellant had represented that he had taken title by conveyance from said Coleman, not for his own use and benefit, but for the use and benefit of the said Henry Coleman, and to enable him to adjust and save the estate of said Coleman, who was so situated that he could not come to the state of New Mexico in order to look after his own affairs. The foregoing was followed by the direct allegation that appellant, in accepting title to the real estate from Coleman, was acting solely in the capacity of trustee, and had no private or personal interest in the said real estate. This reply is all found in a single paragraph.

Appellant moved to strike the reply, upon the ground that the facts therein alleged were inconsistent with the complaint, and constituted a departure therefrom, "in that by its complaint the mortgage therein mentioned and referred to was relied upon, and by its so-called reply an equitable lien is attempted to be set

up. * * * " The motion was overruled, and the cause proceeded to trial and judgment.

At the trial appellant produced evidence to show that at the time of the conveyance by Coleman to him Coleman was a married man. The court found such to be the fact. The court further found, in accordance with the reply, that appellant had no beneficial right, title, or interest in the property, but held it merely as trustee for Coleman. Nevertheless, finding that the mortgage was given for Coleman's benefit and by his authority, he rendered judgment of foreclosure and sale.

Appellant here assigns 25 errors, and presents 9 major questions, none of which is free from difficulty, and most, if not all, of which represent legal complications growing out of the course taken by the pleadings.

[1] Appellant first contends that his demurrer should have been sustained, as the complaint sets up a mortgage void for want of consideration. He urges he did not waive it by answering over; the insuffiency of the complaint to state a cause of action being a fundamental defect, which may be raised at any time. Appellee contends that the mortgage itself imports consideration, citing code 1915, § 2181, and Flores v. Baca 25 N. M. 424, 184 P. 532. Hence, it urges, no consideration need be shown by the complaint. Appellant replies, however, that this is not a case of mere failure to recite consideration in the contract, or allege it in the complaint. Both purport to show the consideration inducing the mortgage, which consideration—the preexisting indebtedness of Coleman—was bad.

Having stated these contentions, we may pass them, since another ground of error controls the disposition of the case. Before proceeding on that ground, however, we may mention that by the reply, construed as a whole and interpreted in the light of the evidence adduced by appellee at the trial ,it appears that appellee claimed no consideration moving to Harper personally, but that the mortgage sought to be foreclosed was upon Coleman's property, to secure Coleman's indebtedness,

a further advance for Coleman's benefit, and to induce the dismissal of an attachment suit against Coleman.

Appellant's next proposition is that the court erred in overruling his motion to strike the reply as a departure from the complaint. He urges that the trial court decided the case, not upon the theory of the complaint, but upon that of the reply, and that facts found by the court and material to the decision would not have been provable under the complaint. He cites Thayer v. D. & R. G. R. Co., 21 N. M. 330, 154 P 691 In that case "departure in pleading" and tests for identifying it were carefully considered, and we are spared the necessity of going over that ground again.

It is the appellee's contention that the whole claim of departure rests upon a mistaken view of the complaint; that appellant erroneously assumes that appellee by its complaint, took the position that Harper was the beneficial owner of the property which he assumed to mortgage. It is pointed out that the complaint is barren of any allegation of title in any one, and it is urged that no such allegation is necessary, citing 27 Cyc. 1598, where it is said:

"The bill or complaint, if against the original mortgagor, need not ordinarily allege title in him, or, if it is attempted, it is sufficient to allege that he is seized and possessed of the premises in question."

We have examined the available texts, and the decisions therein cited, upon the question of the necessity of an allegation that the mortgagor had title to the property mortgaged. We do not find them very illuminating. Although there are statements to the contrary (Sielbeck v. Grothman, 248 Ill. 435, 94 N. E. 67), we find it usuelly stated consistently with the above quotation. 9 Ency. of Pl. & Pr. p. 373, note; Wiltsie on Mortgage Foreclosure [3d Ed.] § 338. In 19 Standard Ency. of Procedure, 954, such is said to be the rule in some jurisdictions and not in others. In Jones on Mortgages (7th Ed.) § 1453, it is said:

"The general requisites of a complaint are * * * the title of the mortgagor in the mortgaged premises. * * *"

Of the cases there cited only Sielbeck v. Grothman, supra, seems to support the statement. And the same writer, at section 1454, says:

"An allegation of the execution of the mortgage is also sufficient, without any averment of title in the mortgagor."

But we are concerned more with the reasons for the rule than with the rule itself. There are two views: First, that by the mortgage the mortgagor estops himself from denying title, and that there is a right to foreclose whatever his title, or claim of title, may be. This is the view expressed in Jones on Mortgages, § 1454 supra, and in Shed v. Garfield, 5 Vt. 39. The other view is that of Daniel v. Hester, 24 S. C. 301, where it is said:

"We do not understand that * * * it is usual for the plaintiff to go on and allege in terms that the mortgaged premises belonged to the mortgagor, but such allegation is always involved."

This seems to be the reason approved by Wiltsie in the section cited supra. See, also, Bull v. Meloney, 27 Conn. 560; Graham v. Fitts, 53 Fla. 1046, 43 So. 512, 13 Ann. Cas. 149. Porter v. Schroll, 93 Kan. 297, 144 P. 216, merely holds such an allegation unnecessary, without giving the reason for so holding. It seems generally to be held that the allegation is unnecessary. The prevailing, and we think the better, view is that, though omitted, it is to be implied.

[2] So holding, we have this situation: Appellee sought to foreclose the mortgage on the theory—to be implied—that appellant was the beneficial owner of the property and had mortgaged it to secure another's pre-existing debt. It was answered that there was no consideration moving to the mortgagor, and that all of the mortgagor's right, title, and interest in the property was community estate, for both which reasons the mortgage was void. Appellant denies neither of these vital facts, but completely shifts its ground, and pleads, by way of reply, that it was Coleman's property, Coleman's mortgage and Coleman's consideration. Whatever doubt there might be as to whether such was the

exact theory of the reply is removed by the evidence introduced. The court entertained that theory and decided the case upon it.

It is impossible to doubt that the reply, as thus interpreted, was a departure, and that this new theory could have entered the case properly only by way of an amended complaint. Under the theory of the complaint, Harper was the real party in interest. Under the theory of the reply, Coleman was. A foreclosure sale under the theory of the complaint would have passed to the purchaser all the right, title and interest of Harper. Under the findings and decree as rendered, if any valuable right, title or interest is to be sold, it is that of Coleman. He was not a party to the suit, and the findings, of course, do not bind him nor his property.

Appellant, among his other contentions, urges that the court's finding that Coleman was married when he conveyed to Harper, and that Mrs. Coleman did not sign the deed, required a conclusion that Harper's attempted mortgage was a nullity. Appellee says there was no such issue, because the fact was not pleaded. This illustrates the impossibility of the present situation, and confirms our view that the reply must be stricken. The facts found, if not conclusive, at least strongly point to a complete defense to the suit. They could not be pleaded. The occasion for pleading them arose only after the reply came in, and then it was too late. Even under the common law a departure was discountenanced. Under a system arbitrarily ending pleading at the reply, a departure is far-reaching in its consequences.

Appellee does not contend that the present decree is binding upon Coleman, but urges that this court has no concern in that matter. It has, it argues, a decree of sale, and should be allowed to sell Harper's interest, whatever it may be.

This contention further confirms our view. Harper did not deny beneficial ownership. He tendered the issue that his right, title and interest in the property

was community estate. This issue has never been met. Appellee, of course, cannot be allowed to sell any possible interest of Harper until it has been adjudged that it is not community estate.

However we view this record, it seems impossible to sustain a foreclosure sale. We are satisfied that the fundamental error lay in permitting appellant to proceed to litigate on a theory inconsistent with its original pleading. Other serious questions are urged, but, as we do not expect them to arise on a new trial, we do not discuss them.

The judgment must be reversed, and the cause remanded, with direction to strike the reply and to allow such further proceedings as may be consistent herewith; and it is so ordered.

PARKER, C. J. and BICKLEY, J., concur.

[No. 3053, Nov. 19, 1926. Rehearing Denied Jan. 5, 1927.]

CLEVENGER v. SULIER et al.

[252 Pac. 173.]

SYLLABUS BY THE COURT

1. An insured member of a benefit society is entitled to notice of the specific offense charged against him as ground for expulsion.

2. Where the charge was so formulated that the member justifiably interpreted it as accusation of a specific offense, his pleading and going to trial without objection cannot be deemed a waiver of his right to specification, when it appears that he was not convicted for the particular offense, but for misconduct in general.

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

Suit by J. R. Clevenger against D. A. Sullier and others to annul an order of expulsion from Division No. 371, Grand International Brotherhood of Locomotive

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[1] 29 Cyc p. 36 n. 47. [2] Cyc p. 36 n. 47.

Engineers, and for other relief. From an adverse judgment, plaintiff appeals. Reversed and remanded, with directions.

Mechem & Vellacott, of Albuquerque, and O. O. Askren, of Santa Fe, for appellant.

Downer & Keleher, of Albuquerque, for appellees.

OPINION OF THE COURT

WATSON, J. Suit by J. R. Clevenger to annul an order of expulsion from Division No. 371, Grand International Brotherhood of Engineers. to reinstate him as a member, and to enjoin the appellees, individual members of said division, from refusing to recognize him as a member, and to accord him the rights, privileges, and benefits appertaining to membership. From an adverse judgment, he appeals.

[1] The complaint alleges that appellant was a member in good standing of said division, which is a branch and integral part of said brotherhood; that expulsion from the division involves and results in loss of membership in the brotherhood, and of the privileges and benefits appertaining thereto, including loss of certain insurance and sick and accident benefits secured to him under a policy or certificate issued by said brotherhood, which appellant had held for a long time, and upon which he had paid large sums of money. It was further alleged that on the 7th day of July, 1921, appellant was expelled from the division and from the brotherhood upon the following charge:

"For violation of obligation on account of him being accused of charge of rape and is now being tried before the court; also conduct unbecoming as a member and citizen."

The complaint alleged, further, that while appellant was, on July 7th, 1921, convicted in the district court of San Miguel county on the charge of rape, referred to in such charges, he had appealed from such conviction, and the judgment had been reversed by the Supreme Court (see State v. Clevenger, 27 N. M. 466,

202 P, 687), and that thereafter the said charge of rape was dismissed in the district court. The stated ground for relief is that the charges aforesaid fail to set forth any violation of the statutes or laws of the brotherhood or division, by reason whereof said division was without jurisdiction to expel appellant.

Appellees, by their first amended answer, denied the illegality of the expulsion and set up new matter in defense of the jurisdiction. They allege, in substance, that, prior to the institution of the proceedings in question, appellant had been indicted on the charge of rape, committed upon the reputed wife of a son of a member of said division, and that in conversation with another member of said division he had denied committing the rape, but had admitted making indecent proposals; that, by reason of this, the relations of the appellant, and his conduct toward the said woman, were matters of common knowledge in the community, and of general discussion and concern among the members of the division; that the laws of the division and of the brotherhood provide against willful injury of a brother, or of a brother's family, and against any unbecoming or disgraceful conduct, for the bringing of charges in writing against any member of the division guilty of any such offenses, and for expulsion or other penalty on conviction thereof; that pursuant to these laws and in compliance with the prescribed procedure, the charges above recited were made and served upon the appellant; and that said charges were intended and fully understood by the appellant to mean that appellant was thereby accused of violating his obligation not to injure the family of a brother member "in that he had committed rape or an assault upon, or had made indecent proposals to——, wife of——, who was a son of ——, a member of Division No. 371; and that he was further charged with conduct unbecoming a member and citizen by reason of his relations with, conduct toward, and assault upon the said———; that when he appeared for trial the plaintiff made no objections to the specification of charges against him as set forth in the written notice, but, knowing and under-

standing the meaning and intent thereof as heretofore alleged, consented to and permitted his trial to proceed."

The new matter having been denied, the parties went to trial. Appellants stood upon the legal insufficiency of the charge to confer jurisdiction. Appellees undertook the burden of proving the new matter alleged, offering in evidence the minutes of the division, and the testimony of several of the appellees. It seems to have been the purpose of this evidence to show that appellant was not charged with nor expelled for having committed the crime of rape, but for some violation of obligation or misconduct connected with the occurrence on which the accusation of rape had been made in the courts. We may say here that there was no evidence to show a conviction by the division of any specific act, unless of rape. Appellant requested the trial court to find the specific act or acts of which the appellant was found guilty. The request was refused. No such finding could have been made.

Here, as in the trial court, appellant stands upon the insufficiency of the charge. He also assigns error upon the refusal to find as requested and to make specific findings. Counsel agree that:

"In cases of this kind the court never interferes, except to ascertain whether or not the proceedings were pursuant to the rules and laws of the society, were in good faith, and whether or not there was anything in the proceedings in violation of the laws of the land."

The question is, then, whether appellant has been dealt with according to the law of the land. Has he had due process?

Appellees contend, first, that the charges are in themselves sufficient; second, if not sufficient in themselves, they were made so by attendant circumstances; and, third that the accused, by pleading to them, and going to trial without objection, waived all question of their sufficiency. As appellees have been represented by able counsel, we think we may safely rest our conclusion upon a consideration of these propositions.

That the charges, considered independently of attendant circumstances, are fatally defective, seems too plain for argument. Indeed, counsel can hardly be said to press this view. In argument, they assume the existence of extrinsic facts and circumstances. So we pass at once to their second proposition.

We readily agree with counsel for appellees that the charge itself, with its reference to the criminal proceedings, and in the existing circumstances, must have directed appellant's attention to the facts connected with the occurrence upon which the public authorities had based the accusation of rape. It is not so easy to agree to the argument that, because of this, Clevenger was neither misled nor without sufficient information of the charges made against him by the lodge. Counsel enforces the argument by showing that at the opening of the lodge trial appellant "answered 'not guilty,' and thereupon immediately lauched into the merits or demerits of the rape case." Counsel have proven too much, and have, in our judgment, here pointed out the fatal weakness in the contention and the fatal defect in the charges. For present purposes, and without deciding, we concede counsel's next proposition, viz. that an accused may waive the objection that charges are not specific, and that he does so by pleading to them and going to trial.

In making this contention counsel argue as though the charges were entirely without specification, and were merely charges of violation of obligation and unbecoming conduct. Since such charges would have been sufficient, in the absence of objection, they consider them clearly sufficient when aided by the reference to the criminal proceeding for rape. But we do not think that the charges are aided by that reference. We think they are beclouded by it. Relied on by counsel as limiting the lodge inquiry to misconduct connected with a particular occurrence, they have shown that it was relied on by appellant as limiting the charge to one of rape. We are not merely catching counsel up on a weak point in their argument. We are satisfied from the

record that appellant so interpreted the charge, and pleaded and went to trial, as he supposed, on a charge of rape. That being true, the specification and the attendant circumstances were a snare and a delusion, so far as appellant was concerned, and the waiver not a deliberate and conscious consent to go to trial on vague and uncertain suggestions of general depravity and looseness of morals.

We think, also, that appellant was justified in so interpreting the charges. Without explanation, and in the light only of attendant circumstances, we should so interpret them. It is a well-known fundamental principle that every man put to trial, where his valuable property rights are involved, is entitled to notice of the particular act with which he is charged. The knowledge of it is not confined to lawyers. It is understood generally by intelligent people. Appellees are intelligent. Their calling as locomotive engineers vouches for it. It is plain that they are unskilled in the formulation of accusations. But that is unaccustomed work for them. Substance, not form, will naturally be the product of their efforts in that line. "Forgetting all nice distinctions, and looking at the charge as a whole, attempting in so far as possible to adopt the viewpoint of a layman," as counsel for appellees say we should, we should have said that the intention was, and the attempt was made, to charge appellant with the crime of rape.

[2] If appellant justifiably interpreted the charges as an accusation of rape, and made his defense on that basis. and was as appellees contend, convicted of some other offense, never specified and even now entirely unascertainable, it is manifest that he had but the shadow of a trial, and that his property rights were forfeited in disregard of the law of the land. If this is due process, then the property rights of members of benefit societies, including appellees themselves, are insecure, and almost outside the law's protection.

The issue here made, as counsel for appellees point

out, is whether the charges were sufficient to support jurisdiction. Their patent defects counsel have undertaken to cure by calling in attending circumstances and invoking waiver. Developing the facts has served, it seems to us, to make a bad matter worse. Instead of showing that appellant went to trial with full knowledge of the particular offenses charged against him, and without desiring further specification, it shows that he went to trial for rape, and, according to appellees' theory, that he was convicted of something else. Cases have been cited where knowledge necessarily imputed and waiver of objections have been deemed sufficient to cure the generality of charges. But here we have, not knowledge necessarily imputed, or to be imputed at all, but rather ignorance induced by the charges themselves. The same principle of law should apply here as in cases of bad faith, where the accused has been ostensibly charged and tried for one offense, but really for another. Otto v. Journeyman Tailors B. & P. Association, 75 Cal. 308, 17 P. 217, 7 Am. St. Rep. 156; Thompson v. Grand International Bro. of L. E., 41 Tex. Civ. App. 176, 91 S W. 834.

We agree with the learned trial judge that the determining question "is the sufficiency of the charge to support jurisdiction." We also agree with him that a conviction of crime is not charged. We cannot agree, however, "that a fair construction of the charge would be that the plaintiff was accused of unbecoming conduct in connection with matters on which he was charged with rape in the criminal courts." Primarily the interpretation of this writing was a question of law, as much an original question here as in the court below. To what extent the trial court was influenced by the attendant circumstances we cannot tell, as no findings of fact were made. However, the attendant circumstances material are not in dispute. We find nothing tending to change what we consider the natural and reasonable interpretation. Doubtless the trial court took the view, as a matter of fact, that appellant, by reason of the reference to the criminal proceedings, was informed and knew that any and all misconduct

of his connected with the alleged rape was to become the subject of inquiry and the possible ground for expulsion. As before indicated, the only evidence urged in support of that view convinces us to the contrary.

It follows that there is error in the judgment. Since we conclude that the act of the division in expelling appellant was without jurisdiction, he was and is entitled to the relief prayed. A new trial could not change the situation. The judgment is reversed and the cause remanded. with direction to enter a decree for appellant in conformity with the prayer of his complaint; and it is so ordered.

PARKER, C. J., and BICKLEY. J., concur.

On Motion for Rehearing.

WATSON, J. It seems from appellees' argument on their motion for rehearing that the decision is not clearly understood. Its basis is this: The charges, correctly interpreted, and as understood and acted upon by the appellant, constitute an accusation of rape; but appellant was not tried or expelled for rape, but for other misconduct connected with an alleged rape. If this is true, it is apparent that appellant was expelled from the lodge without due process of law. That he was tried and expelled for causes other than rape is appellee's own proposition. They cannot complain because we adopt it. They can only complain of the interpretation we put upon the charges. The trial judge said that this was the determinative question, and we found it so.

Counsel vigorously contend that appellant was not charged with the commission of the crime. They urge that he was charged simply with "violation of obligation," and with "misconduct unbecoming as a member and citizen." They say that the language, "on account of being accused of charge of rape," is no part of the charge, but is merely a clause of explanation, and that the language, "is now being tried before the court." shows positively that it was not intended to charge a crime, but "was the intention of the lodge to let the

criminal courts handle the matter of the crime, if any, committed by Clevenger, and confined their charges to the conduct and acts of Clevenger in connection with the commission of the crime." While this may be plausible explanation, we cannot accept it as logical interpretation. In our view, the phrases just quoted must be deemed an attempt to specify the particular "misconduct" and "violation" intended to be relied upon. Certainly it is not "misconduct" or violation of obligation" to be "accused" or to be "tried before the court." No one could have thought so. Rape, however, is such "misconduct" and "violation of obligation" and is the only matter mentioned in the document which could be the basis of charges warranting investigation, trial and expulsion. The specification points to a particular act of rape. There might, indeed, be matters "in connection with" an alleged rape which would be cognizable by the lodge as offenses, but no such matters are specified or indicated. Defective as the charges are, they do point to a particular rape. If appellant had been, for that reason, tried and expelled, we are not prepared to say that the charges would have been considered insufficient. We can see no justification, however, for rejecting as a specification the only act mentioned ,and reading into the charges matters not even hinted at.

It is true that the theory on which we have disposed of the case is not exactly the theory on which appellant himself has urged. It was his theory that he was expelled either because the lodge believed him guilty of rape, or because a jury had convicted him of that offense. He took the position that the charges were not sufficient to support an expulsion even on those grounds. Appellees, however, by their answer, proofs and contentions, brought into the case the very material fact that appellant was not tried or expelled for those reasons. So doing, they eliminated the only theory on which the charges could be held sufficient.

Interpreting the charges as they did, appellees, in the effort to sustain them, undertook the burden of

showing from attendant circumstances, known to appellant, both that the lodge intended the charges, and that appellant understood them, as counsel now construe them. If it were admitted that the lodge actually so intended them, it would not satisfy the burden which appellees thus assumed, because, as stated in the original opinion, appellees, by their own showing, have convinced us that appellant did not so understand them. They now urge that appellant did not testify that he understood that he was being put to trial for rape. This fact is accounted for, we think, by the peculiar condition of the pleadings and course of the proceedings, upon which we deem it unnecessary here to elaborate. They also urge that the trial court found to the contrary upon substantial evidence. We do not so understand. The trial court made no finding as to appellant's understanding of the charges, but based his decision squarely upon his interpretation of them.

Holding these views, we must overrule the motion for rehearing; and it is so ordered.

PARKER, C. J. and BICKLEY, J., concur.

[No. 2900, Sept. 8, 1925. Rehearing denied Jan. 7, 1927.]

BOARD OF TRUSTEES OF TOWN OF TORREON LAND GRANT v. GARCIA et al.

[252 Pac. 478.]

SYLLABUS BY THE COURT

1. The town of Torreon, a municipality, sought to quiet title to certain lands claimed by it. Defendants claimed to own said land by virtue of certain granting papers from the Mexican nation, by confirmatory deeds from the plaintiff municipality, and by adverse possession. The trial court found that the plaintiff had no title, and that the defendants are the owners in fee simple and entitled to the possession of the tracts claimed by them. There are no specific findings of facts and conclusions of law separately stated. **Held** that, where no specific findings of fact

[1] 3CJ p. 1428 n. 53; 4CJ p. 735 n. 25; p. 775 n. 29; p. 787 n. 47; p. 1068 n. 22.

and conclusions of law are made by the court, and such failure of the court is not by proper proceedings made the basis for remand in order that the making of such findings, of facts and conclusions of law may be required, as was done in Morrow v. Martinez, 27 N. M. 354, 200 P. 1071, this court will indulge every presumption in favor of the correctness and regularity of the decision of the trial court, and, the requirement that the appellant show clearly that it cannot be sustained on any theory not being met, such decision will be affirmed.

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

Suit by the Board of Trustees of the Town of Torreon Land Grant against Nemecia Garcia and others. Decree for defendants, and plaintiff appeals. Affirmed.

Renehan & Gilbert, of Santa Fe, for appellant.

E. P. Davies and Geo. W. Prichard, both of Santa Fe, for appellees.

OPINION OF THE COURT

BICKLEY, J. [**1**] The plaintiff (appellant) brought suit on August 9, 1918, against a number of persons to quiet its title to the Torreon Land Grant. Answers were filed alleging, in general, among the important defenses, want of knowledge of the due election of the plaintiff board of trustees; denial that the plaintiff is the owner in fee simple and in possession of the lands involved, but alleging that the same are owned in fee simple by the defendants and other settlers of the town of Torreon, to whose ancestors and predecessors in title the land was granted by Mexico in 1841, and confirmed by Congress, setting up the granting papers; that the defendants are in adverse possession of certain described parcels, and so had been for more than ten years individually; denial of not admitted allegations; and asserting claim to their respective individual tracts within the grant; and praying that their respective individual tracts of land be quieted in them. Replies were filed, containing general denials and allegations that the predecessor board had unlawfully distributed the land on the theory that the grant was not a town grant but a grant to individuals, and that it descended

to heirs who were entitled to partition, and made them deeds; and further alleged that the conveyances made by the said board were and are void. Amended replies were filed, denying the allegations of new matter in the answers, and alleging the statute under which the grant was confirmed by Congress to the town of Torreon and its successors, denying the alleged adverse possession, alleging the failure to pay taxes, and otherwise following the form of the original replies. Nearly all the defendants demurred to the amended reply as containing no defense, in part a departure, claiming estoppel of the plaintiff to question the deeds, and as constituting a collateral attack on said deeds. The defendants filed separate answers, which were virtually identical with their joint and several answers.

A final decree was entered in favor of the defendants respectively June 2, 1920.

A motion to vacate the decree was filed, and an amended motion for that purpose was made July 15, 1920, and an order was entered July 22, 1920, vacating said decree. The plaintiff then requested certain findings and conclusions, which were denied April 27,1921, and the former decree was reinstated. The plaintiff, before the reentry of said decree, asked leave to file a second amended reply, which was refused. An amendment to the complaint was allowed by interlineation, so that it was averred that the town of Torreon, a municipality, was the owner in fee of the said grant.

Appellant relies for reversal of the cause upon certain errors assigned, urged in its brief ten points. We shall discuss such of these as seems to be necessary.

It is claimed by appellant that the court erred in overruling the demurrers to the answers of defendants. The only argument made in the brief of the appellant on this point is that the demurrers are predicated on the failures of the answers to allege the payment of taxes for the ten years as a part of the claim of defendants of adverse possession, and that "the law of 1899 defining adverse possession is a general law and is uni-

versally applicable." This is the only ground of the demurrer we will consider. See Raymond v. Holt (N. M.) 141 P. 156.

We assume that appellant alludes to chapter 63 of the Session Laws of 1899, which was "An act to amend sections 2937 and 2938 of the Compiled Laws of 1897." We think the fact that the Legislature by that act amended each of said sections with respect to the disability provisions, but only section 2938 with respect to the payment of taxes, making the payment thereof a constituent element of adverse possession, and did not amend section 2937 in this respect, indicates that it was not intended to make the requirement contained in the amendment of universal application. From the record it appears that the defendants, so far as possession was concerned, claimed under section 2937. See, also, Montoya v. Unknown Heirs of Vigil, 16 N. M. 349, 120 P. 676, wherein these two sections are differentiated.

There are a number of assignments of error which are not argued in the brief of appellant, the brief containing merely a restatement of the assignments of error. These we will not consider. In Klasner v. Klasner 23 N. M. 627, 170 P. 745, we said:

> "The first, fifth, sixth, eighth, tenth, eleventh, twelfth, fourteenth, fifteenth and sixteenth assignments need not be discussed for one or the other of the following reasons: First. A portion of the assignments are not discussed in appellant's brief; the points raised by the assignments simply being stated without any attempt at discussion or citation of authorities, and it has frequently been held by both the state and territorial Supreme Courts that assignments of error, not argued by counsel in their brief, will not be considered and passed upon by this court; that when such assignments are not argued they are deemed to have been waived. (Authorities cited.) Second. The points raised by some of the assignments of error are disposed of by what is hereafter said under assignments discussed."

The foregoing rule is applicable here.

We think the alleged error of the court in refusing to allow the filing of the second amended reply, which was tendered after the case had been tried and after

the decree had been vacated and set aside to permit appellant to present its further objections thereto, is ruled by Holtoff v. Freudenthal, 22 N. M. 377, 162 P. 173, where the argument to reopen the case was made upon grounds similar to those in the case at bar, and where the court decided that a discretion to grant relief of this kind must be left to the court charged with the administration of the law in the first instance. We have examined the record and find no abuse of the discretion of the trial court in this respect.

Certain of the defendants, in addition to other claims of title, claimed by virtue of tax deeds, and exception was taken as to such defendants for the reason that the lands involved, being common lands of the grant, were not taxable. We have held to the contrary in Board of Trustees of Town of Tome v. Sedillo, County Treasurer et al., 28 N. M. 53, 210 P. 102, and State v. Board of Trustees of Town of Las Vegas, 28 N. M. 237, 210 P. 101.

We come now to a consideration of the two principal contentions of defendants: (1) That the grant was a town or municipal trust, and lands held thereunder did not pass by descent; and that (2) the deeds made by the Commissioners of the Torreon Grant to the defendants or their predecessors in title were unauthorized. These will be considered together.

The following is a brief statement of the facts pertinent to the status of the grant lands taken from appellant's brief: Application for the grant was made by and in the name of 27 persons, as shown by the joint and several answers. Juridical possession was given, holding some of it free, as the townsite and commons, and allowing to each petitioner a piece to cultivate 100 varas, measured from east to west, with particular donations to a few, the boundaries being fixed. It was approved by the Surveyor General May 12, 1859, as a town grant and transmitted to Congress for action. It was confirmed as a town grant to the town of Torreon June 21, 1860. As such town it was segregated from the public domain.

We have examined the granting papers appearing in the record, and we conclude that the proceedings effectuating the grant were very similar to those described as applying to the grant described in Williams v. Lusk, 28 N. M. 146, 207 P. 576, and similar to the proceedings in the grants described in the cases therein cited:

"The Mesilla Civil Colony grant lies within what is known as the Gadsen Purchase and was based upon a decree promulgated by the President of Mexico and regulations of the state of Chihuahua. Under these regulations lands were assigned to the colony both for cultivation and for grazing purposes. As was customary under the laws of Mexico, allotments were made of numerous tracts of agricultural lands, of which the allottees became the owners in severalty, and the unallotted land was designated for the common use of all of them for grazing and other purposes. In this particular colony some two leagues of land was allotted as agricultural, and the remainder left for common use. This agricultural land was from time to time divided among the settlers, an allotment of a specific tract being made to each of them. Cultivation of the lands near Picacho, where the tract here in question was situated, was apparently carried on for many years, but a change in the course of the river made further irrigation difficult or perhaps impossible, and cultivation was abandoned. The tract here in dispute lay within these agricultural lands.

"The land which is the subject of this litigation is a part of tract No. 1. Appellee based her claim of title to it disregarding the question of possession upon a deed from the incorporation of Mesilla dated May 11, 1918, signed by its president and secretary, and which in terms conveys the land to her. Since, under the findings of the trial court, this instrument constitutes her only title, the determination of its effect must be decisive of this case. Title to allotted lands passed to the allottee. United States v. Sandoval, 167 U. S. 278, 17 S. Ct. 868, 42 L. Ed. 168; Bond v. Barela, 16 N. M. 660, 120 P. 707; Id., 229 U. S. 488, 33 S. Ct. 809, 57 L. Ed. 1292. Unless, because of the breach of some condition, neither the government nor the grant authorities had any further right of disposition of, or control over them. They had the same status as other lands held in private ownership. Both the New Mexico Legislature and the Court of Private Land Claims in dealing with the Mesilla grant recognized this situation. The Legislature gave no power over such lands to the corporation it created. The court confirmed them to the corporation only as trustee for the actual owners in whom title had already vested. If the corporation acquired any title at all under this decree or under the patent it was merely as a naked trustee with no duties to perform holding the mere legal title for the real owners. Confirmation to the corporation

as trustee was only a convenient method of avoiding the inquiry into the title to each allotted tract within the grant which would have been necessary to a confirmation of the particular tracts to their individual owners. Certainly under general rules of law, such a trustee could have no power of disposition, and its deed is ineffectual as a conveyance of title. The act of the Legislature, which created this corporation and upon which its authority is wholly dependent, gives it no such authority. Its rights and powers as to effectual disposition are confined absolutely to the lands held in common."

In the case at bar the plaintiff introduced in evidence the confirmatory patent from the United States of America, the original of which was dated the 9th day of April, 1908, and rested without the introduction of further testimony. There being no evidence introduced showing the boundaries of the allotted lands or the common lands within the exterior boundaries of the grant or otherwise, the court found that the plaintiff had wholly failed to prove the allegation of ownership of, and title to, the land and property described in the complaint, to wit, that certain tract of land known as the "Town of Torreon Grant," more particularly described in the complaint, and, consequently, dismissed the complaint of the plaintiff . We find no fault with that action of the trial court.

The court then proceeded to find with respect to the answers and cross-complaints of the various defendants, that each of them named in the decree is the owner in fee simple and entitled to the possession of the various tracts of land described respectively. It appears from the record that deeds, bearing in the main dates in 1909, 1910, and 1911, were made to persons interested in the grant, some of whom are defendants and some of whom were predecessors in title of certain defendants claiming title by mesne conveyances from those interested in the grant.

The following is a quotation from one of the deeds from the commissioners of the grant in controversy, which is like the others in question:

"Spanish deed, dated April 12, 1910, from Ross Garcia, Carlos Chaves, and Francisco A. Zamoro, Commissioners of the Torreon Grant, a corporation, by virtue of the act of

the New Mexico Legislative Assembly, designated as title 22 of the Compiled Laws of 1897, to Tirsio Chaves, an heir of Manuel Antonio Chaves, one of the petitioners for the Town of Torreon Grant, witnesseth: That, whereas, the said Tirsio Chaves has made and presented his application to the said Commissioners of the Torreon Grant for a deed and title to a certain piece or portion of land situated within the said grant, known as the land claim of the town of Torreon, being claim No. 22 confirmed by the act of the Congress of the United States of America approved June 21, 1860 (12 Stat. 71), entitled 'An act to confirm certain private land claims in the territory of New Mexico,' which land claim has been regularly surveyed and designated as in townships 5 and 6 north, range 6 each, and townships 5 and 6 north, range 7 east, N. M., containing 14,146.11 acres, and which said grant of land was patented by the United States to the said town of Torreon and its officers, April 9, 1908, and to which patent reference hereby is made for a more complete and accurate description, and which patent is registered in the office of the clerk of the probate court and ex officio recorder, in Book No. 1, Record of Patents, page 61, a record of the county of Torrance and territory of New Mexico, and the said commissioners having examined and considered such application and finding that the said Tirsio Chaves is a person interested in the said grant, and that the land hereinafter described for which he has made application as aforesaid is for agricultural purposes, and does not exceed 190 acres; now, therefore, these presents show that the said Ross Garcia, Carlos Chaves, and Francisco A. Zamoro, Commissioners of the said Torreon Grant as aforesaid, for and in consideration of the premises, and for and by virtue of the right and authority conferred upon them and which they have and possess by law, have given, granted, transferred, and confirmed and by these presents give, grant, transfer, and confirm to the said Tirsio Chaves, and to his heirs and assigns forever, for agricultural purposes, all the following tract and parcel of land and real property situated in and within the granted land of the town of Torreon aforesaid in the county of Torrance and territory of New Mexico, to wit: Said land stands in the Canada del Cuervo; its boundaries are: On the north, common land, and on the south the wall of the grant; on the east by common land, and on the west by land of Carlos Chaves and land of Serafin Perea and common land.

"To have and to hold, the said premises above conveyed and described, together with all rights, privileges and immunities pertinent to the same belonging to the said——— and his heirs and assigns forever."

The introduction in evidence of these deeds was resisted by appellant on the grounds that the execution of the instruments was an ultra vires act of the commissioners of the town of Torreon, for the reason that the deeds were never ratified and never approved by

the judge of the district court. The assignment of error covering this alleged error is as follows:

"The said commissioners' deeds, and each of them, were illegal, ultra vires and void, and the court should not have permitted their introduction in evidence, because they severally constituted a sale or alienation of the common lands within said grant, which was not permissible under section 11, c. 42, Laws of 1907, without a resolution of the board authorizing such sale or alienation, approved by the qualified voters within the grant at an election provided for by the said law, by majority of the persons legally voting thereat, and none of such required processes was observed, nor were they made upon resolution adopted by the board of trustees, and ratified by the people and approved by the judge of the district court of the district wherein said lands lie, to wit, Torrance county, as required by section 809 of the Codification of 1915."

The deeds in question recite that the Commissioners of the Torreon Grant constitute a corporation by virtue of the act of the New Mexico Legislative Assembly designated as title 22 of the compiled laws of 1897. It recites, among other things, that by virtue of right and authority conferred upon such commissioners and which they have and possess by law, after having examined and considered the application of the party claiming title to lands within the grant, found that such applicant, being a person interested in said grant, and that the land described for which he made application is for agricultural purposes, said lands were given, granted, transferred and confirmed to the applicant, etc. The recitals in the deed were not challenged as to the truth thereof, and the deeds were not attackd upon the ground of fraud; the only assault made upon them being that they were given without being properly authorized and as not being properly ratified as required by the statutes cited in the objection. If we assume that the claim made by the commissioners that they acted for a corporation by virtue of title 22 of the Compiled Laws of 1897, and that they were acting upon authority and according to law, meant according to the law of the incorporation of the grant referred to in the deeds, we would conclude that the admission of the deeds was not subject to the objection assigned. It is not objected that the commissioners did not act for a cor-

poration formed under the statutes of New Mexico, in fact appellant brought out on cross-examination of a witness that Chaves, Garcia, and Zamoro at the time of making the deeds were acting as commissioners or board of trustees of the town of Torreon. After the evidence was all in the court permitted the plaintiff to amend its complaint so as to allege that it sued as the "town of Torreon, a municipality." Appellant claims that this amendment was allowed to conform to the proof. Our attention has not been called to any evidence as to the date of the incorporation of such municipality or the manner of the incorporation thereof. If it was, as the commissioners claimed in the deeds, incorporated under title 22 of the Compiled Laws of 1897, and was acting pursuant thereto, then the act of 1907, and section 809, Code 1915, referred to in the assignment of error above quoted, have no application, it being noted that the act of 1907 specifically exempts from its application any grant then being managed or controlled in any manner other than herein provided by virtue of any general or special act of any legislative assembly of New Mexico. On the other hand, in the event of a sale under title 22, Compiled Laws of 1897, § 2166, a resolution was required, but no ratification by election or approval of the court, and section 2176 provides a procedure whereby a person claiming in private ownership any tract, piece or parcel of land within the exterior boundaries of the land grant, may file a petition with the trustees asking confirmaton of his title, and that upon showing that his claim is sustained by the evidence, such board shall convey to the petitioner and his heirs and assigns the lands described in the petition, or so much thereof as is shown by the evidence to belong to such person. It is provided by the next section that any conveyance made in pursuance of the provisions of the preceding section shall operate to conclude all persons claiming the lands described in such petition.

So far as the record discloses, it may be that the proceedings attempted by the commissioners of the plaintiff municipality in the case at bar show some

imperfections, but as we have said, no objections were made or are now made which would challenge such imperfections.

The provisions of section 2176, Compiled Laws of 1897, are very similar to certain provisions of chapter 77, Laws of 1893, being:

'An act to authorize the city of Socorro and Candelario to dispose of certain real estate decreed to it and said Can delario Garcia, in trust, by the Court of Private Land Claims, and to make deeds to property owners within the limits of said grant, and for other purposes."

We have had occasion to consider the last mentioned act in connection with events similar to those in the case at ba in Crity of Socorro v. Cook, 24 N. M. 202, 173 P. 682, and we think the present case is ruled by the decision in that case, in so far as the admission in evidence of the deeds attacked are concerned, and otherwise.

Furthermore, it appears that there are a large number of defendants and cross-complainants claiming title to the lands involved; that the court decreed that their title be quieted, dividing them into more than 20 different groups; that in the main these cross-complainants supported their claim of title upon the theory that they were heirs or successors to the original allottees of the grant; that they were in possession under confirmatory conveyances from the plaintiff municipality and mesne conveyances, and that they had title by adverse possession. The only assault made on the showing of adverse possession is that payment of taxes, as a constituent element thereof, is not shown. This we have disposed of. Otherwise, appellant merely asserts that the evidence does not show adverse possession.

In Morrow v. Martinez, 27 N. M. 354, 200 P. 1071, we held that it is the duty of the trial court, in a case tried to it, to make specific findings of fact and conclusions of law sufficiently specific to enable the appellate court to review the decision upon the grounds upon which it was made below. In that case the party prevailing in the trial court alleged that he was the

owner in fee simple of the premises in question, and relied upon three distinct sources of title, viz.: (1) tax proceedings; (2) court proceedings consummated in a special master's deed; and (3) adverse possession under color of title. In that case we said:

"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."

No error is saved on the failure of the court in this respect in the case at bar. Michigan has a section similar to our section 4197, Code 1915, relative to the court's duty to make findings of fact and conclusions of law, and the Supreme court of that state has often held that in the absence of such findings and conclusions they would not examine the testimony to see whether it supports the judgment. In the case of Putts v. Davis, 50 Mich. 310, 15 N. W. 486, the court said:

"The remaining assignments of error resolve themselves into this: That the judgment should have been for the plaintiffs on the evidence. But it was for the circuit judge, and not for this court, to determine what conclusions the evidence would warrant. If plaintiffs desired a review of the whole case in this court, they should have had the facts found, as well as the conclusions of law dependent upon them, and we could then have determined whether the conclusions were well founded."

In Reymond v. Holt, supra, we held (syllabus):

"Upon the party who alleges error in the action of the court below rests the burden of showing that the judgment or decree appealed from is clearly wrong, or that error to his prejudice has been committed, and an appellate court will not search the record and review questions not raised or insisted upon in order to reverse the judgment."

In Sandoval v. Unknown Heirs of Vigil, 25 N. M. 536, 185 P. 282, we said:

"Upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the decision of the trial court."

Where no declaration of law or finding of facts are given, the theory on which the trial court decided the case not being before the court, it is incumbent on ap-

pellant to show clearly that it cannot be sustained on any theory. This the appellant has failed to do.

For the reason stated, the judgment of the trial court is affirmed; and it is so ordered.

PARKER, C. J., and WATSON, J., concur.

On Motion for Rehearing.

BICKLEY, J. The appellant urges a number of reasons for rehearing in its motion. In the main, they were heretofore urged in the original brief. The appellant challenges a statement in the opinion that no error is saved on the failure of the court to find the facts and give its conclusions of law pertinent to the case separately stated. As we read the record, appellant, in its amended motion to set aside judgment and decree, assigned as one of the reasons therefor the failure of the court: "(a) To give its decision in writing and file the same with the clerk; (b) to find the fact and give its conclusions of law, stated separately."

The decree was vacated by the court on July 23, 1920 and on April 22, 1921, there was filed by the appellant a paper entitled, "Findings of fact and conclusions of law requested by plaintiff." We have read this paper carefully. In the main, it requests the court to give conclusions of law which represent the theory of the plaintiff, but which are inconsistent with the decision of the court. Such findings of fact as were requested were mixed with conclusions of law. No request was made of the court to perform the duty imposed by section 4197 of the Code to make such findings and give such conclusions of law pertinent to the case as the court saw it. Appellant seemed satisfied to rest its case upon the findings and conclusions it requested.

The court refused to make the findings and give the conclusions of law specially requested by the plaintiff, to which plaintiff excepted. Thereafter, on May 21, 1921, plaintiff was allowed certain exceptions nunc pro tunc as of time immediately preceding the reentry of the decree, but these exceptions were directed to the

findings and conclusions the court did make and did not challenge the failure of the court to perform the duties imposed by section 4197. The decrees contain in substance the following language as to the rights of such defendant:

> "The court hereby concludes as a matter of law, and adjudges and decrees that———is the absolute owner in fee simple of all said tract and parcel of land last above described."

The court did not find the facts nor give the conclusions of law upon which the general conclusion above quoted was founded and was not requested to do so, and no exception was taken to such omission. It is also noted that such exceptions as were taken to the decree proposed to be reinstated were not exceptions to the decree as to any particular defendant except as to the Tittsworth Company and the Stern-Schloss Company. With respect to the others, the exception was alike as to all—that is, "to each of the conclusions of law that the defendants, to whom certain parcels of land are adjudged, is the owner thereof in fee simple and entitled to the possession therof." There is no exception to any specific decree on account of lack of findings of fact or the failure to give conclusions of law based on findings of fact as the basis for the decree.

We have no means of knowing definitely the grounds upon which the trial judge proceeded. The defeated party has not a right to a trial de novo in this court. A trial judge is frequently called upon to rule on matters and material facts which he sees transacted before him and of which he must take notice as substantial things in the case, but do not and cannot become a part of the record, and which the appellate court can have no knowledge of, unless perhaps through findings and conclusions. We should labor to affirm the judgment of the trial court unless it is clear that some fundamental right of a party has been invaded, and, as heretofore stated, when the record is deficient, every presumption should be indulged in favor of the correctness and regularity of the decision of the trial court. See

United States v. Biena, 8 N. M. 99, 42 P. 70, and cases cited supra.

While we do not know definitely the grounds upon which the trial court proceeded, it is apparent from the record and from the argument of counsel that the conveyances and documents introduced by defendants embracing 129 exhibits constituted an important element of the trial. The objections which were made to such conveyances are set forth in the assignments of error quoted in our original opinion. It being again urged with much force on the motion for rehearing that the court erred in admitting in evidence defendants' exhibits, it may be well to amplify to some degree the reasons stated in our original opinion supporting the view that the court committed no error in that respect, and that, if error was committed, it is not available to appellant.

Appellant says in paragraph 10 of its motion for rehearing:

"Both this court and the lower court erred in the determination that the appellant had failed to prove ownership of the land described in the complaint for want of evidence of the boundaries of the allotted lands or the common lands, for it had proved by the patent the exterior boundaries, and by the original grant shown in the pleadings the small allottments out of a total of 14,146.11 acres, overlooking that the burden fell on the defendants to show title to or through the allotments or according to the regulations of the statutes."

And in its brief on said motion, it is stated:

"Our court in the Williams Case [28 N. M. 146, 207 P. 576], held that title 'To allotted lands passed to the alottee.' In the case at bar, we atorn to that rule, and so contended throughout the case here and below. As to the allotted lands, 'If the corporation acquired any title at all under this decree or under the patent, it was solely as a naked trustee with no duties to perform, holding mere legal title for the benefit of the real owners,' to wit, those to whom parts of the grant had been lawfully segregated, but not so with regard to the common lands. The corporation therefore held title to the allotted or segregated lands as trustee for the benefit of the true owners, to wit, the persons to whom parcels had been segregated and allotted.

"In our case, by the act of confirmation, the entity called the town of Torreon was trustee for the allottees described

in the granting act and trustee of the community or common lands. That trusteeship by the community or town grant act was transferred to a board of trustees, and the loose fiduciary was made compact. But limitations were placed upon the trust and the powers of the trustees defined, in the said chapter 22 by the laws of March 18, 1907, and the law of March 15, 1913."

Elsewhere in its brief appellant says:

"The status of ownership in the plaintiffs was established not only by the patent offered in evidence, but by the pleadings of the defendants setting up the grant."

Paragraph (d) of the first assignment of error is as follows:

"That the making of said commissioner's or trustee's deeds was unauthorized on the theory of the distribution of the grant to heirs of the original grantees, because the said grant was a municipal trust, and the original grantees were trustees, the said grant being a town grant, which did not pass by descent or inheritance, **as to the common lands.**" (Blackface ours.)

In the amended reply, it is alleged:

"That during the years 1909 and 1910, one Ross Garcia, Francisco Zamoro, and Carlos Chaves were the board of trustees of the town of Torreon land grant, and that said board, without authority in law therefor, and without the payment of any money on the part of the defendants or any of them, and without any court proceeding of any kind whatsoever for the determination of the rights of the respective parties to the land included within the exterior limits of the said town of Torreon land grant, did wrongfully proceed to adjudicate that the said town of Torreon grant was a grant to the individual heirs of the petitioners for the grant, and proceeded to distribute among the parties whom said board had determined were entitled as heirs to a partition of the grant certain tracts of land to different parties theretofore adjudicated by the said board to have been heirs and entitled to the partition of the said land of the town of Torreon grant, and executed to the said parties certain writings purporting to convey to the said individuals portions or tracts of the common lands of the said town of Torreon grant. And that each and all of said conveyances so made by said board of trustees are null and void and of no effect and should by the court be canceled and annulled."

In the amended motion to set aside the judgment and decree it is said:

"That the court should have found that the said plaintiff was the special owner and administrator of the said tract of land, and should have taken notice of the charac-

ter of the grant, as municipal in character, and the status of the board of trustees, as public agents and fiduciaries."

In the exceptions allowed by the court appears the following:

"To the finding that the plaintiff has failed to prove ownership of the said grant, because it is contrary to the law and contrary to the proofs, in that, the plaintiff is the trustee of an express trust, and in that, the complaint, as amended to conform to the proof, alleges ownership of the said grant in the town of Torreon, as to which the plaintiff board was intrusted and invested with power to sue."

Subparagraph (i) of the first assignment of error is:

'That the plaintiff board is the successor in interest of the original grantees of the common lands and those not distributed under the original grant, as trustees of a municipality or municipal trust."

So it would seem from the contentions of appellant that the plaintiff is the trustee of the common lands and those not distributed under the original grant, and also that it is trustee for the real owners of the parts of the grant which had been segregated. As appellant does not stand upon the patent alone but declares that the status of the title is to be determined from the patent, the grant papers, and the confirmatory act, it seems that the situation is not different in effect from that in the Mesilla grant as described in Williams v. Lusk, 28 N. M. 146, 207 P. 576, supra, wherein the allotted lands were confirmed to the corporation "in trust for the persons to whom the same was allotted." In considering the finding and conclusion of the trial court that the plaintiff had "failed to prove the allegation of ownership of, and title to, the land and property described in the complaint," it must be remembered that the plaintiff's complaint alleged ownership in fee simple of the entire 14,146.11 acres, which would include the lands held in trust for the allottees. It seems to us that the interest which the trustee had was hardly a fee simple title.

"Ownership in fee simple implies something more than being the holder of the naked legal title to land. It implies an indefeasible legal title—the entire title and estate in land." United States v. Hyde (D. C.) 132 F. 545, 550.

It may be that in an appropriate proceeding the trustees might quiet title to the common lands, but it is not apparent how one merely a naked trustee with no duties to perform except to hold the mere legal title for the real owners may quiet title in him as against such real owners. It being conceded that within the exterior boundaries of the grant described in the complaint there were both common lands and allotted lands which had been segregated to the original petitioners and their children and successors, and the plaintiff claiming ownership in fee simple of the entire tract and plaintiff not offering to amend so as to take a decree affecting common lands only, we do not see how the court could do otherwise than dismiss the complaint. We will further consider the effect of the commissioners' deeds complained of. In our original opinion, without citation of authority, we gave effect to the recitals in such deeds that the commissioners of the Torreon grant constituted a corporation "by virtue of the act of the New Mexico Legislative Assembly, designated as title 22 of the Compiled Laws of 1897."

In Encyc. of Evidence, vol. 4, p. 182, it is stated:

"Recitals in deeds are prima facie evidence of the facts therein contained, against the parties thereto, and their privies."

The text-writer in the Encyc. of Evidence, 1917, Supp. "Deeds," p. 695, note 182-60, cites Cleveland v. Bateman, 21 N. M. 675, 158 P. 648. Ann. Cas. 1918E. 1011. as supporting the above text. We note in this case that we cited 4 Encyc. of Evidence, 183, and, while the direct question decided involved recitals contained in a deed executed by virtue of a power of sale contained in a mortgage, yet we agree with the text-writer that it supports the general principle laid down at page 172 quoted above. In that case we cited with approval 13 Cyc. 611. Said section corresponds substantially with section 220 of the article on deeds in 18 C. J., from which we quote:

"Recitals in deeds are usually considered, as concerns their effect as between parties and privies, with relation to the doctrine of estoppel, the principle being that a per-

son who admits the existence of a fact or deed either by reciting it in an instrument executed by him or by acting under such instrument will not be permitted to deny its existence. In some cases, however, the effect of recitals has been considered as a mere matter of evidence, without consideration of their effect as constituting an estoppel. In such cases they have been variously held to constitute evidence of the facts stated, which, being uncontradicted, is to be taken as true, to be evidence generally without being conclusive of the facts, or to be taken as prima facie true, or obligatory as full proof of an authentic act, or raise a presumption of the truth as stated."

The deeds were not objected to on the trial on the ground that further proof should be made of the facts recited, and no proof was offered to contradict it. The deeds were objected to on the ground of lack of authority in the party executing them, and that they were made by a party not having title, and appellant asks us to now consider further objections made in its brief. These later objections we may not consider.

If we give effect to the recital as evidence of the fact that the Torreon grant was a corporation by virtue of the act of the New Mexico Legislative Assembly designated as title 22 of the Compiled Laws of 1897, the inference is that the benefits of the provisions of that act were accepted in the manner therein designated. Section 2173 provides that the board of trustees of a corporation created under that act should have no control over the lands within the exterior boundaries of such grant, which were held or claimed in private ownership, except as thereinafter provided. Section 2174 provides that the trustees might institute suits in ejectment against any person holding, in possession or under claim of private ownership within the exterior boundaries of any such land grant, any tract, piece, or parcel of land. Section 2176 provides as follows:

"Any person or persons who have not an unquestioned paper title, holding or claiming in private ownership any tract or tracts, piece or pieces, parcel or parcels of land within the exterior boundaries of any such land grant or real estate may, within two years after the election of the first board of trustees of any corporation created under the provisions of this act, file with such board of trustees a petition in writing, setting forth a description of such land

according to an actual survey thereof, and the nature and source of his title, and praying that such land may be conveyed and confirmed to him by such board of trustees, and thereupon it shall be the duty of such board of trustees to examine such petition and the evidence offered in support thereof, and if the claim or claims of such person or persons shall, in the opinion of the majority of such board of trustees, be sustained by the evidence, such board of trustees shall immediately convey to such person or persons and his or her heirs and assigns, the land described in such petition, or so much thereof as is shown by the evidence to belong to such person or persons: Provided, however, That if such board of trustees shall fail or refuse for any reason to make such conveyance, such person or persons shall have the right to file in the district court of the proper county a bill of complaint in chancery against such corporation, praying that such board of trustees shall be compelled to convey and confirm to such person and his heirs and assigns the property so claimed and held in private ownership, and if upon the hearing of such cause it shall appear that such person or his grantors is entitled under the law, usage or custom of Spain, Mexico, the Territory of New Mexico or the United States, to such land, a decree shall be entered in such cause requiring such board of trustees to convey and confirm the same to such person, his heirs and assigns."

It seems apparent that the commissioners' deeds were issued pursuant to proceedings had under section 2176. The deeds recite that the grantee named therein had presented his application to the commissioners for a deed and title to a tract of land situated within the town grant of the town of Torreon, and that the commissioners had examined and considered such application and found that the applicant was a person interested in said grant and that the land described for which he had made application is for agricultural purposes. This last recital seems significant because the original grant was:

"Within these boundaries, I gave to each settler one hundred varas of land for cultivation, measured from east to west. In addition to the one hundred varas I assigned to them the building of the town, inclosures, and other common purposes, I gave to each settler a piece of land immediately adjoining the town for gardens, considering the same to be just, and having been requested to do so by the settlers, which request I complied with, as aforestated."

The recital in the deed that the land is for agricultural purposes indicates that it is not a part of the common lands. This is further indicated by the descriptions of

the lands in the deed; for instance, in Exhibit No. 2 the land conveyed or confirmed to the applicant is described as being bounded on the north by the common land; in Exhibit No. 1 the land conveyed or confirmed to the applicant is described as being bounded on the north by lands of Serafin Perez and common lands; in many of the other deeds the common lands are designated as one of the boundaries of the tract confirmed to the applicant. This would seem to indicate that the commissioners were not dealing with the common lands. Appellant asserts that the conveyances complained of conveyed common lands, but it has pointed to no evidence supporting the assertion.

Furthermore, in City of Socorro v. Cook, 24 N. M. 202, 173 P. 682, we held that:

> "While the city council of Socorro, acting in its municipal capacity, had no authority to convey away its streets, plazas, or parks, it did have authority, as trustee, acting under said legislative authority, to determine the question as to the right of the claimant to the legal title to lands claimed, and to pass upon the question as to whether such lands so claimed had been dedicated to the public, and as to whether the city or the claimant was entitled to a conveyance of the legal title."

So in this case if the plaintiff grant commissioners, acting under the authority of section 2176, determined and adjudicated that defendants were entitled to certain lands in severalty and gave them "paper title" thereto, we are of the opinion that, presumptively, it investigated and determined that the land so confirmed to the defendants is not a part of the common lands.

This action of the commissioners was apparently acquiesced in in the majority of instances for about eight years and in some instances much longer. Lorenzo Zamora, a witness called by plaintiff, and being examined by plaintiff's attorney, testified that he had lived on the Torreon grant since infancy, over 50 years; that he had been a member of the board of trustees of the Torreon grant for a time—about 1910; he remembered that the patent to the grant was issued in 1908; was on the board when some of the land was partitioned to persons who claimed to be heirs of the original petitioners of

the grant; proof was made before the board that petitioners were heirs of the original petitioners of the grant, and the board decided who were the heirs and to them was partitioned off the lands the board thought they were entitled to as such owners; didn't know of any sale being made by the board; didn't know of any election to ratify the action of the board in issuing deeds; they had their agreements in the meetings they had held. In response to questions by the court, witness testified that he was present at a meeting when they decided to issue the deeds to the heirs of the original petitioners; the people were notified in advance that the meeting was going to be held to divide the land. Question by the Court: "Who was present there? Answer: "Nearly all the people; there were about 60 or 70 men." There was introduced in edivence a portion of what purported to be rules and regulations of the board of commissioners of the town of Torreon. One of these rules and regulations translated into the record provides that said commissioners shall have the right to take care of all the property within said grant, all that portion of land that is now in common, and they also shall have the right to divide and deliver to the owners and heirs the land they should have according to their right. A notation on the corporation record of this rule is: "Approved and adopted by the people at a public meeting held on this the 4th day of June, A. D. 1913."

From this it appears that after the deeds that had been issued up to that time there remained common lands; the exact extent or location of which is not shown. Also, that the people of the town acquiesced in this method to "divide and deliver to the owners and heirs the land that they should have according to their rights."

An examination of the statutes applying to community grants shows that section 2176, C. L. 1897, was not repealed by chapter 42, Laws 1907. In addition to what was pointed out in this respect in the original opinion, we have noted chapter 3 of the Session Laws of 1917,

being, "An act relating to corporations organized under chapter 86 of the laws of 1891, or chapter 54 of the Laws of 1897, for the management and control of community land grants." This chapter is in the main a re-enactment of chapter 54 of the Laws of 1897, of which section 2176 was a part and which section was omitted from the act of 1917, the provisions of the 1897 act with reference to the sale, mortgage, and lease of the common lands being substantially the same in the act of 1917 as in the act of 1897, neither enactment requiring the approval of the court and the 1897 act not requiring an election, the 1917 act requiring an election only in event the action of the board in making the sale, mortgage, or lease is protested within 30 days, after action taken by the board.

The exercise of the power reposed in the authorities of the land grant by virtue of said section 2176 seems to have been in accord with the general policy recognized by the Legislature (see Code 1915, art. 2, c. 22), the language employed being variously:

"To recognize and confirm by deed of conveyance all bona fide adverse holdings of real estate within the grant." Act of February 23, 1905.

"Said board is hereby vested with full power to segregate and convey in severalty to individuals or aggregations of individuals parcels of land within said grant that have been claimed and cultivated by them prior to March 9, 1905, or by those under whom they claim title; also to determine the amount to which any individual claimant or owner of an undivided interest in said grant is entitled in severalty, subject to appeal to the district court by any claimant," etc. Act of March 3, 1909.

"Said commissioners have the right and authority to make, give and execute deeds and titles for lands within said grant in favor of the persons interested in said grant for the purpose of agriculture." Act of March 18, 1907.

"To recognize and confirm by deed of conveyance all bona fide adverse holdings of real esatte on said grant." Act of March 17, 1903.

From all of the foregoing it follows that appellant's motion for a rehearing should be denied, and it is so ordered.

PARKER, C. J., and WATSON, J., concur.

[No. 2988, Jan. 7, 1927.]

[STATE v. McKINLEY COUNTY BANK. In re ROBB et al.]

[252 Pac. 980.]

SYLLABUS BY THE COURT

1. Whether a bank, as to the proceeds of paper held by it for collection, is a debtor or a trustee, depends upon the agreement as to the disposition of the proceeds.

2. Instructions to return the proceeds of a collection, according to banking custom of which judicial notice is taken, authorize the bank, on remitting by draft, to appropriate the money collected and treat it as its own.

3. The payee of a draft, drawn and remitted, pursuant to instructions, in return of the proceeds of a collection, is a creditor not entitled to preference in the assets or cash resources of an insolvent bank in the hands of its receiver.

4. A deposit made in an insolvent bank, whose officers know of its insolvency and have fixed the time for its suspension, is received in fraud, and may be followed as a trust.

5. It is not necessary to the impressment of the trust that the deposit made as in 4, supra, be identified as a specific thing if it can be traced to the bank's cash resources, since there is a presumption that payments from such cash resources, after receipt of the deposit, were from the bank's own funds, and not from those held in trust.

6. A deposit made as in 4, supra, is proper basis of a "preference," when it appears that the cash resources in the bank, from the time of such deposit, and which came into the hands of the receiver, exceeded the amount thereof.

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

Action by the State against the McKinley County Bank, in which Frank B. Mapel was appointed receiver, and in which Everett Robb and others presented claims. From a judgment impressing assets in the hands of the receiver with trusts in favor of the claimants, the receiver appeals. Affirmed in part, and reversed in part, and remanded, with directions.

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[17] CJ p. 617 n. 72. [2] 7CJ p. 616 n. 68. [3] 7CJ p. 616 n. 70. [4] 7CJ p. 751 n. 80. [5] 7CJ p. 751 n. 80. [6] 7CJ p. 752 n. 81.

H. C. Denny, of Gallup, and John F. Simms, of Albuquerque, for appellant.

J. W. Chapman, of Gallup, for appellees.

OPINION OF THE COURT

WATSON, J. The district court of McKinley county rendered judgment impressing the assets in the hands of the receiver of the McKinley County Bank with a trust in favor of appellee Robb in the sum of $1,160, and in favor of appellees the Colorado Milling & Elevator Company and the First National Bank of Pueblo, Colo., in the sum of $1,837.03, requiring such sums to be paid out of such assets prior to any distribution to unsecured creditors. The receiver has appealed from the judgment.

As we desire the exact facts upon which this decision is based to appear in the opinion, we insert here the findings of the trial court, the correctness of which is not in controversy:

"(1) On the evening of Friday, the 17th day of August, 1923, after the close of business, a meeting was held in the city of Gallup by the officers of the McKinley County Bank, together with some of their friends and other banking officials, at which time the advisers of the bank and the officers then present determined and knew that the bank was insolvent, and it was agreed at this time that the bank would continue to run on Saturday, August 18, 1923, keeping all the transactions of that day separate from former business, and at the closing of business on Saturday at noon the bank should be placed in the hands of the state bank examiner.

(2) The bank opened on Saturday, August 18, 1923, and remained opened until noon, at which time it was closed and placed in the hands of the state bank examiner of New Mexico.

(3) During Saturday morning, August 18, 1923, Mrs. W. G. Hearst, who was the holder of a certificate of deposit in the said bank, which she had held for some time previous, came into the bank accompanied by Mr. Everett Robb, the claimant, and surrendered her certificate of deposit to Mr. Sam Bushman, the vice president of the bank, with the request that her note in the bank be canceled out of the proceeds of the certificate of deposit, and that the balance of the certificate, amounting to $1,160, over and above her note, be paid to Mr. Robb, who was then present. Mrs. Hearst was making a real estate deal with

Mr. Robb. Mr. Bushman surrendered Mrs. Hearst's note, took up her certificate of deposit and gave to Mr. Robb an ordinary deposit slip in his name for $1,160, which Mr. Robb accepted and left the bank. The bank was closed at noon on the same day. The deposit slip for the credit of Mr. Robb was not worked into the bank's books until about the 20th day of the month of August, when the bank examiner made the entry through one of his deputies in charge of the bank. No actual money played any part in the transaction, which was consumated entirely with the certificate of deposit of the bank in favor of Mrs. Hearst and by the deposit slip for the balance, after deducting Mrs. Hearst's note, which deposit slip was given to Mr. Robb, who had no knowledge that the bank was then insolvent.

"(4) That on or about the 14th day of August, 1923, the First National Bank of Pueblo, Colo., a national banking corporation, forwarded to the McKinley County Bank for collection and remittance a check of $1,835 drawn by the Gallup Mercantile Company on the order of the Colorado Milling & Elevator Company of the Pueblo Flour Mills, the trade-name of that corporation, and was by it indorsed to the First National Bank of Pueblo. On Friday, August 17, 1923, the McKinley County Bank collected the amount of the check, $1,835 from the Gallup State Bank, and on the same day gave its draft No. 13584 for $1,837.03 on the Continental & Commercial National Bank of Chicago, drawn in favor of the First National Bank of Pueblo, and on that day, Friday, August 17, 1923, deposited the draft in the mail, addressed to the first National Bank of Pueblo. The draft was not paid. The first National Bank of Pueblo did not have an account with the McKinley County Bank, nor did the McKinley County Bank have an account with the First National Bank of Pueblo. The McKinley County Bank received the $1,835 from the Gallup State Bank, and while the sum of $1,835 was not kept separate or earmarked in any way by the McKinley County Bank, there was on hand in the McKinley County Bank more than that amount of cash at the time it closed, and the receiver, when he took over the McKinley County Bank, had more than that amount of cash on hand. That the letter of transmittal accompanying the check from the First National Bank of Pueblo to the McKinley County Bank listed the item forwarded, and contained the words 'for credit or return.' That the said words are generally understood by the banking profession to mean, and it is the custom, that when the forwarding bank has an account with the corresponding bank the money realized from the collection shall be placed to the credit of the forwarding bank, and where it does not have an account with the corresponding bank the latter shall forthwith, upon making collection, immediately remit to the forwarding bank the money so collected."

We find it convenient to dispose, first, of that part of the judgment bearing upon the claim of the Colorado

Milling & Elevator Company and First National Bank of Pueblo. To support this branch of the judgment reliance is placed upon First National Bank of Raton v. Dennis, 20 N. M. 96, 146 P. 948. Regarding that case, appellant contends that, "in so far as the opinion announces the rule that the relation of debtor and creditor did not exist," the holding is not sound in principle, is contrary to the weight of authority, and should be overruled. He further contends that the decision is not controlling because the case at bar is distinguishable.

It is plain that the two cases are distinguishable in their facts. In the Dennis Case the collecting bank, instructed to collect and "remit or return" the amount collected, violated its instructions and failed to make remittance. In the case at bar, the collecting bank, instructed to collect and return, strictly observed its instructions, and made remittance by Chicago exchange on the very day of collection. Whether this distinction is important will appear as we proceed to determine the true import of the Dennis decision. It must, of course, be interpreted in the light of the facts there existent and of the contentions there made.

Both counsel in the Dennis Case admitted the general rule as there laid down, that, in the absence of an agreement to the contrary, the collecting bank and the owner of the paper sustain to each other, in respect to the money collected, the relation of debtor and creditor. As to that general rule, we have no question here.

The appellee in that case contended, however, that the general rule was subject to but one exception, namely, that, in case the proceeds of the collection came into the hands of the bank, when insolvent to the knowledge of its officers, the relation of trustee and cestui que trust arose with respect to such proceeds, because of the fraud in receiving the money under such circumstances. Such a situation was not present in the Dennis Case; nor do we have it here.

This court, however, did not accede to the appellee's contention just stated, but held that another case of

fraud constituted an exception to the general rule, namely, a violation by the collecting bank of its agency agreement. It was because of fraud of that kind that the trust was declared in the Dennis Case. There was none such in the case at bar.

[1] If we have so far read aright, it was the fraudulent conduct of the bank which gave rise to the trust. Further, it is the true intent of the agreement of the parties which determines the relation existing between them, whether of debtor and creditor, or of trustee and beneficiary.

In developing his views, Mr. Justice Hanna, the learned author of the court's opinion, said:

"* * * Where a special agency is created and the collecting bank has no authority to hold and credit proceeds of paper, but is bound by the agreement to remit them immediately to its correspondent (or owner or holder), the relation of trustee and beneficiary is created, and the money collected, or its equivalent, can be recovered from the assignee of the insolvent bank, if the fund be traceable."

Thus it was the view of this court that instructions to collect and remit created a special agency and the relation of trustee and beneficiary. That such is the quite uniform holding as regards the relation of the parties before the collection is made, see the opening paragraph of case note, 24 A. L. R. 1152, citing 3 R. C. L. p. 634, § 262.

[2] Counsel for appellees assumes, as some courts seem to have done, that this trust relation, once arising from the agreement of the parties, cannot change, but must continue to the end of the transaction. We doubt the soundness of this view. An undertaking to collect necessarily makes the bank an agent. So long as it continues to hold for collection, that status, of course, continues. But, having discharged that part of its duty, which requires it to collect, it is no longer the holder of the paper intrusted to it, but of the proceeds thereof. Its status as a holder of the proceeds depends upon its instructions or the agreement governing the disposition of the proceeds. This is mere corollary of the general rule laid down in the Dennis Case. In the absence of

agreement, the collecting bank is authorized to credit the proceeds. Crediting them, it becomes a debtor. Its status changes from trustee of the paper to a debtor as to the proceeds. But, as held in the Dennis Case, if the collecting bank is instructed to remit immediately, its failure to do so in fraud of the agreement does not result in any change of status; that is to say that, being a trustee to begin with, the bank cannot free itself from its liability as such by an act of its own in violation of its contract. It does not follow, however, that it cannot free itself from such liability by a compliance with its contract. So, it seems to us, that it is not inconsistent with the Dennis decision to say that, where there is a special agreement governing the disposition of the proceeds of the collection, the status of the collecting bank may or may not change, and changes as and when contemplated by such agreement. Corporation Commission v. Bank, 137 N. C. 697, 50 S. E. 308, 2 Ann. Cas. 537, citing 3 Am. and Eng. Ency. of Law (2d Ed.) 819; Union National Bank v. Citizens' Bank, 153 Ind. 44, 54 N. E. 97.

It seems to us, therefore, that the Dennis Case is not controlling here, and leaves open the real question in this case, namely, If a bank, intrusted with paper for collection, and intrusted to remit the proceeds, does collect, and does remit, is it, from the time of remitting a debtor or a trustee?

It is quite plain from the authorities that if authorized, expressly or by implication arising from general custom, or special course of dealing, to hold and credit, the bank, upon giving proper credit, becomes a debtor. It is equally plain that, if instructed to hand over or remit the very thing collected, the bank remains a trustee or bailee. If a mere debtor, the creditor is entitled to no preference of payment. If a bailee or holder of a special deposit, the bailor may follow his property so far as he can trace it. These well-established rules are the points of departure for the great body of the decisions. Most of the litigated cases naturally have to do with situations lying between those stated.

Naturally the principles involved in the Dennis Case and in the case at bar have been applied in a great variety of fact situations. The decisions are very confusing. The conclusions reached and the theories involved are conflicting. See, generally, case note, 86 Am. St. Rep. 769; case note, 24 A. L. R. 1148; case note, L. R. A. 1917F, 603; Michie on Banks and Banking, § 166. We shall make no attempt to harmonize, classify, or distinguish. We shall confine ourselves to the question above stated, and seek to indicate the reasons and the authorities which persuade us. Where we have been influenced by the reasoning and principle announced in particular decisions, we shall cite them, regardless of the fact that in some of them the conclusion reached is not the conclusion we reach here.

We assume, at the outset, that the remittance made by Chicago Exchange was one authorized by the instructions. The custom of banks to remit by exchange is so universal as properly to be matter of judicial notice. A requirement that the very money collected be remitted is so contrary to the customs of banking that it cannot be implied. Bowman v. First Natl. Bank. 9 Wash. 614, First National Bank of Richmond v. Davis, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795. It follows, then, that the appellees consented to such legal relation as would necessarily follow when such a remittance was made. They agreed, in lieu of the very money collected, or of any money, to reveive the bank's draft on its correspondent or depository.

The bank, having rightfully remitted its draft, was it seems to us clearly entitled and expected to appropriate the money and to mingle it with its own funds. If not, then in this very ordinary banking transaction a breach of trust is always committed by the collecting bank. Hecker-Jones-Jewell Milling Co. v. Cosmopolitan Trust Co., 242 Mass. 181, 136 N. E. 333, 24 A. L. R. 1148; Sayles v. Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940; Akin v. Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 527, 42 Am. St. Rep. 921; U. S. National Bank v. Glanton, 146 Ga. 789, 92 S. E. 625, L. R.

A. 1917F, 600; Union National Bank v. Citizens' Bank, supra; Bank v. Davis, supra; Commercial Bank v. Armstrong, 148 U. S. 50, 13 S. Ct. 533, 37 L. Ed. 363. See, generally, case note, 38 L. R. A. (N. S.) 146, and case note, L. R. A. 1917F, 603.

[3] The bank became thus according to the implied terms of the agreement, the owner of the money and liable to appellees as the drawer of a bill of exchange. The original owner surrendered his title to the money and became the owner of the bill. The money dropped out of the case as the basis of the relation, and the draft came in. We recognize none of the earmarks of a trust in the relation between the drawer and payee of a bill of exchange. So much for our theory. The practical view is that appellees, in entering into the contract with the bank, trusted its credit as other classes of customers did. They were willing to exchange their money for the bank's draft, just as another customer was willing to exchange his for a certificate of deposit. Either might have insured his safety by express agreement—the one, by stipulating that the very money collected should be remitted; the other, by making a special deposit or bailment. As a matter of convenience, and in his own interest, each waived the safeguard. We are unable, either theoretically or practically, to distinguish between them or to prefer one claim to the other. We can see no equity in favor of the appellee superior to that of one, who, having a payment to make at a distant point, paid his money into the bank and received therefor the bank's draft with which to make his remittance. Sayles v. Cox, supra; American National Bank v. Owensboro Savings Bank & Trust Co.'s Receiver (Pedley) 146 Ky. 194, 142 S. W. 239, 38 L. R. A. (N. S.) 146, citing Billingsley v. Pollock, 69 Miss. 759, 13 So. 828, 30 Am. St. Rep. 585; First Nat. Bank of Richmond (Bowman) v. Davis, supra.

[4] We now come to the claim of Everret Robb. If the transaction in question is to be considered the equivalent of the deposit of $1,160 in cash, we do not understand appellant to contest the correctness of the

judgment in Robb's favor. In such case it would be a trust because of the fraud of the bank in receiving the deposit while insolvent to the knowledge of its officers. But appellant contends that it was not equivalent to a cash deposit; that it was a mere bookkeeping transaction, a debit to Mrs. Hearst, and a credit to Mr. Robb; that neither the assets nor the cash resources of the bank were affected by it; that, if there is to be a trust, there must be a res to which it can attach, and upon which it can be impressed, and which can be identified specifically, or at least followed into the bank's cash resources in augmentation thereof.

[**5**, **6**] Ordinarily, as between the bank and Robb, it would be entirely immaterial whether the transaction took the form it did, or whether he required Mrs. Hearst to obtain from the bank the cash on her certificate, and to pay it to him; he, in turn, depositing it. Such a formality, ordinarily so useless, so contrary to banking custom, would have been entirely superfluous, except as it might serve to satisfy some requirement of the law, to complete a chain of fact necessary to support a delicate and tenuous theory. A court of equity in the endeavor to determine conflicting rights, is not naturally impressed with a distinction so unsubstantial. Nonotouck Silk Co. v. Flankers, 87 Wis. 237, 58 N. W. 383; Darragh Co. v. Goodman, 124 Ark. 532, 187 S. W. 673; Goodyear Tire & Rubber Co. v. Hanover State Bank, 109 Kan. 772, 204 P. 992, 21 A. L. R. 677; Federal Reserve Bank of Richmond v. Peters, 139 Va. 45, 123 S. E. 379, 42 A. L. R. 742.

The situation was created by the unfortunate decision of the bank officials to keep the institution open one day after they were satisfied of its insolvency, and had decided upon and determined the time for its closing. So to do was unfair to its creditors as a whole. Attempting to make special the deposits received during that day, instead of general, as the depositors intended, could avoid but a part of the inequity. Those fortunate enough to withdraw money on that day enjoyed an undeserved advantage over the other depositors. Pass-

ing that, the important question is this. On what principle may it be said that A., who deposited $1,160 in cash, intending it to be a general deposit, can claim a preference based on a trust, because the bank official, without indicating his intention, decided to receive it as a special deposit, placing the deposit slip and the money in a separate envelope; while B. intending exactly the same thing, can claim no preference because the bank official failed to do what in conscience and consistency, he should have done—failed to take $1,160 from the funds of the bank and place it in an envelope with B.'s deposit slip?

No doubt the bank officials supposed that depositors of the last day would recover their deposits, because they were made special bailments merely. In this we think they erred. The general or special nature of a deposit depends upon contract. There can be no contract where there is no meeting of minds. The real reason for the recovery of A. is not that his deposit was special. It is because it was fraudulent. Being carefully kept separate, it was capable of identification. B.'s deposit was equally fraudulent, but not capable of identification as a specific thing. This matter of identification, it seems to us then, is the only distinction.

It is, of course, true, that there must be a res upon which to impress a trust. It is conceded that money kept separate in an envelope is such a res. But if the bank officials had been consistent in their policy of protecting last day depositors, $1,160 would have been found in Robb's envelope. Equity regards that as done which ought to have been done. If it ought to have been done, and could legally have been done, why should it not be regarded as done? Assuming, because counsel do, that payments to creditors under the circumstances in this case were legal, we do not hesitate to say that we have a res to which the trust can attach. The res ought to be in an envelope with Robb's name on it. It is in fact intermingled with, and its identity lost in, the mass of the

bank's money, now in the hands of the receiver. But the identity of money in a bank is of no more practical importance than the identity of so much wheat of a certain grade in a warehouse. Thompson v. Gloucester City Sav. Inst. (N. J. Err. & App.) 8 A. 97; Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 N. W. 21, 86 Am. St. Rep. 769; Federal Reserve Bank of Richmond v. Peters, supra. If it can be traced to the mass, it is sufficiently identified. It is traced to the mass by the bank's books. That it remained there is satisfactorily shown by the fact that more than the amount of it was in the bank in cash, and came into the hands of the receiver; and by the presumption, often indulged in such cases, that, in payments made after the improper mingling, the bank paid out its own funds and not money held in trust. Western German Bank v. Norvell (C. C. A.) 134 F. 724; Continental Nat. Bank v. Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; State v. Bank of Commerce (Edwards) 61 Neb. 181, 85 N. W. 43, 52 L. R. A. 858, citing State v. Bank of Commerce, 54 Neb. 725 N. W. 28; Nonotuck Silk Co. v. Flanders supra; Plano Mfg. Co. v. Auld, supra; Darragh Co. v. Goodman, supra; Massey v. Fisher (C. C.) 62 F. 958.

In Daughtry v. Bank, 18 N. M. 119, 134 P. 220, such a presumption was relied upon by the plaintiff. It did not avail because, for lack of necessary allegations in the complaint, there was no room for its operation. The validity of the presumption, this court did not there question. In First National Bank v. Dennis, supra, counsel, in conceding the sufficiency of the allegations of the complaint "in reference to the tracing of the funds into the hands of the receiver," no doubt recognized that presumption. It is practical, satisfying to the reason, well supported by authority, and we now adopt it.

We conclude, therefore, that the judgment awarding preference to appellee Robb should be affirmed, and that the judgment awarding preference to appel-

lees Colorado Milling & Elevator Company and First National Bank of Pueblo should be reversed, and the cause remanded, with directions to proceed consistently herewith, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3021, Jan. 7, 1927.]

STATE v. NANCE.

[252 Pac. 1002.]

SYLLABUS BY THE COURT

1. Insolvency of the bank at the time of receiving the deposit is an essential element of the offense defined in Laws 1915, c. 67 § 41.

2. Indictment alleging that defendant received a deposit "then and there having knowledge of the fact that such bank was insolvent" sufficiently alleges the fact of insolvency.

3. Discretion of trial court in overruling motion for new trial, based on disqualification of a juror, not reviewable.

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

N. E. Nance was convicted of receiving a deposit in an insolvent bank, and he appeals. Affirmed.

Easterwood & Thompson, of Clayton, for appellant.

John W. Armstrong, Atty. Gen., and J. N. Bujac, Asst. Atty. Gen. for the state.

WATSON, J. Appellant appeals from a conviction under Laws 1915, c. 67, § 41, which provides:

"No bank shall receive any deposit when it is insolvent nor shall any officer, director or employee of any bank knowingly permit the receipt of any such deposits. * * * No officer, director, owner, or employee of any bank shall receive or assent to the reception of any deposit of money or other valuable thing by such bank or create or assent to the creation of any debt or liability by such bank after he shall have had knowledge of the fact that such bank is insolvent. Upon the trial of any person charged with

[1] 7CJ p. 580 n. 28. [2] 7CJ p. 582 n. 49. [3] 17CJ p. 238 n. 26.

an offense under this section, evidence of the failure of such bank at any time within thirty days after the reception of such deposit or the creation of such indebtedness, shall be received as prima facie evidence of knowledge on the part of the person charged, that such bank was insolvent at the time of the reception of such deposit or creation of such indebtedness."

The first point urged is that the court erred in overruling appellant's demurrer and motion to quash. As to the motion to quash, it is sufficient to say, that it does not seem to have raised the objection here urged to the indictment.

[1, 2] The count upon which appellant was convicted alleged that he, as president of the Bank of Des Moines, a state bank, "unlawfully, willfully, knowingly, feloniously, fraudulently and corruptly, did receive a certain deposit of money in said bank, to wit, a deposit of $19.58 then and there made by J. J. Murray, the said N. E. Nance then and there having knowledge of the fact that such bank was insolvent." The objection to the count raised by the demurrer, and here urged, is that it failed affirmatively to allege that the bank was insolvent when the deposit was received.

We readily agree with appellant that under this statute the insolvency of the bank, at the time of receiving the deposit, is an essential element of the offense, and that proof of the fact is necessary to conviction. We agree, also, that it would be better pleading to include in the count an affirmative allegation of that fact. The question is whether its omission is fatal; it being observed that the appellant was charged in the language of the statute.

It is laid down, in substance, in 1 Michie on Banks and Banking, § 62 (1 ch.), 3 R. C. L. "Banks" § 126, and 7 C. J. "Banks and Banking," § 205, that a specific and affirmative allegation of insolvency of the bank is necessary, since, in the absence of that fact, the offense is not committed. Upon these texts and the authorities there cited, appellant relies. Most of the decisions are so clearly distinguishable

as not to require mention. We find but three cases which can be of assistance. State v. Bardwell, 72, Miss. 535, 18 So. 377, and Fleming v. State, 62 Tex. Cr. R. 653, 139 S. W. 598, lend some support to appellan'ts contention; while Commonwealth v. Rockafellow, 163 Pa. 139, 29 A. 757, holds to the contrary. The opinion in the last-mentioned case contains no argument nor authority. It is valuable only as precedent. The other two cases are somewhat distinguishable. In State v. Bardwell, the offense was defined by the statute as receiving a deposit, knowing or having good reasons to believe that the bank was insolvent; and the indictment charged the receipt of the deposit then and there "knowingly, and having good reason to believe, that said bank was then and there insolvent." The court argued that one might have good reason to believe that a bank was insolvent when in fact it was not. In Fleming v. State, supra, the statute made it an offense to receive a deposit "after he shall have had knowledge of the fact that such bank, * * * is insolvent." The defendant in that case was charged with receiving the deposit after said "bank was insolvent and in failing circumstances." The court held that such a charge would permit of his conviction if it were shown that at some time prior to receiving the deposit the bank had been insolvent, even though, at the time of receiving it, it was not.

The indictment in this case charges that appellant, at the time of receiving the deposit, had knowledge that the bank was insolvent. Practically, to enable the state to prove that appellant had knowledge of the insolvent condition of the bank, such condition, as an existing fact, must first be shown. It cannot be said that appellant was not informed of the nature of the offense with which he was charged, nor that it was lacking in particularity. It cannot reasonably be urged that such an indictment would permit of his conviction without proof of the essen-

tial elements of the crime. Clearly, conviction under it would bar further prosecution for the same offense. If this is true, appellant has suffered no injustice or prejudice because of the imperfection of the count.

It is the general rule, subject to some exceptions, that it is sufficient, in charging a statutory crime, to follow the language of the statute. State v. Alva, 18 N. M. 143, 134 P. 209; State v. Probert, 19 N. M. 13, 146 P. 1108; State v. Lazarovich, 27 N. M. 282, 200 P. 422. We think that the count in question is fairly within that rule. The statute itself fails expressly to make actual insolvency an element of the crime. Yet, by necessary intendment, it does so. We think that the count, by necessary intendment, charges, and necessitates proof of, actual insolvency. In State v. Probert, supra, a count following the language of the statute was held sufficient to charge statutory embezzlement, although it contained no allegation of intent to defraud. It was there said:

> "To allege that a person fraudulently embezzled and converted to his own use the money of another, is to allege that he so did with intent to defraud. To do an act fraudulently is to do it with intent to cheat and defraud."

It is just as reasonable to say that to charge one with knowledge of a fact is to charge the existence of the fact.

We think, therefore, that appellant's first contention must be overruled.

[3] Appellant's remaining contention is upon the overruling of his motion for a new trial, in which showing was made that one of the jurors was disqualified, in that he was not a resident citizen of New Mexico. From the affidavits it appears that a few months before the trial the juror moved across the state line into Oklahoma, establishing his residence there; and that on his voir dire examination he stated that he lived at Mexhoma. Appellant says that he understood from his answer merely that the

juror's post office address was Mexhoma, and supposed that he was a resident of New Mexico. Appellant's counsel made no affidavit, but appellant himself undertakes to say for them, that they, as well as he, understood the juror to say that he was a resident citizen of New Mexico. This contention must be overruled on the authority of Territory v. Emilio, 14 N. M. 147, 89 P. 239, which laid down the rule that this court cannot review the action of the trial court in overruling a motion for new trial, based upon the disqualification of a juror. Even if the rule were otherwise, we do not consider the showing of diligence to have been sufficient.

The judgment must accordingly be affirmed, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3026, Jan. 7, 1927]

CONNER v. FLASKA et ux

[252 Pac. 1001]

SYLLABUS BY THE COURT

Section 4467, Code 1915, gives a party litigant the right to address the jury through counsel, and a denial of that right by the trial court is reversible error.

Appeal from District Court, Bernalillo county; Ryan, Judge.

Action by C. H. Conner against John Flaska and wife. From a judgment for defendants, plaintiff appeals. Reversed and remanded for a new trial.

T. J. Mabry, of Albuquerque, for appellant.

George C. Taylor, of Albuquerque, for appellees.

OPINON OF THE COURT

PER CURIAM. Appellant, plaintiff below, sued to recover $75, a balance for professional services

[1] 38 Cyc p. 1470 n. 24.

rendered. The jury found against him, and judgment followed. He complains here that, over his objection and exception, the court refused to allow his counsel to address the jury. This seems to have been the denial of a right which a party litigant enjoys under Code 1915, §4467, which reads:

"Every plaintiff or defendant shall be entitled to be heard before the jury by an attorney, and if there be but one plaintiff or defendant, by two, and when there are several defendants having the same or separate defenses and appearing by the same or different attorneys, the court shall, before argument, arrange their order."

See Territory v. Sherron, 11 N. M. 515, 70 P. 562.

Because of this error, the judgment must be reversed and the cause remanded for a new trial; and it is so ordered.

PARKER, C. J., and BICKLEY and WATSON, JJ., concur.

[No. 3056, Jan. 7, 1927]

STATE v. TAYLOR

[252 Pac. 984]

SYLLABUS BY THE COURT

1. The charge being statutory rape, the prosecutrix's inherently improbable story, uncorroborated by any unequivocal fact pointing unerringly to guilt, is not sufficent to support a verdict.

2. A conviction of statutory rape based on a prosecutrix's inherently improbable story, uncorroborated by any unequivocal fact pointing unerringly to guilt, will be set aside, in the interest of justice, though the insufficiency of the evidence was not urged in the trial court.

Appeal from District Court, Curry County; Hatch, Judge.

Claude R. Taylor was convicted of statutory rape, and he appeals. Reversed, and remanded for a new trial.

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[1] 33 Cyc p. 1517 n. 95. [2] 17CJ p. 60 n. 52.

Hall & McGhee, of Clovis, for applicant.

John W. Armstrong, Atty. Gen., and James N. Bujac, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

WATSON, J. Appellant was convicted of statutory rape upon one Tollie Stone. The verdict was accompanied by a recommendation of clemency. The sentence was not less than 15 nor more than 20 years in the penitentiary. Counsel appearing here did not represent appellant in the court below. There were no exceptions to the instructions given, no other instructions tendered, no motion for a directed verdict, and no motion for a new trial. The matters here urged as error, and that upon which we feel constrained to reverse the judgment, were not brought to the attention of the trial court.

[1] The judgment is here attacked for errors in the instructions given. It is urged that the defective instructions must have misled the jury and have caused the conviction, because of the slight probability that a jury, understanding the evidence and correctly and clearly instructed as to the law, could have found appellant guilty. So, it is urged, the error is fundamental, and should be corrected, though not brought to the attention of the trial court, citing State v. Garcia, 19 N. M. 414, 143 P. 1012; Crawford v. Dillard, 26 N. M. 291, 191 P. 513. In developing this point, counsel call attention to the unsubstantial nature of the state's evidence, and the ack of corroboration of the prosecutrix' testimony. While counsel do not rely directly upon this for a reversal of the judgment, we deem it the vital question in the case and shall not concern ourselves with the instructions.

The prosecutrix reached the age of 16 December 27, 1923. It seems that for some months prior to that date she lived with her father and mother about three-fourths of a mile from appellant's home.

Appellant was 28 years old, and lived with his wife, 19 years old, and three small children, in a one-room house containing one bed. Outside there was a dug-out in which appellant habitually slept with his little boy, while his wife slept in the bed in the house with the two little girls. It is admitted that during the summer of 1923, while they were neighbors, the prosecutrix was frequently at appellant's home, sometimes spending the night there, and tha in January, 1924 (prosecutrix' father thought in March), her father and stepmother moved to Clovis, and that, before joining them, she remained a week or two with appellant and his family. Whatever took place during this visit was subsequent to the prosecutrix' sixteenth birthday.

The directly incriminating evidence was given by the prosecutrix, who testified that on or about July 1, 1923, she spent the night at appellant's home; that she occupied the bed with appellant, his wife and three children; and that while so situated she and appellant had intercourse, during which act appellant's wife was awake and made no objection. This occurrence was flatly denied by appellant and by his wife.

To corroborate this highly improbable narration, the prosecutrix was allowed to testify that she had had intercourse with appellant subsequently. The dates of such subsequent occurrences were not fixed. One or more of them was in a hotel in Clovis after January, 1924. Nowhere in the record is there any evidence of sexual acts between the parties prior to the prosecutrix' sixteenth birthday, except that of July. Except for the alleged occurrence in July, 1923, and the one or more in Clovis, after January, 1924, the only evidence upon which any inference of such acts might be based is the prosecutrix' affirmative answer to this question on cross-examination:

"Do you mean to tell the jury then that sometimes when you were over there you slept with Jewel Taylor,

(appellant's wife) in the house and sometimes you slept with Mr. Taylor in that dugout?"

In connection with this answer it will be observed that no act of intercourse is testified to. No effort was made by the state to bring out the date when the prosecutrix claimed to have slept with appellant in the dugout. This might have occurred as well, or better, during the week or two that the prosecutrix visited in appellant's home after her sixteenth birthday. Following this question and answer, this occurred:

"Q. And Jewel Taylor knew that all the time? A. Yes; sure she knew it.

"Q. And she did not make any objection to it at all? A. No, sir."

The pair were arrested together in Clovis, June 24, 1924. They had been watched and followed at the instance of Mrs. Taylor's relatives. A charge the nature of which the record did not disclose, was lodged against the prosecutrix, under which she was held in custody until the evening of the second day, and then released under bond. The further proceedings against her, if any, are not disclosed. A packet was taken from appellant containing letters which purported to have passed between them, and two photographs showing them in somewhat intimate attitudes. The letters pointed to illicit relations between them. This packet had disappeared from the sheriff's desk before the trial and could not be produced; the contents being given from memory. There was no proof of the authenticity of the letters, except that of the prosecutrix. Appellant disclaims knowledge of the contents of the packet, claiming that at the time of the arrest the prosecutrix had given it to him, asking him to keep it for her. This she does not deny. There was no evidence fixing the dates of the letters or photographs, and no attempt seems to have been made by the state to present such proof. On cross- examination Sheriff Wood said that they were written in

1924, and Deputy Sheriff Hunter said those he noticed were written in April, May and June, 1924. The prosecutrix testified that she was in love with appellant, and that he had, throughout the course of their relations, promised to marry her.

That part of the prosecutrix' story which asserted that appellant had had sexual relations with her is, no doubt, corroborated by the letters and the photographs. But time was the gist of the offense of which appellant was convicted. The evidence of subsequent acts was admitted, not as showing independent offenses, but as showing an adulterous disposition. Its purpose was corroboration. Counsel question, but do not argue, its competency. If competent in this case, it was of little weight. Assuming that there had been a series of acts, some guilty (under the charge), and others not, it remained to the state to establish one act prior to December 23, 1923. That this man and girl should have fallen in love with each other, and should have had illicit relations when opportunity occurred, or could be arranged, is understandable; but such fact, if true, is hardly corroborative of the disgusting occurrence detailed in the record. Unless we are to believe that, there is no evidence of appellant's guilt of the charge.

This court has carefully considered the sort of corroboration which will support, in such a case, a woman's accusation against a man's denial. While it was stated in State v. Ellison, 19 N. M. 428, 144 P. 10, that "in the absence of statute a man may be convicted of rape on the uncorroborated evidence of a strumpet, or he may be convicted on the uncorroborated testimony of a girl below 10 years of age," it appears, also, that the court took unusual pains in its review of the evidence in that case, and not only satisfied itself that no errors of law had been committed, but was convinced of the defendant's guilt. In State v. Armijo, 25 N. M. 666, 187 P. 553, the testimony of the prosecutrix was held not to be

substantial evidence to support the conviction, because there was not "a single unequivocal fact, established by a single witness, shown by his examination to be fair and willing and able to tell the truth, which pointed unerringly to the guilt of the defendant." This view of "corroboration" was taken in State v. Clevenger, 27 N. M. 466, 202 P. 687, and it was there considered the established rule in this state. In Mares v. Territory, 10 N. M. 770, 65 P. 165, it was said:

> "On a conviction of rape, where there is no corroborating evidence nor a single corroborating circumstance, and where none of the incidents testified to as attending the commission of the offense are within the domain of reasonable probability, the affirmance of the conviction would be to establish a dangerous precedent."

There is no corroborating evidence in this case of any unequivocal fact pointing unerringly, or even probably, to appellant's guilt. The fact, if true, that the parties misconducted themselves in a hotel in Clovis subsequent to January, 1924, is far removed from a rape occuring in June 1923. The letters point unerringly only to the fact of former intercourse, but do not tend to fix a date prior to December 27, 1923. It was the theory of the state that appellant's wife was a willing witness of, if not a party to, the outrage. If that were true, it would be most remarkable—the same opportunity existing between July and December—if no repetition of it occurred. Remembering that the state claimed the right to show subsequent acts, and that such right was unchallenged, it is remarkable, if any other acts occurred while the prosecutrix was under the age of consent, that they were not shown.

[2] For the reasons stated, and under the authorities cited, the judgment in this case is against the law and the evidence, and ought, in justice, to be set aside. We hesitate only because the vital error was not brought to the attention of the trial court and is not directly urged upon us here. Nevertheless, we think this is a case like State v. Garcia, sup-

ra, for the interposition of this court to protect fundamental rights. True, this requires us to weigh the evidence, and in the Garcia Case it was said that would not be done. But we do not weigh the prosecutrix' story against the denial of appellant and his wife. We weigh it in the scales of inherent probability. Without strong corroboration, it has no weight at all. It is not corroborated. Without attempting to fix the cause, we conclude that the trial resulted in a miscarriage of justice which we think it our right and duty to correct by awarding a new trial.

The judgment will therefore be reversed and the cause remanded for new trial, and it is so ordered.

PARER, C. J. and BICKLEY, J., concur.

[No. 2917, Jan. 8, 1927]

EXCELSIOR LAUNDRY CO. v. DIEHL et al.

[252 Pac. 991]

SYLLABUS BY THE COURT

An employee who solicits business and delivers work for a laundry may, upon ceasing his employment, become the employee of another laundryman, in competition with his former employer, and solicit business from the customers from whom he had received laundry work, where he leaves with his former employer all lists of the customers, and where there is no contract prohibiting him from soliciting the patronage of such customers.

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

Suit by the Excelsior Laundry Company against J. O. Diehl and another for an injunction. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with leave to entertain an application for a modified injunction.

E. W. Dobson, of Albuquerque, for appellants.
Marron & Wood, of Albuquerque, for appellee.

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[1] 32CJ p. 161 n. 21.

OPINION OF THE COURT

BICKLEY, J. This is an appeal from a judgment granting an injunction, enjoining the defendant J. O. Diehl from soliciting or causing or procuring to be solicited the patronage or laundry work from any of the persons who were customers of the plaintiff prior to the 19th day of February, 1923, along a certain route or district, and from soliciting or requesting, directly or indirectly, or causing to be solicited or requested the customers or patrons of the plaintiff in said district to discontinue their business with the plaintiff, or to transfer their business to the defendant or any other party; and defendant Imperial Laundry Company was enjoined from using in any manner the information acquired by the defendant J. O. Diehl concerning the trade secrets of the plaintiff, or from making use of the same. The plaintiff operated a laundry in the city of Albuquerque and had employed the defendant Diehl to work a laundry route for him in that city. That had been done by soliciting customers for the plaintiff by receiving from those customers work to be done in the plaintiff's laundry, and by delivering that work after it had been done. For several years the plaintiff had prepared and kept a list of its patrons and customers, the particular kind and class of work supplied, and the day and hour of the week when it was to be called for, which list, it is claimed by the plaintiff, was a business and trade secret of the plaintiff, communicated only to such of its agents and employees as needed to use the same in connection with the business, and that this list constituted one of the important and valuable assets of the plaintiff's business; that, for the purpose of enabling the defendant Diehl to perform his duties, the plaintiff revealed and communicated to him the contents of this list so far as the list related to his district; that, from the use of the list and the performance of the duties which the plaintiff employed the defendant Diehl to render, the defendant necess-

arily had acquired knowledge of the valuable trade information and practices of the plaintiff, its customers and needs and class of work, times of collection, etc. The defendant Diehl became ill and was compelled to remain at home and was unable to perform his duties as driver and solicitor, and shortly thereafter was discharged from the service of plaintiff for reasons satisfactory to it. The defendant Diehl afterwards secured employment from the defendant Imperial Laundry Company similar to that which he had rendered to the plaintiff company. The defendant Diehl proceeded at once to visit the same customers and patrons of the plaintiff that he had served as agent and representative of the plaintiff, soliciting them to give up their patronage of the plaintiff and transfer it to himself and the defendant Imperial Laundry Company. The court found also:

"XIII. That in the course of such efforts he went to several of the patrons whom he had formerly served an hour or two in advance of the time when he had been accustomed to collect from them upon behalf of the plaintiff, asked them for their laundry and received the same without informing them of the change in his employment, or telling them that he had ceased to be employed by the plaintiff, and took and was permitted by some of such patrons to take the laundry under the impression and belief that he was still employed by the plaintiff and collecting for it."

There is no finding by the court that the defendant Diehl ever carried away with him any written list of the plaintiff's customers, and no finding that said defendant ever made any copies of any written lists of plaintiff's customers. Whatever knowledge of plaintiff's customers defendant made use of, so far as the record shows, was from memory.

Appellee states:

"This case presents but a single question, the right of the employer to equitable protection against unconscionable use by a competitor, who has employed a discharged servant of the former, of private and confidential information necessarily intrusted to the servant for the performance of his duties."

There was no contract between the plaintiff and the defendant Diehl stipulating that he should not, at the cessation of his employment by the plaintiff, engage in a similar business for himself or another.

The law is in confusion regarding the right of an employee to quit his employment and engage in business for himself, or enter the employment of another, in competition with his former employer, and solicit business from the customers of the latter where knowledge of those customers has been obtained by the employee during the course of his employment, or soliciting such customers. Appellees in their brief state that the authority on which the court below acted was the case of Empire Steam Laundry Co. v. Lozier, 165 Cal. 95, 130 P. 1180, Ann. Cas. 1914C, 628, 44 L. R. A. 1159, and the New York cases therein referred to, and also the case of Grand Union Tea Co. v. Dodds, 164 Mich. 50, 128 N. W. 1090, 31 L. R. A. (N. S.) 260. We think the Grand Union Tea Company Case is distinguishable from the case at bar. In that case the employee was inhibited by injunction from using the list of customers which had been given to the employee or using a copy surreptitiously obtained by the employee for the benefit of a competitor, and required the employee to furnish the employer with the lists which he had withheld upon the discontinuance of his employment. Mr. Justice Hooker, who wrote the opinion in that case, said:

"We are of the opinion, however, that he cannot be restrained from selling his commodities for himself or for any employer, in any part of the city, or to any person, so long as he does not use any property belonging to the complainant, or copies thereof that were surreptitiously made."

The facts of the Grand Union Tea Company Case are summarized in Ice Delivery Co. of Spokane v. Davis, 137 Wash. 649, 243 P. 842, as follows:

"It was a case wherein the driver of a delivery wagon used cards or order blanks and obtained orders for cash sales of goods to be delivered a week later. The names

and addresses of the purchasers were written on the cards. For some months the driver contemplated a change of employment, and some days before ceasing work for the plaintiff, he agreed with his new employer to bring the former patrons to his route with him, and agreed to continue to solicit them thereafter. During the last week, he told the customers of his plan, and obtained their patronage for his new employer. He immediately commenced work for the new employer and before turning over his cards to his old employer, on leaving him, he erased all names of customers from the cards and cancelled others by not putting them on the cards. He continued thereafter to work on the same route and solicit for his new employer."

It cannot be denied, however, that the case of Empire Steam Laundry Co. v. Lozier, supra, and subsequent cases from the same court following that one seem to hold, under the same or similar facts here involved, that the employee may be enjoined as herein attempted. The holding of the California court, however, seems to be the minority holding. It seems to be well settled that, independent of contract, an employer may maintain a bill of equity to restrain an employee from practicing or divulging to others trade secrets, knowledge of which was acquired by him through his employment. It is also said that while equity should lend its aid to the fullest extent to protect the property rights of employers, whether existing in the form of trade secrets or otherwise, consideration of public policy and justice demands that such protection should not be carried to the extent of restricting the earning capacity of individuals on the one side, while tending to create or foster monoplies of industry on the other. And, as was said in E. I. Du Pont, etc., v. Masland (D. C.) 216 F. 271:

"The line which terminates the limits where the rights of the plaintiffs end and those of the defendants begin is a difficult one to draw. The iniquity of an employee who takes away with him the property of his employer, existing in the form of valuable processes, is as clear as if he asported any other form of property. The right of the employee to use his abilities, developed through his experiences, to the utmost of his capacity, is equally clear. This right of the employee and his obligation to preserve to the full the property of the employer are shaded into each

other by lines so fine that it is doubtful whether anything but a nice sense of honor can keep them distinguished."

Some of the cases from those jurisdictions which do not agree with the California courts make a distinction between the carrying away and use by an employee of lists of customers and the use by him of knowledge which he has obtained and which he carried away with him solely in his memory. In Peerless Pattern Co. v. Pictorial Review Co., 147 App. Div. 715, 132 N. Y. S. 37, injunctive relief restraining the manager of a rival firm from soliciting or filling orders from plaintiff's customers was expressly denied, and the court remarked:

"All that clearly appears is that he undertook to use in his new employment the knowledge he had acquired in the old. This, if it involves no breach of confidence, is not unlawful, for equity has no power to compel a man who changes employers to wipe clean the slate of his memory."

Without undertaking to analyze or classify the numerous cases which have dealt with the subject of injunctive relief against the disclosure of trade secrets and the like, we call attention to the case of Progress Laundry Co. v. Hamilton, 208 Ky. 348, 270 S. W. 834, decided in 1925. The court said that the mere knowledge of a list of customers which is common and is essential and necessary to the prosecution of any business would not necessarily be the product of any kind of special ingenuity, but that it is acquired because of other facts common to all commercial activities and trades, and without which none of them would succeed. The court continued:

"Moreover, to hold that a list of customers, obtained in the manner as did defendant in this case, could not be solicited by him (although his efforts may have largely assisted in contributing to the number) when subsequently engaged in a rival competing business is, according to our opinion, directly antagonistic to another cherished principle of the law; i. e., that competition should not be stifled but be free and untrammeled. If defendant herein could be enjoined from soliciting his former customers on route No. 4 in the prosecution of the same business for his new employer, then a traveling salesman, who is ordinarily called a 'drummer,' for a particular business within

a larger territory limited only by state lines, or even to a greater extent, could not engage in business thereafter for another or others conducting a like business within that territory by selling to his former customers. The inevitable result of which would be that a salesman would be forever barred from selling to a customer whose acquaintance he formed during his first employment. If he should succeed in creating a new list in the same territory, for a subsequent employer, and for any cause that employment should be terminated and a similar one accepted from another rival competitor of the two he would then be barred from soliciting sales from either list of customers, and he would eventually be forced to entirely abandon that territory and seek other fields of labor, for which, in the meantime, he had become especially equipped."

The court then remarked that many of the cases cited by counsel involved undisputed trade secrets within that definition; in others, there was an express contract by the employee that he would not appropriate such information either for himself or another, upon retiring from the employment; while in still others, the thing attempted to be appropriated was a copied list of the customers made and taken from the employer's books, which evidently was his property, and so far as the court was able to discover, only two of the cases relied upon by counsel measured squarely up to the facts of the case, and held that an acquired list from the memory of customers by an employee was the acquisition of a trade secret belonging to his employer, and that the former may not solicit their patronage either for himself or while serving another engaged in a similar business. One of those cases, the court said, is Empire Steam Laundry Co. v. Lozier, supra. The court continued:

"On the contrary the Supreme Courts of the states of Georgia, Maryland, Minnesota, and Kansas, before which the exact question was presented, hold to the contrary [citing cases.]"

To which may be added now Washington. See Ice Delivery Co. v. Davis, supra.

In the recent case of Garst, et al. v. Scott, 114

Kan. 676, 220 P. 277, 34 A. L. R. 395, the court decided:

"An employee who solicits business and delivers work for a laundry, may upon ceasing his employment, engage in a laundry business for himself or become the employee of another laundryman, in competition with his former employers, and solicit business from their customers from whom he had received laundry work where he leaves with the employers all lists of the customers, and where there is no contract prohibiting him from soliciting the patronage of such customers."

The court quoted from Empire Steam Laundry v. Lozier, supra, but declined to follow the doctrine therein announced, but adopted the doctrine laid down in Fulton Grand Laundry Co. v. Johnson, 140 Md. 359, 117 A. 753, 23 A. L. R. 420, quoting from the syllabus of that case as follows:

"The list of customers on a 'laundry route,' being obtainable by a rival concern merely by observation, is not a trade secret, to be protected as such by a court of equity.

"An employee in an ordinary business, on going into business for himself or into the employ of another, should not be enjoined from seeking to do business with friends made by him in the course of a previous employment, merely because he became acquainted with them while so engaged and as a result of such previous employment.

"An employer may expressly contract with his employee that the latter shall not, on leaving the employer's service, solicit business in the same line from the customers of the employer in a particular territory."

The court further quoted from the note found in an annotation to Fulton Grand Laundry Co. v. Johnson, in 23 A. L. R. 423, as follows:

"It is held in the majority of the cases which have passed on the question, that in the absence of an express contract, on taking a new employment in a competing business, an employee may solicit for his new employer the business of his former customers, and will not be enjoined from so doing, at the instance of his former employer."

A lengthy discussion of all the decisions will not add to what has been said in the language last above quoted. Since the publication of the Johnson Case as reported in 23 A. L. R., the Kansas court handed

down the opinion in the case of Garst v. Scott, supra, which was also published in 34 A. L. R. 395, and the annotations to that case again say:

"The cases hold that, in the absence of express contract provision, a former employee may not be enjoined from merely soliciting or accepting business from the customers of his former employer."

The court, in Garst v. Scott, supra, said:

"A person who leaves the employment of another has the right to take with him all the skill he has acquired, all the knowledge that he has obtained, and all the information that he has received, so long as nothing is taken that is the property of the employer. Trade secrets are the property of the employer, and cannot be taken or used by the employee for his own benefit, but customers are not trade secrets. They are not property. The right to trade with them may be property, but that right was not interfered with by the defendant. Written lists of customers may be propery, but the defendant did not take any such list. Skill and knowledge acquired or information obtained cannot be left behind so long as those things exist within the mind of the employee. All that knowledge, skill, and information, except trade secrets, become a part of his equipment for the transaction of any business in which he may engage, just the same as any part of the skill, knowledge, information, or education that was received by him before entering upon the employment. Those things cannot be taken from him, although he may forego them, forget them, or abandon them."

In the very late case of Ice Delivery Co. of Spokane v. Davis, supra, decided March 4, 1926, considering facts similar to those in the case at bar, the court reviewed the Grand Union Tea Company Case and many other cases, and decided that a bill to enjoin a former employer of plaintiff, Ice Company, from soliciting customers with whom he had become acquainted on the former route and delivering ice to them in behalf of plaintiff's competitor was properly dismissed for want of equity; there being no evidence of any scheme, plan, fraud, or oppression on part of defendant.

We are in accord with the majority holding as heretofore outlined.

If the injunction had been limited so as to restrain

the practices described in the thirteenth finding heretofore quoted, we probably would find no fault with it. The injunction, however, is very broad and is not limited to restraining the defendant from doing the things described in said finding XIII. It follows from the foregoing that the judgment of the trial court must be reversed and the cause remanded, with leave for the district court to entertain an application for a modified injunction in accord with the principles herein set forth, and it is so ordered.

PARKER, C. J., and WATSON, J., concur.

[No. 2922, Jan. 8, 1927]

STATE ex rel. ARMIJO, Dist. Atty., v. ROMERO, Treasurer San Miguel County.

[253 Pac. 20]

SYLLABUS BY THE COURT

"A subsequent statute treating a subject in general terms will not be held to repeal by implication an earlier statute treating the same subject specifically, unless such construction is absolutely necessary in order to give the subsequent statute effect." State ex rel. v. Romero, 19 N. M. 1, 140, p. 1069."

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

Proceeding by the State, on the relation of Luis E. Armijo, District Attorney, for mandamus, to be directed to Cleofes Romero, Treasurer of San Miguel County. From a peremptory mandamus, defendant appeals. Affirmed, and cause remanded with direction.

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

Tom W. Neal, of Las Vegas, for appellee.

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[1] 18CJ p. 1327 n. 86; 36 Cyc p. 893 n. 23; p. 1087 n. 92; p. 1088 n. 94.

OPINION OF THE COURT

WATSON, J. This is an appeal from a peremptory mandamus commanding the county treasurer of San Miguel county to pay a warrant or certificate of the clerk of the district court of the Fourth judicial district, representing an allowance out of the court fund made by the district judge, covering supplies and traveling expenses of the district attorney.

The county treasurer sought to justify his refusal to pay the warrant upon these grounds: That one of the items included in the claim allowed was not legally chargable; that certain of the traveling expense items were in excess of the sums legally chargeable, under regulations made by the state comptroller, in that (a) more than 12½ cents per mile was allowed for the use of the district attorney's automobile, and (b) it was not shown that such trips could not have been made by rail or stage; that the statement did not have attached to it receipts for all expenditures in excess of $1; and that he had received from the state comptroller the following written order:

"I hereby order until further notice that you do not pay any more claims presented by county and district officials for expense until such bills have been sent to the auditing department of the comptroller's office to be audited for payment. This order is issued you under authority of section 8, c. 48, of the Laws of 1923."

The court fund is a special fund levied by the county commissioners of the several counties for the purpose of maintaining the district courts and to meet the expenses thereof. It is to be disbursed by the county treasurer only upon the certificates of the clerks of the district courts on allowances made by such courts. Code 1915, §1369. District attorneys are entitled to the following payments out of the court fund: " * * * Actual traveling expenses, including hotel bills * * * incurred while in the discharge of their duties, * * * upon order of the court, supported by sworn statement of such expenses * * * "—and the actual cost of "all neces-

sary stationery, office supplies and postage * * * to be paid, upon verified account approved by the district judge. * * * " Code 1915, § 1869, as amended by Laws of 1921, c. 139.

It is plain that under these provisions of law the district attorney's claim was properly allowed by the district judge and the mandamus properly awarded. It is claimed, however, by appellant, that chapter 48, Laws of 1923, creating the office of state comptroller, providing for uniformity of public accounts, making him the state's auditor, and giving him the authority to establish certain rules and regulations governing expenditures, repealed, or at least modified, the provisions above referred to for payment for supplies and traveling expenses of district attorneys. If this be true, important results follow. The district attorney is now entitled to "actual and necessary" traveling expenses instead of "actual" traveling expenses as formerly. The state comptroller may, by rules and regulations, determine what shall constitute actual traveling expenses of the district attorney, that having formerly been the duty of the district judge. The sworn statement of such expenses, and the verified account for stationery and office supplies are no longer sufficient; but such statements and accounts must be accompanied by receipts in every case where the expenditure exceeds $1. In fact, if appellant's contention be upheld, practical control over the court fund is taken from the district judge and vested in the comptroller.

We think that appellant's contention is clearly erroneous. The question may be disposed of by applying familiar rules of statutory construction. Laws of 1923, c. 48, does not in terms repeal or amend the provisions in question. These provisions are special in their scope. They relate to a special fund and to allowances to a particular officer. Chapter 48 is general in its scope, relating, as it is claimed, to all public funds and to all public officers. Repeals by implication are not favored. Statutes, apparently relat-

ing to the same subject matter, must both be given effect unless clearly repugnant to each other. A statute, special in its scope, will not be deemed repealed by a general statute, although the language of the latter may be broad enough to include what is provided for in the former. Board of Education v. Tafoya, 6 N. M. 292, 27 P. 616; Territory v. Riggle, 16 N. M. 713, 120 P. 318; State ex rel. County Commissioners v. Romero, 19 N. M. 1, 140 P. 1069.

So we hold that chapter 48, Laws of 1923, has no application to allowances to district attorneys for supplies and traveling expenses. This view seems also to have been that of the Legislature in 1925, which after this case had been tried, having occasion again to amend Code 1915, §1869, re-enacted the provisions governing such allowances. Laws 1925, c. 120, § 1.

Some reliance seems also to be placed upon Laws of 1921, c. 206, § 7, which provides that officers and employees of the state shall be allowed for transportation only by the shortest usually traveled route, and that expenses for such purpose may be allowed only "when incurred and paid in conformity with rules and regulations to be issued by the state traveling auditor who is hereby authorized and directed to issue such rules and regulations." The powers and duties of the state traveling auditor were, by chapter 48, Laws of 1923, conferred and imposed upon the state comptroller. The section relied upon is found in a general appropriation bill. A reading of it satisfies us that it was intended to apply only to the disbursements of the legislative appropriations, not to disbursements from court funds. Attempting to apply it to disbursements of court funds, we should be compelled to meet the objection raised in State ex rel. Whittier v. Safford, 28 N. M. 531, 214 P. 759, that it offends section 16 of article 4 of the Constitution, providing that:

"General appropriation bills shall embrace nothing but appropriations for the expense of the executive, legislative

and judicial departments, interest, sinking fund, payments on the public debt, public schools, and other expenses required by existing laws."

In the case mentioned the section was upheld upon the principle that "the details of expending the money so appropriated, which are necessarily connected with and related to the matter of providing the expenses of the government, are so related, connected with and incidental to the subject of appropriations that they do not violate the Constitution if incorporated in such general appropriation bill." We mention this question without deciding it, being satisfied that the section is by its language limited in its application to disbursements of legislative appropriations.

We conclude, therefore, that the mandamus was properly awarded. The judgment will be affirmed and the cause remanded to the district court, with direction to enforce it; and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 2956. Jan. 8, 1927.]

STATE v. BOARD OF TRUSTEES OF TOWN OF LAS VEGAS et al.

[253 Pac. 22.]

SYLLABUS BY THE COURT

1. Error in overruling demurrer unavailable, unless stood upon.

2. Error not available, unless called to attention of trial court.

3. In suit by state for taxes, judgment should include statutory penalties and interest, although there is no proof as to the amount thereof.

4. Under Code 1915, § 5437, and Laws 1921, c. 133, § 203, the description of real estate in a tax assessment will be good, if such description would be sufficient in a deed to identify the property so that title thereto would pass.

[1] 4CJ p. 938 n. 9; 31 Cyc p. 719 n. 78; 37 Cyc p. 1113 n. 81. [2] 3CJ p. 689 n. 41; p. 742 n. 3; 37 Cyc p. 1255 n. 64 New. [3] 37 Cyc p. 1254 n. 50, 54. [4] 37 Cyc p. 1052 n. 13; p. 1053 n. 18; p. 1055 n. 28.

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

Suit by the State against the Board of Trustees of the Town of Las Vegas, administering the Las Vegas land grant, and land, real estate and property. Judgment for the State for less than it asked, and it appeals. Reversed and remanded, with direction.

Milton J. Helmick, Atty, Gen., J. W. Armstrong, Asst. Atty. Gen., and M. E. Noble, of Las Vegas, for the State.

O. O. Askren, of Roswell, for appellee.

OPINION OF THE COURT

WATSON, J. This is a suit by the state to obtain personal judgment against the board of trustees of the town of Las Vegas and a lien upon its real estate for taxes assessed upon said real estate in San Miguel county for the years 1919, 1920, 1921, and 1922. The complaint alleged that certain sums had been duly and legally assessed and levied for those years and remained unpaid; the aggregate being about $11,000, besides penalties and costs.

The only defense made by the answer was that in each of said four years the property had been assessed in excess of its actual cash value, which, it was alleged, was not to exceed $1.50 per acre in each of said years, and that the proper sum had been tendered to satisfy the taxes if the assessments had been made on that basis.

The state demurred to the answer as to the 1919 and 1920 assessments for the reason that in the absence of fraud or other ground of equitable relief mere excessive valuation could not be relieved against by the court. As to the 1921 and 1922 assessments, the state replied, denying the fact of excessive valuation. The demurrer was overruled. Thereupon the state replied, denying the fact of overvaluation as to the 1919 and 1920 assessments.

The court made findings and conclusions to the effect that the 1919 and 1920 assessments were entirely void for insufficiency of description of the real estate, and that the 1921 and 1922 assessments were excessive, as claimed by the defendant. As the defendant had tendered payment of the taxes for all of the years mentioned on the basis of valuation of $1.50 per acre, judgment was entered for the amount tendered. The state having called the court's attention to the failure to include penalties and interest, the court ruled that there could be no interest or penalties as to the 1919 and 1920 assessments, because they were void, and could be none as to the 1921 and 1922 assessments because the state had closed its case without having made proof as to the proper amount of such penalties and interest. From this judgment, the state has appealed.

[1, 2] The first matter urged as error is the overruling of the demurrer to the answer as to the 1919 and 1920 assessments. Appellant has submitted an elaborate argument to support the contention that prior to the 1921 act (chapter 133, § 431) the district court was without jurisdiction to lower an assessment merely because excessive of cash value. It is undoubtedly right. State v. Persons, etc., 29 N. M. 654, 226 P. 886 . The lower court, doubtless, erred in overruling the demurrer. The error is unavailable, however, because the state failed to stand upon its demurrer, but pleaded over in denial of the facts. Pople v. Orekar, 22 N. M. 307, 161 P. 1110; Tenorio v. Leyba, 30 N. M. 524, 239 P. 1034. This error did not recur in the case for the reason that the decision as to 1919 and 1920 was not based upon the excessive valuation, but upon the complete invalidity of the assessments. There is a question as to the correctness of the court's action in this respect, but it is also unavailable. Although the answer raises no question as to the legality of the assessments in any respect, except that they are in excess of true cash value; and, although the defendant would seem to have ad-

mitted their validity by having tendered the amount necessary to satisfy the taxes on an assessment of $1.50 per acre, the court ruled, of its own motion, that the state must make proof of valid assessments. In making such proof, the facts developed upon which the court based its holding that the assessments were illegal for insufficincy of description. This ruling, however, was not objected to, and seems to have been acquiesced in. If erroneous, it is not reviewable because not brought to the attention of the trial court. Laws 1917, c. 43, § 37; State v. Garcia, 19 N. M. 414, 143 P. 1012.

[3] The next contention is that the court erred in failing to include penalties and interest in the judgment. The state contends that the correct rule is laid down in Cottle v. Union Pac. R. Co. (C. C. A.) 201 F. 39, namely (quoting from the brief):

> "That a tax void entirely gives no rights and will carry no penalties, either by way of interest or otherwise; that a tax valid in part and void in part will carry a penalty by way of interest or otherwise to the extent that it is valid."

If that be the correct rule, and the taxes for 1919 and 1920 were void as the court held, his ruling as to those years was correct, but incorrect as to 1921 and 1922. The ruling of the court as to the latter years, refusing to allow penalties and interest because of lack of proof of the amount, was, as we think clearly erroneous. The amount was to be determined merely by consideration of the statutes and the making of mathematical calculations. The appellee does not undertake to defend this ruling, but urges that the 1921 and 1922 assessments were equally void as those of 1919 and 1920. This may be the fact, but it does not appear. The court did not hold them void, and the descriptions for those years are not in the record. We hold, therefore, that the court erred in failing to include in the judgment interest and penalties for the years 1921 and 1922.

[4] Finally, it is contended that the court erred in holding the assessments for 1919 and 1920 void for insufficiency of description. The assessment for 1919 appears in the transcript as follows:

"Board of Trustees of the Town of Las Vegas, Administering the Las Vegas Grant. The undisposed part of the Las Vegas grant, under the management of the board of trustees.

"Description: 'Bounded on the north, Sapello river; south, Antonio Ortiz grant; east, Aguaji Llyegua; west, Pecos Forest.' The remaining part being hilly and rough cannot be used for agriculture; dry grazing lands. * * * 35,000 acres, at $4.50, class E land, $157,500.00."

The 1920 assessment was not substantially different, except that the acreage is given as 29,215, and it was assessed at $4 an acre.

The boundaries above mentioned are the exterior limits of the Las Vegas grant, only the undisposed of portions of which it was intended to assess. The county treasurer testified that from the description above he could not tell what lands were assessed, and that many thousands of acres within the exterior boundaries had been disposed of. Appellee states in the brief that the exterior boundaries employed in the description include about one-fourth of San Miguel county, including Las Vegas, East Las Vegas, and other towns. This fact was not proven nor found; but the court might have taken, and probably did take, judicial notice of it.

To sustain the decision, appellee relies largely upon Manby v. Voorhees, 27 N. M. 511, 524, 203 P. 543, 548. In that case, the court had under consideration Laws of 1899, c. 22, § 25, providing for a description in the assessment roll, "such * * * as will serve to identify * * * "the property. It was there held that a sufficient description was a jurisdictional requisite of an assessment, and held, further, that describing the property as so many acres of land in Taos county was insufficient. This word of caution was uttered by Mr. Justice Parker, who wrote the opinion:

"In so holding, we desire to be rather cautious in laying down any hard and fast rule on the subject of necessary description of property for taxation. We appreciate the difficulty in this state in properly describing real estate, because of the fact that a large proportion of the property is held by metes and bounds rather than by government legal subdivisions, growing out of the fact of the large areas covered by Spanish and Mexican land grants."

In the present case we have to deal with a land grant, and are controlled by a different statutory provision, namely: That the description shall be "such as would be sufficient in a deed to identify it so that title thereto would pass." Code 1915, §5437. Such is also the provisions of Laws 1921, c. 133, §203. The change in the controlling statute seems to involve a change in principle. While formerly the description appearing upon the tax roll must, in itself, be sufficient to identify the property, under the present law the description will be good if it would be sufficient in a deed to identify the property so that the title would pass. Under well-known principles, we consider that the description here in question, if contained in a deed, would have been sufficient to pass title. Armijo v. New Mexico Town Co., 3 N. M. (Gild.) 427, 5 P. 709. See, also (though the point was not there decided), Maxwell Land Grant Co. v. Dawson, 7 N. M. 142, 34 P. 191, and the same case in the United States Supreme Court, reported in 151 U. S. 586, 14 S. Ct. 458, 38 L. Ed. 279. We are therefore constrained to hold that the trial court erred in holding void the assessments for 1919 and 1920.

From the principles herein announced, it follows that the judgment must be reversed and remanded to the district court of San Miguel county, with direction to enter judgment for the state for taxes for the years 1919 and 1920 as assessed, and for the years 1921 and 1922, upon the valuation as determined by the district court, with the statutory interest, penalties and costs for each of said four year, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3076, Jan. 8, 1927]

STATE v. LAYTON

[252 Pac. 997]

SYLLABUS BY THE COURT

Objection to admission of a confession cannot be considered if not made below.

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

Cliff Layton was convicted for burglary of a warehouse, and he appeals, Affirmed.

O. T. Toombs, of Clayton, for appellant.

J. W. Armstrong, Atty. Gen., and J. N. Bujac, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

WATSON, J Cliff Layton, a youth of 16, appeals from a conviction for burglary of a warehouse (Code 1915, §1521), for which he received a sentence of from 12 to 15 months in the reform school.

Error is assigned because of the refusal of the court to instruct the jury to acquit appellant unless they found that Jose Lanfor was the owner of the warehouse in question. It is also assigned as error that appellant's counsel was not allowed to read from the indictment and to argue to the jury that the question of ownership was involved. These assignments depend entirely upon appellant's contention that the indictment in substance alleged ownership of the warehouse by Lanfor, and that the fact, being alleged, must be proved, It is sufficient to say here that the indictment cannot reasonably be so construed.

Objection is urged to the admission in evidence of a confession which appellant admitted he made, but which he claims was not voluntary, and was made upon promise of immunity. The point is not available, even if it had merit, and we think it has not. Such objec-

(1) 17 CJ p. 56 n. 16.

tions as were made at the time were clearly not good. There was no motion to strike the evidence. The court submitted to the jury the evidence of the confession, and of the circumstances under which it was made, instructing that the confession should be wholly disregarded if the jury had reasonable doubt as to its having been made freely and voluntarily, or of its having been induced by threats and coercion, promise of immunity, or any other improper influence. Appellant did not except or object to this instruction, nor request any different form of submission. The contention now made not having been urged below, we cannot consider it. Laws 1917, c. 43, §37; State v. Garcia, 19 N. M. 414, 143 P. 1012.

Having found no error, the judgment must be affirmed, and

It is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3084, Jan. 8, 1927]

STATE v. KNOWLES

[252 Pac. 987]

SYLLABUS BY THE COURT

1. Objections not made in trial court not available on appeal.

2. To warrant new trial, there must be an affirmative showing of error.

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

R. B. Knowles was convicted of selling intoxicating liquor to a minor, and he appeals. Affirmed.

Robert C. Dow and E. P. Bujac, both of Carlsbad, for appellant.

James N. Bujac, Asst. Atty. Gen., for the State.

[1] 17CJ p. 51 n. 61. [2] 17CJ p. 274 n. 18.

OPINION OF THE COURT

WATSON, J. R. B. Knowles appeals from a conviction for selling intoxicating liquor to a minor, he not being the parent or guardian of such minor. Laws 1923, c. 10.

[1] Two errors are assigned, the first of which is that there was a lack of all proof to show that appellant was not the parent or guardian of the minor. The assistant attorney general points out that this is an objection not in any manner brought to the attention of the trial court, and we have failed to find any such objection. Hence we cannot consider it here. Laws 1917, c. 43, § 37; State v. Garcia, 19 N. M. 414, 143 P. 1012. On the rehearing of the Garcia Case, some limit was placed upon the application of this rule, but the case at bar does not seem to call for the exercise of the inherent power of this court to intervene for the protection of fundamental rights.

[2] Appellant having put his general reputation in evidence, the state, on rebuttal, produced a witness who testified that it was bad. On cross-examination, he gave a negative answer to the question:

"* * * You are right now under a suspended jail sentence of 30 days on account of using electricity from the Carlsbad Light & Power Company that you did not pay for?"

On surrebuttal, with a view to impeaching the witness, under Code 1915, § 2179, by showing that such sentence had been imposed upon him, appellant offered the docket of a city police court, presided over by a city judge appointed by the city council; the judge not being a justice of the peace. The district attorney objected that the court had no legal existence and its sentence no validity. That is the question argued here. The state, however, does not rely entirely on its contention that the court was a legal tribunal. It also argues that if the ruling constituted error, it was harmless.

We deem it unnecessary to decide either question. The trial court ruled:

"The offense charged was that of violating a city ordinance. This is a civil matter. Under the law, it is not even a misdemeanor. But as stated, the trial was by a tribunal which had no authority in law to try anybody, and that was not a court, and the judgment is a nullity, and it is excluded from the testimony."

The ruling, it will be observed, was placed on a ground additional to the nonlegaltiy of the court; namely, that the offense, of which conviction was sought to be shown, was violation of a city ordinance, was a mere civil matter, and did not amount to a misdemeanor. In this ruling the court had the record before him, perhaps, the ordinance. We have neither. We have no means of knowing whether the ordinance defined or the complaint charged a misdemeanor. If appellant desired a review of the ruling, it was incumbent on him to include the ordinance and the proceedings in the transcript. In the absence of an affirmative showing of error, the ruling is presumed to have been correct.

It follows that the judgment should be affirmed, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3063 Jan. 11, 1927]

STATE v. SMITH

[252 Pac. 1003]

SYLLABUS BY THE COURT

1. An indictment for forgery of a promissory note set forth in haec verba, including the signature "A.," need not allege that it purports to be A.'s signature.

2. An indictment for forgery, alleging, in the language of the statute, that the act was unlawfully, falsely, and feloniously done, sufficiently exclude authorization by the person whose act it purports to be.

3. Evidence examined, and held sufficient to withstand motion to direct verdict.

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[1] 26CJ p. 939 n. 17. [2] 31 CJ p. 716 n. 23. [3] 26CJ p. 979 n. 4. [4] 17CJ p. 350 n. 7; 26CJ p. 978 n. 72; p. 979 n. 89. [5] 16CJ p. 599 n. 2. [6] 40 Cyc p. 2687 n. 93. [7] 26CJ p. 904 n. 2. [8] 26CJ p. 967 n. [illegible] [10] 26CJ p. 896 n. 4.

4. Error to refuse tendered instructions, correctly stating the law, not covered in the general charge, except in the abstract, and applying the law to defendant's theory of the facts which there is evidence to support.

5. Another forgery by the defendant is competent as bearing on intent to defraud, where he claims that the false instrument he is charged with making was the result of mistake. Evidence examined as to such other false instrument, and defendant held sufficiently connected with it to admit of its reception.

6. Where state seeks to prove forgery by circumstantial evidence, including the fact that others having opportunity did not do it, a defense witness, testifying on cross-examiation that he cannot state whether the handwriting is that of one of the others having opportunity, may be impeached by showing that on a former occasion he had stated it was not the handwriting of such other person.

7. General intent to injure or defraud is sufficient for conviction of forgery, and intent to injure or defraud a particular person need not be alleged nor proved.

8. While the fact that no one was injured or defrauded is not a defense in forgery, the jury should be permitted to consider the fact as bearing on intent.

9. That the defendant, as vice president, indorsed the bank's name on a forged note, of which the bank was payee, and rediscounted it or used it as collateral, is a circumstance to be considered by the jury, with others, if any, and given such weight as the jury may think it entitled to.

Appeal from District Court, Quay County; Hatch, Judge.

Ben Smith was convicted of forgery, and he appeals. Reversed and remanded, with direction.

G. L. Reese, of Roswell, Hall & McGhee, of Clovis, Geo. L. Reese, Jr., of Roswell, and J. L. Briscoe, of Tucumcari, for appellant.

J. W. Armstrong, Atty. Gen., and J. N. Bujac, Asst. Atty. Gen., for the State.

WATSON, J. Ben Smith was convicted of the forgery of a promissory note in the sum of $393.70, dated January 5, 1924, payable two months after date to Security State Bank of Portales, of which Smith was vice president and active manager, and purporting to

bear the signature of Jap Post. This instrument was introduced in evidence as Exhibit 2, and will be hereinafter referred to in that manner.

From the testimony of Jap Post, the prosecuting witness, the jury might have believed: That Post had executed to the bank, and it held, four notes, namely: A $50 note, dated August 11, 1923; due in three months; a $102.50 note dated August 13, 1923, due in three months; a $40.50 note, dated October 8, 1923, due in one month; and a $41.00 note, dated December 29, 1923; due in one month. That from time to time, as these notes matured, Post was notified thereof by the bank, and told appellant that he would pay as soon as he could and would renew the notes if that was desired, and that appellant replied, "That is all right, Jap." That about 10 days prior to March 3, 1923, Post called at the bank and inquired of appellant about his notes, and was told by appellant that they were in the Federal Reserve Bank and would be back the first of March. That on March 3 he called at the bank and told appellant that he was ready to settle his notes, and asked if they had been returned. That appellant said: "I don't know, Jap; I will go see." That appellant and Post went together to the note case, from which appellant raised certain papers to such an extent that Post was enabled to see Exhibit 2, appellant saying, "Jap, your notes are not here; here are the stubs," dropping the papers back into the note case. That Post then left the bank and waited outside until he saw appellant leave, when he returned to the bank and inquired of C. R. Young, an employee of the bank, about the notes. That Young proceeded to the note case and took therefrom the papers which appellant referred to as "stubs," which included Exhibit 2, folded and attached to which were the genuine notes above mentioned, which were introduced in evidence together as Exhibit 1, and another note introduced as Exhibit 3 for $194.35, dated December 11, 1923, payable one month after date to said bank and purporting to bear the signature of Post, but which Post denied having signed. That

Post thereupon denied having signed Exhibits 2 and 3. That during the ensuing discussion appellant returned to the bank, whereupon Young said to him, "Jap's denying two of these notes:" That appellant insisted that Post had signed them, and, upon Post's again denying the signatures, said, "The books will show," went to the books, and, after inspecting them, said that Exhibit 3 was to take care of three little notes, said something about Exhibit 2 and then turned to Young and said: "Those are not Jap's notes; go ahead and settle with him." That thereupon Young and Post effected a settlement by Post giving to the bank his note for some $251 and receiving from Young the six notes which have been described. That some time after the closing of the bank, which occurred on March 31, 1924, appellant came out to Post's place of business, situated some miles from Portales, and said that he had heard that Post had been claiming that his name had been forged to some notes, and that he had come out to see about it. That he had a record of the transaction, and that if he could see the notes he could make an explanation of it. That Post refused to let him see the notes, and that appellant showed no record, simply explaining that it was a mistake.

Exhibits 2 and 3 showed, by the indorsements which they bore, identified and explained, that they had been either discounted or used as collateral at the Federal Reserve Bank. Above the Federal Reserve indorsement on Exhibit 2, there was indorsed "Security State Bank, Portales, New Mexico, by Ben Smith, Vice Pres." and, on Exhibit 3, "Security State Bank, Portales, New Mexico, by M. B. Jones, Cashier." The state further showed by opinion evidence that Exhibits 2 and 3 were made by the same hand, but not by the same hand that made the four notes constituting Exhibit 1, and that the signatures on Exhibits 2 and 3 were an attempt to imitate those on Exhibit 1. J. M. Honea, Jr., C. R. Young, employees, and M. B. Jones, cashier of the bank, testified that they did not write the signatures on Exhibit 2.

Appellant denied having made Exhibit 2 or 3, or having written Post's purported signature thereto. Witnesses familiar with appellant's handwriting gave their opinion that the purported signatures to Exhibit's 2 and 3 were not in his hand. C. R. Young testified that on January 5, 1924, he was in the employ of the bank and in direct charge of the note case, under the general supervision of the appellant, and that among his duties was the making up of offerings of rediscounts to the Federal Reserve Bank; that these offerings consisted usually of a number of notes, and that it was the custom to get them together and prepare the bank's indorsement on the typewriter, except for the signature of appellant, as vice president, or of Mr. Jones, as cashier, one of them merely signing his name and returning the notes to him; that on that day, in making such offering, he discovered that three of the genuine Post notes were past-due and not available for rediscount; that, knowing the custom of the bank to keep on hand notes signed in blank by borrowers, to be used by the bank for renewing paper and under other circumstances, he went to the file where such were kept and found a blank note, apparently signed by Jap Post; that Exhibit 3 was with the three notes mentioned, and failing to notice that the same was evidently a renewal of said three, he filled out the blank for an amount equal to the sum of said three notes, of Exhibit 3, and of the accrued interest thereon, the paper thus produced being Exhibit 2.

This is perhaps a sufficient statement of the evidence in the case to permit consideration of the points raised.

[1] Objections are made, first, to the sufficiency of the indictment. It is urged that it is insufficient, in that it fails to allege that the signature on Exhibit 2 purports to be that of Jap Post. The alleged false instrument having been set forth in full, we think there is no merit in this contention. Edwards v. State, 53 Tex. Cr. R. 50, 108 S. W. 675, 126 Am. St. Rep. 767, is quite different. In that case additional allegations

were necessary because it chanced that the defendant and the person whose signature he forged bore the same name

[2] It is also urged that the indictment should have alleged that the note was made without Post's authority. The indictment follows the language of the statute. Code 1915, § 1590. The allegation that the act was unlawfully, falsely and feloniously done, sufficiently excludes authorization, just as, in State v. Probert, 19 N. M. 13, 140 P. 1108, an allegation of fraudulent embezzlement and conversion included, by necessary intendment, an intent to defraud. Generally as to the sufficiency of an indictment following the language of the statute, see State v. Alva, 18 N. M. 143, 134 P. 209; State v. Lazarovich, 27 N. M. 282, 200 P. 422; State v. Nance, 32 N. M. 158, 252 P. 1002. As to technical defects not prejudicing the defendant, or depriving him of the right to plead former jeopardy, see State v. Lucero, 20 N. M. 55, 146 P. 407.

[3] Error is urged upon the overruling of appellant's motions for a directed verdict, made both at the close of the state's case, and at the close of the case. Whether objection to the overruling of such a motion made at the close of the state's case is available to one who has not stood upon it in the trial, but has, after the overruling of the motion, introduced evidence in his own behalf, is a question not here raised, and, in view of our conclusion, unnecessary to decide. The state, arguing the sufficiency of the evidence, points to the rule that the recent possession and utterance of a forged instrument is sufficient to warrant a conviction of the forgery, citing State v. Milligan, 170 Mo. 215, 70 S. W. 473. Appellant does not question this in its general application, but insists that such possession and utterance must be personal and exclusive; and that possession and utterance by a bank is not sufficient upon which to base a conviction of the agent of the bank who acted in that behalf. We find it unnecessary, however, to decide the question. We think the attorney general has unnecessarily narrowed

it in argument. When the state rested, the jury might have found from the evidence then before them, not only that some one had written Post's name in the effort to imitate his signature, and that appellant had indorsed the note for the bank with a view to using it as a rediscount or collateral at the Federal Reserve Bank, but, further, that appellant had misrepresented to Post that his genuine notes had not been returned from the Federal Reserve Bank; had readily discovered and admitted the alleged error when Post had learned of the existence of the spurious notes; had thereafter visited Post, claiming that he could satisfactorily explain the matter, and seeking to obtain possession of the notes, and that the forgery had not been committed, by some at least, of those who were in a position to have done so. We cannot doubt that, in view of the proof, the court was justified in overruling the motion.

We need take no space in discussing the motion for directed verdict subsequently made at the close of the case. The result of the after-adduced evidence was to strengthen the state's case, considering, of course, only the evidence pointing to guilt.

[4] So we overrule those of appellant's objections which, if sustained, would have entitled him to a discharge. We find, however, that we must reverse the judgment and grant a new trial because of the refusal to give requested instructions Nos. 2, 3, and 4, as follows:

"No. 2. The court instructs the jury that the possession or negotiation of a forged instrument is not forgery, and that should you believe from the evidence that such instrument was forged, and that the defendant had in his possession such forged instrument, if it be forged, and that the defendant negotiated such instrument to the Federal Reserve Bank, or caused the same to be negotiated, yet you cannot find the defendant guilty unless you further believe from all the evidence and beyond a reasonable doubt that the defendant made such forged instrument, or caused it to be made or participated in the making thereof.

"No. 3. The court instructs the jury that if you believe from the evidence in this case that C. R. Young

found the note set out in the indictment, in the bank, and that at the time he found such note in the bank it was signed in blank in the purported signature of Jap Post, and that the said C. R. Young thereupon filed out said note, setting out the sum of $393.70 therein as the principal of said note, without any authority, or direction from the defendant, Ben Smith, then you cannot convict the defendant of forgery and you should acquit him.

"No. 4. You are instructed that the defendant, Ben Smith, is the only person on trial before you for the alleged crimes charged in the indictment, and if you find from all the evidence in this case that it points to some other person as the person who made the note, or signed the note set out in the indictment without the direction or authority of the said defendant, as the person who committed the alleged crime in question as it does the defendant, or if, after a fair and full consideration of all the evidence, you entertain a reasonable doubt as to whether the said Ben Smith or some other person is the guilty party, if any one be guilty of such charge, then it *is your duty to acquit the defendant.*"

These requests seem clearly to state the law and are not covered by the general charge. As to request No. 2, it may be mentioned that instruction No. 11, as given, in effect told the jury that if Exhibit 2, after its making, was in appellant's possession, and was by him negotiated as a genuine note to the Federal Reserve Bank, such facts, unless satisfactorily explained, would warrant a finding that appellant actually wrote the name of Jap Post upon said note, and would warrant a verdict of guilty. Assuming, for the moment, that this was a correct instruction, we think appellant was entitled to have it made plain to the jury that they should not convict merely because satisfied as to possession and utterance, unless those facts caused them also to be satisfied as to the forgery. It is to be remembered that there was in this case an explanation of the possession and utterance of the note consistent with the forgery of it by some person other than the defendant. The jury, of course, was not required to believe such explanation. Yet its presence in the case, we think, made it important that the jury be clearly instructed as to the difference between the ultimate fact of forgery and the merely probative facts of possession and utterance.

As to request No. 4: It was appellant's theory that Young found the note signed in blank, and without appellant's knowledge, filled it in in the amount and in renewal of the three genuine and the one false notes; and that the evidence merely included appellant among a number who had opportunity, and might have forged the signature.

"* * * Where circumstances alone are relied upon * * * for a conviction, the circumstances must be such as to apply exclusively to the defendant, and such as are reconcilable with no other hypothesis than the defendant's guilt. * * * Territory v. Lermo, 8 N. M. 566, 46 P. 16.

The state's case was circumstantial. The jury was correctly instructed that, to warrant conviction, the circumstances must be such as to be incompatible upon any reasonable hypothesis with innocence of the defedant; but that was a mere abstract proposition. Appellant was entitled to have it applied to his theory of the case, which there was evidence to support. State v. Brigance, 31 N. M. 436, 246 P. 897.

In view of the necessity of a new trial, some of the other assignments of error require consideration, though not necessarily to determine whether they constitute reversible error.

It is contended that the court erred in admitting in evidence Exhibit 1 (the four genuine notes), Exhibit 2 (the note set forth in the indictment), and Exhibit 3 (the note for $194.35.) The contention is that they were not admissible because the appellant had not been and was not shown to have committed the forgeries. What we have said as to the sufficiency of the evidence would seem to dispose of this point, as it bears on Exhibits **1** and **2**.

[**5, 9**] As to Exhibit 3, the situation is somewhat different. It was admitted on the theory that it was evidence of a separate offense, competent as tending to show a general plan, or design, to defraud, and the intent with which Exhibit 2 was made. In defending the admission of this exhibit, on this theory, the state assumes that appellant's signing of it was shown

by the same evidence as his signing of Exhibit 2. Appellant points out, however, that this is not true. Exhibit 3, like Exhibit 2, bore indorsements showing rediscount with the Federal Reserve Bank, or its use there as collateral. But, unlike Exhibit 2, the indorsement of the Security State Bank on Exhibit 3 was made by M. B. Jones, cashier. Thus, as to Exhibit 3, the possession and utterance which, with other facts, we hold sufficient to warrant conviction, were not only absent, but the proof indicated that another than appellant had had possession and had uttered. The facts which raise an inference, according to the state's contention, that appellant forged Exhibit 2, would raise an inference that another forged Exhibit 3. We think, nevertheless, that this was a matter for the consideration of the jury. It is laid down in Wharton (Cr. Ev. § 34) that in forgery the independent or collateral offense "must be proved with the same fullness and the same directness as is the instrument which the accused is charged with forging or uttering, or evidence of it cannot be received." That does not mean, of course, that the evidence must be the same as to both, but merely that the collateral offense must be proven by evidence which would suffice as proof of the offense charged. The state's evidence showed that both notes were made by the same person. Both had been used as collateral or rediscount at the Federal Reserve Bank. Both were found together in the note case. Both involved the account of the same borrower from the bank. Both were admitted to be mistaken, and appellant claimed to be able to explain both. When Exhibit 3 was introduced, the burden was upon the state to prove general intent to defraud. True, that might be inferred from the act, but the state was not compelled to rely on inference. It had a right, as against the claim of mistake which appellant had made, to produce evidence showing a course of conduct indicating a design to defraud, and not so readily explainable as a mistake as one act would have been. Exhibit 3 could not be used as proof that it was appellant who forged Exhibit 2, but if the jury

was convinced from other evidence that appellant forged Exhibit 2, it would be warranted in believing that he forged Exhibit 3; and that fact, if believed, would be material on the question of intent. The fact that Exhibit 3 was indorsed for the bank by Jones instead of by appellant goes to a different question. It affects the question of knowledge in uttering, rather than of intent in forging. The fact was no doubt favorable to the accused, but not conclusive. We think Exhibit 3 was properly admitted for the purpose stated, if for no other.

Several witnesses testified on behalf of appellant that the signatures on Exhibits 2 and 3 were not in appellant's handwriting. On cross-examination, they were asked, in substance, whether if they were in appellant's handwriting they were not so cleverly "forged" or "concealed" that appellant's handwriting could not be recognized. It is urged that the questions repeatedly asked were purely argumentative and tended to prejudice appellant's case by constantly impressing upon the jury the district attorney's theory that the signatures were in fact written by appellant. Two of the witnesses answered without objection, and two others over objection not now urged. Only once was it objected that the question was so worded as to be prejudicial. A reversal could not be granted under the circumstances. If proper and timely objection had been made, the trial court would no doubt have required the district attorney so to frame his question as to avoid unnecessary and improper prejudice.

[6] In its case in chief, the state had shown that neither Honea nor Young nor Jones had signed Exhibit 2. Honea afterward became a witness for the appellant, and, on cross-examination, it was shown that certain others had access to the files of the bank and might have signed Exhibit 2. Among them was Curtis Boone. Honea was then asked if Exhibit 2 was Curtis Boone's handwriting, and he replied that he could not state. A predicate having been laid, four witnesses, including the district attorney, were allowed to

impeach this answer by showing that on a former occasion the witness had said that such signature was not Boone's handwriting. It is urged that this was impeachment on a collateral matter. We do not think so. One of the means employed by the state to fasten the forgery upon appellant was to show that others who might have done it had not done it. In view of this process of elimination, the fact that Boone did not do it was not collateral, but directly bore upon the question whether appellant did it. It is also urged that since the answer sought to be impeached was brought out by improper cross-examination, the state made Honeo its own witness as to that answer ,and so could not impeach him; but that was not the objection urged below.

The correctness of paragraphs 9, 10, and 11 of the court's instruction is challenged. Those paragraphs read as follows:

"(9) You are instructed that it is unnecessary to contitute the offense of forgery that the person or persons charged with such an offense intended to defraud or injure any particular person or that any particular person was injured or defrauded. It is sufficient to constitute the offense if it is established that the accused with the intent to defraud signed the name of the person who purports to be the maker of said note, and that the name was signed without authority from such person, and if it further appears that the promissory note, if true, would have the effect to affect the interest and rights of the person whose act it purports to be, and in this connection you are instructed that if you believe from the evidence and beyond a reasonable doubt that the instrument in writing set out in the indictment and produced in evidence was not made by Jap Post, but that it is a false instrument, and that it was made by the defendant without lawful authority with intent to injure or defraud, this would constitute forgery.

"(10) You are further instructed that the fact, if it be a fact, that no person suffered any injury by reason of any acts charged against the defendant herein, is not to be considered by you in arriving at your verdict as to his guilt or innocence; if you believe beyond a reasonable doubt that the prosecution has proved the truth of the allegations in the indictment, you should find the defendant guilty, regardless of the question whether or not any injury resulted to any one as a consequence of his act. Therefore the question whether or not any third party

suffered any pecuniary loss as a result of the defendant's conduct is a question which should not be considered by you in your deliberations and determining his guilt or innocence.

"(11) I further instruct you that in order to find the defendant guilty under the indictment, it is not necessary for the state to prove by direct evidence, that is, it is not necessary for witnesses to testify who saw the act done, that the defendant signed the name of Jap Post to the note set forth in the indictment, but the same may be inferred from other facts and circumstances proved in the case, if any have been proved. Therefore if you find and believe from the evidence that said note was in the possession of the defendant in the county of Roosevelt recently after the same was dated and purports to have been executed, and if you further believe that the defendant negotiated said note as a genuine note to the Federal Reserve Bank, then these facts, if proven, unless satisfactorily explained by the defendant, would warrant you in finding that the name of Jap Post was actually written and signed by the defendant, and you would upon such finding from the evidence be warranted in returning a verdict of guilty."

[7] To the ninth instruction appellant objects that it is not the law that the accused need not have intended to defraud any particular person, and that a mere general fraudulent intent is not sufficient for conviction. These objections require construction of sections 1590 and 1604, Code of 1915, which are as follows:

"Sec. 1590. Every person who shall falsely make, alter, forge or counterfeit any public record, or any certificate, return or attestation of any clerk of a court, register, notary public, justice of the peace, or any other public officer, in relation to any matter wherein such certificate, return or attestation may be received as legal proof, or any charter, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, or any order, acquittance or discharge for money or other property, or any acceptance of a bill of exchange, indorsement, or assignment of a bill of exchange, or promissory note, or any accountable receipt for moneys, goods or other property, with intent to injure or defraud any person, shall be punished by imprisonment in the state penitentiary, not more than five years, nor less than one year."

"Sec. 1604. In any case, when the intent to defraud is necessary to constitute the offense of forgery, or any other offense that may be prosecuted, it shall be sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient and shall not be deemed a

variance if there appear to be an intent to defraud the United States, or any state or territory, county, city, or precinct, or any body corporate, or any public officer in his official capacity, or any co-partnership or member thereof, or any particular person."

Appellant points out that by section 1590 "intent to injure or defraud any person" is an essential element of the crime, and urges that, while section 1604 dispenses with the necessity of naming in the indictment the person the accused intended to injure or defraud, it does not dispense with the necessity of proof of such particular intent.

The state cites and relies upon State v. Pilling, 53 Wash. 464, 102 P. 230, Am. St. Rep. 1080. Appellant points out that this case merely holds that a section identical with our section 1604 dispenses with the necessity of allegation, and does not affect the question of proof. This is true.

We have not found any decided case which can be cited as direct authority upon the question. In 26 C. J. title Forgery, § 18, it is said:

"In a number of jurisdictions, because of special legislation on the subject, it is no longer necessary to show an intent to defraud a particular person or persons, a general intent to defraud being sufficient."

In note 9 a number of cases are cited to this text. Examining those cases, we find that the Washington, Iowa, Michigan and Florida statutes are like ours. Unfortunately, the cases in those jurisdictions do not seem directly to support the text. The statutes of New Jersey, New York, Pennsylvania, Louisiana, and Massachusetts expressly dispense with the necessity of proving an intent to injure or defraud any particular person.

[10] While there is an obvious distinction between these two classes of statutes, we think that they must have been induced upon the same theory, and that their legal effect is the same. All of them dispense with the necessity of naming in the indictment the particular person whom the accused intended to in-

jure or defraud. This provision was, no doubt, induced by the fact that it is often a matter of difficulty in such cases to make such proof. In many forgery cases the act itself might result in possible injury to different persons. In the case at bar, the promissory note, in question might have injured Post; it might have injured the Security State Bank, the payee; or it might have injured the Federal Reserve Bank, to which it was uttered. It might be impossible to prove which of these it was intended to defraud, and the circumstances, while raising an inference of a general intent to defraud, might point as strongly to intent to defraud one person as the other. The crime of "forgery" consists in the act of making the false instrument with an intent to defraud. It may be the means of accomplishing a larceny or an embezzlement, or of obtaining money or goods under false pretenses; or it may serve merely to conceal such crimes. The whole transaction may involve several of these crimes. We think that the lawmaking power in the several states, adopting these two classes of statutes, had these matters in mind and intended to take practical measures to make it possible in the ordinary case to convict of the crime of forgery. Where they dispense with the necessity of proof of the particular intent they make their purpose plain. Where they merely dispense with the necessity of allegation, we think the same purpose was in view and the same result accomplished. There may have been a conviction in this case, as appellant urges, though the 12 jurors never reached agreement as to what person or corporation appellant intended to defraud. It may be admitted that as regards most crimes the statutes and rules of pleading and procedure are designed to prevent such a situation. Yet we think, as indicated, that in forgery, for the reasons stated, such is the very result aimed at by the statutory provision quoted. Without an allegation of particular intent, there is no way of limiting the evidence or of limiting the consideration of the jury to one particular intent rather than another. The court cannot select the person whom the jury must consider the ac-

cused intended to defraud, if any one; nor can the jury be required to name him. So proof is no more requisite than allegation, and general intent only is necessary. Such an intent is a natural inference from the doing of the act; and unless the defendant's explanation of the act is sufficient to raise a reasonable doubt as to the correctness of such natural inference, a conviction is proper under the law. So we think that the instruction, as given, is essentially sound.

Appellant urges that, under section 1604 certain classes are named, the intention to defraud one of whom may be shown under an indictment without allegation as to the particular person, and that a proper instruction would confine the jury's consideration to those classes. The criticism is perhaps technically correct. In this case, however, there can be no doubt that if there was a general intention to defraud, the possibility of defrauding was limited to persons included within those classes. It would perhaps be better in the charge to enumerate the classes mentioned in section 1604, but we do not think, in this case, that the failure to do so is reversible error.

[8] Appellant contends that the tenth paragraph takes from the jury consideration of the fact shown that Post suffered no loss or injury by reason of appellant's act; which fact had a possible bearing upon appellant's intent in doing the act. We incline to appellant's view. The explanation which he offered of his part of the transaction was consistent with absence of guilty knowledge or intent. The facts surrounding the discovery of the forgery or mistake, whichever it may have been, and the return of the note to Post, whereby he was secured against loss, would seem to be proper for the jury's consideration in determining whether, if appellant did the act charged, he did it with intent to defraud. Clearly, a loss or injury to the party would be competent as bearing on intent. We think that the converse must be true. The state cites People v. Webber, 44 Cal. App. 120, 186 P. 406, as sustaining this instruction; but appellant points out

that the present objection was not there urged. Without deciding that there is reversible error in this instruction, we think that the evidence should not have been withdrawn from the jury's consideration entirely, but that its effect should have been limited ,by a proper instruction, to its possible bearing on intent.

By the eleventh paragraph the jury was instructed, in substance, that evidence of recent possession and the utterance of a forged instrument, unless satisfactorily explained, is sufficient for conviction. It is objected that this is a comment on the weight of the evidence, and that it places the burden of explanation on the defendant; thus depriving him of the presumption of innocence. In support of the instruction, the state cites State v. Milligan, supra. It was there sustained, over a different objection than that here urged. It was said to be "in accordance with the rule announced in the case of the State v. Yerger, 86 Mo. 33, wherein it is said that the possession of a forged instrument, or the uttering of it by one in the county where the indictment is found, is strong evidence not only to show that he forged it but to show that the forgery of the instrument was committed by him in the same county." Appellant says that this Missouri decision has been overruled and repudiated by later Missouri decisions, citing State v. Swarens, 294 Mo. 139, 241 S. W. 934, and State v. Andrews, 297 Mo. 281, 248, S. W. 967. The first-mentioned case dealt with an instruction to the effect that if stolen property was found in the possession of the defendant, he was presumed to be the thief, and that the burden was upon him to overcome the presumption; and, unless satisfactorily explained, the jury "should find the defendant guilty." The court elaborately considered the question whether the recent possession of stolen property raises a presumption of law, or merely an inference of fact. It held that there is no such presumption at law, and that the inference to be drawn is one solely for the jury, overruling State v. Kelly, 73 Mo. 608, and cases following it. However, the instruction in the case at bar clear-

ly does not go so far into the province of the jury as that in the Swarens Case. In the Andrews Case an instruction "that possession of a forged instrument and an attempt to sell it, are evidence that the possessor forged it," was held bad as contrary to State v. Swarens, supra. We also understand the court in the Andrews Case to doubt the correctness of State v. Pyscher, 179 Mo. 156, 77 S. W. 836, wherein an instruction was sustained to the effect that possession and a claim to the land (the instrument forged being a deed) "constituted evidence that he committed the forgery * * * and unless he explains or accounts for his possession thereof, in a manner consistent with his innocense, then these facts are sufficient to warrant the jury in finding him guilty of forgery * * *" Assuming instruction No. 11 to be sound in the ordinary case, it is doubtful, as previously indicated, whether it is proper in a case where the possession relied upon is not personal nor exclusive. But, even if it were an ordinary case of possesion and utterance, we are doubtful of the correctness of such an instruction. It being unnecessary to decide the point, we merely suggest that the precedents in this jurisdiction favor an instruction, which we think preferable, to the effect that such possession and utterance are circumstances to be taken into consideration with other facts and circumstances, if any, and given such weight as the jury may think they are entitled to. Territory v. Livingstone, 13 N. M. 318, 84 P. 1021; Territory v. Caldwell, 14 N. M. 535, 98 P. 167; Underhill on Criminal Evidence (2d Ed.) §§ 299 and 300.

Such of appellant's propositions as we have failed to mention we consider either without merit, or as governed by what we have here said.

For the error pointed out in failing to submit appellant's theory of the case, the judgment will be reversed and the cause remanded with direction to grant a new trial; and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3164, Jan. 14, 1927]

STATE v. ASHCROFT

[252 Pac. 1001]

SYLLABUS BY THE COURT

The state has no right of appeal from a judgment of the district court, sustaining a plea of former conviction and dismissing the indictment.

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

J. Wilford Ashcroft was indicted for receiving and purchasing stolen property. From a judgment sustaining his plea of former conviction and dismissing the indictment, the State appeals. Appeal dismissed, and cause remanded.

Fred E. Wilson, Atty. Gen., and O. A. Larrazolo, of Albuquerque, for the State.

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

OPINION OF THE COURT

PARKER, C. J. Appellee was charged in the indictment with the crime of unlawfully receiving and purchasing stolen property. He interposed a plea of former conviction for the same offense. The court sustained the plea and dismissed the indictment. Thereupon the state appealed to this court. A motion to dismiss the appeal had been filed on various grounds, but only one ground need be considered. It is that the state has no right to appeal in cases of this kind. The matter is governed by section 50, chapter 43, Laws 1917, which is as follows:

"When any indictment, complaint or information is quashed or judged insufficient upon any interlocutory motion, or judgment is arrested, the district court may cause the defendant to be committed or recognized to answer another indictment, complaint or information, or an appeal to the Supreme Court shall be granted, if the prosecuting attorney desire it."

[1] 17CJ p. 44 n. 5.

This whole matter has been considered in Ex parte Carrillo, 22 N. M. 149, 158 P. 800, and in State v. Dallas, 22 N. M. 392, 163 P. 252. In both of these cases we held that the state has no right of appeal in a criminal case except as the same may be conferred by statute. The statute, under which these decisions were rendered, was identical with the present statute above cited, in so far as the scope of the right of the state to appeal is concerned.

It follows that the motion of the appellee to dismiss the appeal should be granted and the cause remanded to the district court, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3034, Jan. 15, 1927]

BACA v. CHAVEZ

[252 Pac. 987]

SYLLABUS BY THE COURT

1. Execution of power of sale in mortgage is not barred by limitation barring suit or action on the debt or security.

2. A mortgagee's power of sale is coupled with an interest and is not revoked by death of mortgagor, following Cleveland v. Bateman, 21 N. M. 675, 158 P. 648, Ann. Cas. 1918E, 1011.

3. A distinct decision of a question fairly raised is not dictum, even though the decision might have been placed on other grounds.

4. "Stare decisis" applied to a decision establishing a rule of property.

5. A third party shown to have owned an undivided interest in real estate when it was mortgaged, and now owner of the whole, may not enjoin a sale, under power contained in the mortgage, on the sole ground that the notice fails to exclude his interest, such interest not having been excluded in the mortgage; such notice not being so misleading or prejudicial that a sale under it would necessarily be void.

6. Power of sale construed as not requiring entry or demand for possession as condition precedent to giving notice of sale.

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[1] 41CJ p. 944 n. 88. [2] 41CJ p. 927 n. 57. [3] 15CJ p. 952 n. 66. [4] 15CJ p. 947 n. 41. [5] 41CJ p. 952 n. 40. [6] 41CJ p. 945 n. 99; p. 946 n. 18.

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

Suit by R. L. Baca against Miguel Chavez, to enjoin a sale under a mortgage. From a judgment dismissing certain counts, and giving only partial relief on the first, plaintiff appeals. Affirmed.

C. J. Roberts and E. P. Davies, both of Santa Fe, for appellant.

E. R. Wright, of Santa Fe, for appellee.

OPINION OF THE COURT

WATSON, J. Appellee, pursuant to a power of sale in a mortgage executed and delivered to him by apppellant's mother and predecessor in title, published notice of a sale of the mortgaged premises for the satisfaction of the debt—a note which the mortgage secured. Appellant sued to enjoin the sale. Demurrers to the second and third counts were sustained. Appellant declined to plead further, and judgment was entered dismissing those counts and granting but partial relief on the first. Such facts as are necessary to an understanding of the propositions considered will be stated as we proceed.

[1] The debt secured by the mortgage was barred by the statute of limitations. Code 1915, §§ 3346 and 3348. Appellant contends that it also barred execution of the power of sale. This question we consider first. Appellant admits that the weight of authority is against his contention. He cites no case sustaining his position. He seeks to maintain it by explaining some of the decisions as influenced by statutes and established principles not operative in this jurisdiction, and by reasoning which, though not without force, it is unnecessary to record here. Appellee cites Menzel v. Hinton, 132 N. C. 660, 44 S. E. 385, 95 Am. St. Rep. 647; House v. Carr, 185 N. Y. 453, 78 N. E. 171, and the notes following said case as reported 6 L. R. A. (N. S.) 510, 113 Am. St. Rep. 936, 7 Ann. Cas. 185; Moline

Plow Co. v. Webb, 141 U. S 616, 12 S. Ct. 100, 35 L. Ed. 879; 19 R. C. L. title "Mortgages," §436; 27 Cyc. 1451-1463 (41 C. J. 944).

It is not our purpose to review these very interesting decisions. Our reading of them and others discloses that many cogent arguments, based upon equitable considerations, may be marshaled on both sides of the question. We think, however, that the point is to be determined by correct construction of our statute and the application of principles already established in this state. The controlling sections are as follows:

"Section 3346. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided."

"Section 3348. Those founded upon any bond, promissory note, bill of exchange or other contract in writing, or upon any judgment of any court not of record, within six years."

It strikes us at once that these sections place no limitations upon the exercise of a power of sale. The limitation is upon the bringing of suits or actions. Appellee was not resorting to a suit or action. He had provided himself by contract with another remedy for the enforcement of his security. Of this he was proceeding to avail himself. It may be admitted that the mortgage and the power of sale are but security dependent upon the debt, and discharged by whatever serves to discharge the debt. If the effect of the statute is to extinguish the debt, the power of sale has lost its vitality. But it has long been established here that the statute does not discharge the debt. It merely bars the remedy. Newhall v. Field, 13 N. M. 87, 79 P. 711, 12 Ann. Cas. 979; Joyce-Pruitt Co. v. Meadows, 27 N. M. 529, 203 P. 537. So we have an undischarged debt, but one upon which a remedy by suit or action is not to be had. Does it follow that the contract remedy of advertisement and sale is also barred? Nothing is urged as barring it except the statute, which, as we have seen, by its express terms bars nothing but suits or actions. If we give it effect upon

a power of sale, we must do it by construction—by reading something into it, and by attributing to the Legislature an intention which it did not express.

Fortunately, the trail has been blazed for correct construction of this statute. In Buss v. Kemp Lumber Co., 23 N. M. 567, 170 P. 54, L. R. A. 1918C, 1015, this court passed upon the contention that possession of the mortgaged property by a mortgagee would toll the statute. The proposition was supported by eminent authority and by strong reasoning. But this court held fast to what it deemed the correct application of the statute. The contention was for an implied exception to the running of the statute. It was determined that the Legislature had stated such exceptions as its wisdom dictated, and that it was not for this court to create others, however reasonable they might seem. The early tendency of courts to give inhospitable reception to limitation statutes was alluded to, and it was noted, with approval, that the habit of implying exceptions at every opportunity no longer prevails.

In the case at bar we are asked to read into the statute, not another exception, but another bar. We think the latter less permissible than the former. We approve the principles of Buss v. Kemp Lumber Co., supra. We are not hostile to the statute. We have no quarrrel with the policy it serves. But surely an arbitrary time limit upon actions is not a matter to receive unusual favor at the hands of equity. The denial of the aid of the courts to collect an unpaid debt is justifiable only on broad grounds of policy. It is for the Legislature to consider those grounds and to determine in what cases to apply the bar. If we enforce the statute "as it is written, without any arbitrary subtraction (from), or addition to its meaning," have we not done all that equity could be expected to do? Of course, we do not speak of laches, to which equity is always sensitive, but only of the mere lapse of time prescribed by statute as raising the bar. It is urged, not without reason, that the same policy served

by refusing the aid of the courts, after the debtor has sat by for the statutory time, would be served by barring execution of a power of sale. It is said, also not without force, that the result we arrive at serves in such a case as this to defeat the policy of the statute. But these considerations are for the lawmakers. As for equity, laches, not arbitrary limitation, is the principle it favors. It was once doubted whether equity was controlled by limitation statutes. That is now generally conceded. But limitation is of legislative, not of equitable, origin. We enforce it, as written, as a legislative policy. We cannot be expected to extend by implication a policy not in its nature equitable. So we overrule the present assignment.

[2] 2. The mortgagor, appellant's predecessor in title, died before appellee attempted to exercise the power. Appellant contends that the power could not survive her death. It is a well-known principle that the death of the donor is, by operation of law, a revocation of the power. The exception is that if the power is one coupled with an interest, it survives. The question is, therefore, whether the present power is one coupled with an interest. In Cleveland v. Bateman, 21 N. M. 675, 158 P. 648, Ann. Cas. 1918E, 1011 this court answered that question in the affirmative. If we are controlled by that decision, appellant's contention cannot prevail. This he admits, and he bends his efforts to establish, first, that the consideration and decision of the question was unnecessary in that case, and, second, that it was there wrongly decided and should not be adhered to. Both of these contentions must, in our judgment, be overruled upon the authority of Duncan v. Brown, 18 N. M. 579, 139 P. 140.

[3] 3. Claiming that the point was not necessarily involved in Cleveland v. Bateman, appellant contends that in that case the mortgagors who gave the power were husband and wife, and the property community estate, the wife's interest in which passed, upon her

death, to the husband who was still alive. This contention is based upon the refusal of this court to accept the finding of the trial court that the mortgaged property was the husband's separate estate. That finding, it was said, would have been decisive of the question had it been supported by substantial evidence. It did not necessarily follow, however, that the property was community estate. In any event, it was the ground upon which this carefully considered decision was based. It was decisive, whatever the wife's estate may have been; and, unless her estate was a community interest, it was necessary to the decision.

[4] 4. In view of the conclusion we reach, it would be as improper as it is unnecessary to pursue the inquiry which appellant's argument suggests, as to the soundness of the doctrine announced in Cleveland v. Bateman. It is admittedly opposed by some authority. On the other hand, it is not without precedent. The question is quite technical. Its mere unsoundness, even if so considered, is not sufficient reason to overrule it. It has been a rule of property in this state for ten years. We must consider that attorneys have passed, and their clients have accepted, title in reliance upon it. Litigation involving property rights has, no doubt, been determined by it. A change in the rule, not merely prospective, might cast doubt upon many titles. In such a case we are not at liberty to overturn a former decision of this court, even if convinced that it is unsound. We must be governed by it. In saying this, we intimate no doubt of the correctness of the decision. We follow it without re-examination of the question. Duncan v. Brown, supra; Bowers v. Brazell, 31 N. M. 316, 244 P. 893; 15 C. J. 947; 7 R. C. L. 1001. Decisions cited by appellant to the contrary are not deemed in point

[5] 5. The first count of the complaint sets forth that when the mortgage was made appellant was the owner of an undivided one-third interest in one of the parcels; but that, nevertheless, appellee had advertised and intended to sell the whole property. The court

found that appellant did own such an undivided one-third interest, though the mortgagor had assumed to mortgage the whole. The sale of appellant's interest only was enjoined. He then contended, and now argues, that the notice, having misdescribed the interest to be sold, was void, and that the sale should have been enjoined entirely, pursuant to his prayer. Counsel agree that no precedent has been found. Appellant contends that it is established that a sale of a less quantity than advertised is void. So, by analogy, he urges, a sale of a less interest than that advertised would be void. He cites Fenner v. Tucker, 6 R. I. 551; Schoch v. Birdsall, 48 Minn. 441, 61 N. W. 382; People's Savings Bank v. Wunderlick, 178 Mass. 453, 59 N. E. 1040, 86 Am. St. Rep. 493.

We agree in general with the principles declared in the cases just cited. Equity should, no doubt, carefully guard powers of sale against abuse, in fraud or prejudice of the mortgagor. In the foregoing cases the result was based, or the principle declared, in view of actual or possible fraud upon, or prejudice to, the donor of the power. The only possible prejudice in this case is that the public was not informed that only a two-thirds undivided interest in the more valuable and improved parcel was to be sold, so that buyers who might desire to make such an investment might remain away, thinking that the whole was to be sold. The possibility of prejudice from this cause is so remote as, in our judgment, to furnish little practical basis for intervention. The theory of enjoining such a sale is that it would necessarily be void and serve only to becloud the title. None of the cited cases support that theory. They all arose after the event and were decided according to the circumstances. In Schoch v. Birdsall ,supra, the statute provided that the notice should contain a description "conforming substantially to that contained in the mortgage." The court said:

"The only question that can arise is whether there is such a variance as to influence bidders unfavorably."

It held that failure to exclude in the notice 25 feet of a 200-foot lot, which was excluded in the mortgage, was not to be held "upon the record alone to be misleading or prejudicial to any interested party." Admitting that a sale should be set aside on a showing of fraud, or a showing that the manner of advertising had actually or possibly worked prejudice to the owner, it does not follow that this sale should have been enjoined. We do not think that a sale held under the notice in question would be necessarily void. The court therefore properly refused to enjoin it.

[6] 6. The mortgage provided that, in case of default:

"He, the said party of the second part, or his agent, or legal representative shall be and hereby is authorized and empowered to enter upon and take possession of said * * * premises, and after having given notice of the time, place and manner of sale thereof * * * expose and sell at public auction."

Appellant contends that an entry by appellee, or at least a demand for possession, was, by this provision, made a condition precedent to the exercise of the power of sale. As appellee had not entered or demanded possession, appellant contends that he was entitled to enjoin the advertised sale.

Appellant admits that the weight of authority is contrary to his contention. He urges that some of the decisions are to be explained because in the particular jurisdicition a different theory of mortgages prevails than in this state. As to other decisions, he urges that distinctions growing out of these different theories have been overlooked. The only reason advanced in support of appellant's position is that the power is one which must be strictly complied with, and that, by the language of the power in question, entry must precede sale. He cites but one case as being in point: Roarty v. Mitchell, 7 Gray (Mass.) 243. In that case power was given to "enter and take possession of said premises immediately, and * * * sell and dispose of the same * * *" The court made the bald statement:

"We think such entry and possession, or, what perhaps would be equivalent, a demand for possession, and refusal, were conditions precedent, without which no valid sale could be made under the power of sale in the deed."

That was a case, not to enjoin an advertised sale, but to recover possession for the purchaser after the sale. In the later case of Cranston v. Crane, 97 Mass. 459, 93 Am. Dec. 106, a power for the said grantee, "to enter into and upon the premises and sell and dispose of the same * * * such sale to be upon the premises granted, first giving notice of the time and place of sale," was construed as authorizing entry for the purpose of sale only. So it was not necessary that entry should precede the giving of notice, and an entry at the time and for the purposes of the sale was sufficient. In Foster v. Boston, 133 Mass. 143, both of the foregoing cases were cited. It was held in that case that the trustees under a trust mortgage could not proceed to sell until they had taken possession. The decision, however, is fully explained by the trust provisions of the instrument and the correlative rights and duties of the mortgagor and the trustees thereby created.

We conclude that these Massachusetts decisions do not support appellant's position. We find nothing in this power of sale, or in the contract relations of the parties, making it necessary for the mortgagee to enter or demand possession prior to publishing notice of sale. Jones on Mortgages (7th Ed.) § 1782.

As the judgment is consistent with these views, it will be affirmed and the cause remanded.

It is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3067, Jan. 15, 1927]

STATE v. CURRY

[252 Pac. 994]

SYLLABUS BY THE COURT

1. Where the verdict of the jury is not supported by substantial evidence, judgment upon such verdict will be set aside on appeal.

2. Larceny is the felonious stealing and carrying away, etc., of the personal property of another; every larceny including a trespass to the possession, which cannot exist unless the property was in the possession of the person from whom it is charged to have been stolen.

Appeal from District Court, Quay County; Hatch, Judge.

W. T. Curry was convicted of the larceny of a cow, and he appeals. Reversed and remanded for a new trial.

James L. Briscoe, of Tucumcari, for appellant.

J. W. Armstrong, Atty. Gen., and J. N. Bujac, Asst. Atty. Gen, for the State.

OPINION OF THE COURT

BICKLEY, J. **[1]** Appellant was convicted of the charge of larceny of one neat cattle, under the provisions of chapter 123, Laws of 1921, which is amendatory of section 1613, Code 1915. The indictment charges that the said animal was the property of Ethel McMurren, who is the wife of J. C. McMurren. It appears that Mr. McMurren made some kind of a deal with Doc Curry, son of the defendant, whereby J. C. McMurren was to trade a cow belonging to Ethel McMurren to Doc Curry for the cow here in question. The animal which was the subject of the alleged larceny had been in the McMurren pasture between 65 and 70 days. Some difficulty arose over the transaction

[1] 17CJ p. 262 n. 76; 36CJ p. 903 n. 35. [2] 36CJ p. 747 n. 7.

between the McMurrens and Doc Curry, and on September 10, 1924, J. C. McMurren took the cow in question and put her in the pasture known as the Curry horse pasture, for the reason, as Mr. McMurren stated, Doc Curry did not carry out his part of the transaction and the McMurrens wanted to avoid the expense of keeping the cow any longer, and called off the trade, and for the purpose of releasing the McMurrens from the trade and of turning the cow back to the possession of Mr. Curry. All the acts of J. C. McMurren with regard to the cow and in making the trade and in calling off of the trade and in returning the cow to the Curry pasture were with the full knowledge and consent of Ethel McMurren. The McMurrens, nor either of them, ever had a bill of sale to the cow. Some litigation arose over the transaction in the justice of the peace court. When this litigation commenced or when it ended cannot be definitely determined from the record. The McMurrens were unsuccessful in the litigation and lost the case. Apparently the McMurrens were held to the trade by which they had acquired the animal in question. The record is so vague as to what this litigation was about that we think that the testimony concerning it has no probative value whatever. The McMurrens had never been to look for the cow (except through a telescope), and never requested the defendant or any other member of the Curry family to return the cow to him or his wife, had never sent any person to look for the cow, and had not asked the brand inspector to get her, or made any attempt whatever to get the cow back into their possession. McMurren said that he had been warned to stay out of the Curry pasture, and he did not think it expedient to go there himself. Circumstances were elicited on the hearing from which it could be inferred that ill feeling existed on the part of the McMurrens against appellant. This witness stated that he looked for the cow with a telescope from points of from 100 yards to half a mile away.

On November 6, 1924, the defendant killed a cow and sold the beef to J. C. Robbins, of Tucumcari, N.

M., and on December 8, 1924, sold the hide to Bassett Collins, of Tucumcari, and the animal so killed is the subject of the alleged larceny. The hide was identified by Mr. McMurren and others as being the hide of the animal returned to the Curry pasture on September 10, 1924. The brand on the hide was a cross on the right hip. The defendant and a son testified that the McMurrens' cow had been in the Curry pasture, and, in fact was there at the time of the trial. In the testimony it appears that defendant and Doc Curry and other sons of the defendant referred to the Curry pasture as "their" pasture, and Mr. McMurren stated that he did not know whether it was Doc Curry's pasture or W. T. Curry's—that all of the Currys referred to it as "their" pasture. The defendant, W. T. Curry, whose character was not impeached, testified that he supposed that the cow which he killed was his. That he had 22 cows branded the same way as the cow in question—that they were mostly Hereford cattle, bald-faced, red in color; that he had half a dozen nearly alike, and he thought the cow he killed was his own. Two other witnesses, testifying on behalf of the defense, stated that they were cowmen with considerable experience, and that they were on the McMurren place in June or July, and that McMurren showed each of them a cow he got from Doc Curry in a trade, and which was in the McMurren pasture, and made some remark as to her value. The witnesses stated that they had since seen the same cow two or three weeks before the trial (March, 1925), in the Curry pasture.

On the other hand, other witnesses called by the state thought the defendant's witnesses were mistaken in their identification of the cow they saw in the Curry pasture as being the one they had seen at the McMurren premises.

It will thus appear that there was some element of uncertainty concerning the identity of the cow which was killed by the defendant, although this has only an indirect bearing upon the decision.

The appellant assigns ten alleged errors challenging the sufficiency of the evidence to support the verdict, the correctness of certain instructions given by the court, and the correctness of the ruling of the court in refusing instructions tendered by defendant, and presenting the proposition that there is a vital variance between the allegatoins of the indictment and the proof, in that the proof shows that if any crime was committed by the defendant it was the crime of embezzlement of an animal, and not larceny.

The section of the statute upon which the indictment was predicated enumerates three distinct crimes, namely: (1) Stealing of animals; (2) embezzlement of animals; and (3) knowingly killing or otherwise depriving the owners of animals of their immediate possession. See Territory v. Cortez, 15 N. M. 93, 103 P. 264. In State v. Anaya, 28 N. M. 283, 210 P. 567, we said that an indictment alleging that on a day certain the defendant, having been intrusted with a certain number of sheep of the property of a named person, embezzled and fraudulently converted the same to his own use, states an offense under section 1613, Code 1915. There seems to be no doubt, therefore, that the section in question embraces embezzlement and larceny as distinct offenses. The indictment is in one count and charges the defendant with larceny alone. It was held in State v. Roberts, 18 N. M. 480, 138 P. 208, that in an indictment which alleges that the defendant "did steal, take and knowingly drive away" the animal, it is not necessary to allege that the owner was thereby deprived of its immediate possession, and in that case we said that if the defendant did feloniously steal, take, and drive away the animal, necessarily the owner was deprived of the immediate possession of the animal. And in the indictment in the case at bar, it is alleged that the defendant did "unlawfully and feloniously deprive the said owner of the said one neat cattle of the immediate possession thereof." That larceny is an offense against possession there can be no doubt. In this respect it is distinguished from embezzlement.

"It is this element of trespass which distinguishes larceny from the crime of embezzlement. In embezzlement the possession of defendant is lawful and the wrong consists in the criminal misappropriation of the thing possessed. In larceny defendant's possession is at no time lawful, for this felonious intent vitiates the consent with which he obtains the possession, and hence the wrong consists not in the misappropriation, but in the original taking." 36 C. J. "Larceny," § 133.

In a case note in 13 Ann. Cas. p. 882, the distinction is stated in this manner:

"The crimes of larceny and embezzlement are distinguishable in that in the latter the property comes lawfully into the possession of the taker, and is unlawfully appropriated by him, whereas in the former the property is unlawfully taken and retained."

See, also, Bishop on Criminal Law (9th Ed.) §§ 794-799.

It is not worth while to multiply citations.

In State v. Liston, 27 N. M. 500, 202 P. 696, we said:

"Before a case of larceny is complete, there must, of course, be evidence of an unlawful taking and asportation."

Asportation is defined as follows:

"A taking out of the possession of the owner, without his privity and consent. * * *" 5 C. J. 607.

In this case the alleged owner of the cow in question, Ethel McMurren, did not deny the facts as testified to by her husband, J. C. McMurren, heretofore referred to. Her testimony in regard to the cow, and from which asportation must be inferred, is as follows:

"Q. You may state whether or not you gave any one any permission to take that cow from you. A. No, sir; I didn't.

"Q. You may state whether or not the cow was taken or killed; was it with or without your consent and knowledge? A. It was killed without my consent."

We do not think that there is any substantial evidence from which it can be concluded that the cow was taken from the possession of Ethel McMurren by the defendant. In effect, she herself sent it to the pasture of the defendant with the intention of dis-

claiming any right, title, or interest in the animal. The litigation in the justice court apparently caused the McMurrens to repent of having relinquished possession of the cow and having attempted to put the possession thereof back in Doc Curry by putting her in the Curry pasture, over which apparently the defendant had control. This repentance, however, did not show itself in works in the nature of an attempt to repossess the cow. There is not a bit of evidence to show that the McMurrens ever again regained possession of the cow in question. Whether the defendant, W. T. Curry, made an honest mistake in killing a cow which did not belong to him or whether he embezzled a cow in his possession belonging to Ethel McMurren is beside the question. He is not indicted for embezzlement, but for larceny.

We believe the facts in this case fail to show a criminal intent on the part of appellant, and we are fully satisfied that they do not show that the appellant did take, steal, and carry away and deprive Ethel McMurren of the immediate possession of the cow in question. Indeed, it is contended with much show of reason that Ethel McMurren repudiated title and ownership, as well as possession, when the trade was called off and the cow taken back to the Curry pasture—that is, in so far as the animal might become the subject of larceny from her.

The verdict not being supported by substantial evidence, the trial court should have sustained appellant's motion for a directed verdict.

[2] It is argued by appellant that the court erred in giving instruction No. 9, which is as follows:

"I further instruct you that it is necessary under the charge laid in the indictment that the property alleged to have been stolen be in the possession of the person from whom it is claimed the same was stolen; however, in this connection I charge you that actual physical custody of such property is not necessary to constitute possession within the sense or within the purview of the larceny statutes, it being sufficient that the taking be from the place where the property was left by the real owners so long as he retains his ownership in such property, and

when one leaves property at any place without any intent to abandon and relinquish his ownership therein, one taking such property from such place takes the same from the possession of the owner although the actual custody thereof may not be in the owner at that particular time of larceny."

The instruction is correct as an abstract statement of law. Doubtless under the testimony in this case, the phrase, "it being sufficient that the taking be from the place where the property was left by the real owner so long as he retains his ownership in such property," should be explained so as to avoid confusion in the minds of the jury. Ordinarily, the language employed is used in connection with the theft of a chattel which has been left by the owner at a place over which he has some control, either actual or constructive. For instance, it is frequently said that animals on their accustomed range are in the possession of the owner, althugh not in the actual possession of such owner. But it seems to us that where the owner of an animal puts it in a place over which he has no control through ownership, by agreement, or otherwise, the principle announced in the instruction is not applicable.

In view of our decision, we do not consider it necessary to decide upon other points presented by appellant. The judgment is reversed and the cause remanded for a new trial; and it is so ordered.

PARKER, C. J., and WATSON, J., concur.

[No. 2949, Jan. 20, 1927]

FIRST STATE BANK OF ALAMOGORDO (BORDER NAT. BANK OF EL PASO, TEX., Intervener)

v. McNEW et al.

[252 Pac. 997]

SYLLABUS BY THE COURT

1. Where it appears that the bill of exceptions was settled, it will be presumed, in the absence of a contrary

[1] 4CJ p. 792 n. 37. 38. [2] 4CJ p. 792 n. 38. [3] 4CJ p. 792 n. 38. [4] 4CJ p. 251 n. 48.

showing, that the settlement was regular, and that the judge who signed and settled the bill had the requisite authority to do so.

2. When a judge signs a bill of exceptions as a judge of a district court, there is a presumption in favor of the regularity thereof, and, until otherwise shown, it will be presumed that the judge signing the bill of exceptions was in point of fact the judge of the court in which the case was tried, and therefore was the proper judge to sign the same.

3. The movant was given notice of the intention of the appellants to apply to District Judge Owen to have him sign, seal, and settle the bill of exceptions, and made no objection thereto. If such judge was unauthorized, movant could have gotten the record amended in the court below. The appellee had the right to waive a more specific showing as to the authority of Judge Owen. Such circumstances strengthen the presumption alluded to.

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

Action by First State Bank of Alamogordo against Robert J. McNew and others, in which the Border National Bank of El Paso, Tex., intervened. From an adverse judgment, defendants appeal. The intervener moves to strike the bill of exceptions. Motion overruled.

Tom Lea, of El Paso, Tex., Holt & Sutherland, of Las Cruces, and J. Benson Newell, of Alamorgordo, for appelants.

J. L. Lawson, of Alamogordo, and W. H. Winter, of El Paso, Tex., for appellee.

OPINION OF THE COURT

BICKLEY, J. [1] The intervener and appellee has filed a motion to strike the bill of exceptions in this case. The ground of the motion is that said bill of exceptions was not certified to by the judge of the Third judicial district, the said judge being the judge of the Third judicial district court in and for Otero county, in which court this cause was tried. It appears from the transcript of record that Harry P. Owen, judge of the Seventh judicial district, presided at the trial of this cause at the request of the judge

of the Third judicial district of New Mexico. Similar recitals continue throughout the record, including the order settling the bill of exceptions, in which order appears the following language, to wit:

"Now, therefore, I, Harry P. Owen, judge of the Seventh judicial district court of the state of New Mexico, do hereby certify that I am the judge before whom the above-entitled cause was tried, at the request of Hon. Edwin Mechem, judge of the Third judicial district court of the state of New Mexico."

The said order or certificate was signed as follows:

"Harry P. Owen, judge of the Seventh judicial district sitting for and at the request of Hon. Edwin Mechem, judge of the Third judicial district court of the state of New Mexico."

The bill of exceptions was signed and sealed on March 26, 1924. Said bill of exceptions was filed in the office of the county clerk of Otero county, ex-officio clerk of the district court of the Third judicial district of the state of New Mexico within and for said Otero county on April 1, 1924. A transcript containing the bill of exceptions was filed in the Supreme Court on April 5, 1924. Appellants' brief was filed June 16, 1924, and appellee's brief was filed March 23, 1925, and intervener's and appellee's brief was filed May 15, 1925. The motion of intervener to strike the bill of exceptions was filed January 15, 1926.

Movant relies upon Schaefer v. Whitson, 31, N. M. 96, 241 P. 31. In that case Judge Ryan of the Sixth judicial district, sitting for and in the place of Judge Hickey of the Second district, presided at the trial of the cause. Appellant presented his proposed bill of exceptions to Judge Helmick, successor to Judge Hickey. The appellee appeared and objected upon the ground, among others, that the judge who tried the case, Judge Ryan, was the proper judge to sign and seal the bill of exceptions, and not Judge Helmick, who was the successor of the regular judge of the court in which the case was tried. Judge Helmick overruled appellee's objections, and decided adversely to appellee, who then and there objected to the decision of the court. In that case we sustained the au-

thority of Judge Helmick to sign the bill of exceptions and overruled the motion to strike the same.

In the case at bar no objections were made by intervener and appellee, nor any one else, to the signing and sealing of the bill of exceptions by Judge Owen. The judge's certificate attached to the bill of exceptions recites:

"And the said defendants submit 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 plaintiff and intervener of their 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 thereto on the part of the plaintiff and intervener: Now, therefore," etc.

As we said in Schaefer v. Whitson, supra, expressions even of our own court vary as to whether the judge who tried the case is the only one who is properly circumstanced to settle a bill of exceptions. We said that the Legislature had laid down the rule that the bill of exceptions should be presented to "the judge of the court in which said cause was tried, to have the judge of said court sign, and seal the same in proper form, as a bill of exceptions." Laws 1917, c. 43, § 27. The duty of settling a bill of exceptions is in order that it may express the truth. There is nothing inherently wrong or inefficient in having the bill of exceptions signed and sealed by the judge who tried the case, and many members of the bar think that it would be better so, and this court in early decisions prior to Ravany v. Equit., etc., Soc., 26 N. M. 41, 188 P. 1108, expressed the opinion that the trial judge was better situated than any other judge to settle bills of exceptions. In the Ravany Case it was said this is not necessarily true. We have seen in the Ravany Case that the Chief Justice, under certain circumstances, may appoint the judge of a district other than the one in which the cause was tried, to sign the bill of exceptions. Such judge becomes for the time being the judge of the district court in which the cause was tried for the purposes of performing the judicial acts

embraced in the authorization.

In Schaefer v. Whitson, supra, we said:

"We reaffirm the doctrine of the Ravany Case, and we hold that the judge of the court in which the case was tried, and not the judge specifically appointed to hold court for the regular judge, is the only proper one to settle and sign the bill of exceptions, unless the regular judge for some reason be incapacitated to perform that duty.

"In the Ravany Case, we construed the language of section 15 of article 6 of the Constitution to mean, not only that the judge designated could hold court in any district, but that he could be designated to 'do any other official act,' and in that case a judge was designated to perform the single judicial act of settling and signing a bill of exceptions."

[4] In the same section of the Constitution (section 15, art. 6), it is declared:

"Any district judge may hold district court in any county at the request of the judge of such district."

We hold that the power of the resident district judge to designate the judge of another district to hold district court in a county of a district of the resident judge thereof includes the power of designation to perform any judicial act, including the signing and sealing of a bill of exceptions.

[1] There may on occasions arise controversies as to the fact of such designation of such judge pro tem. or as to the extent and scope of the authority vested in such judge pro tem. by the designation, and the evidence thereof, or as to whether the authority vested had been rescinded, etc. These are questions which must be determined from the record, and, where the record shows that the bill of exceptions was signed and sealed by a judge of a district court assuming to act on authority, and the record does not affirmatively show lack of authority in a case where the bill was settled on notice and without objection, we will presume that such authority existed. In 4 C. J., Appeal and Error, § 2748, it is said:

"Where it appears that the bill of exceptions, case, or statement of facts was settled, it will be presumed, in the

absence of a contrary showing, that the settlement was regular and that the judge or other person who signed and approved the bill, case, or statement had the requisite authority to do so."

[2] Additional cases are cited in the annotations to the foregoing text, among them being Husbands v. St. Louis Elec. Term. Ry. Co. (Mo. App.) 196 S. W. 78, wherein the court said:

"When a judge signs a bill of exceptions as a judge of a circuit court, there is a presumption in favor of the regularity thereof, and until otherwise shown it will be presumed that the judge signing the bill of exceptions was in point of fact the judge of the court in which the case had been tried, and therefore was the proper judge to sign same."

We do not wish to plant thorns in the pathway of an appeal, and we will not presume a state of case which will invalidate the record. But rather will we presume in favor of the record that a competent district judge signed and sealed the bill of exceptions.

[3] The only ground of the motion to strike is:

"That the said bill of exceptions, incorporated into the record herein, and appearing as a part of the transcript on this appeal, is not and was not certified to by the judge of the Third judicial district, the said judge being the judge of the Third judicial district court in and for Otero county in which court this cause was tried."

We will take judicial notice of the fact that Hon. Harry P. Owens is the elected resident judge of the Seventh judicial district, and that he is not the elected resident judge of the Third judicial district. It does not appear, however, from the motion that some of the circumstances which would authorize a judge other than the elected and resident judge of the district in which the cause was tried to sign and seal the bill of exceptions did not in fact exist. The intervener and appellee was given notice of the intention of the appellants to apply to Harry P. Owen, district judge, to have him sign, seal and settle the bill of exceptions, and made no objection thereto. If such judge was unauthorized, appellee could have gotten the record amended in the court below. The appellee had the right to waive a more specific showing as to the

authority of Judge Owen, and consent that he sign and seal the bill. Such circumstances strengthen the presumption heretofore alluded to.

For the reasons stated, the motion to strike the bill of exceptions is overruled.

PARKER, C. J., and WATSON, J., Concur.

[No. 3122, Jan. 20, 1927]

HANNETT v. MOWRER

[255 Pac. 636]

SYLLABUS BY THE COURT

Judgments in election contest cases can only be reviewed in this court upon appeal, and writs of error do not lie to review such judgments.

Error to District Court, McKinley County; Holloman, Judge.

Election contest by Dr. J. W. Hannett against J. D. Mowrer. Judgment for defendant, and plaintiff brings error. Writ of error dismissed.

Harold C. Perry, of Albuquerque, and A. L. Zinn, of Gallup, for plaintiff in error.

H. C. Denny, of Gallup, and F. E. Wood, of Albuquerque, for defendant in error.

OPINION OF THE COURT

PARKER, C. J. A writ of error was issued by this court to review a judgment in an election contest. A motion has been filed to dismiss the writ of error on the ground that such judgments are not reviewable by writ of error and may be reviewed only upon appeal. The procedure for review of judgments in election contest cases is prescribed by section 2080, Code 1915, which is as follows:

"Either party feeling himself aggrieved by any judgment rendered under the provisions of this article, may

[1] 20CJ p. 265 n. 22.

take an appeal therefrom to the Supreme Court, in the same manner that appeals are now taken from decrees in equity. But no such appeal shall operate as a stay of the execution of the judgment, except as to costs."

This section has remained in force ever since 1876, when it was enacted, and is the law today. The statute governing the contest of elections, which is sections 2060 and 2080, inclusive, Code 1915, has been under consideration by the territorial and state courts in several cases. See Bull v. Southwick, 2 N. M. 321; Vigil v. Pradt, 5 N. M. 161, 20 P. 795; Gonzales v. Gallegos, 10 N. M. 372, 62 P. 1103; Garcia v. Lucero, 22 N. M. 598, 166 P. 1178; Wood v. Beals, 29 N. M. 89, 218 P. 354; Gallagher v. Linwood, 30 N. M. 211, 231 P. 627, 37 A. L. R. 664; State v. Dist. Court, 31 N. M. 82, 239 P. 452.

From all of these cases it is to be deduced that an election contest is a special statutory proceeding in which the procedure prescribed by the statute must be strictly pursued. It is not a civil proceeding, and is not to be governed by any of the rules of procedure in such cases. The section of the statute above quoted is the only section providing for appeals in election contest cases. Counsel for plaintiff in error argues that sections 1, 2 and 4 of chapter 43, Laws 1917, are broad enough to warrant a review of election contest cases by writ of error. It is to be observed that this chapter is an act providing appellate procedure in civil and criminal cases, and makes no reference whatever to election contests. Sections 1 and 2 of the act refer strictly to civil actions, and section 4 merely provides that a writ of error may be issued in any of the cases mentioned in sections 1 and 2. It is apparent, therefore, that chapter 43 was never intended to apply to election contests, and contestants are relegated, as to the procedure for review, to the contest statute above referred to.

It follows that the writ of error was improvidently issued by this court in this case, and it should be dismissed; and it is so ordered.

BICKLEY and WATSON, JJ., concur

[No. 3136, Jan. 20, 1927]

WILLIAMS et al. v. KEMP et al.

[252 Pac. 1000.]

SYLLABUS BY THE COURT

1. The requirement that a praecipe for the record shall be filed within 30 days from the taking of an appeal, as provided in section 36, c. 43, Laws 1917, is applicable only in case an extension of time to settle the bill of exceptions is desired.

2. Where a partial record is brought to this court by an appellant, it is the duty of the appellee if he so desires to have embodied in the transcript such additional portions of the record as he may desire, and a motion by him in this court for a writ of certiorari to bring up such portions of the record will be denied.

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

Action by H. C. Williams and others against W. C. Kemp and others. From an adverse judgment, defendants appeal, and plaintiffs move for a writ of certiorari and to dismiss the appeal. Motions denied.

E. P. Davies and W. N. Birdsall, both of Santa Fe for appellants.

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

OPINION OF THE COURT

PARKER, C. J. [1] 1. A motion was made to dismiss the appeal upon the ground that the praecipe for the transcript of record was not filed with the trial court within 30 days from the date of the allowance of the appeal. There is confusion in the mind of counsel who filed this motion in regard to this matter. The requirement that a praecipe be filed within 30 days after the taking of an appeal, as provided by section 36, c. 43, Laws 1917, is a provision which is applicable only in case an extension of time within which to have the bill of exceptions settled and signed is desired. Otherwise, there is no requirement as to the filing of the praecipe within said 30 days.

[1] 4CJ p. 285 n. 37. [2] 4CJ p. 260 n. 24; p. 507 n. 10.

[2] 2. Counsel for appellee has filed a motion for certiorari to supply a portion of the record not contained in the transcript. This application will be denied. The record in this case is not a complete record ,and in such cases by the provisions of section 32, c. 43, Laws 1917, if the appellee desires additional parts of the record, it is his duty to require the clerk to certify such additional portions of the record with the transcript to this court.

It follows that the motion to dismiss this appeal should be denied, and the motion for the writ of certiorari should also be denied, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 2951, Jan. 21, 1927]

MICHELIN TIRE CO. v. AKERS et al.

[255 Pac. 388]

SYLLABUS BY THE COURT

1. Failure of a creditor to answer a communication from the retiring member of a debtor partnership notifying the creditor of dissolution and of assumption of partnership indebtedness by the continuing partner, and claiming release from all liability to the creditor, does not constitute consent by implication, nor effect a release.

2. Attempts by the creditor to collect his debt from the continuing partner, who has assumed payment thereof, and the receipt from him of checks in payment, do not constitute dealings with the continuing partner as though the debt were his alone.

3. Assuming, but not deciding, that mere notice to the creditor of the dissolution of the debtor partnership, and of the assumption of the firm debts by the continuing partner, is sufficient, as between the creditor and the retiring partner, to change the latter's status to that of a surety, a mere forbearance of the creditor to press collection will not release the retiring partner's liability, though in the meantime, the situation may have so changed that he cannot enforce indemnity against the continuing partner.

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[1] 30 Cyc p. 616 n. 90. [2] 30 Cyc p. 616 n. 90 [3] 20 Cyc p. 612 n. 34.

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

Action by the Michelin Tire Company against T. G. Akers and W. K. Jones, partners, doing business under the trade-name of the Yeso Trading Company, and such defendants individually. From a judgment against defendant Akers, but in favor of defendant W. K. Jones, plaintiff appeals. Reversed and remanded, with direction.

J. F. Kelton, of Ft. Sumner, for appellant.

Keith W. Edwards, of Ft. Sumner, for appellees.

OPINION OF THE COURT

WATSON, J. T. G. Akers and W. K. Jones were sued upon an indebtedness incurred while they were doing business as copartners. The partnership had been dissolved, and Akers had assumed its liabilities. The judgment was against Akers, but in favor of Jones; the court's conclusion of law being "that the plaintiff at least impliedly released W. K. Jones, and is estopped to hold the defendant, W. K. Jones, for such indebtedness, and cannot now recover from him." The plaintiff, Michelin Tire Company, appeals.

The bill of exceptions having been stricken (Michelin Tire Co. v. Akers, 30 N. M. 338, 233 P. 1005), the only question for our consideration is whether the court's findings support the above-quoted conclusion and the judgment based thereon.

[1] It appears from the findings that Akers and Jones, copartners doing business under the name of Yeso Trading Company, became indebted to appellant in the sum of $552.23. A few months later the partnership dissolved; Akers purchasing appellee's interest, and assuming and agreeing to pay appellant's account. Appellee promptly "notified the plaintiff (appellant) of the terms and conditions of said sale, and notified the plaintiff that he would be no longer responsible for any part of the indebtedness owed by the Yeso Trading Company, and particularly would

not be responsible for the indebtedness sued upon by the plaintiff in this action." About a month later Akers paid one-half of the indebtedness and about four months later gave his check for the balance. This check, however, was dishonored, and the balance has never been paid.

The third and fourth findings are as follows:

"(3) The court further finds that upon the receipt of said notice the plaintiff did not notify the defendant, W. K. Jones, that he would not be released from said obligation; that while the testimony introduced on behalf of the plaintiff is to the effect that plaintiff's agent wrote the defendant W. K. Jones that he would not be released from said indebtedness, yet the evidence does not show that the letter was mailed to the defendant at Yeso, N. M., and said defendant positively testifies that no such notice was received by him. Therefore the court finds that he did not receive such notice, and that he had no notice that his proposition to the plaintiff was not accepted. Although the evidence positively discloses that plaintiff had agents in the town of Yeso at different times subsequent to the dissolution of said partnership and prior to the filing of the suit herein, and although several months elapsed between said time, said agents or the plaintiff never notified the defendant W. K. Jones that he was being held under said partnership contract, and the first notice he had of the plaintiff's claim against him and that they did not assent to his proposition was the filing of the suit herein.

"(4) The court further finds that, after the receipt of the notice from the defendant W. K. Jones that he was no longer a member of said partnership, plaintiff dealt with the defendant T. G. Akers as though said obligation were the obligation of the defendant T. G. Akers alone, and accepted a check from him under date of September 10, 1922, for the balance due on said account, but which check the court finds was not honored or paid by the defendant T. G. Akers."

By the fifth, sixth and seventh findings it appears that, when appellant received notice of the dissolution, Akers had sufficient property, so that if appellant had moved promptly for the collection of its debt, the same could have been collected; but that, before it commenced suit, Akers had disposed of his property, and had not sufficient property in De Baca county to pay the indebtedness, nor to indemnify appellee in case he should pay it; and that, if now compelled to pay,

appellee would suffer loss "occasioned solely by the conduct of the plaintiff in not notifying him that his proposition was not accepted, and in permitting the defendant T. G. Akers to dispose of the partnership property and of his individual property without collecting said indebtedness; that the plaintiff should not be allowed at this time to hold the said W. K. Jones for such indebtedness, in view of its own fault and wrong in the premises."

Upon such findings the conclusion of law set forth at the outset is based.

Appellee's counsel states his position thus:

"The contention of counsel for appellee is not that the defendant W. K. Jones would be released from liability on an indebtedness which was due and payable when he retired merely because the creditor did not at once sue and collect the same. There is another element in this case, which brings it within the rule followed by the lower court. The goods consigned to the partnership, for payment of which the suit below was filed, were still on hand and unsold when defendant W. K. Jones retired and notified plaintiff of his arrangement with his partner T. G. Akers, and that he would no longer be responsible for the payment of said consignment of goods. In view of this fact, it is the contention of counsel, and was the theory of the lower court, that, if plaintiff wished to permit the remaining partner to keep the consignment and sell off the goods, thus benefiting plaintiff as well as the remaining partner, then it was bound to look to the remaining partner solely for payment."

This is, indeed, a harsh doctrine. The creditor having sold and delivered his goods, on being notified of dissolution of the partnership, and that the indebtedness had been assumed by the continuing partner, must either demand return of the goods or lose the liability of the withdrawing partner. Either alternative means loss to the creditor. It means, in effect, that the indebted partnership, by dissolving, may cancel the contract of sale and force the seller to accept a return of the goods. Certainly debtors cannot, in such manner, repudiate their contracts.

Mission Fixture Co. v. Potter, 26 Cal. App. 601, 148 P. 223, is relied upon by appellee to support his

theory. We do not consider it in point. That case did not involve the relation of debtor and creditor. Goods had been consigned to the partnership to be used as samples from which orders might be taken. A bailment resulted. The contract provided for return of the goods on the bailor's demand. The bailee partnership was dissolved; one partner purchasing the other's interest and continuing the business under the same name. Notice of these facts was given to the bailor. The principle of the decision is merely that the bailor, by permitting the bailment to continue when he might have ended it at any time, estopped himself from claiming any liability as against the retiring partner for conversion of the goods, after the dissolution, by the continuing partner. This case clearly does not support appellee's theory, nor is there any authority cited to support the proposition that, by virtue of the notice given, appellee was released from all liability. We cannot sustain the judgment on this theory.

[3] It is urged further, in support of the judgment, that the notice was effective at least to change the appellee's status from that of joint debtor to one of surety; and that, by its conduct, appellant released, or estopped itself from relying on, appelee's liability as surety.

There is a sharp conflict of authority as to whether a notice of dissolution and of assumption of indebtedness by the continuing partner is sufficient, in the absence of express consent and of consideration, to change the status of the retiring partner, in relation to the creditor, from that of debtor to that of a surety. 20 R. C. L., "Partnership," § 223; case note, "Assumption of Debts on Dissolution of Partnership," 9 L. R. A. (N. S.) 49; continued, 48 L. R. A. (N. S.) 547; case note, "Relation of Retiring Partner as Surety upon Dissolution of Partnership," 1 Ann Cas. 725; continued, 11 Ann. Cas. 1028. We shall assume, however, for the purposes of this appeal, that such is the effect of mere notice. To sustain the judgment, how-

ever, it must additionally appear that the conduct of appellant was such as should result in the release of appellee's liability as a surety. The conduct relied on is this: (1) Failure to bring home to appellee notice of a refusal to release him. (2) Continued dealing with the assuming partner as though the obligation were his alone. (This, so far as the findings disclose, consisted merely in accepting from the continuing partner a check for the unpaid balance of the debt, which check was dishonored. It may be that the court here had in mind, also, appellant's failure to reclaim the goods). (3) Permitting the continuing partner to deal with his property, without filing suit or endeavoring to collect the indebtedness, until he had disposed of it, and had not sufficient property in De Baca county to satisfy the indebtedness; by reason of which negligence, continuing for "several months," the situation so changed that, when sued, appellee's recourse on his former partner for indemnity was valueless. These are the equities which appellee urges in his favor, as sufficient to discharge him from liability as a surety.

[2] In the first place, we cannot attach such importance, as counsel does, nor as the district court seems to have done, to appellant's failure to notify appellee that he was not released. Appellee did not apparently request any answer or seek appellant's consent to a release. He blandly informed his creditor that he was no longer bound by the contract. He did not state that he deemed himself henceforth a mere surety. He advanced the legal proposition that, by arranging with another to assume his liability, and notifying his creditor thereof, he had accomplished his discharge. Of course, he was mistaken as to his rights. If appellant had replied, disputing the right it would have been a mere legal contention. We know of no duty resting upon appellant to correct appellee's mistake of law. Appellant had notice of the facts. The relationship resulting did not depend upon the understanding, or misunderstanding, of either party concerning a question of law. It seems to us that, if

appellee was lulled into a sense of security, it was by his own mistake as to his legal rights. Understanding and claiming, then, that he had effected his own release, how can he now urge that he supposed appellant had released him?

We do not understand that the receiving of a check, dispatched by the continuing partner for the unpaid balance, is significant. Whatever the relationship between the parties, Akers was under a duty to pay, and it was appellant's right and duty to receive payment from him. Indeed, it is of appellant's failure to press collection from Akers that appellee principally complains. It does not constitute a dealing with Akers as though the debt had been his sole obligation. In this transaction we see no irregularity, no admission, nor anything prejudicial to appellee. We have already suggested that failure to reclaim the particular goods was not, as in the case of a bailment it would be, a dealing with Akers as though the obligation were his alone. Appellant clearly was under no duty to reclaim the goods, and, so far as the finding shows, had no right to do so.

The question remains, then, whether a creditor by mere delay in enforcing collection by suit during several months, effects the release of a surety who, because of the delay, has suffered through the dissipation or removal of his principal's property. This is not a case of extension of time. In such a case the surety, through the act of the creditor, is placed in a different position. He can no longer pay the debt at any time and look to his principal and his principal's property for indemnity. So an extension of time releases him. But mere delay in enforcing collection is a different matter. Appellee at all times had the right—indeed, could have been compelled—to pay the debt. He, like appellant, sat by until it was impossible to collect from Akers, no doubt enjoying a false sense of security, but as we have concluded because of his own misconception, rather than because of any act or assurance of appellant.

We have examined all cases cited by appellee, and find none to support a contention that mere delay may be relied upon by a surety as effecting his release. An extension of time will do it. Refusal by the creditor to proceed to collect when the surety demands that he do so may do it. But mere forbearance will not. In Brandt on Suretyship and Guaranty, § 376, it is laid down:

"It is also settled, as a general rule, that the mere passive delay of the creditor in proceeding against the principal, however long continued and however injurious it may be to the surety, will not discharge the surety. In such case the contract is not changed and the surety may at any time pay the debt and proceed against the principal. Such forbearance by the creditor, even if continued until the debt is barred as against the principal by the statute of limitations, or if continued for twenty-four years, does not discharge the surety."

In Campbell v. Floyd, 153 Pa. 84, 25 A. 1033, one of the cases cited by appellee, it is said:

"Assuming then, the relation of this appellant to have become that of surety, what is there in the facts alleged to discharge him? Mere forbearance, however prejudicial to the surety, will not release him. U. S. v. Simpson, 3 Pen. & W. 437 [24 Am. Dec. 331]; nor will indulgence, accompanied by payment of interest by the debtor and a promise of punctuality in the future, have that effect, if the creditor's hands are not tied. Johnston v. Thompson, 4 Watts, 446. And while a surety may be discharged by an agreement between the creditor and the principal debtor for an extension of the time of payment, the essential elements of a contract must be present; not only must the agreement be upon a sufficient consideration, but the time of payment must be definitely fixed; otherwise the surety will not be discharged."

Much other authority might be cited to this proposition.

As we view these findings, the judgment is based either on a failure to distinguish between a bailment and a debt or upon the proposition that, by mere forbearance, a surety may be released. We find it necessary, therefore, to reverse the judgment and to remand it to the district court, with direction to enter judgment for the appellant, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3123, Jan. 21, 1927]

STATE v. STEWART

[255 Pac. 393]

SYLLABUS BY THE COURT

A district judge, sitting in a county outside of his district for and at the request of the resident judge, may settle and sign a bill of exceptions presented to him while so sitting.

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

Wesley Stewart appeals. On motion to strike the bill of exceptions. Motion denied.

Holt & Sutherland, of Las Cruces, for appellant.

Fred E. Wilson, Atty. Gen., for the State.

OPINION OF THE COURT

PARKER, C. J. A motion to strike the bill of exceptions is filed based upon the proposition that the same was settled and signed by a district judge without authority. It appears that Judge Ryan, of the Sixth judicial district, at the request of Judge Mechem, judge of the Third judicial district, sat in the trial of the case. In settling and signing the bill of exceptions he subscribed himself as:

"Judge of the Sixth Judicial Court of the State of New Mexico, sitting for and at the request of Hon. Edwin Mechem, Judge of the Third Judicial District of the State of New Mexico."

The Attorney General in support of his motion to strike the bill of exceptions relies upon Schaefer v. Whitson, 31 N. M. 96, 241 P. 31. In that case we used the following expression:

"We reaffirm the doctrine of the Ravany Case, and we hold that the judge of the court in which the case was tried, and not the judge specifically appointed to hold court for the regular judge, is the only proper one to settle and sign the bill of exceptions, unless the regular judge should for some reason be incapacitated to perform that duty."

[1] 4CJ p. 251 n. 48.

We held in Ravany v. Equitable, etc., Soc. 26 N. M. 41, 188 P. 1108, that when a judge is designated by the Chief Justice of the Supreme Court to settle and sign the bill of exceptions in a given case, he becomes and is for the time the judge of the district court of that county for that purpose, and is authorized to settle and sign the bill of exceptions. The same result must be true in the case of the selection of the district judge of another district by the judge of any given district to sit and hold court for him in his district. The designation by the Chief Justice and the selection by the district judge of another judge to hold court in any district, are both contained in the same section of the Constitution, which is section 15 of article 6. It is apparent, therefore, that Judge Ryan in the present case, purporting to act upon the request of Judge Mechem, had full power to sign the bill of exceptions in this case. We have just now examined this question in First State Bank of Alamagordo and Border National Bank of El Paso v. Robert J. McNew et al., 252 P. 997, and the same conclusion is there reached in an opinion by Mr. Justice Bickley.

It follows that the motion to strike the bill of exceptions should be denied; and it is so ordered.

BICKLEY and WATSON, J. J., concur.

[No. 3144, Jan. 26, 1927]

SOUTHERN SURETY CO. v. COLBURN

[255 Pac. 405]

SYLLABUS BY THE COURT

Under the provisions of section 32, chapter 43, Laws 1917, it is necessary to state in the præcipe for the record the questions desired to be reviewed, and, upon a failure so to do, no question is presented to this court for decision.

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[1] 4CJ p. 420 n. 50.

Error to District Court, Colfax County; Kiker, Judge.

Action between the Southern Surety Company and Keith Colburn, a minor, suing by his next friend, C. C. Colburn. To review an adverse judgment, the Southern Surety Company brings error. Writ of error dismissed.

Francis C. Wilson, of Santa Fe, for plaintiff in error.

H. M. Rodrick, of Raton, for defendant in error.

OPINION OF THE COURT

PARKER, C. J. A motion to dismiss the writ of error has been filed by defendant in error, based upon the proposition that the praecipe for the record calls for a partial record, as provided by section 32, chapter 43, Laws 1917 and the praecipe contains no statement of the questions sought to be reviewed. Plaintiff in error thereupon filed an application to amend the record by interlineation so as to state the questions sought to be reviewed.

There are several reasons why this is not allowable. There are three methods of preparing a transcript of record on appeal or writ of error to this court. One is to bring up the whole record, in which case all questions presented to and ruled upon by the lower court may be reviewed. The second method is to procure an agreement in writing with the opposite side and have the clerk make up a record, omitting therefrom any designated portions not deemed material to the decision of the case. See sections 30 and 31, chapter 43, Laws 1917. The third method, in cases where no agreement has been had between the parties to bring less than the whole record, is to file a praecipe—

"Setting forth the questions he desires to have reviewed, and those portions of the record and proceedings he deems necessary for such review; and he shall be bound in the Supreme Court by the præcipe so filed. If in such cases the opposite party desires to take up more of the record than is called for in such præcipe, he may have the additional parts of the record certified by the clerk and by him certified with the rest of the record."

See section 32, chapter 43, Laws 1917. Section 34 of the act provides that the appellant or plaintiff in error—

"shall not be heard to suggest a diminution of the record or to ask for a certiorari to supply such diminution in any case where such appellant or plaintiff in error has caused to be certified to the Supreme Court either by agreement or under section thirty-two (32), less than the entire record, unless such suggestion or motion shall be made prior to the filing of his brief, and shall be accompanied by an affidavit setting forth reasons satisfactory to the court for the omission of the same from the transcript; mere neglect to include the desired portion of the record in the præcipe shall not be sufficient cause for the award of the certiorari applied for."

In this case the plaintiff in error chose the last method. It will be improper at this time to allow the amendment of the praecipe desired, for the reason that in that case the defendant in error would not be in a position to bring up such additional portions of the record as he might deem necessary for the review of the case. In Norment v. Mardorf, 26 N. M. 210, 190 P. 733, we considered the effect of omitting from the praecipe a statement of the questions desired to be reviewed, and held that, in the absence of such statement, there was no question before this court for review. In Savage v. Nesteroff, 31 N. M. 88, 240 P. 987, there was a motion to dismiss an appeal after failure to specify the questions sought to be reviewed upon a partial record, as provided in section 32 of said act. In that case, however, the praecipe stated that the appellant desired to review the action of the court upon the points set out in the stipulation of facts upon which the case was tried. The stipulation was complete, leaving only questions of law to be determined by the court. We correctly held in that case that this was a substantial compliance with section 32 of the act. Not so, however, in the case at bar. The praecipe simply calls for certain portions of the record and gives no intimation whatever as to what the questions are to be reviewed. The mandatory provisions of the statute makes the argument of counsel and the citations of authority as to the power of

this court to allow amendments to the record inapplicable. We are restrained by the statute from allowing the appellant, who has proceeded under section 32, to have the benefit of certiorari or amendment.

It follows that the motion to dismiss the writ of error should be sustained and the cause dismissed, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3187, Jan. 26, 1927]

CLARK v. MAISEN

[255 Pac. 404]

SYLLABUS BY THE COURT

1. Findings of fact and conclusions of law, made and refused by the court, are not a part of the record proper, unless ordered by the court to be filed in the clerk's office.

2. A paper filed in the clerk's office purporting to be a statement of facts, but bearing no authenticity from an order of the court, cannot be considered by this court on appeal.

Appeal from District Court, Bernalillo County, Helmick, Judge.

Action by J. Lewis Clark against H. A. Maisen. From an appeal for defendant, plaintiff appeals. On motion to strike from the transcript special findings given and refused, and a paper entitled "Statement of Facts." Motion granted.

John Baron Burg and J. Lewis Clark, both of Albuquerque, for appellant.

Simms & Botts, of Albuquerque, for appellee.

OPINION OF THE COURT

PARKER, C. J. **[1]** A motion is presented to strike from the transcript the special findings given and refused, and a paper entitled "Statement of Facts,"

[1] 4CJ p. 159 n. 62. [2] 4CJ p. 443 n. 44. [3] 4CJ p. 505 n. 84.

upon the ground that they are not a part of the record proper and are not included in any bill of exceptions. The findings and conclusions of the trial court, made and refused, are not a part of the record proper, unless ordered by the court to be filed with the clerk, which was not done. Gradi v. Bachechi, 24 N. M. 100, 172 P. 188.

[2] The statement of facts, so called, is a paper filed by appellant in the clerk's office, and appearing in the transcript, having no authenticity whatever, was never passed on by the judge, and was never made a part of the record by any order of the district court. This paper cannot be considered by us. Loftus v. Johnson, 23 N. M. 546, 170 P. 49.

[3] It follows that the motion to strike the two papers mentioned should be granted, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3007, Jan. 15, 1927. Rehearing Denied Feb. 12, 1927]

OLDFATHER v. TYLER

[252 Pac. 1000]

SYLLABUS BY THE COURT

1. Objections not made in the trial court cannot be considered on appeal.

2. The amount of a fee allowed to a receiver's attorney is not reviewable, except for error of law or clear abuse of discretion.

Error to District Court, Lincoln County; Mechem, Judge.

Action by Harry B. Oldfather against James L. Tyler. An order requiring a receiver to pay certain items not included in his report and to pay attorney's

[1] 3CJ p. 742 n. 3. [2] 4CJ p. 842 n. 58.

fees was entered, and plaintiff brings error. Affirmed and remanded.

Geo. B. Barber, of Carrizozo, for plaintiff in error.

H. B. Hamilton, of Carrizozo, and Renehan & Gilbert, of Santa Fe, for defendant in error.

OPINION OF THE COURT

WATSON, J. The writ of error herein is directed to an order made upon a receiver's final report, and upon motion of plaintiff in error for its acceptance and for the receiver's discharge.

[1] The order required the receiver to pay two small items of indebtedness not included in the report, and to pay to the receiver's attorney $200 additional to a $300 retainer which had been previously paid him by direction of court. To this additional allowance to the attorney, plaintiff in error objected and it is the only objection which the record discloses to any of the proceedings. Plaintiff in error here urges several other objections, but they are not available. Laws 1917, c. 43, § 37; State v. Garcia, 19 N. M. 414, 143 P. 1012.

[2] As to the attorney's fee, the court found:

"It appearing from the report that an objection is made on the part of George B. Barber, as attorney for Harry B. Oldfather, one of the defendants in said cause, to the payment of the $200 balance due to H. B. Hamilton, as attorney for receiver, the court finds that the sum of $500 is a fair and reasonable fee as compensation to the said H. B. Hamilton, as attorney for Henry Lutz, receiver, and that said Henry Lutz, receiver, should pay said balance of $200 to the said H. B. Hamilton before he is discharged as such receiver."

The transcript before us contains none of the evidence, if any was adduced at the hearing. We have no means of determining whether there was any abuse of discretion in the allowance. It was a matter peculiarly within the knowledge and discretion of the trial court, which we may review only for error of law in deciding it, as in Merrick v. Deering, 30 N. M.

431, 236 P. 735, or for clear abuse. Williams v. Dockweiller, 19 N. M. 623, 145 P. 475.

The record before us showing no error, we must affirm the judgment and remand the cause, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3168, Feb. 1, 1927]

MOORE et al. v. BRANNIN

[255 Pac. 395]

SYLLABUS BY THE COURT

Where it is seen that the result of the issuance of a writ of certiorari would be futile, it will be denied.

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

Action by Cora B. Moore and others against William C. Brannin. From a judgment for defendants, plaintiffs appeal. Application for certiorari to supply portions of the record. Certiorari denied.

J. W. Wilson, of Albuquerque, for appellants.

J. Leahy, of Raton, for appellee.

OPINION OF THE COURT

PARKER, C. J. An application for certiorari to supply portions of the record has been filed by appellee. The parts of the record sought to be brought up show that a previous appeal had been taken, which, upon application of appellant, was dismissed by the district court, and thereafter the present appeal was granted and has been perfected. The effectiveness of the order of the district court in dismissing the first appeal would seem to be doubtful, the jurisdiction which had control of the same being in this court.

Another consideration, however, impels us to deny

[1] 11CJ p. 157 n. 52 New.

the application for certiorari. The taking of the second appeal operated as an abandonment of the first appeal, and it would therefore be immaterial to show in this court the taking of the first appeal. In Dailey v. Foster, 17 N. M. 377, 128 P. 71, we held that the suing out of a subsequent writ of error operated as an abandonment of the former appeal. We can see no reason for any distinction between that case and this. See, also, Blanchard v. State, 29 N. M. 584, 224 P. 1047.

It follows that certiorari would be futile, and for that reason should be denied; and it is so ordered.

BICKLEY and WATSON, J.J., concur.

[No. 3173, Feb. 2, 1927]

DWYER, v. SPRINGFIELD FIRE & MARINE INS. CO.

[255 Pac. 391]

SYLLABUS BY THE COURT

Where an appellant has been in no way misled by the appellee, nor in any way prevented from obtaining an extension of time to perfect his appeal, there is no good cause shown authorizing us to vacate a judgment of affirmance obtained by appellee by reason of such default.

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

Action by D. G. Dwyer, receiver of the property and estate of Wadie S. Boutagy, against the Springfield Fire & Marine Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed. Motion to set aside judgment of affirmance denied.

E. W. Dobson, of Albuuqerque, and Geo. E. Remley, of Raton, for appelant.

Crampton & Darden, of Raton, for appellee.

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[1] 4CJ p. 1247 n. 33.

OPINION OF THE COURT

PARKER, C. J. On January 25, 1926, judgment was rendered in the district court. An appeal was granted March 18, 1926, and supersedeas bond was filed on March 22, 1926. The return day of the appeal was June 16, 1926. A skeleton transcript was filed by the appellee in this court on June 24, 1926, and a judgment of affirmance was here rendered on June 25, 1926. On July 26, 1926, a motion to set aside the judgment was filed by the appellant. The basis of the motion to set aside the judgment, as argued in the brief of the appellant, is that it was entitled to notice of the application to affirm, which was not had. Counsel relies upon the words "unless good cause be shown to the contrary," appearing in section 22, chapter 43, Laws 1917, which is the section providing for the affirmance by this court of judgments in cases where the appellant or plaintiff in error fails to perfect his appeal within the time required by the section. Counsel argues that the words above quoted imply that the appellant must have notice of the application to affirm, otherwise no opportunity to show cause against the affirmants is afforded. However this may be, it is of no avail to appellant in this case. Counsel for appellants allowed the matter to run from June 16th, which is the return day, to July 26th, and made no application for an extension of time within which to perfect the record on appeal. He was in no way misled by the opposite party, nor prevented from obtaining the proper extension of time.

It follows that the motion to set aside the judgment of affirmance must be denied, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3147, Feb. 4, 1927]

In re MADISON.

Appeal of MARRON.

[255 Pac. 630]

SYLLABUS BY THE COURT

Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

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

Application by Thomas K. D. Maddison, receiver of the State Trust & Savings Bank of Albuquerque, for the appointment of a receiver of the Las Trampas Lumber Company, in which O. N. Marron, intervened. From the judgment below, the intervener appeals. Affirmed and remanded, with directions.

Francis E. Wood, of Albuquerque, and C. J. Roberts, of Santa Fe, for appellant.

Renehan & Gilbert, of Santa Fe, and Simms & Botts and Mecham & Vellacott, all of Albuquerque, for appellee.

OPINION OF THE COURT

PARKER, C. J. The Las Trampas Lumber Company, a corporation organized under chapter 79, Laws 1905 (section 884 et seq., Code 1915), filed its articles of incorporation June 15, 1907. On November 12, 1918, said corporation executed and delivered its four promissory notes, each for the sum of $13,750.00, bearing interest at the rate of 8 per cent. per annum, due on demand, and payable to Frank Bond, G. W. Bond, J. B. Herndon, and O. N. Marron, respectively.

On September 6, 1924, the notes above mentioned issued to Frank Bond and George W. Bond were still

[1] 4CJ p. 663 n. 92; 21CJ p. 1223 n. 23.

held by them, and nothing had been paid thereon except an interest payment of $699.73 on each note on July 19, 1919.

The note issued to J. B. Herndon had been transferred by him to the State Trust & Savings Bank at Albuquerque, N. M., and the note issued to O. N. Marron had been transferred by him to the State National Bank of Albuquerque, N. M., and on each of said notes the corporation had made the same interest payment as made upon the notes held by the Bonds, and Herndon and Marron had kept the interest paid on said notes up to July 1, 1923.

On September 6, 1924, the president of the Las Trampas Lumber Company executed and delivered its promissory notes in renewal of the notes held by Frank Bond and George W. Bond for the amount due thereon, principal and interest, and Thos. K. D. Maddison, having been theretofore appointed receiver of the State Trust & Savings Bank, and Francis H. Chapman having been appointed receiver of the State National Bank, the Las Trampas Lumber Company, by its president, on the same date, September 6, 1924, executed and delivered to said Maddison and said Chapman, as such receivers, promissory notes in renewal of the notes originally issued to Herndon and Marron. And on September 6, 1924, the said corporation issued a promissory note for the sum of $4,467.16, payable to the order of J. B. Herndon, and said corporation on said day executed a promissory note for the sum of $4,408 payable to the order of O. N. Marron, said notes representing the interest paid by said Marron and Herndon in behalf of the corporation on the notes originally issued to them and by them transferred to the respective banks as aforesaid.

The following indorsements appear on the original Marrron note:

"7—21—19 Int. paid to July 1st, 1919. Int. paid to Dec. 31st, 1919.

"7—22—20 Int. paid to July 1st, 1920.

"1—24—21 Int. paid to January 1st, 1921.

"7—1—21—Int. paid to July 1st, 1921.

"7—6—22 Int. paid to July 1st, 1922.

"1—6—23 Int. paid to Jan. 1st, 1923.

"6—31—23 Int. paid to July 1st, 1923."

All of said notes so executed by the corporation were due one year after the date thereof and bore interest at the rate of 8 per cent. per annum.

On January 10, 1925, Thos. K. D. Maddison, receiver of the State Trust & Savings Bank of Albuuerque, N. M., aforesaid, the owner of the original note issued to J. B. Herndon, presented to Hon. Milton J. Helmick, judge of the district court for the county of Bernalillo, an application for the appointment of a receiver of the said Las Trampas Lumber Company, and by said application represented that the said corporation had been dissolved by chapter 185, Laws 1921, and also presented the consent of the directors of said corporation that a receiver be appointed. The directors were Frank Bond, J. B. Herndon, and O. N. Marron. A receiver having been appointed, thereafter on October 15, 1925, a referee was appointed by the court to take proof of claims of creditors against the corporation and report the same to the court.

Frank Bond, G. W. Bond, and Thos. K. D. Maddison, receiver, presented to the referee the original notes of the Las Trampas Lumber Company above mentioned, dated November 12, 1918, and the Albuquerque Finance Corporation, having become the owner of the original note of the same date of said corporation held by Frank A. Chapman, receiver of the State National Bank, presented said note to the referee. The notes for interest above mentioned, dated September 6, 1924, payable to Herndon and Marron, were presented to the referee by Maddison, receiver, and the Albuquerque Finance Corporation.

The referee, under date of December 21, 1925, filed his report, in which he allowed as claims against the receiver of the Las Trampas Lumber Company the

principal and interest due thereon of the four original notes dated November 12, 1918, and presented as above stated by Frank Bond, G. W. Bond, Thos. K. D. Maddison, receiver, and the Albuquerque Finance Corporation.

The referee also allowed the sum of $3,352.70 upon the claim presented by Maddison, receiver, on the note dated September 6, 1924, payable to J. B. Herndon, and also the sum of $3,352.95 upon the claim presented by the Albuqureque Finance Corporation on the note dated September 6, 1924, to O. N. Marron.

On December 29, 1925, after the presentation of the referee's report to the district judge for approval, O. N. Marron filed a motion praying that he be permitted to intervene in said proceeding as a stockholder of the Las Trampas Lumber Company, as a trustee thereof, by virtue of his having been a director of said corporation when it was dissolved, and as a creditor of said corporation by virtue of his ownership of the note heretofore mentioned dated September 6, 1924, payable to his order, for the sum of $4,408, and being the note theretofore presented to the referee as a claim against the receiver of the Las Trampas Lumber Company, and upon which the said receiver allowed the sum of $3,352.95 as a claim against the said receiver. And the said Marron filed various objections and exceptions to the said referee's report and to the allowance of the claims of Frank Bond, G. W. Bond, Thos. K. D. Maddison, receiver, and the Albuquerque Finance Corporation, upon the ground, among others, that said claims, being made upon the said original notes dated November 12, 1918, were barred by the six-year statute of limitations.

Before the hearing before the lower court it was stipulated by and between said Marron and the other claimants that he be permitted to intervene and that the court allow as a claim against the receiver of the Las Trampas Lumber Company his said note dated September 6, 1924, in full. Thereafter said referee's report was presented to the lower court for final dis-

position, and upon the hearing the notes heretofore mentioned, being the four notes executed by the president of the Las Trampas Lumber Company, dated September 6, 1924, and payable to Frank Bond, G. W. Bond, Thos. K. D. Maddison, receiver ,and Francis A. Chapman, receiver, were offered and received in evidence in support of the claims of the said claimants above mentioned and the Albuquerque Finance Corporation, transferee of Chapman, receiver, over the objection of said Marron that at the time said notes were executed and delivered the Las Trampas Lumber Company had been dissolved by chapter 185, Laws 1921, and that the president of said corporation had no power or authority to execute or deliver said notes, and that said notes were of no effect or validity for any purpose whatsoever.

By the final decree Marron recovered judgment against the receiver of the Las Trampas Lumber Company for the principal and interest due on his said note dated September 6, 1924, and the court also approved the referee's report with respect to the allowances made to other claimants, upon their notes of November 12, 1918, overruling Marron's plea of the statute of limitations, and rendered judgment accordingly. From the judgment of the court Marron appeals.

It thus appears that Marron presented and obtained judgment upon the note executed by the president of the lumber company without authority, it is alleged, and that appellees, relying upon their renewal notes of September 6, 1924, executed at the same time, by the same person, and under the same circumstances, as the Marron note, as tolling the statute of limitations on their original notes of November 12, 1918, recovered judgment upon the latter. The proposition involved, when clearly understood, would seem to be simple and easy of solution. Marron, when he recovered upon his note of September 6, 1924, vouched for its validity. He thereby asserted that the president of the lumber company had authority to execute the same on behalf of the corporation. He obtained the acquiescence of

the appellees in such position. If the president of the corporation had such authority in Marron's case, he certainly had the same authority to execute the renewal notes to appellees, which would have the effect of tolling the statute of limitations on the 1918 notes.

Counsel for appellees urge upon us the proposition that, notwithstanding the errors appellant assigns to the judgment of the lower court, he cannot be heard to question said judgment, because, having asked for and obtained a judgment of the court in his favor upon the note of September 6, 1924, he cannot assign error to the same judgment in favor of appellees, supported as it is by the same evidence.

The rule invoked by appellees is thus stated by the Supreme Court of the United States in the case of Davis v. Wakelee, 156 U. S. 680, 15 S. Ct. 555, 39 L. Ed. 578:

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

See, also, Philadelphia W. & B. R. Co. v. Howard, 13 How. 307, 14 L. Ed. 157; Hodges v. Winston, 95 Ala. 514, 11 So. 200, 36 Am. St. Rep. 241; Haber-Blum-Bloch Hat Co. v. Friesleben, 5 Ga. App. 123, 62 S. E. 712; Gibson v. Gaines, 198 Ala. 583, 73 So. 929; 10 R. C. L. 698.

In Gibson v. Haines, supra, the court said:

"The defendant, having introduced the hear-say evidence of the defendant and thereby invoked a ruling of the trial court in favor of the admissability of such evidence, cannot now put the trial court in error for permitting similar evidence offered by the other side. The defendant had the court rule that such hearsay evidence was admissible, and he cannot reverse the trial court for making a ruling on the other side, consistent with the one invoked by him."

The rule is thus stated in 10 R. C. L. 698:

"The rule that a party will not be allowed to maintain inconsistent positions in judicial proceedings is not strictly one of estoppel, partaking rather of positive rules of procedure based on manifest justice and to a greater or less degree on considerations of the orderliness, regularity and expedition of litigation."

The record shows that among the items of interest which composed the consideration of the appellant's note of September 6, 1924, there were several which had been barred by the four-year statute of limitations; but counsel for appellant say that this fact was not called to their attention. The appellant, however, in asking the judgment of the court in his favor upon his note, asserted its legality and validity in every respect. He cannot be permitted to say that he was mistaken, because if a mistake was made he was the beneficiary of that mistake. Philadelphia W. & B. R. Co. v. Howard, supra.

The principal argument of appellant in opposition to the foregoing conclusion is that he did not in fact recover on the note of September 6, 1924, for $4,408.60, and that the recovery was in fact had for money paid, laid out and expended by him for and on behalf of the lumber company in the payment of interest on the original note issued to him for $13,750. An examination of his petition in intervention, however, discloses that he plainly claimed under the $4,408.60 note. A stipulation was entered into between him and the Albuquerque Finance Corporation, in whose behalf the said note had been presented to the referee for allowance, that the note might be allowed to him without further proof. All the parties, by counsel, consented to the order allowing him to intervene as prayed in his petition. The intervention was made for the purpose of recovery upon this note, and for no other person.

Appellant objects to the presentation of the legal propostions urged here for the reason that they were not uged in the court below. This objection is not available. If a judgment is correct, it should be affirmed, although a wrong reason for it may have been

assigned by the court below, where the appellant was not placed in a disadvantageous position by reason of the rulings of the court.

It follows from all 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. 2959, Feb. 11, 1924]

CASSELL MOTOR CO. v. GONZALES

[255 Pac. 636]

SYLLABUS BY THE COURT

1. Plaintiff sued upon account. Defendant set up counterclaim sounding in tort. Such counterclaim is not available, under section 4116, Code 1915.

2. Where the trial court has placed a reasonable construction on a pleading, whose averments are susceptible of two constructions, the appellate court will be inclined to adhere to the construction given to the pleading by the trial court.

3. Appellant cannot, in the appellate court, shift the grounds upon which his demand proceeds and having treated it as a tort, such demand cannot on appeal be sustained on the theory that it was good as arising on contract.

4. Upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the decision of the court below.

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

Suit by the Cassell Motor Company against David Gonzales for an open account. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 238 P. 1070.

E. P. Davies, of Santa Fe, and J. T. Vocello of Vero, Fla., for appellant.

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[1] 3CJ p. 718 n. 50; p. 722 n. 53; 34Cyc p. 707 n. 84. [2, 3] 3CJ p. 725 n. 84; 4CJ p. 701 n. 47. [4] 4CJ p. 731 n. 81.

Renehan & Gilbert, of Santa Fe, for appellee.

OPINION OF THE COURT

BICKLEY, J. [1] A suit was brought by appellee (plaintiff) upon an open account for gasoline and supplies furnished appellant and for repairs upon appellant's automobile. The original answer of appellant does not appear in the record, but presumably it presented some counterclaim based upon an alleged oral contract growing out of the purchase of a Nash car, for we find in the amended reply of appellant an allegation that the contract set forth in defendant's counterclaim was reduced to writing and a copy of such writing attached to the amended reply. Appellant thereupon filed a pleading denominated "Amended Answer to the Complaint and to the Reply." Paragraph 9 thereof sets out that the plaintiff received from defendant the sum of $300 in connection with the purchase price of an automobile with the understanding and agreement that the sum of $300 would be repaid to defendant in the event the price of the automobile of that particular make was lowered by the manufacturers of said cars within a year subsequent to the date of the agreement; that the price of said cars was lowered more than $300 within the designated time, but defendant had failed and refused to return or repay the said $300 to the defendant. We suspect that this was a counterclaim pleaded in the original answer, for in plaintiff's amended reply it is alleged, by way of further reply to paragraph 9 of defendant's answer and further answer to the counterclaim in said paragraph contained, that the parties reduced their contract made and entered into at the time of the purchase of said automobile referred to in said paragraph of the answer to writing, which writing embraced all the terms of said contract and was in words and figures as set forth in Exhibit A attached to the amended reply. After this amended reply was filed, the defendant filed his amended answer to the complaint and to the reply, in which apparently paragraph 11 comes in as supplemental to the allegations made in paragraph 9. Said paragraph 11 alleges that the written contract

set up in the amended reply did not embrace all the terms of the contract entered into between the parties, and that said contract is null and void and of no effect for the reason that it was obtained by fraud on the part of plaintiff and the signature of the defendant thereto procured by fraud of the plaintiff, and that the promises of the plaintiff described in paragraph 9 aforesaid was the sole and procuring cause of defendant executing said written contract; that defendant would not have executed same had he not relied upon the representations of the plaintiff that he would be given the benefit of the reduction in price aforesaid; that the representations made by plaintiff at the time said written contract was prepared and before the signing thereof were false and fraudulent for the reason that plaintiff, at the time such representations were made, well knew that it had no idea or intention of giving defendant the benefit of the reduction in price of said automobile; and further alleges that said contract was procured by fraud on the part of the plaintiff and should be declared null and void. The defendant prayed that the court decree said contract null and void by reason of fraud in the procurement thereof; that the complaint be dismissed; and that plaintiff have and recover on his counterclaim, The court ruled that no evidence could be introduced upon the counterclaim alleged in said paragraphs 9 and 11, holding that:

"The defendant will not be permitted to go into that question or introduce any evidence whatever, for the reason that is not a proper counterclaim in this action, in that, in the first place, it has no proper place in this action by reason of its nature, and, in the second place, it is admitted that a written contract existed covering the sale of the automobile, and there are no facts alleged in the answer sufficient to justify the court in not holding the written contract binding as written."

The defendant offered to prove the matters set forth in paragraph 9 and 11 of the amended answer and counterclaim. He further offered to prove that the defendant was compelled to pay the entire amount stipulated in the written contract for the reason that the notes given for same were placed in the hands of

an innocent purchaser by the plaintiff. It is apparent that the court's ruling was that paragraphs 9 and 11, considered together did not state a counterclaim of the nature that could be invoked under our statutes and under the circumstances of that case. So considered together, said paragraphs would seem to set up a counterclaim sounding in tort and the court was correct in eliminating it as having "no proper place in this action by reason of its nature."

If it was not also the theory of the defendant that said paragraphs 9 and 11 should be considered together as alleging his counterclaim, it does not appear that any effort was made to enlighten the court as to such view. The fact that the court considered paragraphs 9 and 11 together as pleading a counterclaim sounding in tort is further indicated by the assignments of error 1 and 2 as follows:

"(1) That the district court erred in refusing to permit any testimony to be introduced as to paragraphs 9 and 11 of the amended answer of the defendant.

"(2) The court erred in rejecting the offer to prove fraud in the procurement of the execution of the contract attached to the amended reply of the plaintiff as Exhibit A and the damages sustained by the appellant as contended for by him in paragraphs 9 and 11 of his amended answer, which offer to prove and its rejection are contained on pages 35 and 36 of the transcript."

It does not appear that appellant was claiming damages for the breach of a valid contract, but damages alleged to be sustained through being induced by fraudulent representations to enter into it.

The cases cited by appellant deal with fraudulent representations such as authorize the rescission of a contract. This in connection with the prayer in his answer for rescission of the contract "by reason of the fraud in the procurement thereof" would further appear to sustain the view that in the trial court he was proceeding on the theory that appellant claimed that he was entitled to a rescission of the contract on the ground of fraud and to recover damages for the fraud. He now claims in his brief that his counterclaim of

$300 was proper and within the express right conferred by the second paragraph of section 4116, 1915 Codification, which provides that in an action arising on contract a counterclaim may be presented based on any other cause of action arising also on contract and existing at the commencement of the action. But the appellant cannot in this court shift the ground on which he proceeded in the lower court and advance new theories to impeach the judgment of the lower court. Cadwell v. Higginbotham, 20 N. M. 482, 151 P. 315.

[2, 3] It was also said in Cadwell v. Higginbotham, supra, that, where the trial court has placed a reasonable construction on a complaint whose averments are suspectible of two constructions, the appellate court will be inclined to adhere to the construction given to the pleadings by the trial court, the court quoting from cited cases as follows:

"'Where a pleading may be construed as proceeding on two or more theories, the theory adopted by the parties and the trial court will be followed by the appellate court.' * * * 'Where a trial court, without objection, placed a certain construction on the wording of a pleading admitting of it, such construction will prevail on appeal'."

[4] We do not know whether the original answer and counterclaim and what occurred when the point was first presented to the court at the trial would throw light on the ruling, or not, but "upon a doubtful or deficient record every presumption is indulged in favor of the correctness and regularity of the decision of the [trial] court." Loftus v. Johnson, 22 N. M. 302, 161 P. 1115; Sandoval v. Unknown Heirs of Vigil, 25 N. M. 536, 185 P. 282.

The third assignment of error is as follows:

"(3) The court erred in refusing to grant a mistrial on account of alleged improper remarks of counsel for the appellee in his concluding argument to the jury."

This is based upon alleged improper argument of counsel for plaintiff in referring to the counterclaim which had been withdrawn from the consideration of the jury. The connection in which these remarks were made and the argument of the appellant to which

they were a reply does not appear in the record, as is shown by the certificate of the court. This point also must be ruled against the appellant upon the authority of the doctrine of Loftus v. Johnson, supra, and Sandoval v. Unknown Heirs, supra, above quoted.

From all the foregoing it appears that none of the assignments of error are well taken. Finding no error in the record, the judgment is affirmed, and it is so ordered.

PARKER, C. J., and WATSON, J., concur.

[No. 3132, Feb. 17, 1927]

COCHRANE v. STEVENSON

[255 Pac. 404]

SYLLABUS BY THE COURT

Under the provisions of section 4350, Code 1915, in case a plaintiff in replevin fails to prosecute his action with effect, the defendant may, at his election, have judgment for the assessed value of the property against the plaintiff and the sureties on his replevin bond.

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

Replevin by J. J. Cochrane against Sam Stevenson. Judgment for defendant, but an award requiring return of the chattels, or judgment for assessed value thereof, was refused, and defendant appeals. Reversed and remanded, with directions.

Medler & Whatley, of El Paso, for appellant.

Posey & Threet, of Las Cruces, for appellee.

OPINION OF THE COURT

PARKER, C. J. This is an action in replevin, in which the district court found that the plaintiff was not entitled to the possession of the chattels at the time of the suing out of the writ. The court, refused, however, to either award the return of the chattels, or

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[1] 34 Cyc p. 1539 n. 36 New.

to render judgment for the assessed value thereof. The defendant, appellee here, had filed an answer, in which he elected to take the value of the property replevined in case the plaintiff failed to maintain his action. In this the court was in error. The statute (section 4350, Code 1915) provides that, in case the plaintiff fails to prosecute his action with effect, judgment shall be rendered against the plaintiff and his securities for the value of the property taken, and that it shall be at the option of the defendant to take back such property, or the assessed value thereof. See, in this connection, Roth v. Yara, 19 N. M. 8, 140 P. 1071.

It follows that the judgment should be reversed, and the cause remanded, with directions to enter a judgment against the plaintiff and the sureties on his replevin bond for the assessed value of the property taken, in addition to the judgment heretofore rendered for damages in favor of the defendant for the unlawful taking and detention of the property, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[Nos. 3079, 3102, Dec. 27, 1926. Rehearing Denied Feb. 19, 1927]

STATE ex rel. ULRICK v. SANCHEZ

STATE ex rel. CHAVEZ v. CLARK

[255 Pac. 1077]

SYLLABUS BY THE COURT

1. Under Const. art. 5, § 5, the Governor has power to remove any officer appointed by him, including those appointed by and with the consent of the Senate. (Parker, C. J., dissenting.)

2. Under Const. art. 5, § 5, the Governor is not required to make charges, to give notice, or to accord a hearing, before exercising the removal power.

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

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[1] 29 Cyc p. 1408 n. 18. [2] 29 Cyc p. 1408 n. 20.

Two proceedings in quo warranto by the State, on the relation of George L. Ulrick, and on the relation of Martin Chavez, directed to Felipe Sanchez y Baca and to John S. Clark, respectively. From a judgment for defendants on demurrers to the complaints, the relators appeal. Cases considered together on appeal. Affirmed.

C. J. Roberts, of Santa Fe, for appellant Ulrick.

E. R. Wright, of Santa Fe, for appellant Chavez.

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

OPINION OF THE COURT

BICKLEY, J. The State of New Mexico by its Attorney General, on the relation of George L. Ulrick, filed a complaint in quo warranto in the District Court of Santa Fe County against Felipe Sanchez y Baca to oust him from the office of associate commissioner of the state tax commission of the state of New Mexico. The defendant appeared and filed a demurrer to the complaint, for the reason that the complaint failed to state facts sufficient to constitute a cause of action, which was sustained by the trial court, and, the plaintiff and relator electing to stand upon the complaint, judgment was entered dismissing the complaint on the merits. The plaintiff appealed, and seeks a review of the action of the court in sustaining the demurrer and entering judgment for the defendant. In the brief of appellant Martin Chavez in case No. 3102 it is stated that that action was brought on the relation of Martin Chavez against John S. Clark to oust him from the office of associate commissioner of the state tax commission of the state of New Mexico. The cause was disposed of by the district court upon like pleadings and proceedings and in the same manner as was case No. 3079. Both cases so far as it is necessary to consider, involved the same points. By agreement of counsel, the two cases are to be argued and considered together upon the briefs filed in the two cases. It is also agreed that

the facts involved in the two cases are substantially identical.

The cause of action was primarily based upon the following alleged facts, to-wit: That relators were duly appointed, qualified and acting associate commissioners of the state tax commission, having been appointed by the Governor of the state of New Mexico on the 21st day of January, 1921, and 12th day of March, 1923, respectively, by and with the advice and consent of the Senate of New Mexico, to serve for a period of six years thereafter; that, while thus acting, the Governor, by executive order, attempted to remove them from office for alleged incompetency, and on or about the same date appointed the said Felipe Sanchez y Baca and John S. Clark to said office; that said purported order of removal and said purported appointments were without authority of law, and were void, because no specific charges constituting the alleged incompetency were filed, and no notice was served upon the relators as to the time and place of hearing; that the relators had not been appointed by the Governor alone, but by the Governor, by and with the advice and consent of the Senate. It is alleged that the relators were notified in writing on or before a date mentioned, to show cause at that time why they should not be removed for incompetency; that thereafter, without any hearing of any kind, the governor entered an order removing said relators and issued to the defendants commissions to the office and caused the adjutant general of the state of New Mexico to forcibly remove relators from the office room occupied by them in the state capitol building, and deliver possession of said office to defendants; that subsequently the Governor caused to be served upon relators an executive communication, fixing a date for relators to appear before the Governor to show cause, "if any you have, why you should not have been, and should not be, removed for incompetency." The language last above quoted was followed by certain specifications of the grounds of incompetency. It is alleged that thereafter a certain purported hearing was had be-

fore the Governor, at which time relators appeared in person and by counsel. After protesting and excepting to the proceedings up to that point, and objecting to proceedings further on the ground of lack of power in the Governor to remove relators, and challenging the sufficiency of the specifications of the charges, and challenging the regularity of the proceedings generally, the relators filed their respective answers, whereupon further hearing was had embracing oral testimony on behalf of relator Ulrick, an ex parte affidavit, declarations by the Governor concerning his information and conclusions, based upon ex parte conversations, his personal observations, and his offer to examine the relators under oath, and his proposal to further examine the records of the office of the state tax commission. These proceedings were duly objected to upon the grounds theretofore stated, and upon the further grounds that the ex parte statements were inadmissible, because relators had no opportunity to cross-examine; that the Governor could not legally base his information for removal upon statements made to him, in the absence of relators, and without an opportunity to cross-examine; that it was improper for the governor to consider the records of the office of the state tax commission without informing the relators of the portions of the records which he considered supporting the charge of incompetency; that the Governor could not legally rely upon his personal knowledge of alleged elements of incompetency without making specifications of the facts within his knowledge so relied upon, and other objections challenging the legality of the proceedings.

The executive orders stated that the removal of each of the relators was on the ground of their incompetency.

The cause is here upon two propositions, to wit: First, that the Governor does not have the power of removal of officers appointed by him by and with the advice and consent of the Senate. Second, that a public officer who has under the law a fixed term of office,

and who is removable only for specified causes, cannot be removed without notice and hearing upon charges specifying the particulars constituting the causes for removal, and that the charges must be established by evidence, and that it is the province of the court to ascertain whether the charges stated a ground of removal with sufficient precision and definiteness to inform the officer with what he was to meet, whether notice was given him, whether there was a hearing, and whether there was any substantial evidence in support of the charges.

[1] As to the first proposition it is urged by appellants that they are not subject to removal by the Governor because they are state officers appointed by the Governor, by and with the consent of the Senate, and can only be removed by impeachment proceedings. It is not contended by appellants that they may be removed by the Governor only by and with the consent of the Senate, or upon the address of the Senate, but that the Governor has no power whatever in the matter; the power of impeachment vesting solely in the Legislature. The provisions with reference to impeachment are found in sections 35 and 36 of article 4 of the Constitution, and are as follows:

"Sec. 35. The sole power of impeachment shall be vested in the House of Representatives, and a concurrence of a majority of all the members elected shall be necessary to the proper exercise thereof. All impeachments shall be tried by the Senate. When sitting for that purpose the Senators shall be under oath or affirmation to do justice according to the law and the evidence. When the Governor or Lieutenant Governer is on trial, the Chief Justice of the Supreme Court shall preside. No person shall be convicted without the concurrence of two-thirds of the Senators elected.

"Sec. 36. All state officers and judges of the district court shall be liable to impeachment for crimes, misdemeanors and malfeasance in office, but judgment in such cases shall not extend further than removal from office and disqualification to hold any office of honor, trust or profit, or to vote under the laws of this state; but such officer or judge, whether convicted or acquitted shall, nevertheless, be liable to prosecution, trial, judgment, punishment or civil action, according to law. No officer shall exercise any powers or duties of his office after

notice of his impeachment is served upon him until he is acquitted."

We first, therefore, consider who are "state officers," as that term is used in the provisions concerning impeachment.

"The term 'state officers' is sometimes construed as only the heads of the executive departments of the state elected by the people at large, such as Governor, Lieutenant Governor, State Treasurer, Attorney General, and the like, and it should be so construed when used without circumstances indicating any other intent. In its more comprehensive sense it includes every person whose duty appertains to the state at large. The exact sense in which the term is used in any particular law must often be determined by ordinary rules for judicial construction. State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500, [508]." 4 Words and Phrases, Second Series, page 675.

It will be noted that state officers may only be impeached "for crimes, misdemeanors, and malfeasance in office," whereas officers appointed by the Governor may be removed for "incompetency, neglect of duty, or malfeasance in office," thus bringing in causes for removal not cognizable by the court of impeachment. A similar uestion was before the Wyoming Supreme Court in State ex rel. Hamilton v. Grant, 14 Wyo. 41, 81 P. 795, 82 P. 2, 1 L. R. A. (N. S.) 588, 116 Am. St, Rep. 982. The court said:

"It will be observed that the causes for impeachment are, 'For high crimes and misdemeanors, or malfeasance in office,' including only criminal conduct or positive wrongdoing, while officers not liable to impeachment may be removed for 'misconduct or malfeasance in office,' thus very greatly extending the causes for removal authorized to be provided for by law. We are very clearly of the opinion that it was not the intention of the framers of our Constitution to require that the jurisdiction of the high court of impeachment should be invoked to try and remove minor subordinate oficers, especially as the term of office of many of such officers would expire by limitation during the session of the Legislature at which they could be impeached, and, again, that court would have no jurisdiction in cases of 'misconduct' not amounting to a high crime or misdemeanor, or malfeasance in office. We are strongly inclined to the opinion, without deciding the point, that the officers liable to impeachment are the Governor and other state officers mentioned in section 11, article 4, of the Constitution, which does not include the office in question. Certainly, and it has generally been so con-

sidered, that only the superior executive and judicial officers of a state are subject to impeachment, and we have found no case where an officer holding by appointment, or an inferior officer of any kind, has been held subject to impeachment. On the other hand, it has been held that such officers are not so subject."

This statement of the law was cited with approval in People v. Shawver, 30 Wyo. 366, 222 P. 11, decided in 1924, citing other cases, and the court said:

"The justices of the Supreme Judicial Court of Massachusetts, in an opinion to the House of Representatives on this subject, said that it was necessary to determine whether county commissioners came within the description of 'officers of the commonwealth'; that there were several classes of civil officers within the commonwealth, for example, town or city officers, county officers, district officers, and state officers; and that in a certain sense, all might be deemed to be officers of the commonwealth, and that the view that all are subject to impeachment might accordingly be possible. But that the impeachment provision was not intended to include all civil officers of every grade; and they held that officers liable to impeachment were those 'elected by the people at large, or provided for in the Constitution for the administration of matters of general or state concern,' concluding by stating.

"'Considering the nature and character of the proceedings by impeachment, it does not seem wise to extend their scope by a doubtful construction.' Op. of Justices, 167 Mass. 599, 46 N. E. 118."

Having in mind the opinion of the justices of the Supreme Court of Massachusetts that officers liable to impeachment were those "elected by the people at large," it is worthy of note that section 5 of article 5 of the Constitution provides:

"Should a vacancy occur in any **state office**, except Lieutenant Governor and member of the Legislature, the Governor shall fill such ofice by appointment, and such appointee shall hold office **until the next general election,** when his successor shall be chosen for the unexpired term."

It is true that in Ward v. Romero, 17 N. M. 88. 125 P. 617, a district attorney was held to be a state officer within the meaning of section 9 of article 20 of the Constitution, which provides that:

"No officer of the state who receives a salary shall accept or receive to his own use any compensation, * * * except the salary provided by law."

From the language of the opinion it would doubtless be held that a district judge would be held to be an "officer of the state" within the meaning of that provision of the Constitution, yet, in framing section 36 of article 4, district judges were not thought comprehended within the term "all state officers." This is further borne out by the fact that the Constitution makers apparently did not consider that section 5 of article 5 respecting filling vacancies that occurred in state officers comprehended district attorneys and district judges, because section 4 of article 20 provides:

"If a vacancy occur in the office of district attorney, judge of the Supreme or district court, or county commissioner, the Governor shall fill such vacancy by appointment, and such appointee shall hold such office until the next general election."

This seems clearly to contemplate that state officers, as the term is used in that section, refers to officers elected by the people at large.

The foregoing is in answer to appelants' argument that appellants could be removed from office only by impeachment. The Governor may remove officers appointed by him. Whether this class of officers is also subject to impeachment may be doubted, but is immaterial in this case. However, it might be observed that, if appellants' contention that officers appointed by the Governor with the concurrence of the Senate may not be removed by the governor is correct, and if they are not "state officers" who may be impeached, then it would appear that a numerous class of officers would not be subject to removal at all, and we do not think it was the intention of the Constitution makers to create such a situation.

Furthermore, it is to be observed that the power to appoint and the power to remove are contained in the same sentence of section 5 of article 5 of our Constitution, as follows:

"Sec. 5. The Governor shall nominate, and, by and with the consent of the Senate, appoint all officers whose appointment or election is not otherwise provided for, and may remove any officer appointed by him for incom-

petency, neglect of duty or malfeasance in office. Should a vacancy occur in any state office, except Lieutant Governor and member of the Legislature, the Governor shall fill such office by appointment, and such appointee shall hold office until the next general election, when his successor shall be chosen for the unexpired term."

There are but few states having constitutional provisions similar to ours with respect to power of removal of public officers; they being Colorado, Maryland, Pennsylvania, Illinois, Nebraska. West Virginia, and Delaware. The Michigan Constitution provides for removals by the Governor, but contains provisions rendering it dissimilar to those of the states above enumerated. The Constitution of Maryland contains provisions similar to ours, and provides in article 2. § 10, as follows:

"* * * He (the Governor) shall nominate, and by and with the advice and consent of the Senate, appoint all civil and military officers of the state, whose appointment or election is not otherwise herein provided for; unless a different mode of appointment be prescribed by the law creating the office."

And provides in section 15 of article 2 as follows:

"The Governor may suspend or arrest any military officer of the state for disobedience of orders or other military offense, and may remove him in pursuance of the sentence of a court martial; and may remove for incompetency or misconduct all civil officers who received appointment from the executive for a term of years."

In Harman v. Harwood, 58 Md. 1, the court construed the above-quoted sections. The Governor, after a hearing, removed Harman as register of voters. The appointment had been by and with the consent of the Senate. It was contended that the power conferred by article 2, § 15, applied only to officers appointed by the Governor alone. The court held that it applied to all officers appointed by the Governor whether confirmed by the Senate or not. The court said:

"The single question raised in the argument is whether the appellant was an officer liable to be removed for cause under section 15 of art. 2. It is contended on his behalf, that the provisions of that section apply only to such civil officers as have been appointed by the Governor alone, and have no application to the appellant, who was appointed by the Governor with the co-operation of the Senate. This

argument is based upon the words 'all civil officers who received appointment from the executive for a term of years.'

"If this construction were adopted, it would restrict the operation of the section within very narrow limits and entirely defeat its purpose; for under the Constitution and laws, very few officers are appointed by the Governor, without the co-operation of the Senate, and these are mostly temporary appointments merely for the purpose of filling vacancies. But in our judgment this construction is not sound. The term executive, as used in the section, is not to be understood as meaning the Governor alone, for appointments made by him, by and with the advice and consent of the Senate, are known and properly designated as 'executive appointments.' The Senate, in its action upon the nominations of the Governor, is really performing executive functions. But if the word executive is to be understood to mean the Governor, the same result would follow; for in all such cases it is the Governor from whom the appointment is received, although to confirm it, the approval of the Senate is required. * * *.

"We do not entertain any doubt, that according to the true construction of article 2, § 15, of the Constitution, the Governor possessed the power to remove the appellant from office for incompetency or misconduct, and therefore have affirmed the orders of the circuit court."

Lane v. Commonwealth, 103 Pa. 481, involved quo warranto proceedings to test Lane's right to the office of city recorder. Lane was appointed by the Governor, by and with the consent of the Senate, for a term of ten years. The constitutional provisions applicable to the case are as follows:

"Article 4, section 2, of the Constitution of this commonwealth declares 'the supreme executive power shall be vested in the Governor.' Section 8 declares he shall nominate, 'and by and with the advice and consent of two thirds of all the members of the Senate appoint,' certain officers therein named, 'and such other officers of the commonwealth as he is or may be authorized by the Constitution, or by law to appoint.

"Article 6, section 4, inter alia, provides, 'that appointed officers other than judges of the courts of record, and the superintendent of public instruction, may be removed at the pleasure of the power by which they shall have been appointed.'

"Section 1 of the Act of 18th April 1878 declares: 'Recorders of cities of the first class shall be appointed by the Governor by and with the advice and consent of the Senate'."

Lane contended that, as he was appointed by the Governor and Senate jointly, he could not be removed except by their joint action under article 4, § 4. The court held that the Governor was the appointing power, and could remove officers appointed by and with the advice and consent of the Senate just the same as those appointed by him alone. The court reasoned as follows:

"As already shown, the Constitution declares in section 8 cited, the Governor shall nominate and he shall appoint. Before he completes the appointment the Senate shall consent to his appointing the person whom he has named. It may prevent an appointment by the Governor, but it cannot appoint. It may either consent or dissent. That is the extent of its power. There its action ends. It cannot suggest the name of another. If it dissent the Governor cannot appoint the person named. If it consent he may or may not, at his option, make the appointment. If for any reason his views as to the propriety of the proposed appointment change, he may decline to make it. That option is not subject to the will of the Senate. Until the Governor executes the commission, the appointment is not made. Prior to that time at his mere will, he may supersede all action had in the case. Marbury v. Madison, 1 Cranch 137 [2 L. Ed. 60]; Story's Con. § 1540.

"The language of section 8 of the Constitution cited. gives further evidence that the Governor is recognized as the appointing power. Thus he can nominate such officers only as he is or may be authorized by the Constitution, or by law 'to appoint.' Again, the temporary commissions which he may grant to fill vacancies that may happen during the recess of the Senate, is limited to offices to which 'he may appoint.' Thus, whenever and wherever the Constitution speaks of the appointing power, it recognizes it as being vested in the Governor. Nowhere does it declare that the Senate can appoint. The whole tenor and spirit of the Constitution, in speaking of the power of appointment, recognizes that it is lodged in the Governor. He is charged with the duty 'to take care that the laws be faithfully executed.' The Senate may not be in session for a year and a half at one time. The powers of the Governor are never suspended. He is at all times duly authorized to exercise 'the supreme executive power.' The fact that an officer may be removed by the dilatory process of impeachment, creates no argument against the summary power of removal by the Governor. Crime, imbecility or gross neglect of duty may demand that an officer shall be removed at once. The power to protect the people of the commonwealth by prompt action is wisely given to the Governor. In giving construction to the Constitution we cannot assume that he will abuse that high trust. * * *

"The present contention is determined by ascertaining in whom the power of appointment is vested. As we have shown, the letter and the spirit of the Constitution both unite in declaring this power to be in the Governor, it necessarily follows that officers appointed by him other than those excepted, may, in the language of the Constitution, be removed at his pleasure."

See, also, Shurtleff v. United States, 189 U. S. 311, 23 S. Ct. 535, 47 L. Ed. 831; Trimble v. Phelps, 19 Colo. 187, 34 P. 981, 41 Am. St. Rep. 236.

Also see Throop on Public Officers, § 344, where the rule is stated as follows:

"A constitutional provision, empowering the Governor to remove 'any officer whom he may appoint,' includes officers appointed by him by and with the advice and consent of the Senate and extends to cases for which other specific remedies are provided."

Appellants cite no decision to contrary of foregoing text.

Appellants invoke the historical facts surrounding the adoption of section 5 of article 5 in support of their contention. It seems to us that, if anything, the historical background sustains the opposite contention. It appears from the proceedings of the constitutional convention that the section as originally reported read as follows:

"The Governor shall nominate, and, by and with the consent of the Senate, appoint all officers **whose offices are established by this Constitution, or which may be created by law** and whose appointment or election is not otherwise provided for, and may remove any [**such**] officer * * * for incompetency, neglect of duty or malfeasance in office."

As finally adopted, the words underscored, including the word "such" immediately preceding "officer." were omitted. We think that the change broadened the power of removal instead of narrowing it.

It would have been competent for the framers of the Constitution to provide that officers appointed by the Governor, by and with the consent of the Senate, be removed only with the consent of the Senate, but they did not do so, and the omission may not be ignored. They

did not lack models in this regard. The Constitution of Florida (art. 4, § 15) contained the following provision:

"And the Governor, by and with the consent of the Senate, may remove any officer, not liable to impeachment, for any cause above named."

And four other state Constitutions contain similar provisions (Delaware, Pennsylvania, South Carolina, and Maine).

From all of the foregoing, it is our conclusion that appellants' first point should be ruled against them.

[2] The judgment appealed from should be affirmed because the Governor had the power under section 5 of article 5 of the Constitution to remove Mr. Ulrick and Mr. Chavez without hearing or notice, and the courts have no jurisdiction to pass upon the sufficiency or insufficiency of the evidence; the only judicial question being whether the cause assigned was a legal cause. The process of arriving at this conclusion is one of construction of the provisions of our Constitution.

The question of due process of law is not involved. If the Governor followed the provisions of the Constitution in making the removal, it was valid. If he did not, it was a nullity. The Constitution makers who, either directly or indirectly, create an office, have plenary power to provide how removal shall be made. Whoever accepts an office so created accepts the burdens as well as the benefits. "Every officer, unless removed, shall hold his office until his successor has duly qualified." See section 2, art. 20. He is entitled as a matter of right to so much consideration as the adopters of the Constitution, or the Legislature, see fit to give him—no more, no less. The lawmaking body may provide for removal without notice or hearing or the assignment of any cause. In such a case. removal may be made without notice or hearing or the assignment of cause. It may provide for removal without notice or hearing for specific causes. In such a case removal may be made without notice or hearing, but a cause must be assigned, and it must be one specified in the Constitu-

tion or statute. It may provide for removal on notice and hearing for specific causes, in which case a reasonable notice and hearing must be given, and the removal must be made for a cause found in the written law. Illustrations are not wanting among the Constitutions and statutes of the various states to show that all three of these methods have been adopted. It would seem almost absurd to deny this power to the makers of the Constitution and the Legislature, and yet it seems to be done in many jurisdictions, some courts holding that the right to hold office is a property right protected by the due process clause of the federal Constitution (Amend. 14, § 1), and others that the power to remove is judicial, and therefore must be exercised in a judicial manner. It cannot be denied that there are a large number of cases holding that a public officer who has, under the law, a fixed term of office, and who is removable only for definite and specified causes, cannot be removed without notice and an opportunity to make defense to the charge or charges preferred against him. The student will find an elaborate case note annoting Kendrick v. Nelson, 13 Idaho, 244. 89 P. 755, setting forth these cases in 12 Ann. Cas. 995. The cases so holding are criticized by other courts. The following is a summary given by the Supreme Court of California in the case of In re Carter, 141 Cal. 316, 74 P. 997, in dealing with a similar list of cases. The court said:

"There are some cases, however, holding that where the statute prescribes no preliminary proceeding, but authorizes a removal 'for cause,' there must be a notice and hearing, and that in such cases the proceeding is judicial [citing cases]. The basis of these decisions, sometimes expressly stated, but always apparently assumed, is that the right to hold public office is a species of property which is protected by the provisions of the United States Constitution, declaring that no person shall be deprived of property without due process of law, and that no law shall be passed impairing the obligation of contracts. This proposition is assumed without argument. There is no doubt that it is erroneous. A public office is a mere public agency created by the public for the purpose of the administration of the necessary functions of organized society, and the agency may at any time be terminated by the power which created it. **As between the officeholder and individuals in their private capacity,** and perhaps as against any authority **except the soverign power itself** acting in pursuance of a

power of removal expressly reserved or necessarily implied from the nature of the office, the officer is entitled to the full protection of the law in his right to hold the office, practically to the same extent as if it were private property. But here we have a controversy between the office-holder and that functionary of sovereignty who is invested with the power of removal, and the question is whether or not the officer has a right to the office which the sovereign power which conferred it must respect as private property. The authorities are uniform that in such a controversy the office has not the characteristics of property. Throop on Officers, §§ 345, 346, 17-19; Conner v. Mayor, 5 N. Y. 296; Id., 2 Sandf. [4 N. Y. Super. Ct.] 369; Nichols v. McLean, 101 N. Y. 533, 5 N. E. 347, 54 Am. Rep. 730; Hoboken v. Gear, 27 N. J. Law, 273; Kenny v. Hudspeth, 59 N. J. Law, 322, 36 A. 662; State v. Council, 53 Minn. 242, 55 N. W. 118, 39 Am. St. Rep. 595; Donahue v. County, 100 Ill. 94. In the case cited the court says: 'It is impossible to conceive how, under our form of government, a person can own or have title to a governmental office. Offices are created for the administration of public affairs. When a person is inducted into an office he thereby becomes empowered to exercise its powers and perform its duties, not for his but for the public benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office or had any title to it. * * * The officer does not own the title to the office in the manner that men own property, but by his commission or induction into office he acquires the legal right to exercise its functions until the end of his term, or until his resignation, removal, or its forfeiture'."

The Supreme Court of Okahoma, in the latter case of Bynum v. Strain, 95 Okl. 45, 218 P. 883, said:

"Some 25 or more decisions from about 16 different states are cited and quoted from by defendant on the question of power of removal from office and how it should be exercised. We have reviewed these decisions and classified them according to the subject-matter before the court, the nature of the offense to be determined, the character of the office under consideration, and the language of the law upon which they were rendered. It would serve no useful purpose to set out an analysis of each decision cited. Some have dealt with subject-matter altogether different from that under consideration here; some have dealt with and determined offenses against the law itself, which in the very nature of our system of government must be determined by the courts; in some the right to an elective office, for a specified term, was involved, a wholly different proposition to that involved in the removal of an appointee from a nonelective position in a subordinate branch of the executive department. The elective officer is responsible directly to the electorate; he is elected by the voters, and the public has a right in his tenure of office, a right which can be properly determined

by the courts only, and the courts have universally and very properly so held. But a different principle is involved in the case of an appointee to an appointive position in a subordinate branch of the special sphere of duties and responsibilities of the chief executive."

We shall not attempt to analyze these cases. Perhaps something ought to be said concerning Dullam v. Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128, because appellants cite it as one of the leading cases on the subject in the United States. It has undoubtedly been cited as a supporting authority in a great many other cases by the courts of other states The material part of the constitutional provision invoked in that case is as follows:

"The Governor shall have power and it shall be his duty, except at such time as the Legislature may be in session, to examine into the condition and administration of any public office, and the acts of any public officer, elective or appointed, to remove from office for gross neglect of duty, or for corrupt conduct in office, or any other misfeasance or malfeasance therein, either of the following state offices, to wit: The Attorney-General, * * * or any other officer of the state, except legislative and judicial, elective or appointed, and to appoint a successor for the remainder of their respective unexpired term of office, and report the causes of such removal to the Legislature at its next session." Const. art. 12, § 8.

Judge Champlin made a point of the fact that "article 5 relates to the executive departments; and while section 6 provides that the Governor 'shall take care that the laws be faithfully executed,' still the amendment under consideration was not added as a part of that article, but was added to article 12, which relates to 'impeachments and removals from office.' "

In New Mexico the provision under consideration is found in article 5 relating to the executive department, section 4 of which provides, as did the Michigan Constitution under executive powers, that:

"The supreme executive power of the state shall be vested in the Governor, who shall take care that the laws be faithfully executed."

Under the Michigan Constitution, the removal power extends to officers both elective and appointed; under New Mexico to only officers appointed by the Governor.

In Michigan the power could only be exercised during a recess of the Legislature, from which it may be argued that the Governor, being able to exercise the power only during a recess of the Legislature, should exercise it in the same manner in which the Legislature would exercise the power of removal by impeachment, were it in session.

"He acts in the place of a court of impeachment during the time the Legislature is not in session." Judge Champlin's opinion, 53 Mich. page 400, 19 N. W. 116.

"The evident purpose of the amendment was to provide that the Governor should have power during the recess to secure the removal of such persons as would be legally impeachable during the session." Judge Campbell's opinion, 53, Mich. p. 420, 19 N. W. 126.

One thing which strongly moved the majority court to its conclusion was the fact that the executive power of removal extended to elective officers as well as appointed, and Judge Campbell thought that it was absurd to suppose that the purpose was entertained when the amendment of 1861 was adopted of confining the legal rights of the elected officers of the state to the brief period of a session of the Legislature.

"The impossibility of sustaining the Governor's action here will further appear by comparing its necessary results with the rest of our constitutional scheme of government. If he could remove respondent as he did it is only because, as is freely admitted by counsel, the restrictions on his power are not obligatory, and his only restraint is his sense of propriety; or, in other words, he has unlimited discretion to do as he pleases. No legislative session can be called during his term of office except by himself; and the removal enables him to appoint for the whole remaining term of office, so that his nominee could only be displaced by his successor, acting under the same absolute power, and in such offices as are most important, and are held by terms of two years, could not be removed at all. If this can be done every officer of the government may be removed as soon as the Legislature adjourns, and every office can be filled by the Governor's nominees, and the whole elective system will be annuled."

And again Judge Campbell said:

"It would be nothing short of absurdity to claim that any purpose was entertained, when the amendment of 1861 was adopted, of confining the legal rights of the elected officers of the state to the brief period of a session of the Legislature, leaving it open to the Governor to fill all the offices for the remainder of his own two-years term. And the Amendment does not sanction such an interpretation, according to the rules of legal construction."

No such situation confronts us. We do not have anything like the same situation to deal with as confronted the Michigan court. The apprehension of dangers from a wholesale change in officers under the Michigan amendment to its Constitution proceeded upon the assumption that the executive might remove every officer of the government, both elective and appointed. "If this can be done every officer of the Government may be removed as soon as the Legislature adjourns, and every office can be filled by the Governor's nominees, and the whole elective system will be annulled." This reasoning was invoked as an argument by the Michigan court to show that the adopters of the constitutional amendment could not have intended such a possible contingency, and therefore, by implication, the check of judicial review must have been intended.

Whatever may be said as to the force of this argument under the situation presented to the Michigan court, no such extreme results could occur under our Constitution. No elective officer may be removed by the Governor. All the constitutional officers are elective. And there are but few state officers appointed by him, and only his appointees may be removed by him, and apparently most, if not all, of the officers which may be appointed by him are such as have to do with the executive department of the state government.

Judge Champlin seeks to show that judicial power was vested in the Governor in cases of removals under the provisions of the amendment; some emphasis being put on the phrase in the amendment which confers upon the Governor the power and makes it his duty " 'to examine into the condition and administration of the of-

fice and public acts of the officers.' '' The phrase is repeated in the argument, and is used once in the following quotation from the opinion of the court:

''That under the amendment the Governor was vested with the power of determining whether the specified causes exist, appears to me too plain for serious contradiction. I fully concur in the views expressed upon this point by the learned counsel for the respondent (Judge Christiancy), wherein he says: 'It was competent, by constitutional amendment, to authorize him to exercise such judicial power. And while this amendment gives the power of removal only for the causes which it specifies (which, though similar in character, are not identical with those specified in the statute,) and the question of the officer's guilt is one judicial in its nature, yet the amendment imposes a duty and confers upon the Governor the power **''to examine into the condition and administration of the office and public acts of the officers'' to which it applies, and to remove them from office for the causes there enumerated;** thus, in effect, giving him the right to try the question whether the officer is guilty or not, and to remove him from his office'.''

Just how far the power of examination here vested confers judicial power to conduct a hearing judicial in its aspects we are unable to say, but some store was put by the phrase in the construction given it by the court, with the exception of Judge Campbell, who concurs specially.

Even if we were to concede that, at the time of the adoption of the Constitution, the weight of authority was as claimed by appellants, it would not follow that our constitutional provisions on removal power of the Governor should be construed in accordance therewith. If there had been no expressions of our own court on the subject prior to the adoption of the Constitution on removals, it might be assumed that the Constitution was framed in view of a consideration of the majority holdings of the courts. But our court had in Conklin v. Cunningham, 7 N. M. 445, 38 P. 170, in 1894, aligned us with the jurisdictions holding to the so-called minority view. In an article by Mr. Alonzo H. Tuttle, appearing in the February and March issues of Michigan Law Review for 1905, on ''Removal of Public Officers for Cause,'' referring to the decisions of the state courts, appears the following:

"In the states, the question is far more unsettled. The matter here is almost entirely covered by Constitution or statute and depends therefore upon the peculiar provisions therein contained. The cases, which are numerous, differ upon almost every conceivable phase of the question. This is due to the facts: (1) The question is a comparatively new one. (2) The cases are the result of fierce political controversy, and the courts are biased thereby. (3) A failure on the part of some courts to recognize that while a public office in England and at common law is an incorporeal hereditament it is not so in this country. (4) A complete inability of the courts to come to any agreement as to what constitutes a judicial or quasi judicial power. * * *

"The unsettled propositions are:

"1. Where power is given 'to remove' or to remove for specified cause or causes, or to remove 'for cause' is the power an arbitrary one or does it require charges, notice and a hearing?

"2. If the latter is necessary what must be the character of the hearing—must the witnesses be sworn? etc. What must be the character of the charges, and must they be of offenses committed during the incumbent's term or may they be of offenses committed prior thereto?

"3. Is the power to remove for cause an administrative or a judicial power?

"4. If judicial, may it constitutionally be given by statute, to the Governor or other executive officer of the state?

"5. If not judicial in the sense that it may not be exercised by the executive department is it judicial in the sense that it may be reviewed by the courts of certiorari?

"6. If it may be reviewed, will the court only inquire as to jurisdiction, or will it go further and examine the evidence? * * *

"II. Many constitutional provisions and statutes are found which confer the power to remove for certain specified causes, as embezzlement, malfeasance, etc. Whether such a provision requires notice, charges and a hearing is a question upon which the courts widely disagree. A learned writer has said that Illinois is the only state which has held that in such cases these things are not necessary. This is manifestly incorrect, for decisions to this effect can be found not only in Illinois but also in New Jersey, Louisiana, Arkansas, Texas, **New Mexico**, North Dakota, and Wisconsin. One of the very strongest statements of this side of the question is found in **Conklin v. Cunningham**, recently decided by the Supreme Court of New Mexico. In this case sheriffs elected for a **term of years** were removable by the **Governor** for certain **specified causes**. With-

out any notice of hearing whatever the Governor removed a certain sheriff, stating in the order of removal that he was guilty of the offense provided for in the statute. The court upheld this summary removal, holding that notice and a hearing were not necessary; that the statement of the Governor that he was guilty must be deemed conclusive by the court. This is an especially extreme case because the law in question provided that officers thus removed could never again hold office.

There is no question, however, that the great weight of authority is to the contrary."

In Conklin v. Cunningham, supra, we said (italics ours):

"That the executive acted within the limits of his authority is a conclusive presumption in this proceeding; that he was authorized by the statute to remove for causes specified in the section under which he acted, and to appoint to the vacancy, and issue his commission, are not less undisputed legal conclusions in this action; and that Conklin ceased to be sheriff by the one executive order and Cunningham became, prima facie, such official, by the other, is the law's operation, so pronounced that it cannot be controverted, except in an action contesting the legal title to the office. The three departments of our government—legislative, executive and judicial—though coordinate, are distinct, and, within their respective lines, separate and independent, and, within their prescribed scope, absolute. In the exercise of the powers confided to his discretion and in the performance of the duties imposed upon him, the executive is independent of the judiciary; and presumptively his acts are within the limitations of his authority, and must be recognized by the judicial tribunals. Prima facie, the order of removal in this case was a legal exercise of executive authority; and the appointment of Cunningham constituted a commission that was evidence, prima facie, that he was lawfully entitled to the sheriffalty, and imposed upon the contestant the burden of showing a better title by an action in the nature of quo warranto. [Whetstone v. Thomas] 25 Ill. 325; [State ex rel. Jackson v. Howard County Court] 41 Mo. 247; [Wenner v. Smith, 4 Utah, 238] 9 P. 297; [Plowman v. Thornton] 52 Ala. 559; 14 Am. & Eng. Encyclopedia of Law, cl. 3, p. 143, and citations there made.

"An appointment to office by the executive is complete upon the delivery of the commission. Marbury v. Madison, 1 Cranch [137, 2 L. Ed. 60] (U. S.); Wetherbee v. Casneau, 20 Cal. 503. We think that, when the Governor appointed and commissioned the plaintiff, he gave him prima facie title to the office. [Whetstone v. Thomas], 25 Ill. 325. The Commission of the Governor, when issued, must be taken at least as prima facie evidence that the person holding it is lawfully entitled to the office. [State ex rel.

Jackson v. Howard County Court], 41 Mo. 247. The powers of a Governor are executive, **not judicial, and they must be exercised promptly, to be effective. Notice to a defaulter is invitation to repair deficiency with a view to retention of office.** To afford opportunity to make good delinquency is to protect the violator of a trust, and to supplant summary action by *judicial investigation*. The impending penalty of removal is to deter breach in office, and to encourage fidelity and promptness in the discharge of its duties. **Trial is not an executive function, and its assumption would be the emasculation of executive efficiency.** The section under which the Governor proceeded is mandatory, and directs summary action, quick execution, and that it is impracticable to attain such a result by the dilatory process of charges and defenses is manifest. A summary end by prolix means is an impossible achievement. So inconceivable is the rapidity in the redress of wrongs by tedious and vexatious remedies, that it is not legitimate to impute such contradiction to the Legislature, unless it shall appear in express terms, and the omission of any requirement of notice from the provisions of section 27 must be regarded as the expression of an intention that notice should not be an essential to its enforcement."

We think the situation in that case presented a much stronger demand upon the court to find reasons to repel the doctrine of arbitrary power or removal than is present in the case at bar. There the office was elective, and, in addition to removal, the statute provided the further deprivation of disqualification for holding office thereafter.

In the case of Territory v. Armijo, 14 N. M. 205, 89 P. 267, it was decided that the executive power vested in the Governor of New Mexico by the Organic Act does not include the right to remove an officer elected in accordance with a statute law of the territory. The court concluded its opinion in the following language:

"We conclude, then, that the power to remove from office a lawfully elected sheriff in this Territory is not by the Organic Act vested in the Governor, and that until otherwise provided by Congress, the Legislative Assembly has the right by appropriate legislation to determine the method of removal. Where the power is, there rests also the responsibility for its proper exercise. That a speedy and efficacious way for removing from office incompetent and dishonest officials is absolutely essential to good government there can be no doubt."

This expression is singularly like the language of Mr. Justice Peckham in the case of Shurtleff v. United

States, 189 U. S. 318, 23 S. Ct. 537 (47 L. Ed. 828) that:

"The only restraint in cases such as this must consist in the responsibilty of the President under his oath of office, to so act as shall be for the general benefit and welfare."

That the attitude of the New Mexico Supreme Court was well known is further indicated by the note to Kendrick v. Nelson, 12 Ann. Cas. 995, supra, wherein it was stated:

"In a few jurisdictions it is held that a public officer holding for a fixed term, subject to removal for specified causes, may be removed without notice and hearing. People v. Higgins, 15 Ill. 110; Wilcox v. People, 90 Ill. 186; People v. Mays, 117 Ill. 257, 7 N. E. 660; Conklin v. Cunningham, 7 N. M. 445, 38 P. 170; Freeman, J., dissenting.

So we think that clearly the only question arising on the point under consideration is: Does the Constitution require the giving of a notice or hearing and an opportunity to be heard as a condition precedent to removal? If it does not, whatever was accorded to the appellants in the way of a notice and hearing was given as a matter of grace, and not of right, and they have no cause to complain about the inadequacy of the opportunity afforded to be heard. In this connection, it will be observed that the Constitution does not expressly provide for notice or hearing, and, if either is required, it must be found by implication. It may be further observed that such requirements cannot be interpolated into the Constitution, unless it is apparent that the Constitution makers intended that they should be. When we consider the history of this constitutional provision contained in section 5, art. 5, of the Constitution, it is about as certain as anything of the kind can be that there was no such intent on the part of the Constitution makers. When the Constitution makers came to consider the question of removals from office, and to write into the Constitution the provision which should express their intent in this respect, they had before them a comprehensive scheme for removals of officers which were contained in the Acts of the Legislature from an early date in the territory of New Mexico, some of them running back to 1846. Some of these acts provided for

notice and hearing, and some did not. Nearly one-third of the members of the Constitutional Convention were lawyers, and more than one-half of the members on the committee on revision and arrangement of the Constitution were lawyers.

Approaching their labors they were bound to observe that it had been the uniform practice of the territorial Legislature to expressly provide for a notice and hearing as a condition precedent to a removal from office, where it was intended that no removal should be made without such notice and hearing. And it is interesting to observe that in at least one instance, while notice and hearing were provided for, the Legislature specifically declared that it was not a judicial question, saying:

> "No such discharge shall be reviewed or interfered with by any court of this state." Section 5, c. 76, Laws 1889; Code 1915, § 5022.

They were conversant with the constitutional provisions of other states, some of which provided for removal only upon notice and hearing, and some of which did not. They had before them the report of the committee on judiciary department, section 34 of which was as follows:

> "All officers not liable to impeachment shall be subject to removal from office for misconduct or malfeasance in office in such manner as may be provided by law."

It will be observed from said report that the causes for removal were named, but it was proposed to leave to the Legislature to enact laws governing the procedure therefor under the clause, "in such manner as may be provided by law." The Constitution makers, however, adopted the recommendations of the committee on the executive department placing the power of removal in the Governor, and did not provide the "manner" in which the removal should be made, and refused to adopt the recommendations of the committee on judiciary to leave to the Legislature the subject of providing the "manner" in which officers might be removed. It seems to us that the Constitution makers had clearly before them the whole policy of removals

from office. They provided that the Senate, when sitting as a court of impeachment, be vested with judicial power. They did not vest the Governor with judicial power. They provided that all state officers and judges of the district court shall be liable to impeachment for crime, misdemeanors, and malfeasance in office after a trial by the Senate upon notice according to the law and the evidence; thus providing the "manner" of impeachment. But they did not, when reposing the power of removal in the Governor of officers appointed by him, specify any manner of procedure for such removals.

With this knowledge before them on the subject which must be imputed to the Constitution makers, we agree with the opinion of the court in Conklin v. Cunningham, supra, that the omission from the provision on removals of any requirement of notice or hearing must be regarded as the expression of an intention that notice or hearing should not be essential to the enforcement thereof.

It is fair to assume that the Constitution makers thought that a person who could be trusted to fill the office of Governor could be trusted to deal fairly with office holders whom he was empowered to appoint, and that cases might arise where prompt action was necessary for the public good, and that it was not wise to tie the hands of the Governor when such action might well work to the detriment of the state. Governmental power must be vested somewhere, and the fact that it may be abused does not prove that the power must not be conferred.

In Ex parte Bustillos, 26 N. M. 449, 194 P. 886, we commented on the power of the chief executive of the state as follows:

"The pardoning power in this country is usually, if not universally, conferred by constitutional provisions, and it is usually conferred upon the Governors of the respective states, unrestrained by any direct limitations of law. The head of the executive department is believed by the American people to be generally so self-restrained, so imbued with patriotism, so conscious of the responsibilities of his high

office, that he will never abuse the power and will always exercise the same in the interests of the state as a whole, to the exclusion of all sordid, personal, political, or other ulterior motives. This is as it should be. Public officers, to be strong and effective, must have power and responsibility. If their activities are so circumscribed by restrictions as to prevent all initiative and independence, their power for good in behalf of the people will be greatly minimized. They may sometimes go astray; but the damages thereby to the state will be negligible, compared to the damage resulting from weak and dwarfed public service."

And, as said in Bynum v. Strain, 95 Okl. 45, 218 P. 883, supra:

"An appointee to such a position is selected by the chief executive for the purpose of aiding the executive in carrying out his sense of duties and responsibilities to the public and with the belief that such appointee will work in harmony with and aid the Governor in fulfilling his sense of duty to the public. It is the Governor, the chief executive, who is held responsible to the sovereignty for errors in his executive and administrative policies. The appointee is responsible to the chief executive, and, in the absence of express authority, the judiciary has nothing to do with the chief executive's judgment, conscience, sense of duty, or responsibilities."

It is worthy of note that but few states have constitutional provisions on removals from office similar to ours. The Illinois Constitution of 1870 is one of these, section 12 of the fifth article being as follows:

"The Governor shall have power to remove any officer whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office; and he may declare his office vacant, and fill the same as is herein provided in other cases of vacancy."

Wilcox v. People, 90 Ill. 186, construing that provision, is regarded as the leading case supporting the construction we have adopted. The court said:

"It being found that the power of removal existed in the Governor, the inquiry remains whether it was validly exercised. Relators say not—that the power granted was judicial in its nature, and should have been exercised according to judicial methods, that is, there should have been a specific charge, notice of it, opportunity for defense and hearing, and proof to support the charge. Undoubtedly the Governor can only remove for some one of the causes specified; but the removal here was for one of these causes—incompetency. The Governor ascertained the existence of the cause here, and made the removal on ac-

count of it. The Constitution is silent as to who shall ascertain the cause of removal or the mode of its ascertainment. It simply gives to the Governor the power to remove any officer whom he may appoint, in case of incompetency, etc. It follows, then, that it is the Governor, who is to act in the matter to determine, himself, whether the cause of removal exists, from the best lights he can get, and no mode of inquiry being prescribed for him to pursue, it rests with him to adopt that method of inquiry and ascertainment as to the charge involved which his judgment may suggest as the proper one, acting under his official responsibilty, and it is not for the courts to dictate to him in what manner he shall proceed in the performance of his duty, his action not being subject to their revision. The Constitution of this state not only declares that the powers of the government of the state shall be divided into three distinct departments, but has expressly prohibited the exercise of any of the powers properly belonging to one by either of the others."

The present case is one where a very important office is at stake, but the section of our Constitution under consideration makes no distinction as to the grade of importance of the offices filled by the appointment of the Governor, and the principles decided apply as well to every ministerial officer, however significant, whose removal is provided for therein.

Our conclusions are:

(1) A public office is not property, and the right to hold it is not a vested one.

(2) The constitutional convention had the power to prescribe any method of removal from office as it might see fit, and a removal made by the prescribed method is due process of law.

(3) Where no provision of the Constitution or of the statute law requires that notice and hearing be given before a removal can be made, neither notice nor hearing is a necessary condition precedent to a valid removal.

(4) It was the intention of the constitutional convention when framing the Constitution, and the people when adopting it, that the Governor might remove the officers appointed by him without notice or hearing.

(5) When the determination of a question of this kind is vested in some tribunal other than the courts,

and no appeal from or review of the decision reached is provided by law, such decision is final and conclusive, if such tribunal acts within its jurisdiction.

(6) The only inquiry left open to the court in this sort of proceeding is whether the cause assigned for removal is one for which the Constitution authorizes a removal to be made. If it is, the Governor acted within his jurisdiction in making it, no matter how grievously he might err in judgment.

(7) The order of removal in this case assigns a constitutional cause for removal, and is therefore conclusive on the courts.

It follows that the judgment of the lower court must be affirmed, and it is so ordered.

Watson, J., concurs in the result.

PARKER, C. J. I am compelled to dissent from the conclusion reached by the majority of the court.

The fundamental question involved is the question of power of the Governor in the premises. The provision on this subject as originally reported to and adopted by the constitutional convention was as follows:

"The Governor shall nominate and, by and with the consent of the Senate, appoint all officers whose offices are established by this Constitution, or which may be created by law, and whose appointment or election is not otherwise provided for, and may remove any such officer for incompetency, neglect of duty, or malfeasance in office."

See Proceedings of Constitutional Convention, p. 99.

This is an exact copy of the Colorado provision on the subject. See Roberts v. People ex rel. Hicks, 77 Colo. 281, 235 P. 1069. This provision, together with all others which had been reported to and adopted by the convention, was referred to the committee on revision and arrangement, which committee reported the same back to the convention in the form in which it was finally adopted, which is as follows:

"Sec. 5. The Governor shall nominate and, by and with the consent of the Senate, appoint all officers whose appointment or election is not otherwise provided for, and may remove any officer appointed by him for incompetency, neglect of duty or malfeasance in office. Should a vacancy occur in any state office, except Lieutenant Governor and member of the Legislature, the Governor shall fill such office by appointment, and such appointee shall hold office until the next general election, when his successor shall be chosen for the unexpired term."

It is to be observed that the section, as finally adopted, marks a wide departure from the letter and spirit of the provision as originally reported to the convention. As originally reported, the section authorized the removal by the Governor of officers appointed by him, with the consent of the Senate, and none others. It is so held in Colorado. See 77 Colo. 281, 235 P. 1069, above referred to. There must have been some important reason in the minds of the members of the convention causing them to make the change above pointed out. Unfortunately the journal of the convention furnishes no report of any discussion of the subject, and we are left to an interpretation of the section without any aid from such source. It is likewise unfortunate that we can obtain no aid from the other states; there being no other Constitution like ours. The nearest approach to our Constitution, so far as language is concerned, occurs in the states of Illinois, Nebraska, and West Virginia. In each of these states, however, the language used in specifying the officers who may be removed by the Governor, is "any officer whom he may appoint." This language, in meaning, is vastly different from our provision. They provide for the removal of officers whom the Governor may appoint; that is, those whom he has the power in any event to appoint. But not so in our case. Here the Governor can remove only such officers as he has appointed. It is perhaps true, as elsewhere held, that, although the consent of the Senate is required before certain officers may be appointed by the Governor, he, nevertheless, makes the appointment. It is so held in Harman v. Harwood 58 Md. 1, and Lane v. Commonwealth, 103 Pa. 481. But this is not the case here. The question is as to the sense in which the words

"appointed by him" were used by the constitutional convention. If the convention had intended that the Governor should have power to remove officers confirmed by the Senate, it certainly would have retained the language employed in the original section as reported to the convention above set out, and as embodied in the Colorado Constitution. The convention must have meant something else. There is provision in the Constitution for the appointment of officers by the Governor alone, and without the concurrence of the Senate. Section 4 of article 20 provides that, in case of a vacancy in the office of district attorney, judge of the Supreme or district court, or county commissioner, the Governor may fill such vacancy by appointment to last until the next general election. Section 5 of article 20 provides that, if the Senate is not in session, and a vacancy occurs in any office where the incumbent is appointed by the Governor with the consent of the Senate, the Governor may appoint to fill the vacancy until the next session of the Senate. Article 20 is an article of miscellaneous provisions, and was evidently adopted to cover omissions in the main body of the Constitution. It thus appears that the removal power of the Governor, mentioned in section 5 of article 5, has subject-matter on which to operate aside from those officers required to be confirmed by the Senate.

It is suggested that, had the constitutional convention so considered the scope and meaning of the provision of section 5 of article 5, the same would have been inserted in article 20, where the provisions for appointment by the Governor alone are contained. This is not conclusive. The Constitution must be interpreted as a harmonious whole, and each provision must have its proper importance and effect. The arrangement of the provision is not controlling, in the absence of some other consideration by way of language or subject-matter or other rule of construction. It seems clear, therefore, that the constitutional convention intended to restrain the power of the Governor to remove from office to such officers as are appointed by him alone and without the concurrence of the Senate. This result is in

accord with the general trend of opinion in America. Some believe in the concentration of power in the executive, giving him full power to control all of the executive functions, and holding him alone responsible to the people. Coupled with this idea is the principle of the recall whereby an executive found to be unworthy may be stripped of his office and prerogatives. But these ideas have found no place in our institutions. We have adhered to the ancient landmarks. We have provided that public officers shall either be elected by the people, or appointed by the executive with the concurrence of the legislative branch of the government, or, in case of vacancy of office, appointment may be made temporarily by the Governor. When once seated in office, the officer is secure in his tenure, except in cases where the Governor alone appoints, or where the offenses are sufficient to warrant impeachment. In this connection it is suggested that impeachment is not applicable in cases like the present, and that therefore there is no way to get rid of an unworthy appointee if the Governor has not the power of removal. Our provision is section 36 of article 4, which is as follows:

"Sec. 36. All state officers and judges of the district court shall be liable to impeachment for crimes, misdeameanors and malfeasance in office, but judgment in such cases shall not extend further than removal from office and disqualification to hold any office of honor, trust or profit, or to vote under the laws of this state; but such officer or judge, whether convicted or acquitted shall, nevertheless, be liable to prosecution, trial, judgment, punishment or civil action, according to law. No officer shall exercise any powers or duties of his office after notice of his impeachment is served upon him until he is acquitted."

The provision is broad, and includes "all state officers." If a state tax commissioner is not a state officer, it is hard to define his status. Under a provision of the Colorado Constitution, much less clear and explicit, it was declared that a civil service commissioner was a state officer, and subject to impeachment. See 77 Colo. 281, 235 P. 1069. above referred to. While it is true that it is often held otherwise, the holdings are based on the phraseology of the constitutional provisions of the various states. State v. Grant, 14 Wyo. 41, 81 P.

795, 82 P. 2, 1 L. R. A. (N. S.) 588, 116 Am, St, Rep, 982, is an example. The constitutional provision there is different from ours. There the language is, in section 18 of article 3:

> "The Governor and other state and judicial officers * * * shall be liable to impeachment."

Section 19 of article 3 provides that all officers not liable to impeachment shall be removable by the Governor in such manner as may be provided by law. These impeachment and removal provisions are common to those of Colorado, Montana, Nevada, North Dakota, South Dakota, Utah and Washington, and the impeachment provision is the same in Arizona. The Wyoming court relies much upon the Washington court's reasoning which is to the effect that, in order to give effect to section 19, above noticed, it must be held that the impeachment provision can apply to superior executive and judicial officers only; otherwise the removal provision would be superfluous. This case is followed, and more elaborate argument and citation of cases is had upon In re Opinion of the Justices, 167 Mass. 599, 46 N. E. 118, where it is held that a county commissioner was not subject to impeachment. The opinion is undoubtedly reached because county commissioners are in no sense "officers of the commonwealth," but are county officers. That court concluded that only elective state officers were subject to impeachment, although that was not necessary to a decision of the case.

It has been suggested that perhaps the Constitution itself defines "state officers," and that they must be held to be officers elected by the state at large. The last sentence of section 5 of article 5 provides that, in case of a vacancy in any state office, except Lieutenant Governor and members of the Legislature, the Governor shall fill the office until the next general election, thus showing, it is said, that state officers are elective officers. It may be that the officers referred to here are elective state officers, but we do not deem this significant in determining the definition of state officers within the impeachment provision. This is mere-

ly a provision for the filling of vacancies in elective state officers. Likewise the provisions of section 4 of article 20 provide for the appointment of officers to fill vacancies until the next general election, but some of the officers named are state officers, and some are local or county officers. It is merely a provision to fill vacancies, and does not define state officers. In Ward v. Romero, 17 N. M. 88, 125 P. 617, we held that a district attorney is a state officer within the meaning of section 9 of article 20, which is a provision in regard to compensation of state officers.

We are convinced that a state tax commissioner is a state officer, and as such liable to impeachment. His duties are state wide, and he has to do in a general way with the equalization and collection of the revenues of the state. It is so held in Roberts v. Hicks, 77 Colo. 281, 235 P. 1069. in referring to a civil service commissioner appointed by the Governor. The causes for removal and for impeachment, as specified in the Constitution, are different except in one instance; that is malfeasance in office. The causes for removal are much broader than those for impeachment. An officer cannot be impeached for incompetency or neglect of duty, but may be removed. This consideration, however, I do not deem to be controlling. The question is not, What should have been provided by the Constitution? It is, What has been so provided? If it is deemed proper by the people to extend to the Governor larger powers of removal than have been extended, it may easily be done by a constitutional amendment clearly giving the power. I think that the power attempted to be exercised in the present case does not exist.

On Motion for Rehearing.

WATSON, J. Appellant Ulrick has moved for a rehearing. I am authorized to say that Mr. Justice BICKLEY concurs with me in overruling the motion.

When the original decision was announced, I was content merely to concur in the affirmance. In view of the importance of the questions discussed, both or-

iginally and on the motion, and since I am not entirely in accord with the views expressed by either of my brothers, I have concluded that it is incumbent upon me to state my position.

The CHIEF JUSTICE holds that the Constitution does not confer power on the Governor to remove officers appointed by and with the consent of the Senate. His argument rests upon the change in the removal provision, as finally adopted, from the original form in which it passed the convention. I agree with Mr. Justice BICKLEY that the change broadened, rather than narrowed, the power.

If, as the CHIEF JUSTICE holds, the section, as finally adopted, marks a wide departure from the letter and spirit of the provision as originally passed, then I agree that there must have been an important reason therefor. No reason is assigned, except the suggestion that the convention decided it had gone too far in conferring power and responsibility upon the executive.

The conclusion of the CHIEF JUSTICE involves one of two suppositions: Either the convention deliberately reversed itself, or else its committee on revision and arrangement reported a contrary provision, which passed the convention unnoticed. I do not think either of these suppositions warranted.

It was not the duty of the committee to change the substance or true meaning of provisions which had passed the convention and had been referred to it. Its duty was to arrange, collate, and clarify. Reasoning from the standpoint of the committee's duty, and crediting it with understanding thereof, and adherence thereto,I cannot admit that it assumed or intended to embody a provision exactly the contrary of that which was referred to it as representing the will of the convention, unless that conclusion is unescapable.

The conclusion is not unescapable. Indeed. there is another possible, and, I think, a more probable, ex-

planation. The convention had decided to give the Governor power to remove officers appointed by and with the consent of the Senate—far the more important class of appointive officers. It would naturally follow that the convention would wish and intend the Governor to have the power to remove those appointed by him alone. Given the larger and more important power, no good reason suggests withholding the smaller. Wilcox v. People, 90 Ill. 186. The lesser power was not, however, expressly conferred by the provision which passed the convention and came to the committee by reference. Perhaps the committee foresaw the contention successfully urged in Roberts v. People ex rel. Hicks, 77 Colo. 281, 235 P. 1069, where the Colorado Supreme Court held that just such a provision gave power to remove officers appointed by and with the consent of the Senate, but not to remove those appointed by the Governor alone. The committee might reasonably have considered that, in changing the provision to include all appointed officers, it was acting in harmony with the recorded will of the convention; merely stating expressly what it deemed already included by inference. If the committee intended to exclude power to remove those officers whom the convention had already subjected to removal, it could not possibly have considered that it was proceeding in harmony with the expressed will of the convention. It must have recognized that it was assuming to reverse it. I think that the correct presumption is against the change in spirit which the CHIEF JUSTICE assumes to have originated in the committee.

The intent of the convention itself is perhaps more likely to appear in the original provision, adopted independently and on its own merits, than in the final draft adopted after being reported as a whole from the committee on revision and arrangement. Of course, it is the final expression of the convention that binds us. If that clearly excluded power to remove officers appointed with senatorial sanction, the question would be settled. But Brother BICKLEY has shown, on

principle and authority, that it does not. Referring, in the effort to interpret, to the earlier expression of the convention's will, merely serves to strengthen the conviction that it was not intended to exclude that power.

A practical question is: What officers are to be removed by the Governor, if not those whom he appoints by and with the consent of the Senate? The CHIEF JUSTICE mentions those who may have been appointed to fill vacancies until the next general election, or until the next session of the Senate. Power to remove such vacancy appointees is so relatively unimportant as not likely to have engaged the serious consideration of the convention, independently of the subject of removals in general. No reason occurs why the convention would have deemed it important to protect the public service from the incompetency, neglect of duty, or malfeasance of vacancy appointees, and unnecesary in the case of full term appointees. I do not understand that the difference is in their being subject or not subject to impeachment. A state treasurer, for instance, is a state officer, I suppose, whether duly elected or duly appointed to a vacancy, and as such subject to be impeached Whether, having been appointed to a vacancy, he is subject to removal, I do not consider. Neither do I consider whether a tax commissioner, as a state officer, is subject to impeachment. On this question my associates differ, but I reach my conclusion independently of it.

Mr. Justice BICKLEY has reached the conclusion that it was not essential to the lawful removal of the relators that they have the benefit of notice and an opportunity to be heard. I am driven to the same view. I confess, however, that I am somewhat shocked to discover the summary power of the Governor to remove a high official of state by merely asserting his incompetency, his neglect of duty, or his malfeasance in office. Such a charge must needs reflect seriously upon the official against whom it is made. Common fairness would seem to require some method

of bringing the specific nature of the accusation to his attention, and of inquiring into its truth. Either as a concession to this principle of fairness, or in doubt as to the power, charges were formulated and served, in the cases at bar, notices given, and hearings had. In view of our conclusion, consideration of the charges, the notice or the hearing is unnecessary and would be inappropriate.

Doubtless it is essential to good government that there be provision for the expeditious removal of incompetent or faithless public servants. It does not seem essential that such power should be so unchecked as we find it to be. However confident we may be that the people of this state will never elect to the high office of Governor one who would prostitute this power to political ends, or misuse it from other unworthy motives, the fact remains that the conclusion we reach opens the door to that abuse. Considerations both of fairness to the individual and of the best interests of the state would forecast a different rule than that we now state. With those considerations, however, the courts are concerned only as they may be assumed to have been in the minds of the Constitution makers, and as aids in interpreting what they said.

There has been much discussion as to whether title to a public office is a property right, and as to whether the power of removal is in its nature judicial, quasi judicial, or administrative. We need not concern ourselves with those questions. As a sovereign state, we had the right to settle them by our Constitution. The courts have only to ascertain how they were determined. It cannot be doubted that we might have given our officials property rights in their offices. We might have made removal from office a purely judicial, a quasi judicial, or a purely administrative, function. We did in fact provide that all officers appointed by the Governor should be removed by him for incompetency, neglect of duty, or malfeasance in office. One accepting such an office, of

course, does so in the knowledge that he obtains no indefeasible title.

So it seems that this is purely a question of correct interpretation. What did the Constitution makers mean? They might have expressly required notice and hearing. They might have expressly dispensed with the necessity. They did neither. In the absence of all precedent, it might have been argued, that if notice and hearing were deemed necessary or desirable, they would have been expressly required. To this the answer would have been that notice of an accusation and hearing before condemnation are principles of the common law, so long established, so essential to satisfy our innate sense of justice, and so much a part of our free institutions, that the observance of those principles is to be assumed; and, therefore, that the Constitution makers assumed that what they wrote into that document would be interpreted in the light of those principles. Such is the doctrine of Dullman v. Wilson, reviewed by Brother BICKLEY, and such the basic principle of those decisions making up what text-writers, unanimously, I believe, call the weight of authority.

That the weight of authority is as stated I am not in doubt. That it is supported by sound reason and salutary policy I agree. The Governor's power of removal was not a new thing in our Constitution. It had often been granted before, and had often been construed. In the absence of local precedent, we would say that it was intended that the power should include what such grants had generally been held to include. So, if, by the decided weight of authority, such grants were deemed limited by the general principles of notice and hearing, we would say that so to limit this grant would be in accord with the presumptive intention of the Constitution makers.

If we could stop hree, I should have grave doubts of the correctness of the rule laid down. But weight of authority is not to be our guide, unless it also guided the Constitution makers. Another consideration is

controlling. Conklin v. Cunningham, 7 N. M. 445, 38 P. 170, was decided by the territorial Supreme Court in 1894—its force unimpaired by later pronouncement. Whatever was therein decided was the law of this jurisdiction when the convention framed, and the people adopted, the Constitution. That case arose out of the removal, by the Governor, of an elected sheriff, and the majority of the court emphatically declared that, without notice of any kind, the Governor might determine that the sheriff had failed in his statutory duty to pay over moneys, and had incurred the prescribed penalty of removal from office. That declaration, counsel say, was dictum. I am not prepared to say that it was. If it was dictum, it is certain that it states a position strongly and ably combatted, and states it deliberately and emphatically. That question, however, may rest until we are called upon to consider the case as precedent. Here our interest is in its bearing on the interpretation of our constitutional provision. It was not only an important and well-known case in this jurisdiction, but, as pointed out by Brother BICKLEY, it was a case much referred to. It represented the extreme of the minority doctrine. Those great principles, engrafted upon our jurisprudence in the course of the Anglo-Saxon struggle for liberty, ably expounded by Judge Freeman, who dissented, were given no weight in interpretation as against the supposed interest of the state in the immediate removal of officials charged with wrongdoing.

In the face of Conklin v. Cunningham, I am unable to satisfy myself that the Constitution makers intended their grant of the power of removal to be interpreted in the light of the weight of authority. They must have recognized that, having omitted any requirement for notice or hearing, such could be required only by construction. They could not have expected such construction in this jurisdiction without an overruling of the decision or the emphatic dictum of Conklin v. Cunningham. So we must conclude that they acquiesced in the rule there declared. Other-

wise common prudence would have dictated a different provision.

On this ground, I concurred in affirming the judgment, and in the conclusion that the Constitution requires no notice and no opportunity to be heard as a prerequisite to the Governor's power to remove.

[No. 3199. Feb. 28, 1927.]

STATE CORPORATION COMMISSION of NEW MEXICO v. ATCHISON, T. & S. F. RY. CO.

[255 Pac. 394.]

SYLLABUS BY THE COURT

A station agency, not established by order of the State Corporation Commission, may be discontinued by a railroad company without permission of the commission; and an order of the commission that the agency be re-established is unenforceable, if based on the failure to obtain permission to discontinue it, and not upon a showing that the public interest reasonably and justly demands the service.

Appeal from Corporation Commission.

Proceeding by the State Corporation Commission against the Atchison, Topeka & Santa Fe Railway Company by citation to show cause why a station agency at Fulton was discontinued and why it should not be reinstated. From an order requiring the agency to be reinstated, defendant appeals. Reversed.

Reid, Hervey & Iden, of Albuquerque, for appellant.

R. C. Dow, Atty. Gen., for appellee.

OPINION OF THE COURT

WATSON, J. The Atchison, Topeka & Santa Fe Railway Company having withdrawn its station agent at Fulton (now June) without having obtained the consent of the State Corporation Commission, the latter cited the former "to show cause why the agency

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[1] 33 Cyc p. 144 n. 39, 41.

at Fulton, N. M., was discontinued, and why such agency should not be reinstated."

The company appeared by counsel and with witneses. Being directed to proceed, it took the position that it was merely present as a defendant, and that it was for the commision to make a case for reinstatement of the service. The commission ruling that the burden of proof was on the company, it made its showing as to the amount of its business at this station, its revenue therefrom, and the cost of maintaining an agent. The commission made practically no showing on its part. Following the hearing, an order was made in effect requiring the company to reinstate its agency until it should show sufficient cause "to warrant the commission in closing the same."

Without going into details as to the evidence, the order, or the findings, it may be said that it clearly appears from the proceedings, the order, and the argument here that the only question involved was the right of the company to discontinue its agency service at Fulton without justifying such action to the commission and obtaining its order of approval. If the company has such right, the order is not lawful and is not to be enforced.

The power upon which the commission relies is given by the Constitution, art. 11, § 7:

> "The commission shall have power and be charged with the duty of fixing, determining, supervising, regulating and controlling all charges and rates of railway, express, telegraph, telephone, sleeping car, and other transportation and transmission companies and common carriers within the state; to require railway companies to provide and maintain adequate depots, stockpens, station buildings, agents, and facilities for the accomodation of passengers and for receiving and delivering freight and express; and to provide and maintain necessary crossings, culverts and sidings upon and alongside of their roadbeds, whenever in the judgment of the commission the public interests demand and as may be reasonable and just."

No legislation affecting the present question has been brought to our attention.

The Attorney General relies upon the word "maintain," found in the above-quoted section. He argues that the duty of the commission is to require the company not only to provide proper facilities where the public interest demands, but to maintain those already provided. Otherwise, he argues, the company, having provided the facilities in accordance with the commission's order, might withdraw them the next day. Of course, such trifling would be intolerable. That question, we have no doubt, can be dealt with satisfactorily when it arises. In this case we are not considering contumacious conduct of a corporation. We are considering whether it may, in the usual course of its business, and where the commission has not taken jurisdiction of the particular matter, or taken action concerning it, proceed to withdraw facilities, which, in its judgment, are no longer reasonably or justly required.

Counsel for the company admit the power of the commission, after notice and hearing, to require of public utility companies such accomodations and facilities as are found to be reasonable and just, and to be demanded by public interest. But they deny the commission's power otherwise to interfere with corporate management in such matters. They place reliance upon St. L. & S. F. R. R. Co. v. Public Service Commission, 294 Mo. 364, 242 S. W. 938; Id., 301 Mo. 157, 256 S. W. 226. The Attorney General cites State v. Florida East Coast R. R. Co., 64 Fla. 112, 59 So. 385; Id., 58 Fla. 524, 50 So. 426. We think, however, that it is unnecessary to consider these interesting decisions, since the controlling principles have been already settled by this court.

The Constitution itself provides:

"The commission shall determine no question nor issue any order in relation to the matters specified in the preceding section, [Article XI, § 7], until after a public hearing held upon ten days' notice to the parties concerned, except in case of default after such notice." Article 11, § 8.

At such hearings the burden of proof is upon the commission, and it is the duty of the commission to

present evidence as to all such facts as are necessary to enable the court to determine the reasonableness and justice of the order. Unless the record contains evidence satisfying this requirement, the order will not be enforced. Seward v. D. & R. G. R. R. Co., 17 N. M. 557, 131 P. 980, 46 L. R. A. (N. S.) 242; Woody v. D. & R. G. R. R. Co., 17 N. M. 686, 132 P. 250, 47 L. R. A. (N. S.) 974; In re Coal Rates in New Mexico, 23 N. M. 704, 171 P. 506. That the hearing is had upon an order to show cause does not cast the burden of proof upon the corporation. In re Coal Rates in New Mexico, supra.

Such being the settled law, what is there in the nature of this case to distinguish it? Only that the question concerns reinstatement of a service formerly afforded, rather than an original demand for service. That was, in fact, the situation in the Seward Case, first above cited; but, in the earlier case, the discontinuance occurred before the creation of the commission. The theory of the commision in this case is that, since the discontinuance of the service has never been authorized, there has been no legal discontinuance; that in law the situation is as though the service were still being given; that the question is, hence, one of "maintaining" service; and that, where such is the question, the burden of proof is necessarily on the company.

Article 11, § 7, is the source of the commission's power to require **maintenance**, as well as of its power to require **provision**, of service.. The requirement of notice and hearing found in article 11, § 8, is the same as to both; that is to say, the commission cannot make any order that a corporation "maintain" service unless it gives notice to the company and gives it a hearing.

The word "maintain" in section 7, supra, occurs merely in defining the jurisdiction of the commission. It would be a violent assumption, particularly in view of well-known conditions, to suppose that the Constitution makers did not know that many and frequent

changes would occur affecting the necessities and needs of railroads from an operating standpoint, and of the public from a service standpoint. There is nothing to indicate that every change in the service being afforded when the Constitution was adopted, or the service thereafter voluntarily installed, was to have consideration and approval in advance by the commission. The contrary seems quite plain when we recall that every order in relation to such matters, however trivial, would involve notice and hearing.

Considering the constitutional provisions, we do not think that the commission was created to manage railroads. Its function is to protect the public interest against unjust and unreasonable deficiencies in service. To that end its limited administrative and judicial powers were conferred. It being claimed that railroad practice is unjustly or unreasonably injurious to public interest, or insufficient in point of service, a case arises for adjudication by the commission. The grounds of complaint must, however, be proven. Otherwise there is no basis for any action. This conclusion we think necessarily follows from the Constitution itself and from the former decisions of this court.

By nothing here said do we express any opinion as to the effect of Laws 1925, c. 19, entitled "An act relative to hearings before the State Corporation Commission involving rates, fares and charges and fixing the burden of proof." The question is not considered, since no provision of that act is applicable to this case.

For the reasons stated, we must decline to give enforcement to the order of the commission in this case. It is so ordered.

PARKER C. J., and BICKLEY, J. concur.

[No. 3234. March 11, 1927.]

[Rehearing denied May 9, 1927.]

STATE ex rel. HAAS et al. v. BOARD of COM'RS of DE BACA COUNTY.

[259 Pac. 37.]

SYLLABUS BY THE COURT

Section 17, chapter 11, Laws 1917, is inoperative and does not authorize De Baca county to issue bonds for courthouse and jail purposes.

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

Proceeding by the State, on the relation of G. L. Haas and others, for themselves and all others similarly situated, for mandamus to be directed to the Board of County Commissioners of De Baca County. From a judgement awarding the writ, defendant appeals. Reversed and remanded, with directions.

R. C. Dow, Atty. Gen., and C. M. Compton, Jr., of Portales, for appellant.

J. E. Pardue, H. R. Parsons, K. W. Edwards, and J. F. Kelton, all of Ft. Sumner, for appellee

OPINION OF THE COURT

PARKER, C. J. The district court of De Baca county awarded a peremptory writ of mandamus against the board of county commisioners of that county, commanding them to construct for the county a courthouse and jail at Ft. Sumner, which is the county seat of that county. The action of the court was based upon the provisions of section 17, chapter 11, Laws 1917, which is the act creating the county of De Baca. Section 17 of that act is as follows:

"The county of De Baca may issue bonds for courthouse purposes to an amount not exceeding $30,000, and for jail purposes to an amount not to exceed $7,500; which

[1] 15CJ p. 612 n. 61.

bonds shall be issued in manner as provided by the Constitution of New Mexico, payable absolutely 30 years from their date and at the option of said county 20 years from this date."

It appears that there is an urgent necessity for the construction of a courthouse in which to house the county offices and to protect the records of the county, and in which to hold the district court. It further appears that the board of county commissioners are willing to issue the bonds of the county for this purpose, but doubt their authority to so issue them without submitting the question to a vote of the people, as provided by section 10 of article 9 of the State Constitution. The Board does not otherwise resist the mandamus.

We have twice examined this question in connection with the courthouse and jail bonds of Harding county. Section 18, chapter 8, Laws 1921, is the same as section 17 of the De Baca county act above quoted, except in one important and controlling particular, which will be noted.

In Martinez v. Gallegos et al., 28 N. M. 170, 210 P. 575, we pointed out that the power granted by the Constitution to create new counties is of such a nature that, if any other constitutional provisions conflict with it, they must ordinarily yield to the former power. This case was re-examined in Floersheim v. Board of County Commissioners, 28 N. M. 330, 212 P. 451, and the doctrine there announced was adhered to. We see no reason to depart from our previous holdings.

In the Harding County Case, however, the statute provided that the bonds might be issued in accordance with the Constitution and laws of the state, while in the present case the statute provides merely that the bonds may be issued in the manner provided in the Constitution, omitting all reference to the laws of the state. De Baca county therefore is left without any directions as to the denomination and rate of interest of the bonds and other details which are pre-

scribed by the general statutes. This circumstance renders the statute creating the county inoperative in regard to the issuance of these bonds.

In Lanigan v. Gallup, 17 N. M. 627, 131 P. 997, we held that sections 12 and 13 of article 9 of the Constitution are not self-executing, and that cities, towns, and villages must proceed according to the statutes in such cases provided when issuing bonds. Section 10 of article 9 of the Constitution is in the same form, and therefore counties when proceeding to issue bonds for courthouse and jail purposes must proceed according to the general laws provided in such cases. The De Baca county act fails to authorize and direct the county to so proceed, and is consequently inoperative in this regard.

It is to be noted, however, that this conclusion in no way interferes with the power of De Baca county to incur indebtedness for courthouse and jail purposes in the same manner as all other counties in the state may do. It simply has no power to proceed under the act creating the county.

It follows that the judgment of the district court is erroneous and should be reversed and the cause remanded, with directions to set aside the judgment and to discharge the writ, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3030. March 25, 1927.]

KNABEL et al. v. ESCUDERO et al.

[255 Pac. 633.]

SYLLABUS BY THE COURT

1. A complaint to quiet title to real estate, in the language of the statute, is not subject to demurrer.

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[1] 31 Cyc p. 115 n. 45; p. 333 n. 76; 32 Cyc p. 1349 n. 19; p. 1352 n. 33. [2] 21CJ p. 36 n. 16; p. 39 n. 18; 35CJ p. 197 n. 48; p. 217 n. 98 New. 32 Cyc p. 1307 n. New.

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

Suit by Ernest Knabel and others against Francisco Escudero and others to quiet title. From a judgment of dismissal, plaintiffs appeal. Reversed and remanded, with directions.

F. C. Wilson and F. W. Clancy, both of Santa Fe, for appellants.

Renehan & Gilbert, of Santa Fe, for appellees.

PARKER, C. J. [1] This is a suit to quiet title to real estate. The complaint is in the form prescribed by sections 4387, 4388, Code 1915. A demurrer was interposed to the complaint to the effect that it failed to state facts sufficient to constitute a cause of action in this, that it failed to allege that the plaintiffs were in possession, or that the premises were vacant or unoccupied, or that the defendants were not in possession. The demurrer was sustained, and, the plaintiffs refusing to plead further, the cause was dismissed, from which judgment it is here on appeal.

It is apparent that a question of pleading and procedure only is involved. It is the established doctrine in this jurisdiction that in order to maintain a suit to quiet title, the plaintiff must be in possession, or the premises must be vacant and unoccupied. See Pankey v. Ortiz, 26 N. M. 575, 195 P. 906, 30 A. L. R 92, where the cases are all collected See, also, Baum v. Longwell (D. C.) 200 F. 450. But this is not the question here. The question is whether it must be alleged in the complaint that the plaintiff is in possession or the premises are unoccupied.

In the first place it is to be noted that the complaint in this case is in exact accordance with the provisions of section 4388, Code 1915, regulating the

procedure in such cases. The statute requires no allegation as to possession or vacancy of the premises. Under an allegation of ownership in fee simple, as in this case, the implication would seem to arise that the plaintiff is in possession, at least in the absence of allegation and proof to the contrary by the defendants. 17 Enc. P. & P. 335; Gage v. Kaufman, 133 U. S. 471, 10 S. Ct. 406, 33 L. Ed. 725 If the defendants are in possession and the plaintiff out of possession, it would seem to be a matter of defense for them to show that fact, thereby securing to themselves the right of jury trial. A demurrer, which merely admits the allegations of the complaint to be true, would seem to be inadequate to raise any such question.

[2] In this connection, it is to be observed that two distinct principles are involved. The first is that equity has no jurisdiction where there is a complete and adequate remedy at law. There is nothing in this doctrine which would prevent the Legislature from enlarging the jurisdiction of equity and providing that suits to quiet title may be maintained in equity whether there is an adequate remedy at law or not, as it has evidently done by the legislation above referred to. The second principle involved, however, is entirely different in scope and consequence. The right of trial by jury is guaranteed by section 12 of article 2 of the state Constitution. Applied to a case like this, the provision means that a man may not be deprived of the possession of real estate, of which he claims title, except upon a trial by jury. This right may, of course, be waived. If the defendant desires to rely upon his constitutional right, it seems clear that it is his duty to assert it in some appropriate form. A demurrer is inadequate for such purposes, When such right is properly asserted, our statute, which provides that the plaintiff may be either in or out of possession, becomes inoperative, and must yield to the controlling provisions of the Constitution in regard to the right to jury trial. There is nothing in our previous cases in any way militating against this conclusion. In Pankey v. Ortiz, 26 N. H. 575,

195 P. 906, 30 A. L. R 92, the complaint itself alleged possession of the defendants, and the answer alleged title, possession, and right to possession in them. The constitutional right of defendants to jury trial was properly presented and denied. We necessarily held that a suit to quiet title could not be maintained. Baum v. Longwell, 200 F. 450, is a case decided by the late Judge William H. Pope in the United States District Court for this state. In that case it was held that a suit to quiet title could not be mainained in the federal court, unless it was alleged that the plaintiff was in possession, or that the premises were unoccupied, and that a complaint failing in this regard was demurrable. But it is to be remembered that this was in the federal court, where the ancient distinctions between law and equity are preserved, and where there is no enlargement of equitable jurisdiction to quiet titles. In such a court the principle that equity will not take jurisdiction where there is an adequate remedy at law is in full force in all cases.

It follows that the judgment of the district court is erroneous and should be reversed and the cause remanded, with directions to overrule the demurrer and to proceed in accordance herewith; and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3166. March 25, 1927.]

STATE v. MONTOYA.

[255 Pac. 634.]

SYLLABUS BY THE COURT

Laws 1921, c. 133, § 474, offends Constitution, art. 4, § 32, in so far as it attempts to discharge personal liability for taxes duly assessed.

2. Laws 1921, c. 133, § 474, does not offend Constitution, art. 4, § 32, in so far as it discharges the lien of taxes.

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[1] 37 Cyc p. 1233 n 62 New. [2] 37CJ p. 327 n. 5; 37 Cyc p. 1149 n. 69. [3] 37 Cyc p. 1233 n. 62 New. [4] 37 Cyc p. 1200 n. 95.

3. Laws 1921, c. 133, § 474, if construed merely as barring suit to enforce personal liability for taxes, still offends Constitution, art. 4, § 32, since it postpones the obligation.

4. Authorty of special collector of delinquent taxes is not restricted by chapter 26, Laws 1925, to taxes assessed since January 1, 1910.

Appeal from District Court, Bernalillo County; Helmick, Judge

Action by the State, by J. W. Norment, Special Tax Collector, against Mauricio Montoya. From a judgment sustaining defendant's demurrer, plaintiff appeals. Reversed and remanded, with directions.

J. W. Norment, of Albuquerque, for the State.

R. P. Barnes and J. A. Miller, both of Albuquerque, for appellee.

OPINION BY THE COURT

WATSON, J. [1] The state, by J. W. Norment, special collector, brought suit upon a tax assessment of 1897, praying personal judgment, and for a declaration and foreclosure of a lien upon the property assessed. A demurrer filed was based upon Laws 1921, c. 133, § 474, which reads as follows:

"All taxes accrued upon any property in this state prior to January 1, 1910, whether assessed or not, when no tax sale has been made therefor to a purchaser other than the county, shall be presumed to have been paid, and any tax lien therefor is hereby discharged, and it shall be the duty of all county treasurers to mark such taxes paid."

The state contended that the section just quoted was ineffectual to defeat its cause of action because of section 32, art. 4, of the Constitution, which reads 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 payment thereof into the proper treasury, or by proper proceeding in court."

The trial court sustained the demurrer, holding that the statute, if ineffectual as a discharge of the taxes, did at least operate as a statute of limitations to bar the remedy, and did also discharge the lien, neither of which effects, he held, is obnoxious to the Constitution. The state has appealed.

The above-quoted constitutional provision has been under consideration four times, and each time it has involved questions of taxation. In Board of Education v. McRae, 29 N. M. 85, 218 P. 346, we held that the repeal of a law under which a poll tax assessment had already been made could not effect liability for such assessment In Asplund v. Alarid, 29 N. M. 129, 219 P. 786, we considered that a property tax once duly assessed would be, and held that a per capita road tax duly assessed was, such an obligation or liability as could not be released or amended. In Lewis v. Tipton, 29 N. M. 269, 222 P. 661, we held that the time of redemption of a tax certificate owned by the state might be extended. The theory of this decision was that, when the county bids in the property, the taxpayer's obligation or liability is extinguished, and that, when he subsequently redeems the property, he in effect merely purchases real estate from the state. State v. State Investment Co., 30 N. M. 491, 239 P. 741, does not seem to have any bearing upon this case. These decisions seem to dispose of the first of appellee's positions; namely, that a tax assessed is not such an obligation or liability as is contemplated by the Constitution in providing that such obligations or liabilities may not be released, etc.

[2] Another of the appellee's contentions is that there is nothing in the constitutional provision to prevent the Legislature from releasing the state's lien upon the property. He points out that the lien is purely of statutory origin, does not exist unless expressly provided by statute, and insists that it may be discharged at the will of the Legislature. Appellant's reply to this contention is that a tax lien is essentially an "obligation or liability held by the

state." In a broad sense that contention may be correct, but it does not go far enough. To come within the language of the Constitution, it must be an "obligation or liability * * * of any person, association or corporation. * * *" The tax lien would not seem to be an obligation or liability of a person. As a lien, it is binding only on property. That it happens, also, to be a personal obligation in this case, or, rather, that there is a personal obligation in the same amount, and of the same origin, does not alter the situation. The co-existence of a personal obligation or liability is quite unessential to a lien, 37 C. J. 310, 311. So we hold with the trial court that, in so far as the statute has discharged the lien, it is not violative of the Constitution, and is to be upheld.

[3] As to the personal liability sought to be enforced appellee contends that, if section 474 cannot be sustained as a discharge or remission of the tax, it should be upheld as a statute of limitations, not discharging the liability, but merely barring the remedy. Such has been held to be the effect of our general limitation statutes. Newhall v. Field, 13 N. M. 87, 79 P. 712, 12 Ann. Cas. 979; Joyce Pruitt Co. v. Meadows, 27 N. M. 529, 203 P. 537; Baca v. Chavez, 32 N. M. 210, 252 P. 987. We fail to discover in this statute, however, the earmarks of an ordinary statute of limitations. A statute which merely bars the remedy is one of repose. It forbids the preferring of stale claims as matter of public policy. But this statute is one of presumption of payment, and directs the county treasurers to make record of actual payment. It does not act prospectively as statutes of limitations do. It acts only retrospectively. It allows no time within which the state may proceed on these old taxes before the bar is to fall, as statutes of limitations must do which are to affect private contract obligations. The plain purpose and necessary effect of this section is to remit and release tax obligations. If the Legislature may remit and release them when 11 years old, it may do so when they are but 3 years old. So we doubt the correctness of classifying sec-

tion 474 as a limitation statute. But the name or classification of the statute does not matter. It is the effect that condemns it. Admitting that it has done nothing more than to bar the remedy, leaving the obligation or liability intact, to be enforced if perchance a future Legislature should repeal section 474, yet the effect has been at least to "postpone" the obligation or liability—a result equally obnoxious to the Constitution. We do not consider, as we need not, whether an ordinary statute of limitations would be objectionable. We hold only that section 474, in its purpose and effect, is void, in so far as it attempts to prevent recovery by the state of personal judgments for taxes previously assessed, and therefore possessing the quality of obligations or liabilities of a person, association, or corporation held or owned by the state.

[4] Appellee also challenges the authority of the special collector to maintain this suit. Such authority is derived from chapter 26, Laws of 1925, and is limited to the collection of "delinquent taxes." Section 1 of that act defines delinquent taxes as "unpaid taxes * * * which were levied or assessed prior to the year 1924 **and not barred by statute.** * * *" It is argued that it appears from this that the Legislature intended to give the special collector no authority to collect taxes assessed prior to 1910. We agree with the trial court that there is no merit in this argument. The 1925 Legislature may have considered that the 1897 taxes were barred by the statute, but we have found that they are not. We can see no reason to hold that the Legislature, in defining delinquent taxes as it did, intended to restrict the authority of the special collector as to any taxes which might, as a matter of law, be delinquent. The wise purpose of so defining them was, we think, to avoid a definition in conflict with section 474. Had the Legislature intended to limit the authority of the special collector as to the taxes assessed in any particular years, it could easily have made such purpose clear.

The complaint, therefore, states a cause of action which will support a personal judgment against the defendant. The judgment must be reversed, and the cause remanded, with direction to the district court to overrule the demurrer and to proceed in the cause consistently herewith.

It is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3028. Jan. 6, 1927,

Rehearing Denied April 8, 1927.]

STATE v. ARCHER et al.

[255 Pac. 396.]

SYLLABUS BY THE COURT

1. The venue of a criminal case may be changed upon the application of the state, even over the objection of the defendant, where such public excitement and local prejudice exists as to be sufficient to prevent a fair trial.

2. Where the indictment is duplicitous and defectively charges a defendant with both the crime of principal in the second degree and accessory before the fact, a motion in arrest of judgment is not available to a defendant who has been convicted as an accessory, and who raised no such question before the verdict.

3. An instruction to the jury directing them that they must find that a defendant was absent at the time of the commission of the crime is not erroneous, where the defendant is being tried upon the indictment which defectively fails to allege his absence.

4. Where a witness has had an opportunity to speak and, where it would be natural to speak, or where it is his duty to speak, fails to make an important disclosure which he afterwards makes on the witness stand, it is a circumstance which, although susceptible of explanation, if unex-

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[1] 16CJ p. 203 n. 40. [2] 16CJ p. 1259 n. 22 New. [3] 16CJ p. 973 n. 84 New. [4] 40 Cyc p. 2706 n. 52; p. 2735 n. 95. [5] 30CJ p. 196 n. 78 New. [6] 16CJ p. 852 n. 87. [7] 30CJ p. 193 n. 54. [8] 30CJ p. 220 n. 7. [9] 29CJ p. 1069 n. 13 New. [10] 17CJ p. 50 n. 48. [11] 40 Cyc. p. 2706 n. 52; p. 2709 n. 64. [12] 16CJ p. 1007 n. 80. [13] 17CJ p. 339 n. 64. [14] 16CJ p. 811 n. 79, 81. [15] 17CJ p. 371 n. 51; 30CJ p. 454 n. 67 New. [16] 40 Cyc p. 2369 n. 32. [17] 30CJ p. 93 n. 35.

plained, tends to impair his credibility, and it is error to refuse cross-examination of the witness to develop such facts.

5. A defendant offered to show that a witness who had testified to important facts against the defendants had visited the home of the deceased and his wife, and while there was armed with a six-shooter. The offer was not tendered for the purpose of reflecting on the credibility of the witness, or to show motive for testifying as he had, so far as is disclosed by the record, but was offered to show the bald fact that he was there at the house armed. The offer was refused on the ground of immateriality, based upon the theory that it was immaterial, so far as the defendants were concerned, whether the witness was a co-conspirator to murder the deceased or not; the question being as to who killed the deceased, and whether the defendants were accessories. There was no error in the ruling.

6. Where an offer of proof is made in which incompetent matters are commingled with competent matters, so that the offer as a whole is incompetent, it is not the duty of the court to separate the competent from the incompetent matter, and the person who made the tender cannot predicate error upon the court's refusal to allow the same.

7. Defendant offered to prove that she and her husband knew of the conspiracy to murder him, and that deceased had expressed an intention to move to California, and that the defendant had agreed to go with him. The court ruled to allow the tender to the extent of allowing her to testify that she intended to remove with her husband to California. It was immaterial to show as an independent fact that the deceased had told her he wanted her to go to California to avoid trouble.

8. It was proposed to show the bald fact that some three years before the homicide a defendant was at times insane or mentally unbalanced on account of the death of her daughter. The court offered to allow testimony as to the sanity or insanity of the defendant during the time of the alleged conspiracy to murder, and indicated that the proposed witness would be allowed to state her reasons for such opinion, including the former insanity. Counsel refused to accept the privilege accorded. Under these circumstances there was no error in the ruling.

9. A defendant may by separate acts be both an accessory before the fact and principal in the second degree to the same murder.

10. An objection, not urged in the court below, will not be considered in this court.

11. A witness who on a former occasion failed to state important facts, notwithstanding he was asked if he knew

anything else about the case, may be impeached by showing that he failed to make such important disclosures on the former occasion.

12. An instruction which directed the jury to consider all of the evidence which they believed to be true is not erroneous.

13. The court instructed the jury that the law established certain rules to promote justice in the submission of facts to the jury, and that the court in its judgment had followed such rules. While this instruction is rather unusual, we can see no harmful error in the same.

14. At the close of the address to the jury by the district attorney, there was some demonstration of approval on the part of the audience. It was not extensive and involved a comparatively small number of the audience, who were at once ordered to leave the courtroom. The court carefully instructed the jury to disregard the demonstration and not to be influenced thereby. There is nothing in the circumstance to indicate that the verdict of conviction was produced by the demonstration. Under such circumstances the verdict will not be disturbed.

15. The crime of being an accessory to murder is a separate crime from murder itelf, and there was at the time of the commission of this crime and the trial no specific statutory punishment for being an accessory before the fact to murder. By section 1454, Code 1915, however, it is provided that in case of conviction of any felony, for which no punishment has been prescribed by law, the criminal may be punished by fine and imprisonment for not less than three months. The court erroneously sentenced all three defendants to death, and should have sentenced the accessories before the fact to imprisonment for not less than three months. The proper procedure in such case is to remand, with directions to resentence in accordance with the law.

On Motion for Rehearing.

16. A witness for the prosecution may be cross-examined as to whether, in giving a statement to the district attorney concerning the facts in the case, he disclosed important facts to which he testified at the trial.

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

Claude B. Archer was convicted of first degree murder, and Katherine Halsey and Luther Foster

were convicted of being accessories before the fact, and they appeal. Affirmed as to defendant Archer, and reversed and remanded, with directions, as to defendants Halsey and Foster.

James N. Bujac, of Carlsbad, for appellant Archer.

Renehan & Gilbert, of Santa Fe, Hiram M. Dow, of Roswell, and Robert C. Dow, of Carlsbad, for appellant Halsey.

E. de P. Bujac, of Carlsbad, and H. C. Maynard, of Roswell, for appellant Foster.

Fred E. Wilson, Atty. Gen., (C. J. Roberts, of counsel), for the State.

OPINION OF THE COURT

PARKER, C. J. It appears that the venue was changed from Eddy county, where the crime was committed, to Chavez county for trial upon the application of the state, and over the objection of defendants. Appellants all assign error.

[1] This presents a most unusual situation. Here the state moves for a change of venue, not on account of the state being unable to obtain a jury for a fair trial, so far as its interests are concerned, but on account of a supposed prejudice against the defendants, which might prevent the obtaining of a fair jury to them. They each protested against any change of venue, unless it be changed to Curry county, outside the district, and demanded a trial in Eddy county, where the crime was committed. The court, nevertheless, changed the venue to Chavez county, where the trial was had.

The question turns upon a proper understanding of our constitutional and statutory provisions. Our Constitution, § 14, of art. 2, is as follows:

"In all criminal prosecutions the accused shall have the right * * * to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

This section is clear, and gives to persons a right to a fair trial in the county in which the offense is alleged to have been committed. But it is to be observed that the constitutional guaranty is for a trial by an "impartial jury" in the county. The right has a double aspect. The trial must not only be in the county, but it must also be an impartial jury. If the latter element is not present, the constitutional guaranty no longer controls. In this connection, it is to be noted that the state owes a duty to the defendant to see that he has a fair trial under all circumstances. The situation is different from that in a civil case, where each party must protect his own interests against his adversary. But in a criminal case, the state has no desire and will not be allowed to secure an unjust conviction by means of a partial and prejudiced jury. This duty is ever present and is not to be obviated or dispensed with merely because the defendant, through mistake or ignorance, fails to invoke the remedies provided by law for his protection, or even refuses to invoke the same. Another consideration presents itself to the effect that in a case where public excitement and prejudice is of sufficient magnitude and is sufficiently widespread, if the defendant has an absolute right to a trial in the county where the crime is committed, he may defy the state and the law, stand on his constitutional right, and thus defeat justice. Such a proposition would seem to be absurd and preposterous. The showing made upon the application for the change of venue, by examination of the compurgators in support thereof, disclosed public excitement and local prejudice against the defendants, but none antagonistic to the interests of the state. The showing made, however, sufficiently disclosed public excitement and local prejudice and precluded the obtaining of a fair and impartial jury, which is the constitutional guaranty. The showing fulfilled the requirement of section 5573, Code 1915. At first sight it seems strange to say that the state may change the venue of the prosecution when all the people are in its favor and all are against the defendant.

But looking a little more closely, it is seen that the state is as much handicapped by a population prejudiced in its favor as by one prejudiced against it. The state is charged with the duty of confronting the defendant with a jury of fair and impartial men. It can proceed to trial in no other way. If such a jury is not to be had in the county, then, if the position of counsel for the defendants is correct, the prosecution must fail because defendants demand a trial in the discredited county. We examined this question in State v. Holoway, 19 N. M. 528, 146 P. 1066, L. R. A. 1915F, 922. The exact grounds for the change in that case do not appear, but it is fairly inferable from the transcript, which we have examined, that the state felt that it could not obtain a fair trial in the county; there having been one attempt resulting in failure of agreement on the part of the jury. However, the principle involved is the same in that case as in this. If a fair and impartial jury cannot be obtained in the county of the offense, then the defendant is deprived of no constitutional right by a change of venue to a county free from objection; he being guaranteed a fair trial in the county of the offense if obtainable there, but not if a fair jury cannot be obtained there. See in this connection 27 R. C. L. "Venue," § 5; 16 C. J. "Criminal Law," § 303. It seems clear, therefore, that the change of venue was rightfully granted.

[2] The indictment charged murder in the first degree against the defendant Claude B. Archer in the usual form, and then alleged:

> "And that Katherine Halsey, Luther Foster, and William Eugene Perdue (Perdue was acquitted and is not concerned in this appeal), then and there, unlawfully, feloniously, wickedly, premeditatedly, deliberately, with malice aforethought, and from a deliberate and premeditated design, unlawfully, feloniously, and maliciously to effect the death of said Fred Halsey, did procure, encourage, aid, abet, hire, and induce said Claude B. Archer to kill and murder the said Fred Halsey in manner and form aforesaid."

The defendant Halsey moved for a bill of particulars, and in response thereto the district attorney filed

a statement that the indictment charged the defendant Claude B. Archer with the crime of murder, and charged the defendants Halsey and Foster as accessories before the fact, and that the state would introduce evidence in support of said charges accordingly. Upon this understanding the parties went to trial without objection to the indictment; in fact, the defendants were not then called upon to disclose their defense. At the close of the testimony, the defendant Halsey moved for a directed verdict in her favor upon the ground that the indictment, made certain by the bill of particulars, charged her with being an accessory before the fact to the murder, and the disputed evidence showed that she was present, within 20 feet of the deceased when he was shot and killed, and, consequently, if guilty at all, she was guilty as principal in the second degree, and could not be convicted as accessory under the evidence. The motion was denied. The same proposition was again presented by requests for instructions to the jury. The jury convicted her as accessory before the fact. A motion in arrest of judgment was interposed in which the whole theory of the defense was reversed, and in which it was set out that the indictment charged her as principal in the second degree, and that she could not be convicted as accessory before the fact. This situation presents two considerations: Does the indictment charge her with being an accessory at the fact, or principal in the second degree; and, if so, has she by her conduct estopped herself now to so claim?

[**17**] The indictment evidently is duplicitous and defectively alleges both crimes. It alleges that the defendants "did encourage, aid, and abet" the commission of the crime, omitting the allegation that they were present, which is required by the rules of good pleading. But the above words imply presence. It would be impossible for one to encourage, aid, and abet another to commit a crime, unless the former was present either actually or constructively. The indictment further charges the said defendants that they "did procure, hire, and induce" the commission

of the murder, omitting the allegation that said acts were done before the commission of the crime, which is required by the rules of precedent and good pleading in order to charge a person as accessory before the fact. But there is something in the nature of procuring, hiring, and inducing a man to murder another which necessarily implies and requires that it be done prior to the murder. It could not be done at the murder. The hiring necessarily requires negotiations and an understanding between the parties. The same may be said of the procuring and inducing to murder. The place where such hiring, procuring, and inducing was done is correctly alleged under the word "there." The time is alleged as "then." In a case like this, where time is not an issuable fact, "then" means at any time within the statute of limitations. 1 Bishop's New Crim. Proc. § 400.

We have then a case where a charge of being an accessory before the fact is defectively stated, but where all of the elements of the crime are implied from the allegations employed. In such a case a motion in arrest of judgment is not available. 31 C. J. "Indictment and Information," § 548; State v. Montgomery, 28 N. M. 344, 212 P. 341.

[3] The same considerations control the objections urged by the defendant Foster in regard to the court's instruction No. 12, in which the court directed the jury that they must find that he was absent at the time of the commission of the crime. The indictment is defective in failing to allege his absence, but his absence is implied by the language of the allegation. At any rate, he might be guilty as accessory before the fact, even if he were also present and guilty as principal in the second degree. 1 Bish. New Crim. Law, § 664.

[4] It appears that one Zach Teel, a witness for the prosecution, testified to several damaging facts against the defendants Foster and Halsey. On cross-examination it was shown that early on the morning

following the homicide he telephoned the sheriff that he knew something about the case. The sheriff went to see him, and the witness told the sheriff that Mrs. Halsey had endeavored to hire the witness to murder her husband. He admitted, however, that he did not at that time tell the sheriff three other damaging facts which he had related at the trial. Thereupon the district attorney, on redirect examination, apparently for the purpose of strengthening the credibility of the witness, inquired whether the witness had not mentioned in a written statement given to the district attorney the several facts testified to on the present hearing. The witness answered that he had. Objection was interposed by counsel for Mrs. Halsey on the ground that the testimony called for oral evidence as to the contents of the written instrument, and that the defendant was entitled to have the writing if the witness was to be examined upon it, so that an intelligent cross-examination could be made. Much insistence was made in behalf of both Halsey and Foster that they were entitled to the written statement. The court, at the instance of Halsey, struck out the answer. Thereupon the prosecution withdrew the question and upon its motion, the question and answer were again withdrawn from the jury. Thereupon counsel for Mrs. Halsey offered to inquire of the witness whether in his written statement to the district attorney he had attemped to tell all he knew about the facts, and whether he had mentioned the damaging facts about which he had testified at the present trial. This offer was denied by the court upon the ground that it would be immaterial to show that he had omitted to state the facts generally, or the specific damaging facts to which he had testified at the trial. In this the court was clearly in error. It is well understood that, if the witness when he has an opportunity to speak, and where it would be natural to speak, or where it was his duty to speak, fails to make an important disclosure, which he afterwards makes on the stand, it is a circumstance which, although susceptible of explanation, if unexplained,

tends to impair the credibility of the witness. See State v. Perkins, 21 N. M. 135, 153 P. 258; 2 Wigmore on Ev. (2d Ed.) § 1042; 6 ones on Ev. (2d Ed.- pp. 2721, 2722. For this error the judgment will have to be reversed as to Mrs. Halsey.

Appellant Foster is not in position to take advantage of this error, not having joined in the objection to the ruling. No questions were asked on behalf of Foster involving this proposition, upon which the court ruled erroneously.

[5] Counsel for appellant Halsey sought to show by the witness Bertha Fields, who is the daughter of appellant Halsey, and who from time to time was being visited socially by the witness Teel at the Halsey home, that Teel was armed with a six-shooter. The offer was not tendered for the purpose of reflecting on the credibility of the witness, or to show motive on his part, so far as is disclosed by the record. The offer was refused on the ground of immateriality. The court based its ruling on the theory that it was immaterial, so far as appellants were concerned, even if Teel was a co-conspirator to murder Halsey by arrangement with Foster and Mrs. Halsey; the question being as to who killed Halsey, and whether the appellants were accessories. In this ruling the court was evidently correct.

[6] Complaint is made of the refusal of the court to permit appellants to ask the witness Perdue on cross-examination the following question:

> "Well, in October, 1923, didn't you shoot John K. Redmond in the town of Artesia, and wasn't John K. Redmond, after being shot in the leg by you in Artesia, taken to the Sisters' Hospital at Carlsbad on the 11th day of October, 1923, and did he not die from blood poisoning on October 21st, 1923, said blood poisoning resulting from the wound you inflicted upon him in the fight you had with that boy?"

The question by the prosecution was that the question was incompetent, which was sustained by the court. The question was clearly incompetent. The only pertinent inquiry was whether the witness shot

Redmond, and not whether he afterwards died of blood poisoning. The refusal by the court was followed by a tender of proof by way of cross-examination covering the same field as was embodied in the incompetent question. The tender contained some matters which were competent, for instance, that the witness had attempted to rob the clothing of the dead man, but the tender is so incumbered with incompetent mattrs as to justify the court in excluding it. 1 Wigmore on Evidence (2d Ed.) § 17; 9 Encyc. Evidence, p. 174; Elliott, Appellate Procedure, §§ 745, 746.

It is true that counsel did afterwards ask a proper question as to whether the witness had had a fight with Redmond, but, in explaining the object of the question, it is disclosed that it was asked for the purpose of obtaining an admission contradictory of the previous account of the affair by the witness. The question clearly failed to call for the desired admission.

[7] Counsel for appellant Halsey complains of the denial of the tender of proof by her to the effect that she and her husband knew of the conspiracy to murder him, and discussed the same, and that deceased had expressed an intention to sell out and move to California, and that the defendant had agreed to go with him. The relevancy of the offer, it is said, appears from the fact that she had discussed the danger with her husband, and that she had agreed to go with him to California to avoid the danger, all tending to show, circumstantially, that she probably was not a participant in the murder. The trouble with the present objection of counsel, however, is that the court ruled to allow the tender to the extent of allowing Mrs. Halsey to testify that she intended to remove with her husband to California, and to state why she so intended. It was immaterial to show as an independent fact that the deceased had told her he wanted to go to California to avoid trouble.

[8] Counsel complain of the exclusion of the tender of testimony on the subject of the insanity of Mrs. Halsey. We are satisfied the tender was properly refused. It was proposed to show the bald fact that some three years before the homicide, Mrs. Halsey was at times insane, or mentally unbalanced, on account of the death of her daughter. The court in denying the tender offered to allow testimony, both by expert and lay witnesses, that Mrs. Halsey was insane during the time of the alleged conspiracy to murder, and indicated that the proposed witness would be allowed to state her reasons for such opinion, including the former insanity. Counsel, however, refused to accept the privilege accorded. No offer to show insanity at the time of the commission of the crime was made. Thus counsel failed to place the court in error.

[9] Counsel urges that Mrs. Halsey, having been present at the killing, could not be an accesory before the fact. We have heretofore seen that this is an erroneous view.

[10] Counsel for Archer and Foster complain of the introduction of the testimony of Roten and Shattuck as to a cut or scratch on Archer's hand when he was arrested. The objection here urged to the effect that these witnesses were allowed to testify without being qualified as experts that the scratch could have been made by a barbed wire in the fence was not presented in the court below. There the objection in the case of Roten was that the question called for the conclusion of the witness, and in the case of Shattuck that the question was leading and called for the conclusion of the witness. It seems clear that the proposition presented here was not raised in the court below, and is not now available.

[11] A witness, Arthur Staten, testified that he had gone to the Perdue restaurant at 11 o'clock p. m. to look for some keys which he had lost, and, knocking on the door, aroused Archer, who rose from bed and

admitted him, all for the purpose of establishing an alibi for Archer. The prosecution introduced the stenographer who took the testimony of this witness before the grand jury, and showed that he gave no such testimony there. The stenographer further testified on cross-examination that no such questions were asked the witness before the grand jury. It appears, however, that upon cross-examination the witness Staten had been interrogated as to whether he had not been asked before the grand jury, "Do you know anything else about this case?" To which he answered, "That is all I know." He replied that he did not remember just how it was. This situation authorized the examination which was had. He had an opportunity and it was his duty, to tell the grand jury in answer to the above question all about the keys and finding Archer in bed, but he chose not to do so.

[**12**] Complaint is made of instruction No. 4, which directed the jury to consider all of the evidence which was believed to be true in arriving at the guilt or innocence of the defendants. The claim is made that this was erroneous on the ground that the jury should have considered all the evidence, true or false, in arriving at their verdict. This contention is frivolous, and needs no other comment.

[**13**] Complaint is made of instruction No. 26, in which the court stated that the law established certain rules to promote justice in the submission of facts to the jury, and that the court, in his judgment, had followed such rules. The only occasion for such an instruction, if any there could be, was the fact that there had been much controversy at the trial as to the order of proof. Counsel cite no authority, nor make any argument to convince us that harmful error was committed.

[**14**] All of the defendants complain of the demonstration made by the bystanders at the close of the address of the district attorney for the prosecution.

There were some demonstrations of approval when the district attorney closed his argument. It was not extensive and involved a comparatively small number of the audience, who were at once ordered to leave the courtroom. The court carefully instructed the jury to disregard the demonstration and not to be influenced thereby. There is nothing in the circumstances to indicate that the verdict of conviction was produced by the demonstration. Under such circumstances the verdict will not be disturbed. State v. Blancett, 24 N. M. 433, 174 P. 207.

[15] The court sentenced all three defendants to death. In behalf of Foster and Mrs. Halsey the proposition is made that the sentence is excessive and unauthorized. In this they are correct. The crime of being an accessory before the fact to murder is a separate and distinct crime from that of murder itself. We had no statute at the time of this trial providing specifically for the crime of being an accessory to a felony, but the procedure for its punishment is now provided by chapter 145, Laws 1925. Prior to that time it was a common-law crime and provision was made for its punishment by section 1454, Code 1915, which is a s follows:

> "When a criminal is found guilty in the district courts of this state of any felony for which no punishment has been prescribed by law, the said criminal shall be punished by a fine of not less than fifty dollars, or by imprisonment in the penitentiary for not less than three months, or both at the discretion of the court."

It is under this statute that Foster must be punished. The proper procedure in such a case is to remand the cause with directions to set aside the sentence as to Foster, and to resentence him in accordance with the law. Territory v. Herrera, 11 N. M. 129, 66 P. 523; State v. Ybarra, 24 N. M. 413, 174 P. 212; 1 Bishop's New Crim. Proc. § 1373.

Counsel are to be commended for the skill and diligence with which the case was presented in both this and the district court. The record discloses a most sordid state of facts. A hired assassin murdered the

deceased at the instigation of his wife and her paramour. This horrible crime was committed in a law-abiding community, where the good people were stunned by its enormity. By the diligence and ability of the district attorney and the law officers, the defendants were speedily brought to justice and convicted. They had an able defense by learned counsel, but the facts were so damning that they could not escape. It seems almost incredible that such things can come to pass.

It follows that the judgment and sentence as to Archer should be affirmed, and, as to Foster and Halsey, should be reversed, and the cause remanded to the district court, with directions to set aside the sentence as to Foster, and to resentence him in accordance with the law, and, as to Halsey, to award her a new trial, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

On Motion for Rehearing.

PARKER, C. J. [**16**] A motion for rehearing has been filed by the state, based upon the proposition that there is error in paragraph 4 of our opinion. The argument is that communications between an informer and the public prosecutor are privileged, and, as such, are not a proper subject for cross-examination, and the refusal of the court to allow cross-examination was therefore not erroneous, even if a wrong reason was assigned therefor. There is considerable confusion in the discussion of this proposition in the books. There are two principles involved. One is that, where the subject inquired about a state secret, the interests of the public are involved, and, in such a case, the communication is exempt from inquiry and disclosure on the ground of public policy. The exemption in such a case is not based upon the confidential relation between attorney and client, but upon the right of the state to protect its secrets for the purpose of effectively serving the interests of all the citizens. In such a case the exemption is absolute. The other

principle, often involved, is the right of the citizen who has informed the public prosecutor of the commission of a crime to be secure from exposure when he is afterwards sued for libel, slander, or malicious prosecution. In such a case, he is directly concerned in maintaining the exemption, being a party to the proceeding, and he may rely upon the confidential character of the communication made by him to the prosecuting officer. This is the true privileged communication between prosecuting attorney and a citizen; the latter having the right to rely upon the advice of the former. This doctrine encourages the citizen to inform the prosecuting officer of criminal offenses, which otherwise might go unpunished.

Though not always made clear, that the general doctrine is that communications by an informer to the prosecuting officer are generally privileged. In an action for slander or malicious prosecution against an informant based upon the communications, they are generally, if not always, so considered. 5 Jones on Ev. (2d Ed.) §§ 2168, 2203; Vogel v. Gruaz, 110 U. S. 311, 4 S. Ct. 12, 28 L. Ed. 158; Worthington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736; In re Quarles &Butler, 158 U. S. 532, 15 S. Ct. 959, 39 L. Ed. 1080; State v. Wilcox, 90 Kan. 80, 132 P. 982, 9 A. L. R. 1091, and note 1112; Michael v. Matson, 81 Kan. 363, 105 P. 537, L. R. A. 1915D, 1; Centoamore v. State, 105 Neb. 452, 181 N. W. 182; Attorney General v. Tufts, 239 Mass. 458, 131 N. E. 573, 132 N. E. 322, 17 A. L. R. 274; Lindsey v. People, 66 Colo. 343, 181 P. 531, 16 A. L. R. 1250, and note See, also, 5 Wigmore on Ev. (2d Ed.) § 2374.

The case at bar, however, is not a case of a civil action for libel or slander. This is a case where a witness on the stand for the prosecution was sought to be probed as to his credibility by examining him as to whether in his account to the district attorney he had included the important statements testified to by him at the trial. The witness claimed no exemption for himself; the objection was made by the dis-

trict attorney. No claim was made that any state secret was involved, nor that the interest of the state could in any way be impaired. Under such circumstances, there would seem to be no reason for the exemption, either for the protection of the witness or to guard the interests of the state. The broad statements in some of the cases to the effect that such communications can in no case be disclosed without the consent of the government are to be taken into consideration with the facts before the court. They were all, or nearly all, cases where the defendant was being sued for slander or malicious prosecution. There is one case, though, which seems to go further and to announce the doctrine that such communications are absolutely privileged. Arnstein v. United States, 54 App. D. C. 199, 296 F. 946. In that case defendants were on trial in the District of Columbia for bringing into the District stolen stock in violation of a local statute. They caused a subpoena duces tecum to be served on the district attorney of the county and state of New York to produce written statements made to him by one Gluck, a witness for the government. The district attorney appeared with the statements, but claimed they were privileged, because made to him in his official capacity in the course of an investigation by him in a matter which was pending and undisposed of in the New York courts involving some of the defendants then before the court. The exemption was sustained on the broad ground that such communications may not be inquired into without the consent of the state. No reliance, in terms, is attached to the fact that this was a state secret; the criminal charges being pending and undisposed of, which alone would have justified the holding. But the court seems to have interpreted the cases of the United States Supreme Court to establish the privileged character of the communications in all cases regardless of the circumstances. This is probably too broad a view. When it is necessary to protect the interests of the state, or when it is necessary to protect a citizen from an action of libel, slander, or mal-

icious prosecution based on his communication to the prosecuting officer, which he should always feel free to make, then the communication is privileged. When no such circumstances are present, there is no reason for the privilege and it should not prevail. There are some well-reasoned cases to this effect. In People v. Davis, 52 Mich. 569, 18 N. W. 362, the defendant was on trial for adultry with the wife of one O'Rourke. The defendant called the district attorney who was acting when the prosecution was begun and asked him whether, in a statement made to him by O'Rourke, the latter did not say that on the occasion when he now testifies he saw the defendant and his wife flagrante delicto he had seen nothing wrong between the parties. Objection on the ground that the communication was privileged was made and sustained by the court. In the discussion of the matter, the court, speaking through Cooley, Chief Justice said:

"If, then, there is any privilege in the case, it must be the privilege of the state in whose interest O'Rourke assumed to act when making his communication to the prosecuting officer. And we are not called upon in this case to consider whether there may not be cases in which the prosecuting attorney would be excused, in the interest of the state, from disclosing what had been told to him with a view to the commencement of criminal proceedings. There would be strong reasons in many cases why the counsel of the state should be inviolably kept; and nothing we shall say in this case will be intended to lay down a rule except for the very case at bar and others standing upon the same facts.

"In this case the prosecutor testified that on a particular day and at a place specified he witnessed the commission of the crime charged. The defense then offered to show that in laying the case before the prosecuting officer the prosecutor stated that on the day and at the place specified he witnessed nothing wrong between the parties. If he did so state at that time when he was laying before the public authorities the very case they were to prosecute, and if he now swears to a case altogether different, it may well be argued that he is unworthy of belief; and the state has no interest in interposing any obstacles to the disclosure of the facts, unless it is interested in convicting accused parties, on the testimony of unworthy persons. But surely the state has no such interest; its interest is that accused parties shall be acquitted, unless upon the facts they are seen to be guilty; and if there shall be in the possession of any of its officers information that can legitimately

tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it. There was therefore no privilege to preclude the giving of the testimony for which the defense called."

A well-considered case is Riggins v. State, 125 Md. 165, 93 A. 437, Ann. Cas. 1916E, 1117. Attached to the report is a valuable note at page 1121. The defendant in that case was convicted of sexual intercourse with a girl between the ages of 14 and 16 years. A question was asked her on cross-examination as follows: "Didn't you tell the state's attorney that you never had intercourse with Walter Riggins?" Objection was interposed and sustained by the court. The Supreme Court of Maryland held that this was error and makes a lengthy analysis of many of the cases. See, also, Marks v. Beyfus, 25 Q. B. Div. (Eng.), 494-498, wher it is said that, when it is made to appear to the court that a disclosure might show the prisoner's innocence, the general rule of privileged communications must yield.

In this connection it is to be noted that we are not considering a question as to whether a district attorney may be put on the stand to contradict a witness for the state who has made communications to him in furtherance of the prosecution. Such a procedure would seem to present such administrative difficulties frequently, as to impair the effectiveness of the prosecution and to involve the administration of the criminal laws in great confusion. What we are determining is whether a witness for the state is subject to cross-examination for the purpose of probing his conscience and testing his memory and reliability by questions as to what he communicated to the district attorney in regard to the facts in the case, and we hold that it can be done.

It is to be regretted that such an objection should have been interposed and sustained. The matter was trivial, and should not cause a reversal of the judgment. But when a legal right has been invaded, we have no reason to ignore it in case we cannot say

the error was harmless.

It follows from the foregoing that our former opinion is to be adhered to, and it is so ordered.

BICKLEY and WATSON JJ., concur.

[No. 3107. March 24, 1927. Rehearing Denied May 12, 1927.]

FIELD v. OTERO et ux.

[255 Pac. 785.]

SYLLABUS BY THE COURT

1. An insolvent husband, indebted to his wife, may prefer her as a creditor and convey property to her in payment of the debt, even though he thereby intends to prevent other creditors from reaching the same.

2. A conveyance from husband to wife cannot be set aside as fraudulent as against creditors, in the absence of allegation and proof that the husband was insolvent both at the time of the conveyance and at the time of filing of the suit to set aside the conveyance.

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

Action by Neill B. Field against Alfredo J. Otero and wife. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

Hanna & Wilson, of Albuquerque, and J. F. Bonham, of Carrizozo, for appellants.

Joseph Gill, of Albuquerque, for appellee.

OPINION OF THE COURT

PARKER, C. J. Alfredo J. Otero and Candelaria Otero are husband and wife. The appellee on November 19, 1924, obtined a decree against the husband in a suit brought to foreclose a lien on shares of corporate stock. On December 24, 1924, the husband filed for record a deed from him to his wife convey-

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[1] 27CJ p. 639 n. 23. [2] 27CJ p. 770 n. 64.

ing the land in controversy in this action. On December 29, 1924, appellee recovered a deficiency judgment against the husband, and on January 13, 1925, recorded a transcript of the same in the proper office. On February 5, 1925, appellee took out an execution on the last-mentioned judgment, and on February 17, 1925, filed this action in aid of his execution, and alleging that the deed above mentioned was without consideration, and that appellants had fraudulently conspired to place the said real estate beyond the reach of the husband's creditors, and especially appellee, and that the husband was insolvent at the time of the recording of the deed. Appellants defended upon the ground that the deed was bona fide and supported by a valuable consideration. In the final decree, the court found as a fact:

"That the land in question was conveyed to the defendant Alfredo J. Otero something like 25 to 30 years ago; at the time of the conveyance of the land he bought the land for the purpose of conveying it or giving it to his wife, and did make a verbal gift of the land to her, but did not take any steps towards conveying the land to her at that time, and the title remained in him up until February 1, 1923, at which time he made a formal deed conveying the land to her, but withheld the deed from record until between the dates of the rendition of the judgment and the deficiency judgment in cause 897, the deed being filed for record on the 24th of December, 1924; that it was a matter of common knowledge, or general knowledge, in the community of Jemez, that this property was the separate property of the defendant, Candelaria Otero, wife of the defendant Alfredo J. Otero; that the defendant Alfredo J. Otero is, and was at the time of the filing of this suit, insolvent, and did not have sufficient property to pay his outstanding obligations, including the indebtedness due the plaintiff in this case. The court further finds as a matter of fact that the deed was placed of record at the time with the intention of preventing the plaintiff in this case from obtaining or levying upon such property and the sale of the same for the satisfaction of the indebtedness due the plaintiff. The court will find that the defendant Candelaria Otero had no knowledge of and did not enter into any conspiracy to defraud the plaintiff in any way in connection with the property, either the withholding of the deed from record or the recording of it at the particular time it was recorded. The court finds that the defendant Alfredo J. Otero used property which had been given to the defendant Candelaria Otero by her father for a long period of time, using the proceeds of the property for his inidivdual use and also for the use of the community, the

amount of such property being uncertain from the testimony and approximating something in the neighborhood of $10,000; that the defendant Alfredo J. Otero never did pay the defendant Candelaria Otero any of this money, and is indebted to her at this time in some amount—the court makes no specific finding as to the amount. That at the time this property in controversy was purchased originally, at the time defendant verbally gave it to his wife, he was in good financial circumstances and was not indebted in any considerable amount."

As a conclusion of law on the foregoing findings, the court held that the deed was fraudulent, and set the same aside as to the plaintiff and appellee. From this judgment this appeal is taken.

[1] The testimony shows that the husband's father paid for the land and enjoined upon the husband at the time that he convey the same to the wife as a gift from the father. The husband, therefore, was never the beneficial owner of the property. The wife's father conveyed property to the husband for the use and benefit of the wife, the proceeds whereof the husband used upon the understanding with his wife at the time that the money was her money, and was to be repaid to her. The wife did not participate in any design to defraud the appellee by placing the property beyond his reach, but merely received the conveyance in consumnation of the gift made years before to her by her husband. Under such circumstances, the conveyance was clearly not voluntary and is to be sustained.

It is to be noticed that, aside from the restrictions of the Bankruptcy Law, or local insolvency laws, neither of which has been invoked in this case, there is no law which prevents a preference of one creditor over another. 12 R. C. L. Fraudulent Conveyances, § 91; 27 C. J. Fraudulent Conveyances, §§ 363, 364. This same principle applies to transactions between husband and wife. 12 R. C. L. Fraudulent Conveyances, § 105; 27 C. J. Fraudulent Conveyances, § 405; Ilfeld v. Baca, 14 N. M. 65, 89 P. 244.

This case differs from the case of First Nat. Bank v. McClellan, 9 N. M. 636, 58 P. 347. In that case

the conveyance was voluntary, without consideration, and fraudulent. In this case the court has found that the wife is the bona fide creditor of her husband in an amount at least equal to the value of the property involved, and the evidence of both husband and wife shows that this was taken into consideration in making and receiving the conveyance.

[2] There is another consideration which prevents recovery in this case. The complaint fails to allege insolvency of the husband at the time of the execution of the deed, or at the time of recording the same, and the court expressly refuses to so find, although so requested by the plaintiff. The court found insolvency of the husband at the time of the commencement of this action, which was subsequent to the recording of the deed, and more than two years subsequent to the execution of the deed. That such an allegation and such proof is necessary in a case of this kind, see 1 Moore on Fraudulent Conveyances, p. 901; 27 C. J. Fraudulent Conveyances, § 674; 12 R. C. L. Fraudulent Conveyances, §§ 10, 165; Nevers v. Hack, 138 Ind. 260, 37 N. E. 791, 46 Am. St. Rep. 380; Wagner v. Law, 3 Wash. 500, 28 P. 1109, 29 P. 927, 15 L. R. A. 784, 28 Am. St. Rep. 56. There is a minority doctrine to the contrary. It is generally held that a like allegation is required as to defendant's condition at the time of the bringing of the action, but this is not involved; the court having found insolvency at the time of bringing this action. This proposition was urged in the demurrer to the complaint and is urged here, and is fatal to the maintenance of the action. The plaintiff asked a finding that the husband was insolvent at the time of the conveyance, which was refused by the court, as before seen; but the point is not argued in the brief, and even if it were there is substantial evidence to support the court's refusal.

It follows that the decree is erroneous and should be reversed and the cause remanded, with directions to set aside the decree, and to enter a decree in favor of the wife, establishing her title to the land in con-

troversy, as prayed in her answer, and it is so ordered.

BICKLEY and WATSON, JJ. The refusal to find that Alfredo J. Otero was insolvent, when he made the conveyance to his wife, we consider fatal to the judgment; and we therefore concur in the result.

[No. 3228. May 6, 1927.]

BOARD OF COM'RS of SAN MIGUEL COUNTY v. FRIENDLY HAVEN RANCH CO. et al.

[257 Pac. 998.]

SYLLABUS BY THE COURT

Under the provisions of section 2626, Code 1915, a public highway can be established either in pursuance of some law of the state, or by dedication, or by recognition and maintenance by the public authorities, none of which elements are present in this case. Mere permissive use of a private way by the public is not sufficient to establish a public highway by prescription.

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

Action by the Board of County Commissioners of San Miguel County against the Friendly Haven Ranch Company and another for an injunction. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with direction.

A. T. Rogers, Jr., of East Las Vegas, for appellants.

Chester A. Hunker, Dist. Atty., and Geo. L. Robertson, Asst. Dist. Atty., both of East Las Vegas, for appellee.

OPINION OF THE COURT

PARKER, C. J. The court below awarded a peremptory injunction against defendants, restraining them from obstructing by means of locked gates and fences, an alleged public road. The question is whether there

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[1] 18CJ p. 47 n. 67; 29CJ p. 373 n. 99; p. 375 n 20; p. 376 n. 24; p. 377 n. 44, 45; p. 378 n. 46; p. 379 n. 61.

exists in fact a public road at the place involved. It appears that the county authorities have never laid out a road, and have never assumed authority over any road at the place involved, and have never worked or improved the same. The court found that there is a road at the place in controversy, which has been traveled by the public generally for a period of more than 40 years. There is no finding as to the character of the use made of the road by the public, whether it was adverse under claim of right, or whether it was merely permissive. The proof shows that the road was privately constructed and maintained, and tends to show that the use made of the road by the neighbors and the public was permissive at all times. No dedication of the road to public use is shown. Under such circumstances, it would seem clear that no public road exists at the place involved.

Our statute (section 2626, Code 1915) defines what are public highways as follows:

> "All roads and highways, except private roads, established in pursuance of any law of New Mexico, and roads dedicated to public use, that have not been vacated or abandoned, and such other roads as are recognized and maintained by the corporate authorities of any county in New Mexico, are hereby declared to be public highways."

It appears from this statute that we have three methods of establishing highways: They must be established in pursuance of some law of the state; or they must be dedicated to public use; or they must be recognized and maintained by the public authorities. In this case not a single element mentioned in the statute is present.

Under a statute identical in terms with ours, the Supreme Court of Colorado considered the identical question now before us in Lieber v. People, 33 Colo. 493, 81 P. 270, and held that there was no highway established by the proof, which proof was quite similar to the proof in this case. See, also, O'Connell v. Chicago, etc., R. Co., 184 Ill. 308, 56 N. E. 355, where the court discusses the question of acquisition by prescription of the right to a public highway. The pro-

position is not open to debate, and all the courts agree that in order to establish a highway by prescription the public use must be adverse, uninterrupted, continuous, and under claim of right. See, also, 1 Elliott, Roads and Streets (4th Ed.) § 194.

It follows that the judgment of the court below is erroneous and should be reversed, and the cause remanded with directions to set aside the judgment and to dismiss the complaint, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 2853. Sept. 22, 1925. Rehearing Denied May 21, 1927.]

PORTER v. ALAMOCITOS LAND & LIVESTOCK CO.

[256 Pac. 179.]

SYLLABUS BY THE COURT

1. Where defendant was in court when the case was set for trial with consent of the parties, and did not demand a jury, and afterwards the case was submitted on the date set for such trial the defendant then making no objection to the proceedings and not demanding a jury, is not in a position to complain that there was no submission to a jury.

2. One who holds a note secured by a mortgage has two separate and independent remedies which he may pursue successively or concurrently; one is on the note against the person and property of the debtor, and the other is by foreclosure to enforce the mortgage lien upon his real estate.

3. A plaintiff may unite in the same complaint several causes of action, both legal and equitable.

4. If two causes of action are stated in one count, this might offend against the requirement of practice with respect to separately stating the causes of action sought to be joined; but, if defendant makes no objection to the intermingling of the causes of action in a single count of the complaint, he is not in a position to complain if the trial court considered that the complaint stated two causes

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[1] 35CJ p. 166 n. 2. [2] 34CJ p. 291 n. 59; 35CJ p. 204 n. 30, 31. [3] 27 Cyc p. 1515 n. 44, 45. [4, 5] 1CJ p. 1088 n. 53; p. 1091 n. 97. [6] 33CJ p. 815 n. 34; 34CJ p. 293 n. 76. [7] 34CJ p. 293 n. 76.

of action, one at law upon the note, and the other in equity for foreclosure of the mortgage.

5. The court having jurisdiction of the parties and to administer both legal and equitable relief in the same lawsuit under appropriate pleadings, its mistake (if mistake it was) in holding the complaint sufficient to warrant both was a judicial error, and not an "irregularity."

6. Where it is plain that the action is primarily to foreclose a mortgage, and the other (legal) relief sought is merely incidental, and consequently the action should be considered as one in equity, if the question of which was the primary purpose of the suit was material, and the court made a mistake in its decision, such a mistake was a judicial error, and not an "irregularity."

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

Suit by J. H. Porter against the Alamocitos Land & Live Stock Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Renehan & Gilbert, of Santa Fe, and R. A. Prentice, of Tucumcari, for appellant.

O. P. Easterwood, of Clayton, and E. R. Wright, of Santa Fe, for appellee.

OPINION OF THE COURT

BICKLEY, J. This suit was brought for the foreclosure of a mortgage on certain real estate situated in Harding county, N. M. On March 10, 1922, judgment was rendered foreclosing the mortgage, and in the same adjudication a personal judgment was given against the appellant for the full amount of the indebtedness claimed by the plaintiff (appellee).

The complaint recites substantially that on the 30th day of July, 1927, the defendant (appellant), being then indebted to the plaintiff in the sum of $16,500, executed and delivered to the plaintiff its certain promissory note, whereby it promised and agreed to pay said indebtedness with interest and attorney's fees, if the note was not paid when due; that various other defendants executed a written guaranty for the payment of the indebtedness sued on, after the security should first be exhausted; that the prin-

cipal defendant likewise executed a mortgage on certain land and assigned a certain state contract to secure the payment of such indebtedness; that the whole amount of the principal with interest thereon as provided by the terms of the note sued on from the 1st of October, 1920, until paid, remained due and unpaid; that demand had been made for payment and payment refused. The appellant admitted that the copy of the note set forth in the complaint was true and correct. The first paragraph of the prayer demands judgments against the principal defendant (appellant), the Alamocitos Land & Live Stock Company, for the full amount of the $16,500 principal, with interest and attorneys' fees. The second paragraph of the prayer asks for the foreclosure of the mortgage lien. To this complaint defendants demurred, and the demurrer was overruled. The appellant likewise filed a motion to strike certain portions of the complaint, which motion was overruled. The defendants then answered the complaint. The answer, so far as appellant is concerned, admitted that the principal and interest of said note was due and unpaid, but alleged that the note sued on was made and delivered to the plaintiff upon the usurious agreement between the defendant and plaintiff that the defendant should pay, and the plaintiff should receive for the loan of the money, a greater sum than 12 per cent. per annum.

The appealing defendant prayed that the relief asked for by the plaintiff be denied, and that said defendant be not required to pay to the plaintiff a greater sum than the principal of the note with interest thereon at the rate of 10 per cent per annum until paid, and asked that attorneys' fees be denied to plaintiff. A reply was filed by the plaintiff denying that the transaction was usurious and denying all of defendant's affirmative allegations. Plaintiff gave notice that he would call the case up for trial on the 2d day of March, 1922, at Raton, Colfax county, N. M. At such time and place, the parties appeared and the cause was continued by consent of all parties and by

the court set for trial at Clayton, Union county, N. M., on the 10th day of March, 1922, at which time and place the plaintiff appeared and announced ready for trial, and the defendant, the Alamocitos Land & Live Stock Company, appeared by its president, R. J. Freeland, who was also one of the guarantor defendants, and said cause was continued until 2 o'clock in the afternoon of March 10, 1922, at which time plaintiff presented his evidence, and the defendants, failing to offer any evidence and not asking any further continuance of said cause to a subsequent date, the court having considered the evidence offered and having heard the counsel for plaintiff, made findings and conclusions and rendered the judgment and decree, which recites that the same was done in open court on the 10th day of March, 1922, the date of said trial.

Thereafter an execution was issued and levied upon certain personal property of the appellant, the Alamocitos Land & Live Stock Company. Appellant filed its motion to quash the execution and motion to set aside the sale under the execution. These motions were overruled by the court. Appellant then filed a motion asking the court to strike from the decree certain portions thereof and for an order nunc pro tunc permitting appellant an exception to that part of the decree granting a personal judgment against appellant. This motion was also overruled. On August 25, 1922, appellant filed its motion for allowance of an appeal from final judgment and appeal was granted by the court, the order being filed on August 30, 1922. Time for perfecting the appeal was by various orders extended to September 26, 1922. On December 4, 1922, appellant filed its motion to modify the judgment or, in the alternative, to vacate the same. On the same day, appellee filed his motion to strike the motion to vacate the judgment, setting out that all the matters set out in the motion to vacate had theretofore been passed upon by the court adversely to the defendant; that the time for filing

such a motion had elapsed, and that the defendant had thereofore taken an appeal from the final judgment. Thereafter the court sustained the motion of appellant to vacate and modify the final judgment. From this order of the court sustaining the motion to strike the motion to modify and vacate the judgment, the appeal was prayed and allowed, and upon such appeal the case is now in this court.

[1] There are nine assignments of error, but the appellant says in its brief:

"The court will note that but one question in reality is raised by this appeal, to wit, whether or not the district court, in an ordinary suit brought for the purpose of foreclosing a real estate mortgage, has jurisdiction to render a personal judgment against the mortgagor for the full amount of the indebtedness claimed to be secured by the mortgage, and to authorize the immediate issuance of execution upon such judgment in the same decree as that in which the mortgage was foreclosed."

The only basis of such a contention is that defendant was entitled to a jury trial before a personal judgment could be given against it.

Section 4193 of Code of 1915 provides:

"An issue of fact in an action for the recovery of money only, or specific real or personal property, where the right of trial by jury existed at common law, must be tried by a jury, unless a jury trial be waived."

Section 4189 of the Code provides:

"An issue of fact arises upon a material allegation in the complaint controverted by the answer."

The plaintiff having pleaded a copy of the note sued on, and the defendant having admitted the copy pleaded as correct and admitted the execution thereof, further pleaded—

"that the note mentioned in the complaint was made and delivered to the plaintiff upon the usurious agreement between the defendant and the plaintiff, that the defendant should pay the plaintiff, and that the plaintiff should reserve and secure to himself for the loan of money a greater sum than at the rate of 12 per cent. per annum, to wit, at the rate of 12 per cent. per annum after the maturity of said note and an additional 12 per cent. per annum on the interest so charged."

That statement of the rate of interest to be charged is exactly what is stated in the note sued upon. This allegation not being controverted but, on the other hand, being relied upon by the defendant for the purpose of showing a usurious contract, did not present an issue of fact. An issue of law arose as to whether upon the admitted facts the contract was usurious.

[2] If the court erred in finding the contract free from the taint of usury, this was an error occurring upon the trial and may not be taken advantage of by a motion to vacate the judgment, the remedy being by an appropriate motion for a new trial or rehearing on appeal. Wallis v. Mulligan, 20 N. M. 328, 148 P. 500; Coulter v. Board of County Commissioners of Bernalillo County, 22 N. M. 24, 158 P. 1086.

It will be noted that section 4193, quoted supra, at most only provides for the trial of an issue of fact by a jury in certain cases, "unless a jury trial be waived." Section 4197, Code 1915, provides certain specific methods by which a trial by jury may be waived, one of which is "by suffering default, or by failing to appear at the trial." Section 4198 provides that upon the calling of the docket at a term of court the parties shall either demand or waive a jury in the trial of a cause in which they are interested. It will be noted that both appellant and appellee were present in court at Raton, Colfax county, on March 2, 1922, and thereupon consented that the case should be set for trial at Clayton, Union county, N. M., on March 10, 1922. No demand was made by appellant for a jury. The case was one which originated and which was then pending on the civil docket of Harding county, one of the counties of the Eighth judicial district. When the appellant on March 2d consented to a trial of the case in Clayton, Union county, N. M., on March 10th, and the record not showing any change of venue from Harding county to Union county, it must be assumed that the appellant did not expect that in any issues triable by jury could be tried in Clayton, Union county, on the date agreed upon for the trial.

"Appellants contend that the court erred in denying the demand for a jury trial. As seen above, appellants were present in court and made no demand for a jury when the case was set down for trial. Appellants, therefore, waived their right to a jury (Chelan County v. Navarre, 38 Wash. 684, 80 P. 845), and it was not error for the court afterwards to deny the request when the case was on for trial." Fruitland Irr. Co. v. Smith, 54 Wash. 185, 102 P. 1031.

In the case at bar, the appellant did not demand a jury on the trial at Clayton on March 10th. It appears from the record that the attorneys for the appellant did not appear at the trial in Clayton, but it is recited in the judgment that the appellant appeared by its president, R. J. Freeland, and the case was thereupon submitted to the court upon the evidence offered by the plaintiff, the defendant offering no evidence, making no objections, and asking no continuance and making no demand for a jury.

It is said in the article on Juries in 35 C. J. par. 114:

"A jury trial is waived by voluntarily submitting a controversy to the determination of the court, or by permitting the court, without any objection or demand for a jury trial to proceed to hear and determine it."

Many cases are cited in support of the text. In one of the later cases, Van Dorn Iron Works Co. v. Erie-Huron Realty Co., 108 Ohio St. 314, 140 N. E. 325, the court said (syllabus):

"In a civil action for judgment for money a trial by jury may be waived, not only by express stipulation of the parties or their attorneys, or statement in open court, but also by their conduct in submitting the cause to the court without objection; and an objection thereto cannot successfully be made after such submission and judgment of the court."

This court has expressed itself in accord with the views heretofore stated. In Pankey v. Ortiz, 26 N. M. 575, 195 P. 906, 30 A. L. R. 92, this court said:

"Where the jury has been waived expressly or by action of the parties, a court of equity has taken jurisdiction of the cause."

In Territory v. County Commissioners of Bernalillo

County, 5 N. M. 1, 16 P. 855, in which it appeared that the controversy was expressly submitted to the court, we said:

"We have not found in the record that any request was made by the respondent to have the questions involved submitted to the jury, or of any objection made at the time to their consideration by the court. A court should have opportunity, in cases of law at least, to consider the very question presented in the Supreme Court. It often occurs that a point may be passed upon inadvertently when if the attention of the trial court is at the time of the ruling called to it the decision will be otherwise. * * * After such a submission, without the most remote suggestion even that it was desirable that a jury should be called, we think it should be held, even if a jury could be impaneled—a point not here decided—that such action was a waiver of the jury. In any event it is difficult to perceive what duty there was for a jury to perform. Appellant is not in a position to complain that there was no submission to a jury."

As in that case, so in this it is difficult to perceive what duty there was for a jury to perform, and appellant is not in a position to complain that there was no submission to a jury.

Finding no error in the record, the judgment of the trial court should be affirmed, and it is so ordered.

PARKER, C. J., and WATSON, J., concur.

On Motion for Rehearing.

BICKLEY, J. Appellant has filed a motion for rehearing upon the grounds that in the original opinion the court failed to pass on appellant's contention that the decree complained of was in excess of the equity powers of the court in mortgage foreclosure cases, and therefore irregular and in excess of the jurisdiction of the court, and that in said opinion we failed to pass upon appellant's contention that the decree complained of was not within the issues embraced by the pleadings, and was therefore irregular and in excess of the court's jurisdiction. The motion assailing the judgment was entitled "Motion to Vacate Judgment for Irregularities." The motion declared, however, that the judgment is "irregular and beyond the jurisdiction of the court."

The appellant argues that the decree was beyond the jurisdictional powers of the court, and should have been vacated, whether the term "irregularity" was an appropriate designation of the defect or not. If all or a part of the judgment was void, at least the void portion should have been vacated. So our consideration will be given to the question as to whether the judgment was void in whole or in part. The appellant argues that, since the decision of this court in Young v. Vail, 29 N. M. 324, 222 P. 912, 34 A. L. R. 980, the settled law of this jurisdiction is:

"(1) That a proceeding to foreclose a mortgage is a suit in equity.

"(2) That even under our Code there is no such thing as a mixed action, but that the jurisdiction exercised by the courts must be either purely legal or purely equitable.

"(3) That mortgage foreclosure proceedings being strictly equitable in their nature, and the court having no authority to exercise common-law jurisdiction therein, the appellant has no right to a trial by jury in such cases."

Counsel for appellant concedes that the rule existing at common law is that, in the absence of statutory prohibition, the mortgagee could pursue all his remedies concurrently; for example, he could maintain in a suit at common law upon the bond or note, and at the same time pursue his equitable remedy of foreclosure. Appellant quotes 2 Jones, Mortgages, § 1215, as follows:

"Where there is no prohibition by statute, the mortgagee may pursue all his remedies concurrently or successively. He may at the same time sue the mortgagor in an action at law upon the note, or other personal debt; may enter to foreclose, file a certificate thereof; may maintain a right of entry or ejectment to recover possession of the land, and a bill in equity to foreclose the mortgage. * * * The cause of action on the debt is personal against the person and property of the debtor; and the proceedings to foreclose are to enforce the lien upon the debtor's real estate which he was charged with the payment of the debt. * * * So long ago as the case of Burnell v. Martn, 2 Doug. 417, Lord Mansfield declared that 'it had been settled over and over again that a person in such case is at liberty to pursue all his remedies at once'."

Appellant also quotes Phelan v. Iona Savings Bank, 48 Ill. App. 171, as follows:

"The mortgagee might, if he desired a judgment in personam, bring his action at law upon the indebtedness, and might at the same time file a bill in chancery for the foreclosure of the mortgagor's equity of redemption. The remedies are concurrent. 4 Kent's Com. 184."

Further statements of the same doctrine will be found in 19 R. C. L. "Mortgages," 309, where it is said:

"In short, the case of a mortgage is an exception to the general doctrine that a party shall not be allowed to sue at law and in equity for the same debt, and a mortgagee may pursue all his remedies at once, though he is under no obligation to do so, or he may pursue them concurrently or successively."

To the same effect, see Wiltsie on Mortgage Foreclosure, § 11.

[3] The rule is thus stated in Colby v. McClintock, 68 N. H. 176, 40 A. 397, 73 Am. St. Rep. 557:

"One who holds a note secured by mortgage has two separate and independent remedies, which he may pursue successively or concurrently; one is on the note against the person and property of the debtor, and the other is by foreclosure to enforce the mortgage lien upon his real estate."

Our attention has not been called to any statutory prohibition against such procedure in this state, and we know of none.

[4, 5] The next inquiry is whether these remedies may be pursued concurrently in the same action, and the two results obtained in the same judgment. The appellee claims that his complaint prays for a personal judgment on the note and for a foreclosure of the mortgage lien, and that the allegations of the complaint warranted the court in granting both kinds of relief. He invokes section 4067 of the 1915 Code, which is as follows:

"There shall be in this state but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated as civil action, and the party thereto com-

plaining shall be known as the plaintiff, and the adverse party as the defendant."

He further argues that, under the practice in New Mexico, it is proper to bring suit involving both legal and equitable demands, and in which both legal and equitable remedies are invoked, and that otherwise this section of the statute would be as an absurd provision and would be meaningless. He also invokes section 4105 of the 1915 Code, which is as follows;

"The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of:

"First. The same transaction or transactions connected with the same subject of action; or

"Second. Contract, express or implied; or

"Third. Injuries with or without force, to person and property, or either; or

"Fourth. Injuries to character; or

"Fifth. Claims to recover real property, with or without damages for the witholding thereof, and the rents and profits of the same; or

"Sixth. Claims to recover real property, with or without damages for the withholding thereof; or

"Seventh. Claims by or against a party in some representative or fiduciary capacity, by virtue of a contract or by operation of law. But the causes of action so united must all belong to one of these classes and must affect all the parties to the action, and not require different places of trial, and must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished."

Appellee quotes from the opinion of Judge Pope in Baca v. Anaya, 14 N. M. 382, 94 P. 1017, 20 Ann. Cas. 77, as follows:

"* * * That an issue of fact in an action for the recovery of money only, or specific real or personal property, where the right of trial by jury existed at common law, must be tried by a jury, and that other issues of fact may be referred to a jury. In our judgment this invests the court with ample power to impanel a jury under either branch of its jurisdiction, whenever the rights of the parties require it. As was said in Hammer v. Garfield Mining Co., 130 U. S. 295 [9 S. Ct. 548, 32 L. Ed. 964], quoting

from Basey v. Gallagher, 20 Wall. (U. S.) 670, 679, 22 L. Ed. 452: 'The courts of Montana, under a law of the territory, exercise both common-law and equity jurisdiction. The modes of procedure in suits both at law and in equity are the same until the trial or hearing. The suitor, whatever relief he may ask, is required to state, in ordinary and concise language, the facts of his case on which he invokes the judgment of the court. But the consideration which the court will give to the questions raised by the pleadings when the case is called for trial or hearing, whether it will submit them to a jury or pass upon them without such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury, and, if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment.' The right, which this case recognizes under the Code system to try issues before either jury or court, dependent upon whether they are legal or equitable, includes in our judgment the right to try in the same case before both, whenever both classes of issue are present."

In Mogollon G. & C. Co. v. Stout, 14 N. M. 245, 91 P. 724, it was contended by the plaintiff in error that, where plaintiff seeks both legal and equitable relief under a statement of facts which constitutes a single cause of action, the case is one for the court sitting as a chancellor, and not for a jury. But the court held that the mere fact that the defendant in error united in one complaint for necessary allegations and prayers for legal and equitable relief does not deprive him of his right to a jury trial on the legal issues, and affirmed the action of the lower court in rendering judgment upon a jury award of damages for injuries already sustained by plaintiff and granting a restraining order against future trespasses.

In Kingston v. Walters, 14 N. M. 368, 93 P. 700, the court thus summarized the provisions of our statutes above quoted:

"In this territory the practice is no longer controlled by the common-law forms, for under our Code of Civil Procedure (section 2685, Compiled Laws of 1897), there is but one form of civil action, and a plaintiff may unite in the same complaint several causes of action,, both legal and equitable. In other words, under the reformed

system of pleadings, which our Legislature has adopted, litigants are given the relief which the facts in the pleadings show them to be entitled to, in one action, whether the relief is equitable, or legal, or both."

The last sentence of the foregoing was quoted by Mr. Justice Roberts in his concurring opinion in Pankey v. Ortiz, 26 N. M. 575, 195 P. 906, 30 A. L. R. 92.

We are next required to consider whether the decision in Young v. Vail, supra, has changed the rule as thus laid down by the statutes of New Mexico, as construed by the decisions of the court. In Young v. Vail, supra, none of the New Mexico cases last above referred to were overruled or modified or criticized. Furthermore, in that opinion the court referred to one of the statutes above quoted, as follows:

"Section 4105 of the Code authorizes the plaintiff to unite in the same complaint certain several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both; and section 4116 of the Code authorizes the defendant to set forth, by answer, as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both."

There was no intimation that these provisions are inapplicable under appropriate circumstances. There was no question in that case involving the principle of joinder of legal and equitable causes of action by the plaintiff. In that case the plaintiff sought no personal judgment against Young and Ferguson, two of the defendants, and while they prayed a personal judgment against Hettie Campbell and Mack Campbell, the original makers of the note, there was no personal service of process upon the Campbells, they being served by publication only for the purpose of the mortgage foreclosure, so that the rendition of a personal judgment for plaintiff was not involved in the case. Also it is to be noted that in the decree the court declared:

"That the above-entitled cause is a suit in foreclosure of a real estate mortgage."

There was no contention by any one that there was joined with the foreclosure action a cause of action

for personal judgment on the note. No personal judgment was granted against any one in the case. In that case the appellant contended that because the allegations of the plaintiff with reference to the mortgage security were admitted, and the only controversy being as to the amount of the indebtedness from the defendant to the plaintiff because of certain matters set up by the defendant in a cross-complaint, in which damages were sought for breach of contract, therefore defendant and cross-complainant was entitled to a trial by jury upon the question of the amount, if any, in which he was indebted to the plaintiff, and the court held that the existence of a present indebtedness on the part of the defendant is the very foundation of the right to foreclosure, and therefore a proper matter for determination by the court according to the principles by which the rights of the parties are to be determined in an action for foreclosure of mortgage, and that one who pleads a breach of the contract in consideration of which a mortgage is given as a defense to a suit in equity for the foreclosure of such mortgage is not entitled to have the issues raised thereby tried by jury.

We will now consider appellant's contention that the decree was not within the issues embraced by the pleadings. The bench and bar of New Mexico have been accustomed to look for assistance in the construction of our Code of Civil Procedure to the courts of Missouri and California. The Missouri Code of Civil Procedure (section 3512, Rev. Stat. of 1879) is identical with section 4105 of our Code. Under this language the court of Missouri has held a number of times that:

"While the Code permits the joining of legal and equitable suits, yet they must be separately stated and relief separately prayed, so that each may be separately tried, the one by the court and the other, if desired, by the jury; and where a petition in one count mingles allegations common to actions at law with those peculiar to equitable actions for the reformation of a contract, the plaintiff may be compelled to elect; and, if he elects to proceed at law, he abandons his cause in equity, and is

not entitled to introduce evidence that is only pertinent thereto."

See Kabrich v. State Ins. Co., etc., 48 Mo. App. 393.

Also it has been decided a number of times that, when separate causes of action are united in the same petition, each must be distinctly and separately stated.

"If two causes of action are stated in one count, the proper method of objection is by a motion to require the plaintiff to elect on which cause he will proceed to trial. Kern v. Pfaff, 44 Mo. App. 29; Liddell v. Fisher, 48 Mo. App. 449; Childs v. Kansas City, etc., R. R. Co., 117 Mo. 414, 23 S. W. 373." Burns' Annotated Practice Code, note to section 413, p. 267.

The California courts, under a statute quite similar to ours, have said that, where causes of action may be properly joined in same action, but are not separately stated, as required by this section, remedy is by motion to make pleading more distinct and certain, by separating and distinctly stating separate causes of action. City Carpet B. Works v. Jones, 102 Cal. 506, 510, 36 P. 841. See Bernero v. South British & N. Ins. Co., 65 Cal. 386, 4 P. 382; Fraser v. Oakdale L. & W., Co., 73 Cal. 187, 190, 14 P 829; Jacob v. Lorenz, 98 Cal. 332, 338, 33 P. 119.

It has been the practice in the courts of New Mexico for the trial court to entertain the motion to require plaintiff to make his complaint more definite and certain by separately stating and numbering his paragraphs and causes of action. As to the statutory authority for that practice, it is probable that it comes from section 4127 of the Code, which provides that:

"* * * And when the allegations or denials of a pleading are so indefinite or uncertain that the precise nature of the charge or denial is not apparent, **and when they fail in any other respect** to conform to the requirements of law, the court may require the pleading to be made definite and certain, or otherwise to conform to the law by amendment."

Thus, if the pleading undertook to state a cause of action at law on the note and also an action in equity

to foreclose the action in a single count, it would probably offend against the statute and the practice by failing "to conform to the requirements of law" with respect to separately stating the causes of action sought to be joined. It was open to the defendant under section 4127 to move the court to require the plaintiff "to conform to the law" by separately stating his causes of action. That he was put on notice that separate causes of action were attempted to be stated would appear from the prayer of the complaint, which prays in the first paragraph for personal judgment and in the second paragraph for foreclosure of the mortgage. It is sometimes said that the prayer is no part of the cause of action stated by the complaint. While that may be true, it is evident that the prayer may be considered in determining the character of the relief sought, and it at least expresses the theory of the plaintiff as to the kinds of relief he is entitled to under the cause or causes of action stated in his complaint.

It will be noted from section 4105 of the Code that the requirement is that the causes of action must be separately stated, "with the relief sought for in each cause of action, in such manner that they may be intelligibly distinguished." So it is apparent that that Code provision intends that the prayer shall be looked to, as well as the statement of the cause of action, to determine at least the character of the relief sought. The appellant not having objected to the intermingling of the causes of action in the complaint, and not having moved to have them separately stated, is not in a position to complain now of the action of the court in considering that the complaint stated two causes of action, one at law upon the note, and the other in equity for foreclosure of the mortgage.

[6] From all of the foregoing, our conclusion is that, the court having jurisdiction of the parties and having jurisdiction to administer both legal and equitable relief in the same lawsuit under appropriate pleadings, its mistakes, if any, were judicial errors,

and the judgment, though it might have been voidable, was not void, and likewise, if the decision was a judicial error, it was not an irregularity. 33 C. J. 814; Freeman on Judgments (5th Ed.) § 221.

It is argued that this action is primarily to foreclose the mortgage. In Mogollon G. & C. Co. v. Stout, supra, there is language to the effect that in a suit for damages, where an injunction is also asked, if the suit is primarily for injunction, and the right to damages is merely incidental to and dependent on plaintiff's right to the injunction, the court may, without the intervention of a jury, assess the damages already sustained; but, if the action is brought primarily for the recovery of a money judgment, it is triable by a jury, notwithstanding that the plaintiff also asked for an injunction against the further violation of his rights, etc. In Young v. Vail, the mortgage foreclosure was not only the primary, but the only, relief plaintiff was entitled to.

In the case at bar, if the plaintiff claimed that the right to a personal judgment on the note was of equal dignity with the right of foreclosure of the mortgage lien, and the defendant was in default and not contending otherwise, then, if the question of which was the primary purpose of the suit was material, and the court made a mistake in its decision, such mistake was a judicial error, and not an irregularity.

We adhere to our former opinion, as thus supplemented.

PARKER, C. J., and WATSON, J., concur.

[No. 3096. May 21, 1927.]

McFADDEN v. MURRAY.

[257 Pac. 999.]

SYLLABUS BY THE COURT

1. Exemption statutes should be liberally construed.

2. The exemption in lieu of homestead (Code 1915, § 2327) may be claimed out of current wages garnished.

Parker, C. J. dissenting.

Appeal from District Court, Rio Arriba County; Holloman, Judge.

Action by Mrs. E. F. McFadden against C. P. Murray. From a judgment for plaintiff against defendant and a garnishee, defendant appeals. Reversed and remanded, with directions.

E. P. Davies and W. N. Birdsall, both of Santa Fe, for appellant.

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

OPINION OF THE COURT

WATSON, J. [1] In an action against appellant, wages due him were garnished. The garnishee's return showed an indebtedness of $130. Being a resident of New Mexico, the head of a family, and not the owner of a homestead, appellant laid claim to the whole of said indebtedness as exempt under Code 1915, § 2327. The contention was overruled, and judgment was given against appellant and the garnishee for $32.50.

Secton 2327, supra, on which appellant relies, is as follows:

"Any resident of this state who is the head of a family, and not the owner of a homestead, may hold exempt from levy and sale, real or personal property to be selected by such person, his agent or attorney, at any time before sale, not exceeding five hundred dollars in value, in addition to the amount of chattel property otherwise by law exempted."

[1] 25CJ p. 10 n. 52. [2] 25CJ p. 128 n. 48. [3, 4] 32 Cyc p. 667 n. 62; p. 668 n. 82; p. 669 n. 88.

Appellee relies on Laws of 1919, c. 153, § 1, reading as follows:

"No person shall be charged as garnishee, in any court in this state, on account of current wages, or salary due, from him to a defendant, in his employ, for more than twenty per cent of any wages or salary due such defendant for the last thirty days' service, unless the wages or salary due said defendant exceeds seventy-five dollars per month, garnishment may be had for twenty per cent of seventy-five dollars of such wages and salary, and, in addition thereto, for full amount of the excess of such wages or salary above seventy-five dollars. No exemption whatever shall be claimed, under the provisions of this section, where the debt was incurred for necessities of life, or for any debt, in either of the following cases: In case the debtor is not the head of a family, or in case the debtor is the head of a family, where the family does not reside in this state."

Appellee admits that this appeal involves but the single question—whether the $500 exemption in lieu of homestead may be claimed out of current wages which have been garnished. She contends that the only exemption which may be so claimed is that prescribed by Laws of 1919, c. 153, § 1, supra.

Contending that the $500 exemption in lieu of homestead may be allowed from current wages, appellant invokes two well-established rules of statutory construction, namely: (1) That exemption statutes are to be construed liberally in aid of their beneficial purpose; and (2) that repeals by implication are not favored. His argument is that, liberally construed, Code, § 2327, supra, applies to attempts to reach current wages by garnishment process, and that it was not impaired by the subsequent adoption of the 1919 provision, supra.

Appellee cites only Gregory v. Evans, 19 Mo. 261; In re French (D. C.) 250 F. 644. The former is not persuasive; the latter is not in point. Appellant cites 25 C. J. "Exemptions," § 224; Wilson v. Bartholomew, 45 Mich. 41, 7 N. W. 227; Seymour, Sabin & Co. v. Cooper, 26 Kan. 539; Fanning v. Bank, 76 Ill. 53; Goodwin v. Claytor, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209, 107 Am. St. Rep. 479; Enzor & McNeill

v. Hurt, 76 Ala. 595; Pomeroy v. Beach, 149 Ind. 511, 49 N. E. 370. These cases are undoubtedly distinguishable as appellee claims. Still we think they tend generally to support appellant's contentions. We need not discuss them, as the question must be decided upon consideration of the course of garnishment and exemption legislation in New Mexico.

Prior to 1887, garnishment was not an independent proceeding, though the same substantial result was attainable as now—that of subjecting to the payment of a debt property of the debtor in the hands of a third person, including wages owing. After judgment, it was accomplished by what is known as garnishment on execution. Code 1915, § 2192. If it was desired to obtain a lien before judgment, there was statutory provision for garnishment in attachment suits. C. L. 1897, § 2698 et seq.

In 1887 a comprehensive exemption act was passed. Laws 1886-87, c. 37. It now appears, without much change, as sections 2311-2329, Code of 1915. Section 19 of that act is the present Code, § 2327, supra. Section 1, sub-sec. 6 (Code 1915, § 2311) originally read:

> "The personal earnings of the debtor, and the personal earnings of his or her minor child or children, for three months, when it is made to appear, by the affidavit of the debtor, or otherwise, that such earnings are necessary to the support of such debtor, or of his or her family, and such period of three months shall date from the time of issuing any attachment or other process, the rendition of any judgment, or the making of any order, under which the attempt may be made to subject such earnings to the payment of a debt."

In 1909 a garnishment act was passed, compiled in Code 1915 as sections 2521-2552. By it the garnishment provisions of the attachment law were expressly repealed. The provision for garnishment on execution was not. Laws 1919, c. 153, § 1, supra, which appellee contends provides an exclusive exemption from current wages, has, by legislative processes, succeeded to section 26 of the 1909 act (Code 1915, § 2546).

Garnishment is not a device by which exempt prop-

erty may be reached. The second ground for the issuance of the writ is "that the defendant has not within his (affiant's) knowledge property in his possession within this state subject to execution sufficient to satisfy such debt." Code 1915, §2521. It is only effects subject to execution which the garnishee will be required to deliver to the sheriff. Code 1915, § 2539.

We find, then, in the present garnishment law, no such change from the former system, or from former principles, as would sustain the view that the Legislature intended to change the former relation between the garnishment law and the exemption law. So we think that if the act of 1887, when adopted, applied to garnishments, it still so applies.

While the language used in the various sections of the 1887 act is somewhat varied, most of the sections mention attachment, as well as execution, as process from which property is to be exempt. As we have seen, attachment at that time included garnishment. It can hardly be doubted that in general the exemptions established by the act were intended to be allowed when the property was sought to be reached by garnishment.

It was section 1, subsec. 6, supra, of the 1887 act, which particularly applied to current wages. It is plain from that section, in its original form, that "personal earnings" were to be exempt from "attachment or other process, the rendition of any judgment, or the making of any order, under which the attempt may be made to subject such earnings to the payment of the debt." The language just quoted no longer appears in the section, it having been amended to its present form by Laws 1897, c. 71. There is nothing in the change to indicate a change of policy as to the applicability of that particular exemption to garnishment proceedings. Indeed, we do not understand how that exemption could have been otherwise intended. Personal earnings, as a debt, could then, as

now, be reached only by garnishment. So in 1887 there was a specific exemption, as there is now, when current wages were garnished. We think that when proceeding under the garnishment statute it must be considered that subsection 6, § 1 of the 1887 Code was superseded by section 26 of the 1909 act, the present form of which is Laws 1919, c. 153, § 1, supra. We do not see how the two sections could operate together. The present specific exemption being merely the successor of the original 1887 provision, and there being nothing to indicate the contrary, it seems plain that if the additional exemption in lieu of homestead could, in 1887, have been claimed out of current wages, it may still be so claimed. That reduces the question to this: Was the exemption from personal earnings in the 1887 act an exemption of chattel property to which the exemption in lieu of homestead was to be additional?

Appellee urges that section 19 of the 1887 act, providing for exemption only from "levy and sale," was intended to apply only to execution process. The term "levy" is equally appropriate in speaking of an attachment. At that time the levy of attachments and of executions involved, in appropriate cases, notice to garnishees. So, to exempt from "levy" was to exempt from garnishment.

[**2**] Section 19 of the 1887 act permits exemption to be selected from "real or personal property," and "in addition to the amount of chattel property otherwise by law exempted." Personal property "in its broad and general sense * * * includes everything which is the subject of ownership not coming under the denomination of real estate." 32 Cyc. 667. The term "real or personal property" is in common use to denote property of all kinds. A chose in action is personal property. 32 Cyc. 669. "Chattel" is perhaps somewhat broader than "personal property." All things personal may be included under it. It also includes chattels real. 32 Cyc. 666. "Words and phrases shall be construed according to the context and the

approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning." Code 1915, § 5424. Whether we construe these terms as technical or according to approved usage, they clearly include "personal earnings" and "current wages." We find nothing in the context indicating any intent to vary those meaings.

[1] Appellee admits that exemption statutes are to be liberally construed in favor of the debtor. The Territorial Supreme Court has said so. In re Spitz Bros., 8 N. M. 622, 45 P. 1122, 34 L. R. A. 604. Considering all this, we cannot escape the conclusion that the Legislature originally intended that the exemption in lieu of a homestead might be claimed out of personal earnings. If any subsequent Legislature has intended to change the rule, or has supposed that it did not apply, it has entirely failed to express such intention or supposition.

Section 19 of the 1887 act, supra, provides that the lieu selection shall be made "at any time before sale." This is said to be inconsistent with the selection of current wages or personal earnings. It is argued that while other chattels must be delivered by the garnishee to the sheriff, and by the latter sold to satisfy the plaintiff's debt, a money debt is not so delivered or sold; the process being to render a money judgment for it against the garnishee. While the argument is not without force, it is not decisive. In the first place, the mere entering of a money judgment against a garnishee does not satisfy the plaintiff's debt. There must be a sale of the garnishee's property to complete the process. Of course the garnishee may satisfy the judgment without waiting for sale of his property. The defendant whose effects have been delivered to the sheriff by the garnishee may likewise choose to satisfy the judgment without waiting for a sale. It might have been wiser to have required the defendant to claim his exemptions, imme-

diately upon or before the rendering of judgment against the garnishee. This, however, was a matter for the Legislature to decide. Sale of property is the last step in collecting a debt by process of law. The effect of the provision is to preserve the debtor's right of selection until the last moment. Another provision might have been wiser; but that is not our concern. So we do not think the claimed inconsistency exists. We might admit that the Legislature, in fixing the time, did not have momentarily in mind the entire field of selection. Still, the chapter must be construed as a whole. A doubt as to time of selection cannot be allowed to limit the subject-matter clearly included in the section. In a comprehensive statute such as this, harmony and consistency, while greatly to be desired, are not always found. A momentary lapse from them may easily be given too much weight in interpretation.

Appellee points out that though this exemption has been in the books for 40 years, it has never before been claimed in this court that it was allowable out of current wages. She also points out that if it may be so allowed, garnishment is a far less effective remedy than had been generally supposed; that a wage earner will seldom be found with as much as $500 due him from his employer; that many wage earners do not own homesteads; that many cases must arise in which the remedy will be unavailable because of these facts; that garnishment, as perhaps most frequently and usefully employed, has been the means of collecting small accounts from debtors having little, if any, property. There is force to these suggestions. If we were in doubt as to the meaning and intent of the statutory provisions which we have reviewed, we might be moved by them. Not being in doubt, however, they can be influential only with the lawmaking power. If the Legislature should consider that the present law, as we find it to be, is too liberal to wage-earning debtors, it can easily adopt a different policy.

The trial court therefore erred, and the judgment must be reversed and the cause remanded, with direction to allow the exemption.

It is so ordered.

BICKLEY, J., concurs.

PARKER, C. J. (dissenting). I am compelled to dissent from the conclusion reached by the majority. Exemption statutes have existed from an early day, the first one having been passed in 1865 (Comp. Laws 1865, appendix, p. 768). See sections 1243-1245, C. L. 1884. This statute provided no exemption in lieu of the homestead. In 1887 a comprehensive statute of exemptions was enacted, which appears now as sections 2311-2329, Code 1915. This act provided for the exemption of personal earnings of the debtor for 60 days next preceding the application for the exemption. Subsection 6 of section 2311, Code 1915. It also provided an exemption of $500 in lieu of the homestead as follows:

> "Any resident of this state who is the head of a family, and not the owner of a homestead, may hold exempt from levy and sale, real or personal property to be selected by such person, his agent or attorney, at any time before sale, not exceeding five hundred dollars in value, in addition to the amount of chattel property otherwise by law exempted." Code 1915, § 2327.

This section, to my mind, clearly shows an intention on the part of the Legislature to limit the exemption to physical, tangible, chattel property, capable of manual delivery and sale by the sheriff on execution. It is true that an account for wages or earnings is a chose in action and as such is chattel property, but it is not the subject of manual delivery or sale under execution. It is to be collected by a judgment directly against the garnishee. I do not find that chapter 153, Laws 1919, has any bearing on the question. Section 1 of that act merely provides the amount of current wages or salary to be exempted, and the circumstances under which the same may be allowed, and has no reference to an exemption in lieu

of the homestead.

I agree, of course, that exemption statutes are to be liberally construed in order to effectuate the beneficent intention of the Legislature to aid the poor and needy. But where the interpretation of the exemption statute is plain, the courts have no authority to award an exemption in cases where none has been provided by law.

[No. 3146. June 8, 1927.]

STATE v. CAPITAL BANK et al.

Appeal of NEW ENGLAND NAT. BANK of KANSAS CITY, MO.

[257 Pac. 993.]

SYLLABUS BY THE COURT

1. An action cannot be maintained on a contract that is illegal or against public policy, where both parties are equally culpable.

2. A contract in whose consideration and performance nothing illegal or against public policy inheres may be enforced although it may incidentally aid one in evading or violating the law, the incidental transaction tainted with illegality not being required to be proven to enable the plaintiff to make out his case.

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

Action by the State against the Capital City Bank, in which the New England National Bank of Kansas City, Mo., presented a claim as a general creditor against the receiver of the bank. From a judgment denying the claim, the claimant appeals. Reversed and remanded, with directions.

See, also, 246 P. 899.

Mechem & Vellacott, of Albuquerque, for appellant.

E. R. Wright, of Santa Fe, for appellees.

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[1] 13CJ p. 493 n. 18. [2] 13CJ p. 502 n. 57; p. 503 n. 58.

OPINION OF THE COURT

RYAN, District Judge. [1] This is an appeal from the final judgment of the district court for Santa Fe county denying a claim in the principal sum of $34,-889.06, asserted by New England National Bank of Kansas City as a general creditor against the receiver of the Capital City Bank of Santa Fe.

The New England National Bank presented its claim to the referee of the insolvent bank, and upon the rejection of the claim prosecuted, by stipulation, an original action at law in the district court of Santa Fe county for money lent.

The claim of the New England Bank is upon two notes. One, for convenience, called the Jaramillo note, originally in the sum of $30,000; the other, for convenience, called the Trujillo note, originally in the sum of $26,005.55. There was subsequent substitutions and renewals of these notes, but such transactions do not affect any of the matters here involved, so, for the sake of clarity, we refer to the original notes only. The Capital City Bank of Santa Fe, a state institution, was adjudged insolvent on the 14th of July, 1923, and its affairs proceeded to liquidation by the receiver under the provisions of the general corporation insolvency act.

With reference to the Jaramillo note, the petition above referred to, filed in the district court, alleges that on or about the 26th of December, 1916, the petitioner, called herein the New England Bank, lent to the Capital City Bank, called herein the Santa Fe Bank, at the request of the latter and to be used in the latter's business, the sum of $30,000, under an agreement between the parties that the New England Bank should carry for the Santa Fe Bank and hold as security for said loan a certain indebtedness due from Jaramillo to said Santa Fe Bank in the sum of $30,000; that this indebtedness was renewed from time to time as evidenced by promissory notes signed by Jaramillo; that payments were from time to time made on such indebtedness, and the balance due re-

newed, and at the time of the closing of the Santa Fe Bank and the appointment of the receiver, there was owing and unpaid $14,872.60, with interest; and, further, that by the custom and trade usage by bankers, well known to petitioner and defendant and to the banking community at large sufficiently to charge all parties with notice thereof, the agreement to carry such note for defendant meant and was understood to mean that petitioner would loan and advance the face amount of said note to defendant to enable it to use such amount of cash and hold the note as security therefor, and that at maturity said note should either be paid off by defendant or collected by it from the principal maker and the amount remitted or credited by petitioner and the note be taken up by defendant.

The same allegations were made with reference to the Trujillo note, except that with regard to it the money was lent and advanced on September 22, 1927, and the amount of the loan was $26, 005.55, and the amount due at the time of insolvency was $20,016.46.

The defendant receiver of the Santa Fe Bank denied all the facts alleged as above set forth, so far as they had to do with the existence of the claim, and pleaded by way of affirmative defense that the capital stock of the Capital City Bank was $50,000, and that it had a book surplus of $10,000; that in the conduct of its business it was governed by the provisions of chapter 67 of the Session Laws of 1915 and the various amendments thereto; that during all of said time the maximum amount said bank was authorized to lend to any person, firm or corporation, was the sum of $12,000; "that on or about the 26th day of September, 1916, the said Capital City Bank then and there having loaned to one Venceslado Jaramillo the full amount of $12,000, and said amount, being the maximum amount which under the laws of the state of New Mexico the said Capital City Bank was entitled to loan to the said Venceslado Jaramillo, and the said Venceslado Jaramillo desiring to obtain additional funds and credit from the said Capital City Bank, the

said Capital City Bank made and entered into an agreement with the said New England National Bank of Kansas City to obtain for the said Venceslado Jaramillo the additional sum of $30,000, the said $30,000 being the amount referred to in the said amended petition of the said New England Bank; that at the time of obtaining said sum of $30,000 for the said Venceslado Jaramillo from the said New England National Bank, it was understood and agreed by and between the said New England National Bank and the said Capital City Bank that the said note and obligation of the said Venceslado Jaramillo representing said sum of $30,000 while taken in the name of said the Capital City Bank was to be indorsed to the said New England Bank by the said Capital City Bank without recourse, and that said note and all renewals thereof down to some time in the year 1921 were so indorsed to the said New England National Bank without recourse; "that at the time of so receiving said note and collateral security attached thereto from the said the Capital City Bank, the said New England Bank well knew that the Capital City Bank could not carry the said paper, note, and obligation of the said Venceslado Jaramillo as a direct loan from the Capital City Bank, because same was an excessive loan and in excess of the legal amount which said Capital City Bank was authorized to loan to the said Venceslado Jaramillo, and at the time of so receiving and accepting said note of the said Venceslado Jaramillo, indorsed without recourse as aforesaid, the said New England National Bank well knew that the purpose and intent of the said Capital City Bank in so indorsing the same without recourse to the said New England National Bank was for the purpose and with the intent of avoiding the provisions of the New Mexico statutes above referred to, and to enable the said the Capital City Bank to avoid reporting to the bank examiner of the state of New Mexico the said obligation of Venceslado Jaramillo as an obligation and indebtedness of the said the Capital City Bank."

The same affirmative defense is set forth relative to the Trujillo note, and the defendant also alleges with reference to the renewals and substitutions above referred to "that the several renewals were all indorsed without recourse and with a similar purpose and with a similar intent and with a similar knowledge on the part of said New England National Bank to avoid reporting the same as an indebtedness and obligation of the said the Capital City Bank"; and so the defendant charges:

"This receiver further alleges that all of said indebtedness now claimed by the New England National Bank against your receiver was contracted in the manner hereinbefore alleged and not otherwise; that the said New England National Bank at the time of making said original loans and at the time of each renewal and substitution thereof well knew that said loans were excessive loans and in excess of the legal and lawful amount that the said Capital City Bank could loan under the laws of the state of New Mexico to any one individual, copartnership, or corporation, and well knew that the manner of making said loans and indorsing the paper and obligations representing said loans to the said New England National Bank was to enable the said Capital City Bank to avoid reporting the same as obligations of said Capital City Bank, in the reports required by the statutes of the state of New Mexico, to be made to the state bank examiner."

Because of these things the defendant, the receiver of the Capital City Bank, concludes:

"That the New England National Bank in now presenting its claim on account of said indebtedness as against the receiver of the Capital City Bank is estopped to set up, claim, or contend that by reason of any custom existing among bankers or by reason of any written agreement or oral understanding or guarantee made by the said Capital City Bank the said alleged indebtedness is an obligation against the assets of the said Capital City Bank."

After the conclusion of the trial had upon the issues framed, estoppel as above set forth being the principal issue, the court made numerous findings of fact and these conclusions of law:

"(1) That the secret arrangement made between the Capital City Bank and the New England National Bank, whereby the Capital City Bank guaranteed verbally, through J. B. Herndon, its president, the payment of the Jaramillo note, and later the payment of the Danner & Hughes note,

being made and entered into with full knowledge on the part of the New England National Bank that the indorsement of said notes without recourse was made for the purpose of enabling the Capital City Bank to evade the banking laws of the state of New Mexico, and with full knowledge on the part of the New England National Bank that the Capital City Bank thereafter would not report the said notes as a liability of the bank, makes the New England National Bank a party to said plan and conspiracy to violate the banking laws of the state of New Mexico.

"(2) This being an equitable proceeding, and the New England National Bank having made the loans upon the Jaramillo and Danner & Hughes notes with full knowledge that said loans were both in excess of the legal amount which could be loaned by the Capital City Bank, and having full knowledge at the time of making said loans that the indorsement of same 'without recourse' was a mere subterfuge to enable the Capital City Bank to violate the banking laws of the state of New Mexico, and with full knowledge thereafter that the Capital City Bank did not report the said notes as a liability of the Capital City Bank, the court will leave the parties as it finds them, and not aid the New England National Bank by enforcing an agreement made and entered into under the circumstances set forth in the findings of fact herein.

"(3) That the action of the New England National Bank in failing and refusing to disclose to the state of New Mexico in June and July, 1922, and again in December, 1922, as set forth in the findings of fact, estops New England National Bank from now asserting against the receiver any claims for or on account of an unpaid balance on either the Jaramillo or Danner & Hughes notes.

"(4) That the claim of the New England National Bank should be disallowed."

It is not essential to set forth fully or to analyze in detail the evidence upon which the court made the findings of fact from which the conclusions of law above set forth were deduced.

There is little dispute concerning the evidence and only one issue of law predicable upon it—that is, whether the facts constituted an estoppel as claimed by the receiver. These facts, however, were emphasized and in effect admitted: That the excessive loan of the Santa Fe Bank to Jaramillo was made prior to the negotiations between it and the New England National Bank, which latter bank had nothing to do whatsoever with the making of the excessive loan.

This the trial court found specifically, viz:

"This Jaramillo loan had been made and the note therefor taken by the Capital City Bank prior to any negotiations with the New England National Bank for the carrying of it by the latter, and there is no evidence that the New England National Bank had any knowledge of the loan to Jaramillo, prior to the application to it for the loan here involved."

There was no similar finding with reference to the Trujillo note, but the evidence discloses that the New England Bank was not in any way involved with the excessive loan made to Trujillo by the Santa Fe Bank; that the Santa Fe Bank as a result of the negotiations with the New England Bank secured $30,000 on the Jaramillo note, and $26,005.55 on the Trujillo note, and used these amounts in its banking business; that as between the two banks the liability of the Santa Fe Bank to the New England Bank for these loans in the amounts stated above was always fully understood and clearly acknowledged; that the transaction between the Santa Fe Bank, represented by J. B. Herndon, its president and executive, by P. G. Walton, its vice president and executive officer, resulted in an agreement whereby the New England Bank carried both notes—that is, the Jaramillo note and the Trujillo note, for the use and benefit of the Capital City Bank—the term "carry" meaning, as understood by both parties and in banking circles, that the New England Bank would take the paper and lend the money to the Santa Fe Bank, which bank would be ultimately liable, that is, would pay the full amount due to the New England Bank in case the makers of the notes did not pay it; that these notes were indorsed by the Santa Fe Bank without recourse, so that they would not have to be entered as loans or as bills payable or as rediscounts in its statements; that the purpose of the Santa Fe Bank in this regard was known at the time of these negotiations to the New England Bank; that the state bank examiner of New Mexico knew during the month of July, 1922, that the effect of the transaction involving these notes between the two banks was such as to make the Santa

Fe Bank liable on the notes by reason of what he referred to as a "gentlemen's agreement" to pay ultimately notwithstanding the indorsement without recourse.

Argument was made that there is no evidence in the case that the New England Bank knew the Santa Fe Bank did not intend to report these loans as liabilities. We think that though the executive officers of both banks deny that reference was made to such intent in their conversations at Kansas City when the loans were made, and we have no doubt their testimony in this regard reflects the true facts, the purpose of the Santa Fe Bank complained of was so obvious as not to need express disclosure; undoubtedly the New England Bank was aware of the reason the Santa Fe indorsed the paper without recourse while contracting otherwise. Appellant also contends that the forms provided by the state bank examiner did not contemplate a report by the Santa Fe Bank of the transaction here involved as it in fact existed, and that there was no duty resting upon it to report it, and, further, that section 37, c. 67, of the session Laws of 1915, as amended by section 22, c. 120, Session Laws of 1919, did not require that the loan be reported. We omit comment on these contentions, since it is apparrent that even though viewed adversely to the contention of the appellant, its asserted adherence to the banking regulations of the state exerts no important influence on the real merits of the case as presented to us; and we proceed to determine whether upon the admitted facts the trial court was correct in holding that the New England Bank was estopped in asserting its claim against the receiver of the Santa Fe Bank.

It is plain that so far as the loans themselves are concerned no element of the transactions between the two banks is affected with any shadow of illegality. In substance, the contract was simply one by which money was lent on the one hand and borrowed on the other; and both parties in all the implications

of their mutual agreements and in the performance of them were clearly within the letter and the spirit of the law. The illegality and hence the claimed unenforceability of the contract rests on the fact that one of the parties, the Santa Fe Bank, intended at the time the contract was made and to the knowledge of the other party to omit setting forth the true nature of it in its published statement, thereby failing to conform to the laws and banking regulations of the state of New Mexico. The illegality is, therefore, in the publication of the contract itself. This statement fails to notice the fact that the Jaramillo and Trujillo notes were excessive loans. This can have nothing to do with the legality of the transaction. Banking paper representing executive loans is just as validly the subject of negotiations with another bank as other paper is. Aldrich v. Chemical National Bank, 176 U. S. 618, 20 S. Ct. 498, 44 L. Ed. 611; Jones v. New York ndemnity Co., 101 U. S. 622, 25 L Ed. 1030; Union National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Union Gold Mining Co. v. Rocky Mountain National Bank, 96 U. S. 640, 24 L. Ed. 648; Nelson v. Leiter, 190 Ill. 414, 60 N. E. 851, 33 Am. St. Rep. 142.

[2] The question here presented is then simply this: Was the contract illegal, against public policy, and therefore unenforceable because the paper involved was indorsed "without recourse" for the purpose on the part of the Santa Fe Bank of evading or violating the New Mexico banking laws, and because the New England Bank knew merely of such purpose at the time the loan was negotiated? The question has been very frequently considered in judicial decisions, and the law is firmly settled that such a contract is enforceable. Ruling Case Law says (6 R. C. L. 696):

"Where there is no moral turpitude in the making or in the performing of the contract, the mere fact that an agreement, the consideration and performance of which are lawful, incidentally assists one in evading a law, or public policy, is no bar to its enforcement, and that if the contract has been performed by the promisee, it is no defense that the promisor knew that the agreement

or its performance might aid the promisee to violate the law or to defy the public policy of the state, when the promisor neither combined nor conspired with the promisee to accomplish that result, nor shared in the benefits of such violation."

In support of this text, see Jefferson v. Burhans (C. C. A.) 85 F. 949; Kansas City Brick Co. v. National Security Co. (C. C. A.) 167 F. 496; Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468; Armstrong v. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. Ed. 747; Waterbury v. McKinnon (C. C. A.) 146 F. 737; Ingraham v. National Salt Co. (C. C. A.) 130 F. 676; Taylor v. North Star Gold Min. Co., 79 Cal. 285, 21 P. 753; Savings Bank v. Pacific Railroad Co., 117 Cal. 332, 49 P. 197; Trust Co. v. Crescent Loan Co., 27 Ind. App. 451, 61 N. E. 688, 87 Am. St. Rep. 257; Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Mechanics' Insurance Co. v. Hoover Distilling Co. (C. C. A.) 182 F. 590, 31 L. R. A. (N. S.) 873

To the same effect is the text of Corpus Juris (13 C. J. 502):

"An agreement will be enforced, even if it is incidentally or indirectly connected with an illegal transaction, provided it is supported by an independent consideration, or if plaintiff will not require the aid of the illegal transaction to make out his case."

The note to the above text lists citations from practically every state in the Union, from the federal courts and the United States Supreme Court.

The publication of the transaction between the two banks as a liability of the Santa Fe Bank was wholly extrinsic and incidental to the contract upon which the Santa Fe Bank's obligation to pay was founded, and in no respect was the New England Bank required to have the aid of or enforce the element of the contract tainted with illegality—that is, the publication of it—to make out its case.

Bank v. Smith, 17 N. M. 166, 125 P. 632, cited by appellee, is not in point, but, on the contrary, is in

harmony with what we have above stated. The court there said that the contract under consideration "was illegal, in that its consideration was grounded upon the violation of a penal and prohibitory statute of the United States." Further, the distinction was also made that the refusal of courts to enforce illegal contracts referred to such contracts as had to be proven of this character in order to maintain the cause, quoting with approval to this effect McMullen v. Hoffman, 174 U. S. 639, 19 S. Ct. 839, 43 L. Ed. 1117:

"No court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights springing from such contract."

Particularly lucid and convincing to the point here involved is the argument of Judge Sanborn in writing the opinion of the court, United States Circuit Court of Appeals, Eighth Circuit, in the case of Hanover National Bank v. First National Bank of Kansas, reported in 109 F. 421. In the case cited, while the note in question was not indorsed "without recourse," it does appear that the president of the Kansas bank, Sheldon, negotiated with the New York bank for discounting promissory notes for the Kansas bank, and stated that he did not wish to put the name of the Kansas bank on the note to be discounted for the reason that he did not desire to state the bank's indebtedness on account of these notes in the reports to the Comptroller of the bank's financial condition. For this reason he signed the notes individually, and the New York bank agreed to discount with the Kansas bank notes signed or indorsed individually by Sheldon, and the Kansas bank agreed to authorize the New York bank to charge these notes to its account as they matured. The facts in the federal case, therefore, are in effect identical with the facts in this. The court said:

"Another contention of counsel for the bank is that the contract between the two banks is incapable of enforcement, because Sheldon informed the New York bank that

the reason why he wanted to make the agreement without putting the indorsement of the defendant on the paper was that he did not wish to report to the Comptroller and to publish the fact that his bank had procured these rediscounts. It is insisted that this statement of Sheldon when the contract was made injected into it a fatal vice, because it brought home to the New York bank knowledge of the fact that the contract might assist Sheldon in evading or violating the provisions of section 5211 of the Revised Statutes, which requires the presentation to the Comptroller of Currency, and the publication of the reports of the resources and liability of a national bank. But there are several reasons why this position is not tenable. In the first place, the argument is founded on the principle that an action cannot be maintained on a contract that is illegal or against public policy in which both parties are equally culpable. Bartle v. Nutt, 4. Pet. 184, 7 L. Ed. 825; Trist v. Child, 21 Wall. 441, 22 L. Ed. 623; Marshall v. Railroad Co., 16 How. 314, 14 L. Ed. 953; Hinnen v. Newman, 35 Kan. 709, 12 P. 144. But this rule has no application to an agreement which has no consideration, and which requires the performance of no act that is either illegal or against public policy; and that is the character of the contract here in issue. Neither the intention of Sheldon not to report the rediscounts nor his statement of that intention constitutes any part of the consideration of this agreement. The only consideration for the advances of the New York bank was the discounts and the interest it would obtain, while, on the other hand, the only consideration for the promise of the Kansas bank was the use of the money it would secure, and the excess of discounts and interest it would earn above those that it would pay. The intent or purpose of Sheldon could not have been a part of the consideration of the agreement, because neither he nor the Kansas bank promised to accomplish that purpose, and there is no evidence that it ever was accomplished. It was at most a mere collateral, incidental, unaccomplished purpose, and could constitute no bar to the enforcement of the agreement. The mere fact that a contract the consideration and performance of which are lawful incidentally assists one in evading a law is no bar to its enforcement. Green. Pub. Pol. p. 538, rule 464; House v. Soder, 36 Tex. 629; Gerhard v. Neese, Id. [36 Tex.] 635; Jefferson v. Burhans, 29 C. C. A. 481, 85 F. 949, 58 U. S. App. 586, 593, 595."

We are able to find no case at variance with what is above expressed.

The third conclusion of law found by the court rests upon different facts than those which we have considered above. In substance it finds that the claimant, New England National Bank, is estopped from asserting its claim against the receiver because

of the character of its answer to the state bank examiner in response to inquiries put to it by that official.

Under date of June 23, 1922, the state bank examiner of New Mexico wrote to the claimant as follows:

"I would be obliged if you would kindly indicate whether or not you are holding the Capital City Bank, Santa Fe, itself liable in any way with the notes of J. W. Danner, $26,250, and F. W. Wood, $42,000, which you are carrying as an accommodation to the bank. Also notes of Messrs. Mardorf and Ormsbee, $7,500, and note of Mr. Mardorf, $14,772.60, secured by note of V. Jaramillo."

Under date of July 14, 1922, the New England National Bank replied to this letter as follows:

"We are in receipt of your letter of July 12th, enclosing copy of your letter of June 23rd. The following notes were discounted for the Capital City Bank as an accommodation. They do not bear the bank's indorsement. The proceeds were placed to the bank's credit and we understand was for their use and benefit."

There were other letters of like tenor. In the first place the reply of the New England National Bank to the inquiry addressed to it by the state bank examiner was not evasive. It stated the substantial facts in such a way that the bank examiner might readily know that it did hold the Capital City Bank liable on the notes in question, even though it did not answer categorically the precise question put to it by the state bank examiner, viz., whether they held the Capital City Bank liable on the notes in question. See Aldrich v. Chemical National Bank, 176 U. S. 618, 20 S. Ct. 498, 44 L. Ed. 611. That the state bank examiner was not misinformed by the answer given is evident from the fact that subsequently to his receiving these letters he immediately called the Capital City Bank to task for its having omitted to publish in its reports these items as rediscounts or as liabilities of the bank. The facts with regard to this particular matter fail to establish an estoppel. Dye v. Crary, 13 N. M. 439, 85 P. 1083, 9 L. R. A. (N. S.) 1136.

We find that the trial court was in error in concluding that the claimant, New England National Bank, was estopped from asserting its claim against the receiver.

The order denying the claim of New England National Bank is reversed and the cause remanded, with directions to allow the claim of the appellant; and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3116. May 21, 1927.]

ORCUTT v. NICHOLS ET AL.

Rehearing Denied June 25, 1927.

[257 Pac. 998.]

SYLLABUS BY THE COURT

A notice by the commissioner of public lands to the holder of an oil and gas lease, issued prior to the due date of the annual rental thereon, notifying the lessee of the due date of the rental, and that, unless the rental should be paid within 30 days, the lease would be canceled without further notice, is a valid notice, and authorizes the commissioner to cancel the lease after the expiration of 30 days after the due date of the rental.

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

Application by H. T. Orcutt to revoke the cancellation of an oil lease by the Public Land Commissioner, opposed by G. T. Nichols and others. After sustaining a demurrer to the application, the district court on appeal sustained the demurrer and dismissed the application, and applicant appeals. Affirmed.

J. D. Atwood, of Roswell, for appellant.

H. M. Dow, of Roswell, and David Chavez, Jr., of Santa Fe, for appellees.

C. J. Roberts, of Santa Fe, amicus curiae.

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[1] 40CJ p. 896 n. 3.

OPINION OF THE COURT

PARKER, C. J. The appellant had an oil lease dated November 26, 1923. On November 7, 1924, the commissioner of public lands mailed a notice to appellant, giving the due date of the rental on this lease for the succeeding year, which notice contained the following:

"If payment is not made within 30 days, lease will be canceled without further notice."

On February 27, 1925, the commissioner of public lands declared the lease forfeited for nonpayment of rentals, and leased the lands to other parties. Afterwards the appellant filed in the office of the commissioner an application to revoke the cancellation of the said lease. A demurrer on behalf of appellees was filed before the commissioner, which was by him sustained. Thereupon appellant appealed to the district court of Chaves county, where the case was heard upon the demurrer, which demurrer was sustained, and the application of appellant was dismissed. From this judgment, the case is here on appeal.

Much argument and citation of authorities is made in the briefs, which we do not deem relevant to the inquiry. Counsel for appellant devotes much space to demonstrating that under section 20 of the lease he is entitled to 30 days notice before forfeiture can be declared. This proposition is denied by counsel for appellees on the ground that section 6 of the lease provides for forfeiture of the lease automatically in case of failure to pay rentals. We do not deem this controversy of any revelancy to the proper determination of the case. We assume that appellant was entitled to 30 days notice before forfeiture could be declared by the commissioner of public lands. It appears, however, that appellant received more than 30 days notice before forfeiture was declared. It is true that the notice served by the commissioner was prior to the due date of the rental, but we regard this as entirely immaterial. The notice served pointed out the due date for the payment of the rentals, and

notified the appellant that, if the rental was not paid within 30 days, the lease would be forfeited without further notice. The only thing in the notice approaching ambiguity is the fact that it does not distinctly state that the lease would be forfeited after 30 days after the due date of the rental. Such, however, is the plain meaning of the notice. If the commissioner had attempted to forfeit this lease 30 days after the date of the notice, it might have been a violation of appellant's rights, but the commissioner made no such attempt, and declared forfeiture more than three months after the due date of the rental. In this way appellant received more consideration at the hands of the commissioner than he was entitled to under the provisions of the lease. The fact that the 30 days notice was given prior to the due date of the rental is of no significance whatever.

It follows that the judgment of the district court in sustaining the demurrer to the application of appellant was correct, and should be affirmed, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 2838. Jan. 3, 1927.]

Rehearing Denied June 28, 1927.

CALVERT v. JOSEPH et al.

[257 Pac. 680.]

SYLLABUS BY THE COURT

1. An executory land contract having been rescinded at the purchaser's suit, and he being entitled to recover what he had paid, consisting largely of his notes secured by collateral, which notes and collateral have passed into the hands of innocent third parties, a decree is equitable which fixes the amount of recovery as the face of the notes with provision for credit for such thereof as may be delivered up with their collateral.

2. Equity will not consider a vendee of land in default for interest, if, previously, the vendor has converted a larger

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[1] 38 Cyc p. 2097 n. 71; 39 Cyc p. 2072 n. 23 New. [2] 39 Cyc. p. 1570 n. 36 New. [3] 39 Cyc p. 2002 n. 42; p. 2047 n. 55 New.

sum of the vendee's funds.

3. Vendee of land may accept the vendor's wrongful declaration of forfeiture as an abandonment of the contract, in which case he may recover his payments, as upon a mutual rescission, and his right to restitution is not defeated by his failure to tender interest due under the contract.

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

Action by Simon P. Calvert against Elizabeth F. Joseph and others to cancel a land sale contract and to recover payments thereon. From the judgment, defendants Joseph appeal. Affirmed and remanded, with direction.

J. O. Seth, W. J. Barker, and Renehan & Gilbert, all of Santa Fe, for appellants.

L. F. Twitchell and J. H. Burkhardt, both of Denver, Colo., John I. Palmer, of Saguache, Colo., J. J. Kenney, of Santa Fe, and William McKean, of Taos, for appellee.

OPINION OF THE COURT

WATSON, J. [1] This litigation grows out of a contract dated June 8, 1920, whereby Elizabeth F. Joseph, Antonio F. Joseph and Angela L. Joseph, Antonio's wife, agreed to sell to J. J. Handley and Simon P. Calvert the Ojo Caliente Springs property, consisting of about 1,300 acres of land and a hotel. The consdieration named was $150,000, of which $59,457 was acknowledged to have been paid. It was recited that the vendees had received possession and that the vendors had executed a deed. It was agreed that the deed should be delivered in escrow to the Capital City Bank of Santa Fe, and should be by it delivered to the vendees whenever, on or before June 8, 1930, the vendees should have paid the sum of $90,533, with interest thereon at 6 per cent., payable December 15, 1920, and semi-annually thereafter. The vendors agreed to pay forthwith the taxes accrued up to and including 1919, and to pay off all mortgages and incumbrances then outstanding on or before June 8, 1930; the vendees

also having the right to pay off such incumbrances at any time and to have credit for such payments. It was provided that, in case of default by the vendees in any covenant or condition of the agreement, they should immediately deliver quiet and peaceable possession of the premises, and that time should be the essence of the contract, and that, in case of failure of the vendees to fulfill any condition or covenant of the agreement, the vendors might, at their option, declare the agreement canceled and the rights of the vendees forfeited, and might enter upon and take possession of the premises, and that all payments made and all improvements placed thereon and all personal property therein should be forfeited to the vendors as liquidated damages. The contract was executed by J. J. Handley for himself and as attorney in fact for Calvert, and by Antonio F. Joseph for himself and as attorney in fact for the other vendors.

This suit was commenced by Calvert against Handley, the three Josephs, and certain other defendants, for the purpose of cancelling the contract and recovering what had been paid thereon. Judgment was rendered against Handley by default and against the other defendants after trial; only the defendants Joseph appealing.

The facts found by the trial court, freely rendered, are as follows: Antonio F. Joseph at all times was the duly authorized agent and attorney in fact for defendants Elizabeth F. Joseph, his mother, and Angela L. Joseph, his wife. Handley, who had an agreement with Joseph for a 5 per cent. commission if he should sell the Ojo Caliente property for $150,000, proposed to Calvert, with Joseph's knowledge, that they—Handley and Calvert—buy the same together and operate it as partners. While thus posing as a prospective partner, with interests identical with Calvert's, Handley really had no bona fide interest in the purchase, was unable to contribute substantially thereto, and was, in fact, working in concert with Joseph to effect the sale.

Calvert was 76 years of age, had spent his life in the cattle business, from which he had just retired, and was "almost without capacity, because of the depreciation caused by age and infirmities to make a contract of any kind," and these facts were known to Joseph. The sale price of the property "was an exceedingly large price for the same, and very largely in excess of any reasonable valuation thereof."

Negotiations among Joseph, Handley, and Calvert progressed to an understanding, which, as we may infer, is correctly represented by the written contract made, except in these particulars: (a) The sale was to include the personal property, commissary, and supplies situated on the premises, but this was not included in the contract; (b) interest on deferred payments was to be paid annually, while the contract made it payable semiannually; (c) a strict forfeiture clause, such as was inserted in the contract and afterwards invoked, was not contemplated.

Having reached this understanding, Joseph and Handley represented to Calvert that some one must go to Santa Fe to examine the title, and that it would expedite matters if Handley were armed with power of attorney to act for Calvert. They thus prevailed upon him to clothe Handley with power—

"to sign all papers in regard to deal now pending re of Springs, * * * to sign my name to three notes of $10,000 each, with the full understanding that these notes are to be secured by notes of like amount due in the years of 1926, 1927, 1928, and are signed by E. B. Noland and Gordon Gotthelf * * * above-mentioned notes that I am putting up as security are in the Saguache County Bank. * * * Also further understood that any further papers in regard to the above-mentioned deal are also to be signed, where my signature is needed, by J. J. Handley, of Ojo Caliente, N. M., and that same signature will be as binding as if same were signed by me personally."

By virtue of this power, Joseph and Handley, at Santa Fe, in the absence of Calvert, prepared the written contract and executed it; Calvert himself never having seen it until December 20, 1920.

The sum of $59,467, acknowledged in the contract

to have been paid, was largely made up as follows: Three notes of $10,000 each, executed by Handley for himself and as attorney in fact for Calvert, payable, respectively, on June 8, of the years 1926, 1927, and 1928, with annual interest at 8 per cent., each of these three notes being secured by a $9,250 note given by the Calvert Cattle Company to Calvert; a $7,000 note and a $10,000 note, signed by Calvert and Handley, payable to Jesse Boothe, maturing, respectively, on June 4 in the years 1921 and 1922, with annual interest at 8 per cent.—these notes being secured by two $9,250 Calvert Cattle Company notes; a $3,000 note, due one year after date, with 8 per cent. interest, with Handley as principal and Calvert as surety, Calvert's signature being by Handley as attorney in fact; and Handley's $7,500 commission. The notes made payable to Boothe were, according to agreement, the consideration for which Boothe surrendered to the Josephs a contract which he had with them at the time for the purchase of an undivided half interest in the property.

About September following this, on the representation that he would use them for the purpose of paying delinquent taxes and outstanding incumbrances on the property, Joseph obtained from Calvert two additional notes of $9,250 each, maturing, respectively, on June 8 of the years 1931 and 1932, with annual interest at 8 per cent., and, as collateral, obtained two $9,250 Calvert Cattle Company notes, payable, respectively, on March 1, in the years 1930 and 1931, with 6 per cent. annual interest. Joseph had no intention of so applying these notes, but did in fact at once dispose of them, together with two of the $10,000 notes and their collateral, receiving therefor property in Denver of the value of $15,000 and $10,500 in cash. All of the Calvert Cattle Company notes thus used as collateral were Calvert's sole property.

About December 15, 1920, a check given to Joseph by Handley for the semiannual interest was dishonored, and Handley immediately disappeared, and

his whereabouts has since been unknown to all parties. On December 20, 1920, because of this breach in the condition of the contract, Joseph took possession of the property, thereafter retained it, declared a forfeiture of all payments made, and, on January 22, 1921, entered into a contract to sell it to other parties. On December 20, when the forfeiture was declared, Joseph had not paid the delinquent taxes nor the incumbrances, and had in his hands, belonging to Calvert, more than enough money to pay all that was due on the contract. By this finding it was undoubtedly meant that the two notes, which Joseph had disposed of contrary to his agreement, amounted to more than the interest due on December 15.

Upon these findings the court rests conclusions of law upon which the judgment is based. An analysis of these conclusions shows two main propositions: First, that Joseph had no right in equity to exact or declare a forfeiture, and that, by doing so, he became bound in equity and good conscience to return what had been received from Calvert, and Calvert, on his part, might rightfully treat the contract as rescinded and demand a restitution of payments; second, that the misrepresentation and fraud of Joseph and Handley was such as entitled Calvert, in equity, to a cancellation, and to be placed in statu quo ante. The first main proposition seems to be based upon two theories: First, that Joseph had no right to declare a forfeiture because he was himself, at the time, in default; second, that Joseph had no right to declare the forfeiture because the provision for such forfeiture, construed as liquidated damages, was itself an unconscionable provision which equity would not enforce. Thus we find the judgment standing upon three theories. If any one of them is correct, we need not inquire further.

We do not understand appellant's counsel to question the sufficiency of the findings to support the conclusions stated. Their attack is upon the sufficiency of the evidence to support the findings. Most of the

argued propositions relate to the fraud theory. This suggests the wisdom of considering the other theory first.

Appellee urges that a vendor, himself in default, has no right to rescind. He cites Fairchild v. Southern Refining Co., 158 Cal. 264, 110 P. 951; Provident Loan & Trust Co. v. McIntosh, 68 Kan. 452, 75 P. 498, 1 Ann. Cas. 906; Mason v. Edward Thompson Co., 94 Minn. 472, 103 N. W. 507; Norris v. Letchworth, 167 Mo. App. 553, 152 S. W. 421; Higginbotham v. Frock, 48 Or. 129, 83 P. 536, 120 Am. St. Rep. 796; 27 R. C. L. Title, "Vendor and Purchaser," 867. He next contends that if a vendor rescinds wrongfully, the vendee may accept the rescission and sue to recover the consideration already paid. He cites Maffet v. Or. & Cal. R. R. Co., 46 Or. 443, 80 P. 489; Smith v. Treat, 234 Ill. 552, 85 N E. 289; Seiberling v. Lewis, 93 Ill. App. 549; O'Brien v. Quirk, 204 Ill. App. 448; Cornely v. Campbell, 95 Or. 345, 186 P. 563, 187 P. 1103; Gibson v. Rouse, 81 Wash. 102, 142 P. 464.

These legal propositions are not questioned by appellants. Their contentions are: First, that appellants were not themselves in default, that the two notes obtained in September were credited on the contract, and that the court erred in refusing so to find; and second, that no forfeiture was in fact declared, and that the court's finding to the contrary is not supported by substantial evidence.

We cannot see how a finding that the two notes obtained from Calvert in September were credited upon the unpaid balance would have been material. Joseph obtained $18,500 of that balance long before it was due, upon the condition that it should be used in paying taxes, which his contract obligated him to pay "forthwith," and incumbrances, which his contract obligated him to pay ultimately, and permitted Calvert to pay at any time and receive credit for. The fact that he did credit the amount would not relieve

him from the duty of performing the condition. Whatever he did with the notes or their proceeds, Calvert was entitled to credit therefor.

Appellants contend that the evidence shows that:

"Instead of declaring forfeiture and terminating the agreement, Joseph desired the payment of the interest and the continuation of the contract. He was perfectly willing to give him (Calvert) time to raise the money and was desirous of continuing the contract with Calvert alone, eliminating Handley."

A part of this contention is true. Joseph did offer Calvert time to pay the interest, and did offer to make a new contract with him alone, on the same terms, provided Calvert would pay certain expenses, including attorney's fees and the cost of Joseph's trip from Denver. The evidence leaves no doubt, however, that Joseph came to the Springs from Denver on December 20, 1920, with the intention of declaring a forfeiture and of taking possession. He had with him a written notice to surrender, which he told Calvert he would have the sheriff read to him if necessary. He was in virtual possession and in active authority from that date. On that date he wired the Capital City Bank, which held the escrow, that the contract had been broken by nonpayment of interest and directed the bank:

"Deliver my deeds to no one."

On December 21, he wired the bank:

"Mail deeds care of the First National Bank of Taos registered."

On December 24, he wired:

"Handley has issued thousands of dollars of bad checks, left the country, last report was suicide. Send me deeds at once."

On December 31, he wrote the bank:

"I beg to advise that you are laying yourself liable, by not returning my deeds, as you know instructions to your bank were very clear; you also know interest was not paid as same was to be paid at your bank. I have many other reasons for breaking this contract; simply wish to advise you that you are causing me much damage by not

sending these deeds to me by registered mail as by wired instructions; of course, if you will not pay attention to same, you become liable for any and all damages that I may suffer in the near future."

On January 18, Attorney Edwards wrote the bank:

"In behalf of Elizabeth F. Joseph, Antonio F. Joseph, and wife, you are hereby notified that J. J. Handley and S. P. Calvert have defaulted in the payment due the above-named Joseph under the contract of June 8, 1920, between said parties.

"Under the terms of the escrow instructions under which a deed from the Josephs to Handley and Calvert was deposited with you, upon such default the deed was to be returned to the Josephs. You are requested, therefore, to return the said deed to the Josephs, or, if you prefer, I will call for and receipt to you for it as attorney for the Josephs."

The fact that Joseph was willing, and offered, to make a new contract with Calvert on conditions does not weaken the showing that he had declared a forfeiture of the contract subsisting with Calvert and Handley. It is plain to us that he took advantage of the forfeiture clause in the contract to force Calvert into a new contract, in which he would be solely, rather than jointly, liable; and we are quite satisfied that the court's finding of a declared forfeiture is correct.

Another consideration seems to us to lead to the same result. It is unquestioned that on January 22, 1921, Joseph assumed to enter into a contract for the sale of this property to new purchasers. Clearly, by that time, he considered the forfeiture effected and himself capable of giving possession. There had been no change in the situation with respect to default in payment of taxes and incumbrances, There had been no restitution of the $18,500 obtained from Calvert for that purpose. No new ground of forfeiture had intervened. Hence Joseph was in no better situation to enforce forfeiture on January 22 than he had been on December 20. We do not see how it could help appellants even if they could show that no forfeiture was declared on December 20, so long as they must admit it to have been effected on or before January

22.

We hold, therefore, that the lower court. properly awarded cancellation and restitution on the theory that appellants attempted to rescind the contract when they were themselves in default. It is unnecessary to consider whether, if appellants had not been in default, equity would have permitted them to enforce the attempted forfeiture. It is also unnecessary to determine whether the evidence supports the findings of fraud in the procuring and making of the contract.

The court made an accounting of what appellants had received under the contract; decreed that they were indebted to appellee in that amount; made the indebtedness a lien on the property; and decreed a foreclosure of the lien and the sale of the property for such indebtedness. In determining the amount, the court charged the appellants with the face value of the notes, but provided that full credit should be given for any of such notes delivered by appellants to appellee within 90 days from the date of the decree. Appellants complain of this as inequitable. They claim that the evidence shows that the notes were worth not more than 60 per cent. of their face, and point out that Joseph actually realized for $38,500 par value of them but $25,500 in cash and property. They invoke the principle that where equity requires a party to be placed in statu quo, the property to be restored, if it has passed beyond the control of the party so that he cannot return it, is to be represented by damages amounting to the value of the property at the time the duty arose to make restitution, regardless of the valuation which may have been placed upon it in the trade. That is all very well, when the property to be restored is land having an ascertainable market value. The cases cited by appellants involve such a situation. Blahink v. Small Farms Imp. Co., 181 Cal. 379, 184 P. 661; McGowan v. Burg Bros., 59 Cal. App. 219, 210 P. 545; Forrest v. Wardman, 40 App. D. C. 520. But this is not such a

case.

We fully appreciate the hardship of requiring appellants to make good a greatly larger sum than they have enjoyed. Yet, if we do not, we must contemplate a large loss to appellee when he is compelled to pay his notes. We cannot presume that he could settle his obligations for less than their face merely because appellants were willing to dispose of them for less. He is entitled to be placed in statu quo. That requires that he have his notes back, or the means to pay them. Nothing less will satisfy equity. If these notes are, in fact, worth less than par, appellants can buy them in and restore them as cheaply as appellee can settle them. This the decree permits. We do not see how the court could have done more for appellants or less for appellee. Facing probable loss to one of the parties, the court properly imposed it upon the wrongdoers.

"It is no obstacle to the rescission of the contract that such (the) wrongdoer is unable to return the specific property, for in such cases he may be required to account for its value or for the value of so much of it as he has parted with." Black on rescission and Cancellation, § 627.

"In an action by the maker of a negotiable promissory note against one who has wrongfully negotiated it, so as to render the maker liable upon it, the measure of damages is the amount of the note, and proof that the plaintiff has already paid the note is unnecessary." Sedgwick on Damages (9th Ed.) § 708.

"The maker of a promissory note can maintain an action for its conversion against one who, before it has any legal inception, wrongfully negotiates it to a bona fide holder for value. He is entitled to recover the full amount without averring or proving that he has paid it to the holder. It is sufficient that he is legally liable to pay it." Sutherland on Damages (4th Ed.) § 1132.

We can see no difference, to affect the rule of damages, whether the negotiation of the note was wrongful, or whether by his own act the payee, after having negotiated it, is in a position requiring that he return it.

Appellants cite Southeastern Land Co. v. Jonnard, 198 Ky. 504, 249 S. W. 789. There it was held that, in rendering judgment for the face of $10,000 of unsecured notes given as part of the consideration, and which could not be canceled because held by innocent third parties, there should have been a stay of its enforcement by execution or otherwise, to operate until the notes were paid by the plaintiff. We do not question the correctness of that decision. It was concerned with short-time notes, and, so far as the report indicates, no lien was decreed. The notes in the case at bar were not to mature for many years. It is not questioned that the amount to be restored was properly made a lien on the property. It would have been impracticable and probably against the interest of all concerned to have continued the lien until the notes should mature. It would not have been restitution. In any event, we do not understand that any such decree was suggested to the trial court. We are satisfied that the decree, in the matter of the accounting and its provisions for restitution, is equitable. Doherty & Co. v. Steele, 71 Colo. 33, 204 P. 77; Metropolitan Elevated Ry. Co. v. Kneeland et al., 120 N. Y. 134, 24 N. E. 381, 8 L. R. A. 253, 17 Am. St. Rep. 619.

One other contention is made by appellant. It has to do with the admission of evidence, but as it has no bearing upon the theory upon which we sustain the decree, it will be unnecessary to consider it.

It follows that the judgment should be affirmed and the cause remanded with direction to enforce it, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

On Motion for Rehearing.

WATSON, J. We placed the decision on two legal propositions, which appellee urged and which appellants did not question. They are: (1) That "a vendor, himself in default, has no right to rescind;" and (2) that "if a vendor rescinds wrongfully the vendee may accept the rescission and sue to recover the consideration already paid."

[2] Appellants moving for a rehearing, say that the foregoing are correct as abstract propositions, but not applicable to this case because of another proposition which we must have overlooked; viz., that neither vendor nor vendee, in default, may have rescission. They urge that appellee, the vendee, being in default for 6 months interest, could not rescind for the same reason that appellants, in default, could not do so. We may admit, as an abstract proposition, that a vendee in default is in no better position to demand rescission than a vendor in default. Yet we cannot sustain the contention as applied to this case.

It was the view of the trial court, undoubtedly, that appellee was not in fact in default. Our approval of this theory is made fairly clear by the opinion. The reason is that, in September preceding the interest maturity in December, appellants misapplied and converted of appellee's money several times the amount of the interest. It would seem absurd in a court of equity, where the doctrine of set-off had its origin, to hold that appellee, under such circumstances, was under a duty to pay the interest or in default for failure to do so.

[3] Attention now being directed to the point, we notice some confusion of terms in our original statement. Appellants, strictly speaking, did not claim the right to rescind. They claimed the more drastic right to declare a forfeiture. Appellee was not in the position of claiming the right to rescind because of appellants' default. In such a case it might have been necessary for him to tender the interest. He was in

the position of taking advantage of appellants' attempt to forfeit, as an abandonment of the contract. Acceptance of such an abandonment amounts to a mutual rescission. So the cited decisions hold. In those cases the vendee was in default as to payments, but the vendor had waived the default by conduct, or, because of default of his own, was not in position to take advantage of it. If, under such circumstances, the vendor attempts forfeiture, the vendee, without offer to pay what is due under the contract, may claim a mutual rescission and have restitution. So considering, it would be illogical to require the vendee to tender performance before demanding restitution. The purpose of tender is to put the opposite party in the position of having violated the contract. He is already in that position. Of course if such a tender were rejected, it would be a harmless form. But it might be accepted. That would lead to complications readily to be perceived. The vendee's default in payment is no default, within the principle invoked, if, for some reason, the vendor is not in position to take advantage of it. Such is the situation here.

The motion will be overruled.

PARKER and BICKLEY, JJ., concur.

[Nos. 3111, 3112. May 5, 1927.]

CITY ELECTRIC CO. v. CITY OF ALBUQUERQUE et al.

[258 Pac. 573.]

SYLLABUS BY THE COURT

The franchise of the City Electric Company of Albuquerque obligates the company to pave its track zone, and the cost of such paving may be collected either by suit in ordinary form, or by foreclosing a lien in the same manner as mortgages may be foreclosed, under the provision of chapter 152, Laws 1919.

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[1] 12CJ p. 975 n. 39; 26CJ p. 1031 n. 94; p. 1032 n. 96, 97; 28 Cyc p. 1121 n. 7; 36 Cyc p. 1363 n. 28; p. 1404 n. 7; p. 1412 n. 70; p. 1413 n. 77 New.

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

Suits by the City Electric Company against the City of Albuquerque and others for an injunction. From the judgments for defendants, plaintiff appeals. Affirmed.

A. B. McMillen and Lawrence F. Lee, both of Albuquerque, for appellant.

H. B. Jamison, of Albuquerque, and Pershing, Nye, Tallmadge & Bosworth, of Denver, Colo., for appellees.

OPINION OF THE COURT

PARKER C. J. The appellant, City Electric Company, hereinafter styled plaintiff, owns and operates a street railway in the city of Albuquerque, under a franchise granted by the city of Albuquerque on the 17th day of August, 1903, and a further franchise granted on the 9th day of September, 1909. The 1903 franchise contains the following provision:

"The tracks must be constructed in the middle of the street and laid to grade, to be furnished by the city, and the streets between the rails and for one foot on each side thereof shall be paved or macadamized or built by said grantees of the same material as that portion of the street through which the track runs, and shall be kept constantly in repair and flush with the street, so that the same may be readily crossed with vehicles at all points in the street."

The 1919 franchise contains the following provision:

"The tracks must be constructed in the middle of the street and laid to grade, to be furnished by the city, and the streets between the rails and for one foot on each side thereof shall be paved or macadamized or built by said grantee of the same material as that portion of the street through which the track runs, and shall be kept constantly in repair and flush with the street, so that the same may be crossed readily by vehicles at all points in the streets."

The city of Albuquerque improved certain streets in the city by laying bitulithic paving thereon. The city ordered the plaintiff to pave between its rails and for one foot on each side thereof on the streets

being so improved. Plaintiff refused to comply with the order. The city then payed that portion of the street and assessed the cost of such paving by ordinance against the plaintiff. The two cases, Nos. 3111 and 3112, differ only in that they relate to different portions of the streets paved. The issues in each case are the same.

The plaintiff brought suit to enjoin the city from taking steps to assess the cost of paving between the rails of plaintiff and for one foot on each side thereof against the plaintiff's property, and from taking steps to fix a lien against plaintiff's property for the pavement of such paving costs. The court below refused the injunction asked for by the plaintiff and dismissed the complaint in both of the cases, and they are here on appeal from those judgments.

[1] The first proposition presented by plaintiff is to the effect that the contract between the plaintiff and the city arising out of the provisions of the charters hertofore set out do not require the plaintiff to pave the zone occupied by its tracks.

The argument of plaintiff in support of its position seems to us to be entirely inconclusive. A fair interpretation of the franchise above set out would seem to require, in terms, the paving of the track zone by the plaintiff with the same material used by the city on the rest of the streets. At the time of the granting of this franchise, the streets of Albuquerque were not paved. The parties must have contemplated at that time that the streets would be paved in the future, else the use of the word "pave" would be superfluous. When the streets should be paved by the city, it was cleary contemplated that the plaintiff should be required to pave the track zone. This is the only conclusion which can be drawn from the franchises. Counsel have cited the following cases: City of Philadelphia v. Hestonville, M. & F. P. R. R. Co., 177 Pa. 371, 35 A. 718; State v. Corrigan, 85 Mo. 263, 55 Am. Rep. 361; Indianapolis & E. Ry. Co. v. New Castle,

43 Ind. App. 467, 87 N. E. 1069; Chicago v. Sheldon, 9 Wall. 50, 19 L. Ed. 594.

An examination of these cases, however, discloses that in each instance the ordinance required nothing more than to repair, and in no case required paving. In this respect these cases are not in point and furnish no foundation for the contention made. The interpretation which we place on the franchises is strengthened by the recognized consideration that in case of ambiguity, if there were any, in the franchises they are to be interpreted most strongly in favor of the public and against the grantee. 2 Elliott, Roads and Streets (4th Ed.) § 941, 1.

We have, then, a case where the plaintiff is liable on contract for the cost of this paving. As before seen, these franchises were granted in 1903 and 1909. The act under which the city was proceeding is section 3, c. 152, Laws 1919, the pertinent provisions of which are as follows:

"The governing body of any municipality shall have power to assess against the owner or owners of any railroad or street railroad occupying or abutting any highway ordered to be improved as aforesaid, the whole cost of the improvements between or under the rails and tracks of said railroad or street railroad, and the two feet on each side of said track or tracks, and shall have power by ordinance to levy a special assessment upon said railroad or street railroad and its roadbed, ties, rails, fixtures, chattels, rights and franchises, which shall constitute a lien thereon, superior to any other lien or claim, except state, county and municipal taxes, and which may be enforced either by sale of said property in the manner provided here, or by suit against the owner."

It is to be observed that this section provides two methods for the collection of the amount due. One is by suit against the owner in ordinary form, which, of course, would reach all of the property of the debtor. The other is by foreclosure in the same manner as mortgages are foreclosed, as is pointed out in section 4 of the act. We can see no objection to this legislation. The liability of the plaintiff for the cost of the pavement is not in any way increased. The remedy of the city for the enforcement of the liability

is somewhat enlarged, but this would violate no constitutional guaranty of which we are aware. See 12 C. J. "Constitutional Law," § 559. With the provision in regard to priority of the lien over all others, except state, county, and municipal taxes, we are not concerned in this connection, there being no party before the court in position to present the question.

It is then apparent that the judgment of the district court was correct and should be affirmed, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3113. May 5, 1927.]

CITY OF ALBUQUERQUE v. CITY ELECTRIC CO. et al.

[258 Pac. 574.]

SYLLABUS BY THE COURT

1. The power to levy special or local assessments is a branch of the taxing power.

2. The Legislature may provide that the lien of such taxes shall be paramount to all prior liens created by contract.

3. This may be done, although the statute declaring the priority was enacted subsequent to the lien by contract.

4. Where a tax debtor is obligated by contract to pave its tract zone, it can raise no objection to the assessment on account of alleged discrimination, or lack of benefits, and a mortgage must suffer the same consequence.

Appeal from District Court, Bernalillo County, Helmick, Judge.

Suit by the City of Albuquerque against the City Electric Company and another to foreclose liens. From a judgment for plaintiff, defendants appeal. Affirmed.

A. B. McMillen and Lawrence F. Lee, both of Albuquerque, for appellants.

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[1] 28 Cyc p. 1103 n. 17 New. [2, 3] 28 Cyc p. 1202 n. 73. [4] 28 Cyc p. 1121 n. 7; p. 1202 n. 74.

H. B. Jamison, of Albuquerque, and Pershing, Nye, Tallmadge & Bosworth, of Denver, Colo., for appellee.

PARKER, C. J. This is a suit to foreclose liens brought by the city of Albuquerque, hereinafter styled plaintiff, against the City Electric Company, hereinafter styled defendant, arising out of the same paving program involved in the two companion cases just now discussed in Nos. 3111 and 3112 on the docket of this court. In these cases we have held that the present defendant is liable on contract for the cost of paving its track zone in the city of Albuquerque, and that there is no objection to chapter 152, Laws 1919, in so far as it has authorized the fixing of the lien upon the property of the defendant for the cost of such paving. In these cases, however, there was no discussion of the question of the relative priorty of the paving lien over prior incumbrances. It appears in this case that the defendant had executed a trust deed securing bonds in the sum of approximately $200,000 upon its property long prior to the institution of the paving program above referred to. At that time there was no statute giving to the paving lien any prority over prior incumbrances. By section 3, c. 152, Laws 1919, however, the Legislature provided that the pavng lien should "constitute a lien thereon, superior to any other lien or claim, except state, county and municipal taxes." The question, then, is as to whether it is competent for the Legislature to create a priority in favor of the city as against a prior valid mortgage upon the property of the street railway company.

In approaching the question, certain established principles of taxation are to be observed.

[1] 1. In the first place, the power to levy a special or local assessment is essentially a branch of the taxing power. 1 Page & Jones, Taxation by Assessment, § 8; 2 Cooley, Taxation (3d Ed.) p. 1153 et seq.

[2] 2. This being so, it is competent for the Legislature to provide that such taxation shall be a lien

upon property paramount to prior liens by way of contract, mortgages, judgments, etc. 3 Cooley, Taxation (4th Ed) §1240; 2 Page & Jones, Taxation by Assessment, § 1058; Doremus v. Cameron, 49 N. J. Eq. 1, 22 A. 802; 2 Elliott, Roads and Streets (4th Ed.) § 749; Carstens v. Seattle, 84 Wash. 88, 146 P. 381, Ann. Cas. 1917A, 1070, and note; Provident Institution, etc., v. Mayor, etc., of Jersey City, 113 U. S. 506, 5 S. Ct. 612, 28 L. Ed. 1102; Seattle v. Hill, 14 Wash. 487, 45 P. 17, 35 L. R. A. 372, and note. See, also, article of Renzo D. Bowers in Yale Law Review for March, 1923, at page 460.

This proposition would seem to be thoroughly established by the authorities. It must be so because taxes are laid upon the res in the exercise of a high sovereign power, and all persons having an interest in the res must yield obedience to that power.

[3] 3. The fact that the law creating the priority of the tax was enacted after the mortgage was executed seems to be immaterial. The owner of the property and the mortgage alike are at all times subject to the taxing power of the state. Wabash East R. Co. v. East Lake, etc., Commissioners, 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285; Seattle v. Hill, 14 Wash. 487, 45 P. 17, 35 L. R. A. 372; Provident Institution, etc., v. Jersey City, 113 U. S. 506, 5 S. Ct. 612, 28 L. Ed. 1102.

It is only in states where retroactive statutes are forbidden that such laws are unconstitutional, as in Texas. Mellinger v. Houston, 68 Tex. 37, 3 S. W. 249.

[4] 4. It appears that the tax laid upon the defendant is in excess of the benefits received and disproportionate to that laid upon abutting owners. Much argument is made in the brief to the effect that this renders the tax void. Counsel, however, have overlooked the fact that defendant is obligated by contract to do this paving. Under these circumstances, no question of benefits, discrimination, or confiscation can arise. If defendant has contracted to pay the cost of the pav-

ing, it must do so, regardless of the consequences to it. The contract stands in the way of defendant to raise any question in regard to the amount of the tax. See Milwaukee, etc., Co. v. State ex rel. Milwaukee, 252 U. S. 100, 40 S. Ct. 306, 64 L. Ed. 476, 10 A. L. R. 892. We have been unable to see how the mortgage is in any better position. If the mortgage may be made inferior to the tax, which seems to be thoroughly established, and if the defendant is not in a position to dispute the tax, then the mortgagee, holding as it does under the defendant, must suffer the same consequence. If defendant were not bound by contract, a different question might arise, a question we are not at liberty to discuss in this case.

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

PARKER, C.J., and BICKLEY, J., concur.

[No. 3115, May 16, 1927. Rehearing Denied, July 25, 1927.]

STATE v. KAVANAUGH.

[258 Pac. 209.]

SYLLABUS BY THE COURT

The Constitution of New Mexico (section 14 of article 2) provided that "No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the militia when in actual service in time of war or public danger." The statutes of New Mexico prior to the adoption of the Constitution and for a time thereafter provided that a grand jury should be composed of 21 persons, and that 12 must concur in finding an indictment. **Held**, that the amendment to section 14, art. 2, of the Constitution, which took effect January 1, 1925 (see Laws 1923, p. 351), providing, among other things, that a grand jury should, unless otherwise provided by law, consist of 12 in number, and that of such number at least 8 must concur in finding an indictment, does not disparage any substantial

[1] 12CJ p. 1105 n. 88; 28CJ p. 783 n. 73.

or constitutional guaranty and is not ex post facto, therefore, in applying to offenses committed prior to its adoption.

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

Juan D. Kavanaugh was convicted of a crime, and he appeals . Affirmed.

D. J. Leahy, of East Las Vegas, and E. R. Wright, of Santa Fe, for appellant.

Fred E. Wilson, Atty. Gen., for the State.

Renehan & Gilbert, of Santa Fe, amicus curiae.

OPINION OF THE COURT

BICKLEY, J. Appellant was indicted and convicted of a crime.

Section 14 of article 2 of our Constitution prior to amendment provided:

"No person shall be held to answer for a capital, felonious, or infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the militia when in actual service in time of war or public danger."

The date of the commission of the crime charged was after the adoption of the New Mexico Constitution and prior to the amendment thereof, which took effect January 1, 1925 (see Laws 1923, p. 351), and provided that a grand jury should, until otherwise provided by law, consist of 12 in number, and that of such number at least 8 must concur in finding an indictment.

Appellant has called our attention to the opinion of the Attorney General of New Mexico No. 882, construing the section of our Constitution, quoted supra, to mean a presentment or indictment by grand jury as known to the common law, and that it was not within the power of the Legislature to make grand juries of greater or less number than was permissible at common law. The Attorney General, however, went on to say:

"In many states it seems that by constitutional provision smaller grand juries are authorized, as in Iowa the Con-

stitution provides for a grand jury of from 5 to 15; in Colorado, the Constitution limits the grand jury to 12; in Kentucky, the Constitution provides that the grand jury shall be 12; in Montana, the Constitution reduced the grand jury from 16 to 7; and in Texas the Constitution provides for a grand jury of 12."

It has been decided that the provision of the federal Constitution for "due process of law" does not require that a grand jury finding an indictment shall be composed, as at common law, of the common-law number of grand jurors. See Parker v. People, 13 Colo. 155, 21 P. 1120, 4 L. R. A. 803. The opinion in this case is based upon the decision of the United States Supreme Court in Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232, which decided that due process of law in criminal cases did not make any grand jury necessary but might be satisfied by information even in case of felony, and that the statute may modify the accusatory system between the two extremes of the common-law grand jury and prosecution by information. In this connection, see, also, Matter of Moran, 203 U. S. 96, 27 S. Ct. 25, L. Ed. 105, where the court was considering the Fifth Amendment to the federal Constitution, which is in language identical with that of our Constitution (section 14, article 2) quoted supra. The court there said:

"The Fifth Amendment, requiring the presentment or indictment of a grand jury, does not take up unto itself the local law as to how the grand jury should be made up, and raise the latter to a constitutional requirement."

We do not understand that appellants urge that our constitutional amendment in question is repugnant to the Fifth Amendment to the federal Constitution. The exact point urged is that such amendment to section 14 of article 2 of our Constitution is an ex post facto law as applied to offenses committed prior to the adoption of such constitutional amendment.

We have been aided in our labor by able arguments. Counsel for appellant have shown a commendable spirit in citing the adjudicated cases touching upon this important question, regardless of whether they support appellant's contentions or not. Amicus curiae in an

able brief support the contentions of appellant.

Section 10 of article 1 of the federal Constitution provides:

"No state shall * * * pass any * * * ex post facto law."

We will assume, though not deciding, for the purpose of this consideration, that the provisions of the federal Constitution apply not only to the mere acts of the Legislature, but to changes in the fundamental law of the state.

Appellant says:

"The following cases hold either that the changing of the practice from indictment to information; information to indictment; or changing the number of grand jurors, are merely changes of rules of procedure, and that as such they are subject to change and not substantive vested rights: Hallock v. United States (C. C. A.) 185, F. 417 (but see dissenting opinion of Judge Sanborn); Lybarger v. State, 2 Wash. 552, 27 P. 449, 1029; State v. Hoyt, 4, Wash. 818, 30 P. 1060; In re Wright, 3 Wyo. 478, 27 P. 565, 13 L. R. A. 748, 31 Am. St. Rep. 94; People v. Campbell, 59 Cal. 243, 43 Am. Rep. 257; Sage v. State, 127 Ind. 15, 28 N. E. 667.

"Again, it wil be noted, in examining the cases which hold that such constitutional changes are not ex post facto as to crimes committed prior to the constitutional change, that the courts so holding have in all cases failed to recognize the definitions of an ex post facto law heretofore cited and quoted by us as being one of the recognized definitions of an ex post facto law in the federal courts. They have attempted to limit their definitions of such acts as set out in the case of In re Wright,, 3 Wyo. 478, 27 P. 565, 13 L. R. A. 748, 31 Am. St. Rep. 94. The court there limits its definition of ex post facto laws to the following:

"(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

"(2) Every law that aggravates a crime or makes it greater than when it was committed.

"(3) Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

"(4) Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender."

It is to be noted, however, that the state courts have generally followed and frequently cited the case of Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648, which is the leading federal case on the subject. 1 Watson on the Constitution, pp. 739-741, comments on this case and quotes therefrom as follows:

"The subject of ex post facto laws was first considered by the Supreme Court of the United States in Calder v. Bull. While the judges delivered separate opinions the principal opinion seems to have been delivered by Mr. Justice Chase, whose definition of an ex post facto law, and whose classification of the subject, as well as his general comments thereon, have met the approval of the bench of the country for more than a century, and are as follows:

" 'I shall endeavor to show what law is to be considered an ex post facto law, within the words and meaning of the prohibition in the federal Constitution. The prohibition, "That no State shall pass any ex post facto law," necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing. Literally, it is only, that a law shall not be passed concerning, and after the fact, or thing done, or action committed. I would ask, what fact; of what nature or kind; and by whom done? That Charles I, King of England, was beheaded; that Oliver Cromwell was protector of England; that Louis XVI, late king of France was guillotined; are all facts that have happened; but it would be nonsense to suppose, that the states were prohibited from making any law, after either of these events, and with reference thereto. The prohibition, in the letter, is not to pass any law concerning, and after the fact; but the plain and obvious meaning and intention of the prohibition is this: that the Legislatures of the several states, shall not pass laws, after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. I do not think it was inserted, to secure the citizen in his private rights of either property or contracts. The prohibitions not to make any thing but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction, not to pass any ex post facto law, was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making ex post facto laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated, were unnecessary, and therefore, improper; for both of them are retrospective.

"'I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. First. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. Second. Every law that aggravates a crime, or makes it greater than it was, when committed. Third. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Fourth. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive. In my opinion, the true distinction is between ex post facto laws, and retrospective laws. Every ex post facto law must necessarily be retrospective; but every retrospective law is not an ex post facto law: The former, only are prohibited. Every law that takes away or impairs, rights vested, agreeable to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule, that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also individuals, relate to a time antecedent to their commencement; as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations; or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful; and the making an innocent action criminal, and punishing it as a crime. The expressions "ex post facto laws," are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning, by legislators, lawyers and authors. The celebrated and judicious Sir William Blackstone, in his Commentaries, considers an ex post facto law precisely in the same light as I have done. His opinion is confirmed by his successor, Mr. Wooddeson; and by the author of the Federalist, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government."

Appellant relies upon the definition approved in Kring v. Missouri, 107 U. S. 235, 2 S. Ct. 449, 27 L. Ed. 506, substantially as follows:

"Any law passed after the commission of an offense which, * * * 'in relation to that offense, or its con-

sequence, alters the situation of a party to his disadvantage,' is an ex post facto law."

—and claims that this applies whether the law pertains to punishment or procedure merely.

In the elaborate Rose's Note on Calder v. Bull, supra, is a paragraph devoted to a discussion of the definition of the leading case as affected by Kring v. Missouri, supra, as follows:

"It only remains to consider the decision in the Kring Case, with the definition of the ex post facto laws, which it offered, and its effect upon the authority of that laid down in the principal case. Kring v. Missouri was the first case in which the Supreme Court felt called upon to withhold its approval from the long-established definition of Justice Chase, and the majority opinion contains a statement of the ex post facto prohibition which was manifestly believed to be more nearly accurate. See People v. McDonald, 5 Wyo. 533, 43 P. 17 [29 L. R. A. 834]. 'An ex post facto law,' it was said, 'is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which in relation to the offense or its consequences, alters the situation of a party to his disadvantage.' According to this definition which, it was affirmed, was a correct exposition of the term, the law in question in the case at bar was declared invalid as thus applied; because taking away what, by the law of the state at the time of the homicide, was a good defense to the charge of murder in the first degree. The dissenting judges relied largely upon the definition of the principal case, which, they insisted, included all objectionable forms of retrospective criminal legislation. Obviously the proposition that a law which alters the situation of an accused to his disadvantage is objectionable when applied ex post facto broadens the scope and operation of the constitutional prohibition considerably beyond the definition of the leading case. It is apparent, also, that it is broad enough to include all the laws declared ex post facto, which could not be brought fairly within the definition of Calder v. Bull. But the difficulty with it is that it seems to be too broad, and must be received with caution. It would include changes in procedure which have been declared unobjectionable, because depriving of no vested right, although manifestly to the possible disadvantage of an accused. Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. Ed. 262; Mrous v. State, 31 Tex. Cr. Rep. 599, 21 S. W. 764, 37 Am. St. Rep. 835. 'That decision,' observed the Supreme Court of Indiana, with reference to Kring v. Missouri, 'does not go to the extent of breaking down the general rule so long approved by the courts and text-writers, for the most that can be said of that decision is that it declared the mode of procedure may sometimes so far materially affect the

rights of an accused as to fall within the sweep of the constitutional provision prohibiting the enactment of ex post facto laws.' Sage v. State, 127 Ind. 19, 20, 26 N. E. 669. It would be a mistake to suppose that it has supplanted the definition of the principal case. And while the authorities recognize the modification which the Kring Case introduced (In re Medley, 134 U. S. 160, 10 S. Ct. 384, 33 L. Ed. 835; People ex rel. v. McDonald, 5 Wyo. 533, 42 P. 17 [29 L. R. A. 834]), they still cite, and to a large extent follow, the early decision (State v. Welch, 65 Vt. 54, 25 A. 901; Jones v. Commonwealth, 86 Va. 663, 10 S. E. 1006; Lybarger v. State, 2 Wash. 557, 27 P. 450 [1029]; People v. Hawker, 152 N. Y. 234, 240, 46 N. E. 608; Hawk- v. New York, 170 U. S. 201, 18 S. Ct. 578, 42 L. Ed. 1007; In re Wright, 3 Wyo. 481, 483, 27 P. 566, 567 [13 L. R. A. 748] 31 Am. St. Rep. 97, 99; People ex rel. v. McDonald, 5 Wyo. 533, 42 P. 17 [29 L. R. A. 834]; Gibson v. Mississippi, 162 U. S. 590, 16 S. Ct. 910, 40 L. Ed. 1081; Lynn v. State, 84 Md. 78, 35 A. 22; Thompson v. Missouri, 171 U. S. 382, 383, 18 S. Ct. 922, 923, 43 L. Ed. 206."

In Gibson v. Mississippi, cited in the last preceding paragraph, both Calder v. Bull and Kring v. Missouri are considered. The provisions in question regulated the selection of jurors and their qualifications. The court said:

"The provision in question related simply to procedure. They only prescribed remedies to be pursued in the administration of the law, making no change that could materially affect the rights of one accused of crime theretofore committed. The inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The mode of trial is always under legislative control, subject only to the condition that the Legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against ex post facto enactments. In Hopt v. Utah, 110 U. S. 574, 589 [4 S. Ct. 202] [28 (L. Ed.) 262, 268], a statute that permitted the crime charged to be established by witnesses who by the law at the time the offense was committed were incompetent to testify in any case whatever was adjudged not to be ex post facto within the meaning of the Constitution, the court, observing that such a statute did not increase the punishment nor change the ingredients of the offense nor the ultimate facts necessary to establish guilt, but related 'to modes of procedure only, in which no one can be said to have vested right, and which the state, upon grounds of public policy, may regulate at pleasure.' Hence it has been held that a general statute giving the government more challenges than it had at the time of the commission of a particular offense was constitutional. Walston v. Com., 16 B. Mon. [Ky.] 15, 39."

We think the material inquiry is whether any substantial right of the defendant (appellant) vested in him at the time of the offense, and upon which he had a right to rely, has been violated. It is usually held that a person has no vested right in matters of procedure merely, and so a change in procedure, although possibly to the disadvantage of the accused, is not ex post facto. In a note to People v. Hayes, 37 Am. St. Rep. 572, it is said that:

"All the courts, state and national, agree that a change in criminal procedure is not to be regarded as altering the situation of an accused to his disadvantage."

This is putting it too strongly, as there are cases holding that a change in procedure may be objectionable, although not within the terms of Mr. Justice Chase's definition, if it operates to deprive accused of any of those substantial rights which may have been vested in him at the time of the offense and upon which he was entitled to rely.

The origin of the grand jury, as we know it today, is very difficult to trace to its exact source. Like many other institutions of modern civilization, it has been an evolution. The following interesting account of the ancient grand jury is given by Mr. Justice Matthews in Hurtado v. People of California, supra:

"And as to the grand jury itself, we learn of its Constitution and functions from the Assize of Clarendon, A. D. 1164, and that of Northampton, A. D. 1176, Stubbs' Charters, 143-150. By the latter of these, which was a republication of the former, it was provided, that 'If any one is accused before the Justice of our Lord the King of murder, or theft, or robbery, or of harboring persons committing those crimes, or of forgery or arson, by the oath of twelve knights of the hundred, or, if there are no knights, by the oath of twelve free and lawful men, and by the oath of four men from each township of the hundred, let him go to the ordeal of water, and, if he fails, let him lose one foot. And at Northampton it was added, for greater strictness of justice (pro rigore justitiae), that he shall lose his right hand at the same time with his foot, and abjure the realm and exile himself from the realm within forty days. And if he is acquitted by the ordeal, let him find pledges and remain in the kingdom, unless he is accused of murder or other base felony by the body of the country and the lawful knights of the country; but

if he is so accused as aforesaid, although he is acquitted by the ordeal of water, nevertheless he must leave the kingdom in forty days and take his chattels with him, subject to the rights of his lords, and he must abjure the kingdom at the mercy of our Lord the King.' 'The system thus established,' says Mr. Justice Stephens (1 Hist. Crim. Law of England, 252) 'is simple. The body of the country are the accusers. Their accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and his hand. If it succeeds he is, nevertheless to be banished. Accusation, therefore, was equivalent to banishment, at least.' When we add to this that the primitive grand jury heard no witness in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our 'ancient liberties.' It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.

"This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."

Later, it came about that no grand juror could also act as trial juror in the same case if objected to by the accused. Still later it became the practice for "the court directly to authorize the sheriff of each county to return the name of 24 or more persons, from whom the grand jury is chosen, which number gradually settled to 23, a majority of whom must consent in order to frame a valid indictment. Whence it became the custom that however many attend, or actually officiate, 12 at least must concur in presenting an offender." See volume 54, Central Law Journal, p. 211, quoting an article from the Canadian Law Review.

While through the historical accounts the number 12 seems to have been highly esteemed, there seems no satisfactory reason for it except that, in the case of a grand jury of 23, 12 constituted a majority. The majority was the essential thing. In 4 Blackstone, 302, it is said:

"As many as appear upon this panel are sworn upon the grand jury to the amount of 12 at the least, and not more than 23; that 12 may be a majority."

It is true that if the number be reduced below 23 by challenge or otherwise, the 12 would be more than a majority of those participating, yet the offender was always subject to be indicted by a bare majority of 23.

Ever since 1865 and until the adoption of our constitutional amendment, our grand jury was composed of 21 persons and 12 must concur in finding an indictment. The amendment provides that:

"A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. * * * Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a **majority of those who compose a grand jury,** and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment." See Laws 1923, p. 351.

This seems to be the most that the accused was guaranteed, although in some instances the percentage required to concur might be greater than a majority, that is, it was always possible for him to be indicted by a majority of 23.

The case of Hallock v. United States (C. C. A. 8th Circuit) 185 F. 417, is a leading case and is authority for the proposition that the right to be indicted by a grand jury, as given by our Constitution, does not relate to any particular number, and that the qualifications, impanelling, and the precise number of the grand jurors are purely procedural matters and subject to change by the same law-making body which prescribes such qualifications, number, and procedural requirements. In that case the court considered the Kring Case and held it inapplicable. The court said:

"But as was held in Gibson v. Mississippi, 162 U. S. 565, 590, 16 S. Ct. 904, 40 L. Ed. 1075, the inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried in all respects by the law in force when the crime charged was committed. The mode of

trial is always under legislative control, subject only to the condition that the Legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against ex post facto enactments. For example the constitutional prohibition against ex post facto laws has been held not to apply to state laws which authorize an appeal by the state to the Supreme Court of the state from a decision of an inferior appellate court in favor of a defendant (Mallett v. North Carolina, 181 U. S. 589, 21 S. Ct. 730, 45 L. Ed. 1015); which make competent evidence of a disputed writing not competent before (Thompson v. Missouri, 171 U. S. 380, 18 S. Ct. 922, 43 L. Ed. 204); which enlarge the class of persons competent to testify in criminal cases (Hoyt v. Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. Ed. 262); prescribing additional qualifications for jury service (Gibson v. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075); making a change in the organization of the Supreme Court of a state so that instead of a hearing before a full court of five Justices the hearing is before a division of the court composed of three out of seven Justices (Duncan v. Missouri, 152 U. S. 377, 14 S. Ct. 570, 38 L. Ed. 485); changing the place of trial from one county to another in the same district or to another district (Gut v. State, 9 Wall. 35, 19 L. Ed. 573); changing the manner of summoning and making up the jury (Perry v. Commonwealth, 3 Grat. [Va.] 632); giving the government a right of peremptory challenge of jurors it did not have when the crime was committed (Walston v. Commonwealth, 16 B. Mon. [Ky.] 15; State v. Ryan, 13 Minn. 370 [Gil. 343]); reducing the number of peremptory challenges allowed defendants in trials of felonies, not capital (South v. State, 86 Ala. 617, 6 So. 52); reducing the number of grand jurors (State v. Ah Jim, 9 Mont. 167, 23 P. 76); preventing a defendant from taking advantage of variances in an indictment which are not prejudicial to him (Commonwealth v. Hall, 97 Mass. 570); authorizing an appellate court on writ of error to render such judgment as should have been rendered (Jacquis v. Commonwealth, 9 Cush. [Mass.] 279); making the court the judge of the law, whereas before the jury were (Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825); depriving a defendant of a right of change of venue from an examing magistrate (People v. McDonald, 5 Wyo. 526, 42 P. 15, 29 L. R. A. 834); changing practice from indictment to information (Lybarger v. State, 2 Wash. 552, 27 P. 449 1029; State v. Hoyt, 4 Wash. 818, 30 P. 1060); the substitution of information for indictment under the authority of the state Constitution (In re Wright, 3 Wyo. 478 27 P. 565, 13 L. R. A. 478, 31 Am. St. Rep. 94; People v. Campbell, 59 Cal. 243, 43, Am. Rep. 257). In the last case the court said:

"'It is not uncommon practice to change the number of grand jurors required to investigate criminal charges, but we have never heard of the right of the Legislature

to make such changes questioned, neither has it ever been claimed that the charge, must be investigated by the precise number of grand jurors of which that body was composed, at the time the act was committed.'

"In the case at bar the accused was by the Fifth Amendment exempt from accusation except by presentment or indictment of a grand jury, but the amendment went no further in terms, and if the accused had any constitutional right as to the number of grand jurors, which we need not determine, it was that there should be not less than 12 nor more than 23 as at common law. That right was accorded him in a grand jury of 19. True, a maximum of 16 was prescribed by the statute of Oklahoma Territory, but there was no constitutional quality in that particular number. It was purely statutory. As was said in Matters of Moran, 203 U. .S 97 27 S. Ct. 26 (51 L Ed. 105):

" 'The fifth amendment, requiring the presentment or indictment of a grand jury, does not take up unto itself the local law as to how the grand jury should be made up and raise the latter to a constitutional requirement.'

"The details of qualification and impanelling and the precise number between 12 and 23 are matters with which the amendment is not concerned. They belong to procedure, and are left to legislative discretion. They are not inherently of substantive right within the tests of ex post facto laws above enumerated. Indeed, as already noted, it has been held that, in the absence of a constitutional requirement of indictment, a Legislature may do away with it, and substitute information for offense previously committed. How less intrinsically important is the mere number of grand jurors! An indictment is not a trial for crime. It is merely a form of public accusation upon which a trial may afterwards be had. Historical research into the origin of the procedure shows that the important thing was not the particular number of persons who participated in the investigation or who made the charge of their own knowledge as in a presentment, but that it should be under official or public sanction so that one might not be put to the ordeal upon mere private accusal.

"It is urged that prejudice resulted from an increase of the maximum number of grand jurors, 16, under the statute of the territory, to 19, because out of the greater number it was easier to secure the concurrence of 12 to an indictment. We think the prejudice more imaginary than real. . At the common law there was a range from 12 to 23, and, if the practice under that law was in contemplation at the adoption of the Fifth Amendment, it is apparent that the greater or less number between the limits was regarded as of such minor importance that it was left to the discretion of the courts. Even under the Act of Congress, any circuit or district court impaneling a grand jury may determine whether there shall be 16 or 23 members or any number between, and it is common for a

grand jury in one of those courts to vary in the number of attendant jurors during a single term of court. Safeguards of life and liberty regarded as substantial and important are not usually left in such an indeterminate condition."

In State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115, the court decided that the amendment to the Constitution of Missouri making an indictment and information concurrent remedies in prosecutions for felonies, whereas prior thereto a felony could not be prosecuted otherwise than by indictment "except in cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger," was not an ex post facto law. The court relied upon the definition given in Calder v. Bull, supra, and said:

"Under this definition of an ex post facto law, the amendment, although providing for another mode of procedure for the prosecution of felonies than by indictment does not fall within the meaning of an ex post facto law as thus defined, for it does not make an action done before its adoption criminal, nor does it aggravate the crime, or in any way affect it, nor change the punishment nor alter the legal rule of evidence, but, as has been said, goes merely to the mode of procedure. The mode of investigating the facts remain as before, and this through a trial by a jury of defendant's own choosing, surrounded by certain safeguards guaranteed to him by the laws of the land, which cannot be dispensed with. * * *

"In re Wright, 3 Wyo. 478 [27 P. 565, 13 L. R. A. 748, 31 Am. St. Rep. 94], it was ruled that a law changing the mode of procedure from indictment to information in cases of felonies already committed is not ex post facto, and does not infringe any substantial right of the offender. The same rule is announced in State v. Thompson, 141 Mo. 408 [42 S. W. 949]; Duncan v. Missouri, 152 U. S. 377 [14 S. Ct. 570, 38 L. E.. 485]."

Appellant, however, thinks that the better reasoning is found in the dissenting opinion of Judge Sanborn in Hallock v. United States, supra. When the defendant below (in the Hallock case) committed the offense with which he was charged, he could be tried as the law then stood only under such an indictment found with the concurrence of 12 members of a grand jury composed of not less than 12 nor more than 16 persons. Later statutes authorized an indictment, concurred in

by 12 members of a grand jury composed of not less than 16 nor more than 23. Judge Sanborn says:

"The indictment in this case was found by a jury composed of 19 members. Did this change in the law wrought by the adoption of the Constitution of Oklahoma and the admission of that state into the Union after the commission of the offense and before the trial 'in relation to the offense or its consequences alter the situation of the accused to his advantage?' In my opinion it clearly had that effect (1) because, if the defendant had been indicted under the law as it stood when his offense was committed by a jury of 19 men, he could not have been tried or convicted on that indictment (Harding v. State, 22 Ark. 210), while the new law permitted his conviction upon such an indictment; and (2) because for him to have only 5 dissenting members of the grand jury to defeat the indictment against him, while under the new law it was necessary for him to have 8."

So it is seen that Judge Sanborn attached some importance to mathematical consideration in determining whether the change placed the accused at a disadvantage. So, following his line of argument, we see that under the common-law grand jury of 23 it would have been necessary for the defendant to have 12 dissenting members of the grand jury to defeat the indictment against him, and under our former statutes he would have to secure 10 dissenting members, and under our constitutional amendment at present only 5 dissenting members are required to defeat an indictment. If it be said that there is a smaller number from which to secure the dissenters it will be observed that 5 is a smaller percentage of 12 than 10 is of 21.

On the other hand, whereas under the common-law grand jury of 23 the 12 required to concur is a bare majority of 23, and under our old statutes the concurrence of 12 was just a little more than a majority of 21. The amendment requires a concurrence of two-thirds of 12 to find an indictment, and it is to be noted that the amendment declares that it may be provided by law that the grand jury may present an indictment by a majority of the number of the grand jury, which is the only guaranty that the offender ever had at the common law.

We do not feel that any substantial right of the defendant is impaired by the change in the grand jury system. We think the amendment relates to a procedural matter merely. It is not complained that any error was committed at the trial resulting in his conviction by either the petit jury or court. It is not made to appear how he was placed at any disadvantage by being put on trial by the indictment found upon the concurrence of 8 out of 12, instead of 12 out of 21. It did not change his acts from innocent to criminal; the crime was not augmented, no change was made in the punishment; no change was made in the legal rules of evidence requiring for his conviction less or different testimony than was required at the time of the commission of the offense. We agree with the Circuit Court of Appeals of this circuit that the prejudice, if any, to the defendant resulting from the change is more imaginary than real. We would not wish to sanction the liberation of all those who committed crime prior to January 1, 1925, upon technical grounds without the plainest showing that the change in procedure has altered their situation to their disadvantage and deprived them of a substantial vested right upon which they were entitled to rely. We do not think it has. The judgment is affirmed, and it is so ordered.

PARKER, C. J., and WATSON, J., concur.

[No. 2800, Sept. 4, 1924. On Rehearing Aug. 13, 1927.]

FIRST NAT. BANK OF ALBUQUERQUE v. DUNBAR et al

[258 Pac. 817.]

SYLLABUS BY THE COURT

1. There is no equitable jurisdiction to set aside an order of the probate court, approving an executor's final report and ordering a distribution of the assets; there being an adequate and complete remedy by appeal to the district court.

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[1] 15CJ p. 1021 n. 83; 21CJ p. 35 n. 15; p. 36 n. 16; 24CJ p. 1035 n. 17; p. 1044 n. 29. [2] 15CJ p. 859 n. 71; p. 860 n. 75; p. 861 n. 92; p. 863 n. 41. [3] 15CJ p. 1131 n. 31; p. 1133 n. 39; 38 Cyc p. 213 n. 30 New.

2. Former statutes and decisions reviewed, and **held**, that it is competent for the Legislature to regulate the respective jurisdictions of probate and district courts, and to provide, as it has done by section 1430, Code 1915, that the probate court has original jurisdiction in the administration of estates, and the district court appellate jurisdiction only, except where some situation arises requiring equitable intervention.

Appeal from District Court, Bernalillo County; Judge.

Action by the First National Bank of Albuuerque against Ralph S. Dunbar, as executor of the estate of E. H. Dunbar, deceased, and another. From a judgment for plaintfif, defendants appeal. Reversed, and remanded, with directions.

J. A. Miller and Simms & Botts, all of Albuquerque, for appellants.

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

PARKER, C. J. The appellee, hereinafter styled plaintiff, filed its amended complaint against the appellant Dunbar, as executor, and the appellant Fidelity & Deposit Company of Maryland, as surety upon his executor's bond, hereinafter styled defendants. It appears that plaintiff presented a claim against the estate, which claim was allowed and ordered paid in due course of administration. Thereafter the defendant Dunbar filed in the probate court his final report of his doings as such executor, and in said report falsely represented to said probate court that said claim of plaintiff had been paid in full, whereas, in truth and in fact, nothing had been paid upon said claim. Thereupon said Dunbar procured said probate court to fix May 24, 1919, as the time for the hearing and considering of said final report. Said Dunbar gave notice of such time for hearing and considering said final report by posting on the front door of the county courthouse of Bernalillo county a notice of the same. On said May 24, said Dunbar procured from the probate court an order approving the said final report and directing him to "distribute all balance remaining in his hands pro rata among such claimants as appeared by the said re-

port to have been approved by this court and to remain unpaid." Dunbar then distributed the funds among the creditors of the estate, excluding the plaintiff from any participation therein. Plaintiff prayed that an accounting be had of and concerning the assets of said estate and the expenditures made by said Dunbar as such executor, and the amount of fees justly due him, and the amount of claims subject to payment, and the pro rata share or amount which should be paid to the plaintiff, and prayed for a judgment against both defendants in such amount as the court finds is rightfully due the plaintiff, and for judgment over against the defendant Dunbar for such amount as may be payable in excess of the penalty of said bond, and for general equitable relief.

Defendants demurred to the complaint, upon the ground that the same failed to state facts sufficient to constitute a cause of action against them, and that it appeared upon the face of the amended complaint that the court had no jurisdiction of the subject-matter of the action. The court overruled this demurrer, and the defendants answered the bill of complaint, to which answer a reply was filed. A trial was had before the court, and a judgment was awarded the plaintiff, to the effect that the order of distribution above mentioned was void and of no effect as against the plaintiff, and that the plaintiff have and recover from the defendants the sum of $1,123.27, together with interest. The defendants have brought the case here by appeal.

[**1**] The original complaint was filed in this case on June 19, 1919, which was 25 days subseuent to the order of the probate court approving the executor's final report and making the order of distribution. At that time the plaintiff had the right of appeal to the district court. A trial de novo could have been had in the district court, and the correctness of the judgment, approving the final report and ordering distribution, could have been there reviewed. See chapter 99, Laws 1915. It is apparent that the plaintiff had an adequate and complete remedy at law by appeal at the time this

suit was instituted. The district court, upon such an appeal, had power to vacate and set aside the order approving the executor's final report and making distribution of the assets of the estate, and to order him to make a pro rata distribution to all of the creditors, including the plaintiff, which is all of the relief to which the plaintiff was entitled.

It is a fundamental principle that courts of equity have no jurisdiction to entertain a cause of action where there exists at the time an adequate and complete remedy at law. 1 Pom. Eq. Juris. (4th Ed.) §§ 222, 178. Where there is a right of appeal in which an erroneous judgment may be corrected, there is no jurisdiction in a court of equity to set aside the judgment, as was done in this case. Counsel for plaintiff argue that the remedy by appeal was inadequate, because the funds of the estate had already been distributed by the executor to claimants other than the plaintiff. This argument seems to be fallacious. The executor, upon an appeal to the district court, and a correction of the order confirming the final report and ordering distribution, was still chargeable with the money due to the plaintiff, and his bondsman was likewise chargeable to make good the amount adjudged against the executor. It is apparent that the demurrer to the complaint should have been sustained, on the ground that there was no equitable jurisdiction to entertain the cause. See Barka v. Hopewell 29 N. M. 166, 219 p. 799.

It follows, from all of the foregoing, that there is error in the judgment, and that it should be reversed, and the cause remanded, with directions to sustain the demurrer and dismiss the complaint; and it is so ordered.

BRATTON, J., and R. R. RYAN, District Judge, concur.

BOTTS, J., having been of counsel below, did not participate.

On Rehearing.

PARKER C. J. [2] A motion for rehearing has

been filed and granted, and the cause has been reargued. It is strenuously urged that we are entirely wrong in our conclusion for the reason that we have misunderstood the nature and extent of the respective jurisdiction of the probate and district courts. We deem it proper to overhaul the whole subject with the view of settling a much vexed question.

The first statute on the subject of jurisdiction of probate courts is section 21 of the Kearney Code (page 95, C. L. 1884). This section was carried into C. L. 1865, c. 21, § 3, and C. L. 1884, §562, which is as follows:

"The several probate judges shall have exclusive original jurisdiction in all cases relative to the probate of last wills and testaments; the granting letters testamentary and of administration, and the repealing the same; the appointing and displacing guardians of orphans and persons of unsound mind; to binding out apprentices; to settlement and allowance of the accounts of executors, administrators, and guardians; to hear and determine all controversies respecting wills; the right of executorship, administration or guardianship, respecting the duties or accounts of executors, administrators or guardians; and all controversies between master and those bound to them; to hear and determine all suits and proceedings instituted against executors or administrators upon any demand against the estate of their testator or intestate; Provided, that when any such demand shall exceed one hundred dollars, the claimant may sue either before the probate court or in the district court, in the first place."

This was the law under which the case of Perea v. Barela, 5 N. M. 458, 23 P. 766, and 6 N. M. 239, 27 p. 507, was decided. In that case it was pointed out by Judge Lee, in the opinion of the court on rehearing, that by the very terms of the statute the plaintiff might resort to the district court in the first instance, her claim being for more than $100. It was further pointed out that the plaintiff might resort to equity to set aside her receipt to the executor, obtained from her by fraud, and equity, having been invoked for one purpose, would retain jurisdiction for all purposes to do complete justice between the parties.

[3] It is further stated that under the Organic Act of the territory, the district courts were granted the

same jurisdiction as that possessed by the circuit and district courts of the United States, which was the same as that possessed by the High Court of Chancery in England, among whose powers was the power to enforce trusts, and to compel executors and administrators to account and distribute the assets in their hands. This statement is erroneous, in that it fails to discriminate between the district courts as created by the act of Congress and exercising their jurisdiction in causes arising under the Constitution and laws of the United States, and those courts sitting for the trial of causes arising under the laws of the territory. In the former case, those courts were clothed with the same jurisdiction as was possessed by the circuit and district courts of the United States, which included the jurisdiction over the administration of estates. But in the latter case no such jurisdiction is conferred by the congressional legislation, and the jurisdiction is limited to causes in which the United States is not a party, and is confined to causes arising under the laws of the territory. The citation of the City of Panama, 101 U. S. 453, 25 L. Ed. 1061, makes clear this failure of the court to draw this distinction, as that was a case under the admiralty laws of the United States, a matter of purely federal jurisdiction. A fine discussion of the distinction in the two jurisdictions of the district courts, in cases where they are administering the laws of the United States and in cases where they are administering the laws of the territory, is to be found in Lincoln, Lucky & Lee Mining Company v. District Court in First Judicial District, 7 N. M. 486, 38 P. 580, where it is pointed out that originally the district courts created by the Organic Act exercised both federal and territorial powers, and that in pursuance of the authority granted by section 1874, R. S. U. S. (U. S. Comp. St. § 3464) the territorial Legislature in 1859 established territorial district courts in each of the counties then existing in the territory, and provided for the transfer thereto of all causes not arising under the federal laws. Since that time the two jurisdictions have always been separate and distinct, although the courts were pre-

sided over by the same justice, and the former jurisdiction under the Organic Act over territorial causes has been withdrawn from the district courts sitting for the trial of causes arising under the Constitution and Laws of the United States.

Reliance is had in both the original opinion and the one on rehearing in the Perea-Barela Case upon Ferris v. Higley, 20 Wall. 375, 22 L. Ed. 383, but we doubt it is applicable to the facts in the Perea-Barela Case, or the present case. In that case the Legislature of Utah had attempted to confer upon the probate courts of that territory general common law and chancery jurisdiction in both civil and criminal causes commensurate with that possessed by the district courts. The Supreme Court of the United States held simply that such legislation was contrary to the Organic Act of the territory, which vested all such jurisdiction in the d strict courts, and that such jurisdiction was foreign to the general nature of the jurisdiction of probate courts as organized and developed in this country. The court, however, did say:

"Nor are we called on to deny that the functions and powers of the probate courts may be more specifically defined by territorial statutes within the limit of the general idea of the nature of probate courts, or that certain duties not strictly of that character may be imposed on them by that legislation.

The court thus recognized the powers of the territorial Legislature to regulate and define the jurisdiction of the probate courts within the general scope of the jurisdiction of such courts as known and recognized in this country. See Clayton v. Utah, 132 U. S. 632, 10 S. Ct. 190, 33 L. Ed. 455, where Ferris v. Higley is reviewed and interpreted in accordance with the above view. See, also, Hornbuckle v. Toombs, 18 Wall. 648, 21 L. Ed. 966, in which it is held that, subject to such exceptions as expressed in the Organic Acts of the territories, the territorial Legislatures have power to regulate the jurisdiction of the territorial courts. We believe that the decision of Perea-Barela has not always been understood by the members of the bar, and pos-

sibly not always by the territorial Supreme Court. All that was decided was that, under the circumstances in that case, there was equitable jurisdiction to relieve the plaintiff from her accord and satisfaction, although, as heretofore pointed out, there is much in the argument of the court to cause one to conclude that the court intended to go further. However, a case is to be interpreted by what it decides, not the reasons assigned for the decision or the arguments in support thereof, unless the same are sound. The result reached in that case was undoubtedly sound. The statute remained in this form until by section 48 of chapter 90, Laws 1889, now section 1430, Code 1915, it was changed to read as follows:

"The probate courts shall have exclusive original jurisdiction in all the following causes, to wit: The probate of last wills and testaments, the granting letters testamentary and of administration and the repealing or the revocation of the same, the appointment and removal of administrators, the appointment and removal of guardians of orphans and persons of unsound mind, the binding out of apprentices, the settlement and allowance of accounts of executors, administrators and guardians, the hearing and determination of all controversies * * * between master and those bound to him, the hearing and determination of all controversies respecting any order, judgment or decree in such probate courts with reference to any of the foregoing matters of which the probate courts are herein given exclusive original jurisdiction, and no suit shall be prosecuted or begun in any district court to review or in any manner inquire into or reopen or set aside any such order, judgment or decree, and no such order, judgment or decree shall be reviewed or examined in any district court except upon an appeal taken in the manner provided by law."

It thus appears that provision for concurrent jurisdiction in cases involving more than $100 was eliminated, and the Legislature displayed a determination to strip the district court of all original jurisdiction in these matters and to limit the jurisdiction to review on appeal. This statute stood unchanged down to statehood, and is codified as section 1430, Code 1915, and is still in force. In 1913 in Candelaria v. Miera, 18 N. M. 107, 134 P. 829, we had before us the question as to whether a bill in equity could be maintained to open and vacate an executor's account for fraud and for an

accounting. In that case, as to certain items in question, the claim was made that the items having been approved by the probate court, they could be questioned only on appeal. The argument was disallowed, and the court, quoting from Perea v. Barela, upheld the proceeding. In that case we have re-examined the record and note therefrom that it was a clear case for equitable intervention. The legatees were infants. The executor was guilty of actual fraud, and there was no remedy by appeal, and an accounting was necessary in order to ascertain what was due the plaintiffs. It is true, the statutory notice was published of the time for hearing the so-called final report of the executor, but the report was so imperfect and fraudulent as to be no report at all. An unfortunate citation and quotation from the Perea-Barela Case is made in the opinion to the effect that a trust, fraudulently administered, is all that is necessary to give a court of equity jurisdiction. This statement was correct in connection with the facts in that case, but is too broad for universal application. It is only where plaintiff is otherwise remediless that equity has and may take jurisdiction of the administration of estates and the accounts of executors and administrators.

Since statehood we have had several cases involving this proposition. In Michael v. Bush, 26 N. M. 612, 195 P. 904, a creditor of an estate attempted to sue an administrator and his bondsman at law before the estate was closed, and we held, there being no equitable consideration present, the statute (section 1430, Code 1915) applied, and the district court had no jurisdiction to entertain the action. This case was cited with approval in Romero v. Hopewell, 28 N. M. 259-269, 210 P. 231. In Barka v. Hopewell, 29 N. M. 166, 219 P. 799, the distinction between euitable and legal actions is recognized, and it is held that in the former the district court has original jurisdiction in proper cases, and in the latter appellate jurisdiction only.

An enlightening discussion of this whole subject, showing the situation in all of the states as to the juris-

diction of probate courts and equity courts in these matters, is contained in section 1154 of Pomeroy's Equity Jurisprudence (4th Ed.). The author groups the states into three classes: First, those in which the original equitable jurisdiction over administrations remains unabridged, concurrent with that possessed by the probate courts; second, those states in which the jurisdiction of the probate courts over everything pertaining to the regular administration of estates is virtually exclusive; and, third, those states in which the equitable jurisdiction is not concurrent, but is simply auxiliary or ancillary. The author places New Mexico in the first class, citing Perea-Barela, 6 N. M. 239, 27 P. 507.

Professor Pomeroy, in placing New Mexico in the first class, relied upon the decision in Perea v. Barela, above cited, and his attention was evidently not called to some of the considerations herein mentioned.

It follows from all of the foregoing that the judgment of the district court is erroneous, and that our former opinion in this case should be adhered to, and that the cause should be remanded, with directions to dismiss the complaint, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3283, July 30, 1927.]

STATE v. REGENTS OF UNIVERSITY OF NEW MEXICO.

[258 Pac. 571.]

SYLLABUS BY THE COURT

1. Bonds issued by the University of New Mexico under the provisions of chapter 47, Laws 1927, are not obligations of the state, and no provision for taxation to provide interest and sinking fund need be made, and the approval by the voters need not be had.

2. Such bonds, when issued, will be the valid obligations of the University.

[1] 11CJ p. 994 n. 80 New. [2] 11CJ p. 994 n. 80 New. [3] 11CJ p. 994 n. 80 New.

3. A slight misnomer of the corporation in the contract is immaterial, where the identity of the corporation appears, or can be made to appear by parol.

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

Suit by the Attorney General on behalf of the State against the Regents of the University of New Mexico for an injunction. From a judgment sustaining a demurrer, plaintiff appeals. Affirmed and remanded.

Robert C. Dow, Atty. Gen., for the State.

H. C. Denny, of Gallup, for appellee.

OPINION OF THE COURT

PARKER, C. J. This is a suit for an injunction brought in behalf of the State, by the Attorney General, seeking to enjoin the Regents of the University of New Mexico from putting out a bond issue of $190,000 of building and improvement bonds. A demurrer was interposed by the defendant and was sustained by the court, and plaintiff has appealed.

The bonds are proposed to be issued under the provisions of chapter 47, Laws of 1927, and are in exact accord with the requirements of the act. Appellant seeks to enjoin the proposed action upon several grounds.

[1] 1. The Attorney General argues that the proposed bonds are in effect the obligation of the state, and as such may be issued only in compliance with the provisions of section 8 of article 9 of the Constitution, which requires that any law authorizing any such debt shall provide for an annual tax levy sufficient to pay interest and provide a sinking fund, and each law shall be submitted to a vote of the people for approval, neither of which requirements have been complied with. The argument is unsound and based upon a false premise. It is true that the state holds the legal title to the lands granted by Congress, but there is nothing in the enabling act or the state Constitution preventing the state from making the state University and other state institutions the beneficiary of these grants, and empower-

ing them to make such use of the proceeds or income therefrom as it may be deemed proper, within the limits prescribed by the congressional legislation. In the case of the University, by section 11 of article 12 of the Constitution it was made owner of the state educational institutions, and by section 12 of the same article the lands granted or confirmed by the enabling act for University purposes were accepted and confirmed to it for such purposes. We have then a case where a grant of lands has been made to the state as trustee, for the use and benefit of the University as beneficiary, the income whereof may be used by the University in such manner as the state may by law provide, subject always to the restrictions of the congressional legislation, if any there are. In this case, however, there are no restrictions imposed. The Legislature therefore had power to authorize the University to make such use of its income as was deemed best. This is all that is contemplated by chapter 47, Laws 1927, and all that is proposed by the University. It proposes to contract with its bondholders that it will appropriate out of its income sufficient sums of money to pay interest and provide a sinking fund for the retirement of the bonds. It does not propose to mortgage its property in specie. It simply agrees to pay out of its income. How it can be said that this will be an obligation of the state, we cannot understand. This is simply a contract of the University to pay out of a designated fund when received. It is no more an obligation of the state than would be the obligation to pay the salaries of the University faculty. The mere fact that the University is the creature of the state and one of its instrumentalities to carry out its governmental functions is not controlling. The state has given the University certain property rights and has authorized it to make use of the same in a certain manner. This the University is proposing to do, and we can see no objection to the same.

[2] 2. The argument that these bonds when issued would be an incumbrance upon the lands in violation of section 10 of the enabling act would seem to be disposed of by what has heretofore been said.

[3] 3. It is argued that the bonds will be invalid when issued because of a misnomer of the University in the act of 1927. The act names the University as "the Board of Regents of the University of New Mexico," whereas the true name of the corporation is "the Regents of the University of New Mexico." See Section 5120, Code 1915. It is to be noted in this connection that the words "the Board of Regents" and the words "the Regents" are used interchangeably in the act organizing the University. Chapter 138, Laws 1889; section 5117 et seq., Code 1915. Even if this were not so, this slight discrepancy in the corporate name of the corporation will not invalidate the contract with it, if it appears therefrom, or can be established by parol, what corporation made the contract. 1 Cook on Corps. § 742. It is thus seen that the proposed action of the University is entirely legal and is to be approved.

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

BICKLEY and WATSON, JJ., concur.

[No. 3017, July 21, 1927. Rehearing Denied Aug. 23, 1927.]

KING v. DOHERTY.

[258 Pac. 569.]

SYLLABUS BY THE COURT

1. Proposed findings and exceptions to findings are no part of the record proper and must be brought here in the bill of exceptions.

2. A question of law presented by the pleadings, which could not have been overlooked, and which was necessarily and actually decided, may be reviewed, even in the absence of formal exceptions.

3. An assessment of real property, under Laws 1899, c. 22, required a description sufficient in itself to identify

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[1] 4CJ p. 79 n. 52, 54; p. 243 n. 92; p. 443 n. 55; p. 557 n. 45. [2] 3CJ p. 898 n.62. [3] 37 Cyc p. 1052 n. 13; p. 1054 n. 20; p. 1055 n.

the land.

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

Suit by John King against Joe Doherty to quiet title. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

Se, also, 240 P. 810.

Joseph Gill, of Albuquerque, for appellant.

Daniel K. Sadler and Fred S. Merriau, both of Raton, for appellee.

OPINION OF THE COURT

WATSON, J. King sued Doherty to quiet title to the west half of the northwest quarter and the west half of the southwest quarter of section 15, township 28 north, range 29 east. Doherty denied King's title, and asserted and sought to quiet title in himself under a tax deed . Judgment was for Doherty, and King appeals.

[1] Appellee contends at the outset that the record presents no question for review. He points out that appellant's requested findings and his exceptions to the findings made are not certified by the trial judge as part of the bill of exceptions, but appear certified only by the clerk as part of the record proper. His contention that these documents may not, under such conditions, be considered here is fully sustained by former decisions of this court. Gradi v. Bachechi, 24 N. M. 100, 172 P. 188; Baca v. Ojo del Espiritu Santo Co., 28 N. M. 499, 214 P. 764; Fulghum v. Madrid, 31 N. M. 91, 240 P. 990.

[2] Twenty-five of the thirty-one assignments of error attack the findings made or the refusal to make those proposed. These therefore go out, in so far as they require exception to support them. Appellee further contends that the remaining six, based upon the admission of evidence, are also unavailable. This question, in view of our conclusion, we need not decide. Although we must consider that no exceptions were made

in the trial court, there is still one question of which we think the court was fully advised, and which we must review even in the absence of exception. The question is whether the decription on the tax roll was sufficient for a valid assessment. Numerous assignments of error present this question.

Appellee's affirmative answer, which should, no doubt, be considered as a cross-complaint, identified the tax deed on which he relied for title. In the reply appellant alleged that the assessor had not described the land on the tax rolls; that the county treasurer, in attempting to advertise it, had wholly failed to describe it so that it might be identified by the owner, and failed, at the time of the attempted sale to Union county, to insert any description in the tax sale certificate. Thus the issue of insufficient description was brought to the attention of the trial court by the pleadings.

The facts thus alleged in the reply the court found to be true. He found that the land was assessed thus: "Martinez, Epifanio J. real estate Section 15, township 28, range 29 Number of acres 160." That it was described in the advertised delinquent tax list thus: "Precinct No. 22 Epifanio J. Martinez, undescribed land Sec. 15, T. 28, R. 29, 160 acres." That as contained in the certificate of sale assigned to Doherty, the description read: "W 1-2 of NW 1-4, W 1-2 of S W1-4, section 15, township 28, range 29-160 acres." But that: "That portion of said description reading: ' W1-2 of NW 1-4; W; of SW 1-4' so contained in said duplicate tax sales certificate, as assigned to the said defendant Joe Doherty, was added to the description of said property as contained in the treasurer's copy of the assessment rolls of Union county for the year 1910 and to the description of said property as contained in said tax sales certificate, at some date between the time of the purchase of said certificate by the county of Union, at tax sale and the date of the assignment of said certificate on the 15th day of March, 1916, to the said Joe Doherty, upon the discovery by the treasurer's office of said county that the added portion of said description was

the only 160 acres of land owned by said Epifanio J. Martinez in said section 15, or in Union county, New Mexico."

So the issue of the insufficiency of the description was before the court, not only upon the pleadings, but upon his own findings as to the facts. He could not have escaped deciding it, if he had desired. If he erred in the decision, it was through no oversight or misapprehension which might have been prevented by exception taken. So, as we held in Fulghum v. Madrid, supra, no exception was required.

[3] In holding the description sufficient, we think there was error. The attempted assessment was in 1910. In a recent decision, we considered that in an assessment like this, under chapter 22 of the Laws of 1899, "the description appearing upon the tax roll must, in itself, be sufficient to identify the property." State v. Board of Trustees of Town of Las Vegas, 32 N. M. 182, 253 P. 22. We there held that such is not the rule under the present statute. In so construing the 1899 provision, we had before us and in mind Manby v. Voorhees, 27 N. M. 526, 203 P. 543, upon which appellant here places reliance. He also cites Shackelford v. McGlashan, 27 N. M. 454, 202 P. 690, 23 A. L. R. 75, where it was remarked that a description which omitted the section number "would not have supported the tax sale based upon it."

Appellee attempts to distinguish the case at bar from Manby v. Voorhees. The distinction is one of degree only. There the acreage mentioned was to be identified by a search of the whole county. Here it is to be found within the limits of one section. It is plain, however, that neither description serves, unaided, to identify the property. The lower court sustained the assessment because it was possible to show that the taxpayer owned a particular 160 acres of land, and none other, within the section. But it is as possible, though more difficult, to show the same things as to a county. Indeed, it appears from the finding that such showing was made in this case. Having held in the former case that extrinsic

evidence may not be resorted to to identify the land within the county, if we should hold here that such evidence might be adduced to identify it within the section, the greatest confusion would result. The courts would not know where to draw the line and might even be called upon some time to decide whether the same rule should apply in a small county as in a large one.

It is assumed by appellee that the controlling provision is found in section 25 of the 1899 act as follows:

"Such description as will serve to identify the same."

That was, indeed, the provision construed in Manby v. Voorhees. Another provision, however, was in force at the time, namely:

"A description by legal subdivisions, or otherwise, sufficient to identify it." C. L. 1897, § 4032.

Appellee points out that one of Webster's definitions of "serve" is "to contribute or conduce to." He urges, therefore, that the Legislature intended only that the description on the tax roll should contribute or conduce to an identification of the land, and that it might be aided by evidence aliunde. This argument, however, was not allowed to prevail in Manby v. Voorhees. Had it prevailed, the result would have been different. Conceding that appellee's contention might have merit as applied to section 25 of the 1899 act, it certainly can have none as applied to C. L. 1897, § 4032. It is t obe noted, also, that while this court in Manby v. Voorhees invoked the former provision, it used the language of the latter in laying down the rule.

Appellee points to the allusion in Manby v. Voorhees to the large holdings in this state by metes and bounds under Spanish and Mexican grants; in view of which this court remarked that caution should be exercised in laying down hard and fast rules governing descriptions. It was, no doubt, in view of this situation that the Legislature had prescribed "a description by legal subdivisions, or otherwise, sufficient to identify it." Land might be described otherwise than by legal subdivisions, but it was the plain legislative policy that

the description, if "otherwise," should be sufficient to identify it. Appellee calls our attention to Laws 1899, c. 22, § 18, where it was provided that, in proceedings on the district attorney's complaint to obtain an order for sale of property for delinquent taxes, "no assessment * * * shall be construed illegal on account of * * * error or informality as to the description;" and that the court might correct such error. We do not understand, however, on what principle that saving clause may be invoked in a proceeding to quiet title after sale, where the court had made no such correction. In any event, that contention is set at rest by Manby v. Voorhees, where it is said:

> "We now add to the foregoing list of defects which are jurisdictional, and which are not cured by the statute, that of failure of description sufficient to identify the land."

It seems to us, therefore, that Fulghum v. Madrid is controlling upon the procedural questions, and Manby v. Voorhees upon the merits. As appellant has shown a good paper title, and as it would be impossible for appellee to make title under his tax deed, we must reverse the judgment and remand the cause with direction to the district court to enter judgment for appellant, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3018, May 26, 1927. Rehearing Denied Aug. 23, 1927]

SPURGEON v. HUGHES.

[258 Pac. 350.]

SYLLABUS BY THE COURT

Under Laws 1915, c. 71, as amended by Laws 1917, c. 74, recording a chattel mortgage, without filing or minuting, is sufficient for constructive notice.

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

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[1] 11CJ p. 536 n. 12 New.

Action by G. S. Spurgeon against Levi A. Hughes, receiver of the Livestock & Agricultural Loan Company of New Mexico. From an adverse judgment, defendant appeals. Affirmed and cause remanded.

Marron & Wood, of Albuquerque, and J. O. Seth, of Santa Fe, for appellant.

J. G. Fitch, of Socorro, for appellee.

OPINION OF THE COURT

WATSON, J. This suit is a contest for priority between two chattel mortgages. Appellee's mortgage was sent to the county clerk for recording, and the fee paid. It was recorded in full in a record of chattel mortgages, and indexed in the usual manner of indexing instruments of record. It was not minuted or indexed in the special chattel mortgage minute record prescribed by section 5, chapter 71, Laws of 1915. After being recorded, the instrument was returned to appellee, and no copy was left with the clerk. Appellant subsequently took a mortgage upon the same property. Having no actual notice of appellee's mortgage, it claims that the procedure above described did not constitute constructive notice, and that its mortgage, to the filing and minuting of which there is no objection, is entitled to priority.

The question requires interpretation of chapter 71, Laws of 1915, as amended. Great carelessness is manifest in the enacting and amending of that chapter. Its lack of clearness has perplexed all who have had occasion to consult it. It is well that it has finally been repealed. Laws 1925, chapter 25.

Prior to 1915, chattel mortgages were to be recorded "in the same manner as conveyances affecting real estate," and, when recorded, "the party in whose favor the mortgage is executed shall have the right to withdraw the same." Code 1915, § 567. The facts in this case were stipulated. As we understand them, appellee fully complied with the foregoing requirements. In 1915 (chapter 71) this section was repealed. The man-

ner of recording conveyances of real estate was still prescribed by statute, however, and was generally understood.

The difference between counsel is this: Appellee contends that, while chapter 71 introduced a new system of filing and minuting, the old procedure of recording was left optional with the mortgagee. Appellant contends that, though the mortgagee chose to record his mortgage in the old fashion, he must also have it minuted in the chattel mortgage record newly prescribed, and must leave on file the original or a copy of the instrument.

The original provisions of chapter 71, as beaing upon the present question, were: Section 3 required that the chattel mortgage or a copy thereof be filed in the office of the county clerk, "provided, that such chattel mortgage * * * may also be recorded in the same manner as an instrument affecting real estate." Section 4 required the clerk to indorse upon the instrument, or the copy, the time of receiving it and to retain it in the files of his office, "provided, that in case of recording as hereinbefore provided," the mortgagee might "withdraw the original if filed whenever a true copy thereof is filed with such county clerk." The section further provided that when a mortgage "is acknowledged and filed, or recorded in the manner herein prescribed," and it is shown to the court that the same is lost or not in the possession of the party wishing to use the same, " a copy thereof or of the record thereof," duly certified, may be received in evidence without further proof. The section further provided that a certified copy of any original mortgage, or of any copy thereof, "filed as aforesaid," shall be received in evidence; but only as to the fact of receiving and filing according to the clerk's indorsement thereon. Section 5 required the clerk to keep a book in which he should minute certain prescribed facts regarding "all such instruments." Section 6 provided that every chattel mortgage "filed in accordance with the provisions of this act, shall have the full force and effect given to the recording of an in-

strument affecting real estate." Section 7 provided that "whenever any such chattel mortgage * * * shall have been paid or satisfied," and upon the filing of an acknowledged satisfaction thereof, the clerk shall enter in the record book in which the instrument is minuted the word "satisfied" and the date; and then provides:

"In case any such chattel mortgage * * * is also recorded, it shall be the duty of the county clerk to make the same entry on the margin of the page where such instrument is recorded."

Section 8 provided that a chattel mortgage "filed as herein provided" should be void as against creditors, etc., after six years. Section 9 provided that the clerk should charge and collect in advance for the filing and entry of a chattel mortgage 25 cents, and that "in case any such chattel mortgage * * * is recorded as aforesaid," he should "in like manner charge and collect the fee provided by law for the recording of instruments affecting real estate."

To comment upon the many inconsistencies and some seeming absurdities of this chapter would be profitless. It is superfluous to say that its meaning is dubious. It may well be argued that all of the provisions taken together manifest an intent that every chattel mortgage must thereafter be minuted in the new record book and left on file, even though the mortgagee has chosen to have it recorded at length. Reasons may also be suggested to support a contrary conclusion, based, not only upon the language of the chapter, but upon the manifest uselessness of incumbering the files of the county clerk with the original or copy of an instrument which has been spread in full upon his records. One reading section 3 might well conclude that he had the right to have his mortgage recorded as he would record a real estate mortgage, and that if he was willing to do so and pay the expense thereof, he need not concern himself with the further and new provisions of the act.

In 1917 (chapter 74) section 2 of the act was amended to read as follows:

"Sec. 2. That hereafter all chattel mortgages, * * *

shall be acknowledged by the owner or mortgagor in the same manner as conveyances affecting real estate, **and the same shall be filed or recorded as hereinafter required. The failure to so file or record any such instrument in writing shall render the same void as to subsequent mortgages in good faith, purchasers for value without notice, and subsequent judgment or attaching creditors without notice; and as against subsequent general creditors without notice, such unrecorded instrument shall not be valid until the same shall be duly filed or recorded as hereinafter provided."**

The amendment goes far beyond the scope of the original section 2, which provided merely that chattel mortgages should be acknowledged. The part italicized is not germane to the original section, but affects other sections of the act. Before amendment, it could well be urged that section 3 required every chattel mortgage to be filed in the clerk's office, and that section 4 required that it, or a copy of it, should be retained therein. The amendment did not touch these provisions; but it placed ahead of them a provision that chattel mortgages should be "filed or recorded." Section 6 provided that a chattel mortgage filed in accordance with the provisions of the act should have the force and effect given to the recording of an instrument affecting real estate. This provision was undisturbed. But amended section 2, by necessary implication, provided that either filing or recording should have such effect.

It cannot be supposed that the 1917 Legislature intended, by an amendment of section 2 of the Act of 1915, to put in effect provisions quite inconsistent with those of other sections of the act. The 1917 Legislature must have interpreted the 1915 act as appellee did; that is that if a chattel mortgage were recorded in the same manner as real estate mortgages were to be recorded, it was unnecessary to comply with the provisions for filing and minuting.

The Legislature of 1923 (chapter 8) also seems to have construed chapter 71 in the same manner. Desiring that the provisions thereof should be made to apply to conditional sales contracts, etc., as well as to chattel mortgages, it provided that every such instrument

"shall be either recorded or filed * * * in accordance with the provisions of chapter 71 of the Session Laws of 1915." And desiring (chapter 14) to provide for the recording of partido contracts, it required that they should be "either recorded or filed * * * in accordance with the provisions of chapter 71 of the Session Laws of 1915." These 1923 acts, of course, are of no importance except as showing that that Legislature construed the act as we construe it.

Perhaps the greatest difficulty arises out of section 4, the provisions of which were not changed. It is to be inferred therefrom that, even though the instrument had been actually recorded, the original might be withdrawn only on substituting a copy. This, however, is merely permissive in form, and occurs rather, as we think, because of a misconception, than because of any positive legislative intent to incumber the clerk's files with useless documents. Section 4 discloses, not only a looseness of language, but a confusion of ideas; and we do not think that a merely permissive provision thereof should be allowed to control the whole act and lead to an unreasonable construction contrary to that which the Legislature itself has several times put upon it.

Counsel for appellant seems to consider the interpretation of the statute settled by Nations v. Lowenstern, 27 N. M. 613, 204 P. 60. The effect of the statute was there summarized, and in so doing the court said:

> "If the original is filed, it may be withdrawn only when recorded and upon filing a true copy in its stead."

That was not interpretation, however. It was mere summarization of the language. No such question was before the court, and no decision was given upon it. It was expressly stated that the instrument there in question was not recorded. The case involved an attempt to file and minute. The attempt was held insufficient compliance with the statute to effect constructive notice. The present case is one of full compliance with an alternative and optional method of giving such notice.

It follows that the recording of appellee's mortgage was constructive notice to appellant, and that the judgment should be affirmed, and the cause remanded.

It is so ordered.

PARKER, C.J., and BICKLEY, J., concur.

[No. 3062 Aug. 26, 1927.]

In re FLEMING.

[259 Pac. 613]

SYLLABUS BY THE COURT

Attorney disbarred for failure to account for moneys of clients.

Original proceeding by the Attorney General for the disbarment of J. E. Fleming. Respondent disbarred.

J. W. Armstrong, Atty. Gen., and James N. Bujac Asst. Atty. Gen., for relator.

O. O. Askren, of Santa Fe, for respondent.

OPINION OF THE COURT

WATSON, J. This is an original proceeding upon the accusation of the Attorney General, charging J. E. Fleming, formerly a practicing attorney at Santa Rosa, with professional misconduct, and, specifically, with failure to account for moneys of certain clients coming into his hands as an attorney.

By his answer respondent denied the several charges of failure to account, and alleged that all such sums had been remitted prior to the commencement of the present proceeding. He further alleged, by way of new matter, that he had at the time a large collection business, conducted largely through stenographers, and that his files had become confused; that when his attention was called to the matters set forth in the accusation he called in the counsel who represents him here, who caused a complete search to be made of respondent's files and

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[1] 6CJ p. 591 n. 69.

records, and upon ascertaining the several amounts due to his clients, made remittance therefor in full. He further pleads that, though perhaps careless, he had no wrongful intent; that by reason of the publicity given to the charges herein, and upon the advice of his counsel, he had left this state and has already been severely punished for his carelessness; that he is financially unable to come to New Mexico to appear in person at the hearing, and asks for leniency in judgment.

The matter was submitted, by stipulation, upon the pleadings and upon certain documentary evidence.

The evidence does not permit us to accept respondent's protestations of mere carelessness and of no wrongful intent. Without going into detail, we will refer to one transaction, the matter of a collection from J. J. White for Miller Bros. Hat Co. The account placed in respondent's hands amounted to $213.75. White paid respondent $130.00 on January 25, 1924; $25, on February 25, 1924; and $40, on May 28, 1924. For these payments he made no accounting to his client. On the contrary, he, in effect, denied receiving them, as appears from the following excerpts from letters written by him to American Credit-Indemnity Company, the forwarder:

"Regarding this claim, we will say that it has been a most difficult one to adjust, and we are doing our very best to get it closed. Our Mr. Fleming went to Mountainair some two weeks ago to see this debtor and did see him, at which time he promised to pay this account about the 1st of this month. He has not yet done so. This debtor is wholly insolvent, and it is a question of persuasion rather than other methods to get the money. We hope that you will appreciate the situation. We assure you that we will leave nothing unturned to get the desired results." (Letter dated May 6, 1924, after $155 had been collected.)

"Replying to your letter of the 9th inst., will advise that we are doing our best to get this claim settled. We have made two or three trips to Mountainair, where the debtor lives, and he has promised us faithfully to make payments on it. This debtor is no longer in business, and when he went out of business he left a large number of debts, and we assure you that it is very difficult to succeed in collecting this claim. We will continue to push this debtor and hope to be able to get it collected not later than this

fall." (Letter dated July 15, 1924, after $195 had been collected.)

"It seems that this claim is a loss. The debtor has been out of business a long time and has nothing whatever to pay with. When he went out of business a number of judgments were taken against him, running up into the thousands. Left many outstanding unpaid bills. We have seen him a number of times trying to get some money out of him. It seems entirely out of the question. He is working out on some ranch, and it seems has given up all hope of ever paying old debts." (Letter dated September 4, 1924.)

"We have found this to be the hardest claim we have had to contend with. We have made a number of trips to see this debtor trying to effect an adjustment of the claim. As we have heretofore advised you, he is no longer in business and is located out in the country on a ranch. He left a number of judgments and bills unpaid, and it seems that there is but little chance of them ever being paid. Can't you get client to allow 50 per cent. commission on this claim? This is one that is worth it. To ever get anything out of this party we have to keep after him all the time, and by so doing we may be able to get something in small payments. To do this it will require considerable time and expense, and we do not think a 25 per cent. commission would pay us anything. We have done so much work on it we dislike to give it up as a hopeless case. Take the matter up with client and advise us. It is very seldom that we ever ask for 50 per cent. commission, but we feel that this is one claim that is sure worth it." (Letter dated October 4, 1924.)

This proceeding originated before the adoption of Laws 1925, c. 100, conferring jurisdiction on the board of commissioners of the state bar in matters of discipline. However, we deemed it proper, in view of the present relation of that board to this court in such matters, to request its opinion upon the pleadings and the evidence. The board was unanimously of opinion that the respondent is guilty and should be disbarred. Upon the facts herein stated, we concur in that view.

It is therefore ordered and adjudged that the respondent, said J. E. Fleming, be and he is hereby disbarred; that his name be and it is hereby stricken from the roll of attorneys of this court; and that he be and he is hereby precluded from practicing as an attorney in each and all of the courts of this state.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3196, Aug. 26, 1927]

OWENS v. OWENS.

[259 Pac. 822]

SYLLABUS BY THE COURT

1. In an affidavit of nonresidence, to procure service by publication, if, to avoid mailing copy of complaint and summons, defendant's residence is stated as unknown, when in fact it is readily ascertainable, there is fraud upon the court and upon the defendant, and equity will vacate a decree of divorce thus obtained.

2. In a suit to vacate a decree of divorce for fraud, one marrying the defendant after and in reliance upon, the divorce is not a necessary party.

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

Suit by Kathryne Kasser Owens against George L. Owens to vacate a decree for divorce. From a judgment for plaintiff, defendant appeals. Affirmed and remanded.

H. B. Jamison, of Albuquerque, for appellant.

Rodey & Rodey, of Albuquerque, for appellee.

OPINION OF THE COURT

WATSON, J. [1] Appellant obtained a final decree of divorce from appellee, in Bernalillo county, on service by publication. Thereafter appellee commenced, in the same court, the present suit to vacate the said decree, upon the ground of appellant's fraud in suppressing notice of the proceedings, and the further ground that the district court of Bernalillo county was without jurisdiction of the divorce case, because appellant had not been a resident of this state for the requisite one year. The trial court sustained both grounds of the complaint, and rendered judgment setting aside the decree of divorce.

As compliance with Code 1915, §§ 4095, 4096, appellant included in his complaint for divorce the follow-

[1] 19CJ p. 163 n. 75; p. 166 n. 28; p. 167 n. 31; 32CYC p. 567 n. 25. [2] 19CJ p. 172 n. 11, 12, 13.

ing allegation:

"That defendant is a nonresident of the state of New Mexico, and that plaintiff does not know the present whereabouts of the said defendant and has no means of ascertaining her present address."

The complaint alleges:

" * * * In truth and in fact the said George L. Owens knew * * * that the address of the said Kathryne Kasser Owens was at No. 2384½ Summit street, Columbus, Ohio, her sister's home address; and * * * that the said George L. Owens, notwithstanding * * * that he did * * * know the address of Kathryne Kasser Owens, * * * willfully and fraudulently failed to state the same in his complaint * * * that neither the said George L. Owens, his agent, or attorney deposited a copy of the summons and complaint in the post office * * * and * * * totally failed to mail this plaintiff any copy of the summons and complaint; and * * * that she had no knowledge of the pendency of the suit. * * * "

It is not claimed that appellant mailed a copy of the summons and complaint; nor that appellee had any knowledge or notice of the proceedings. As to appellant's knowledge of appellee's address, the court found:

"That George L. Owens, on the 26th day of June, 1924, may not have known the actual street address of the said Kathryne Kasser Owens and his statement to that effect may be literally true, but that he had means of ascertaining her then address and wholly failed in making any effort whatsoever to notify the said Kathryne Kasser Owens of the filing of the complaint. * * * "

"That the residence of Kathryne Kasser Owens was known by George L. Owens on June 26, 1924, at the time of filing the complaint, * * * to be either in Detroit, Mich., or Columbus, Ohio, although the said George L. Owens did not have positive knowledge of the street address at either place.

"It may be literally true that George L. Owens did not know the address of his wife when he filed his suit for divorce; that is, probably literally true—I suppose he did not know where she was. It was not true that he could not have located her.

"It is apparent to the court from the whole record that this man ran away from Detroit to escape his wife and came to New Mexico incidentally on his way to California and procured a divorce by probably a technical compliance with the statute of service by publication, with the idea of

keeping the proceeding secret from his wife, and with the idea of getting a default decree without her actual knowledge. He could easily have located her, but he did not do so. * * * I feel quite sure that a very grievous fraud has been perpetrated on this court. The whole proceeding was conceived in fraud and carried out in fraud."

Appellant advances this proposition:

"If defendant, Owens, did not know residence of plaintiff, Kathryne Kasser Owens, law did not cast upon him the duty of trying to find said residence, and therefore court in original cause had jurisdiction by publication over person of defendant, and original divorce decree was not void."

It may be said at the outset that, to upset the judgment appealed from, it will not be sufficient to show that the divorce decree was not void. Even though all proceedings were on their face in strict compliance with statutory requirements, so as to give the court jurisdic- to give the court jurisdiction of appellee, they might be so false and perjured as to constitute a fraud upon appellee and upon the court, rendering the decree resting thereon voidable in equity. 19 C. J. 166; R. C. L. 448. We do not think that appellant would contend otherwise.

The sworn allegation of appellant, that he "had no means of ascertaining her present address," was false, according to the findings. The question is whether that constitutes such fraud upon appellee and upon the court that equity may avoid the decree. If by means of that false allegation appellant was enabled to withhold from appellee a notice which the law contemplated she should have, we cannot doubt that such fraud is made out.

Appellant points out that section 4096 requires mailing only "when the residence of the defendant is known." He argues that a person can have only one "legal residence" at one time; that the court has found that such legal residence was unknown to appellant that the allegation as to lack of means of ascertaining appellee's then present address was surplusage; and that the finding that he had such means is immaterial.

Here is a suggestion that the word "residence," as used in section 4096, means "legal residence" or domicile as distinguished from a temporary abiding place. If appellant could establish such a proposition, he would but defeat his purpose in this appeal. His jurisdictional allegation did not state, as section 4096 requires, that appellee's "residence" was unknown. He stated merely that he did not know her "present whereabouts." So, unless, for the purpose in view, "present whereabouts" may be accepted as equivalent to "residence," appellant's allegation does not comply with the statute, jurisdiction did not attach, and the decree is void. Therefore the allegation, if of any virtue, means that appellee's "residence" was unknown.

It is doubtless true, as appellant contends, that he need not have alleged that he had no means of ascertaining appellee's "present address." Yet the falsity of the allegation is not entirely immaterial. It points clearly to bad faith. Otherwise it may be disregarded. It is clearly inferable from the findings that appellant, had he desired, could easily have located appellee's residence. Dismissing from view the express falsity, there remains the question whether without it there would have been a false implication. Can one honestly swear that an adversary's residence is unknown when it can be easily ascertained? Ignorance excuses notice by mailing. May it be a willful, studied, and deliberate avoidance of the means of knowledge? The answer would seems to be obvious if any consideration is given to the plain purpose of section 4096.

Our public policy, as represented by legislation, has not been constant. The earliest provision for service by publication was the act of January 24, 1870, being chapter 27 of the Laws of 1869-70. By it diligent search was required, expressly and specifically, that the defendant might be served with process or notified by mail, according as he was within or without the territory. That statute was repealed by the act of January 2, 1874, being chapter 16 of the laws of that year, compiled as sections 2964-2966, C. L. 1897. That act omit-

ted the specific requirements as to diligence, and dispensed with notice by mailing. It does not seem to have been expressly repealed until by subsection 300, p. 294, c. 107, Laws of 1907. But, in the meantime, as part of the Code of Civil Procedure, the present sections 4095, 4096, Code 1915, had been enacted. The most important change thereby made was to restore the requirement of notice by mail.

Constructive service is in derogation of the common law. It is harsh. It lends itself to abuse. It is only resorted to from necessity. Hence the statute granting the right to proceed in that manner is to be strictly constructed and strictly followed. Priest v. Board of Trustees, 16 N. M. 692, 120 P. 894; Bowers v. Brazell, 31 N. M. 316, 244 P. 893. It would be taking a liberal view indeed to say that it was intended that one might close his eyes in order to remain ignorant.

Section 4096 was, as to persons in appellee's situation, remedial. It conferred a valuable right. It cured a defect which had existed in our law for 23 years. It righted a wrong theretofore permitted. From that point of view, it is to be liberally construed. Appellee's right to be notified by mail was absolute unless her residence was really, not pretendedly or technically, unknown.

So, while the statute has nothing to say of diligence or of good faith, they are necessarily implied. In enacting section 4096, the territory of New Mexico, though its Legislature, performed an act of justice and fairness. Adopted in that spirit, it must be followed and construed in the same way.

Appellant urges that we held differently in the recent case of Bowers v. Brazell, supra. We disclaim any intention to do so. Considering the very question here involved, we assumed, though we did not decide, that if the complaint had "pleaded that the affiant had actual knowledge, or reasonably accessible means of knowledge, of appellant's residence," it would have been sufficient to charge fraud in the suppression of

notice. Considering the further contention that the decree was void for lack of jurisdiction because the fact of nonresidence was stated merely on information and belief, we remarked that "our statutory procedure regulating service by publication is loose," and noted that "the New Mexico statute specifies no degree of diligence, and in fact, by its terms, requires none whatever." Appellant relies upon this language to support his present contention. We were at the time considering merely the showing required to support a publication; and we were referring merely to the terms of the statute, not to its implications. We were considering the sufficiency of the affidavit, not the truth or falsity of its contents. It is one thing to sustain jurisdiction when the showing made meets the requirements of the statute. It would be quite another to sustain a decree obtained by a fraudulent affidavit that the defendant's residence was unknown. That distinction we carefully pointed out in the opinion. Weaver v. Weaver, 16 N. M. 98, 113 P. 599, is not in point.

We conclude, therefore, that the court properly vacated the decree of divorce for fraud in the suppression of notice. In view of that conclusion, it is unnecessary to notice appellant's further contention that the finding in the divorce case that appellant had resided the requisite time within the state was res adjudicata, and could not be reviewed in the present case.

[2] Appellant also contends that Mary Kreisler Owens, who married appellant subsequent to the divorce decree and before the commencement of the present suit, was a necessary party. He admits that the weight of authority is to the contrary, and refers to 19 C. J. 172, where it is said:

> "While there is apparently some authority to the contrary, the general rule is that, where the prevailing party has married again, the new spouse is not a necessary party to the proceeding to vacate the decree, at least unless such spouse has some substantial interest in the matter, as where the vacation of the decree would affect the property rights of such spouse."

The authorities cited to the contrary, and as illustrat-

ing the exception mentioned, are Sampson v. Sampson, 223 Mass. 451, 112 N. E. 84, Vanness v. Vanness, 128 Ark. 543, 194 S. W. 498, and Carlisle v. Carlisle, 96 Mich. 128, 55 N. W. 673.

It is not even suggested in these cases that the second spouse is a necessary party. It is merely held that, under certain conditions, it is proper to permit her to intervene for the protection of her own interests. With that question we are not concerned. Mary Kreisler Owens, though fully informed of the proceedings and present and testifying at the trial, has never asserted any rights or attempted to intervene. The fact of the second marriage in reliance upon the decree does not appear from any of the pleadings, came out only incidentally at the trial, and was brought to the attention of the trial court first and solely by a request made by appellant's counsel for a conclusion of law that the second spouse was a necessary party. While admitting all this, appellant's counsel contends that the question has never been decided in a community property state, and that in such a jurisdiction a wife's property rights are such that, in a situation like this, she should be held a necessary party. We are not impressed with the suggestion. It seems to us, on the contrary, that if there is any difference, there is less reason for so ruling in states where the law of community property prevails. In a common-law jurisdiction inchoate dower in the husband's real estate attaches from the date of marriage. In this state the property of the husband acquired before marriage remains his separate estate. So we overrule the contention.

Finding no error affecting the judgment, it will be affirmed and the cause remanded, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3245, Aug. 26, 1927]

HUNKER v. VEEDER et al.

[259 Pac. 431.]

SYLLABUS BY THE COURT

1. An appeal will be dismissed where no cost bond has been filed.

2. Where a party appeals in his individual capacity from a judgment in which he is also a party as executor, a cost bond is required.

Appeal from District Court, Mora County; Armijo, Judge.

Action by Sarah L. Veeder, individually and as executrix of the estate of Elmer Veeder, deceased, and others, against George H. Hunker. From an adverse judgment, plaintiff appeals. Appeal dismissed, and cause remanded.

Hanna & Wilson, of Albuquerque, for appellants.

Hunker & Noble, of East Las Vegas, for appellee.

OPINION OF THE COURT

PARKER, C. J. [1] A motion to dismiss the appeal in this case has been filed, based upon various grounds, only one of which need be noticed. Neither a supersedeas bond nor a cost bond has been filed, although the time within which the same was required by chapter 43, Laws of 1917, has long since expired. Under our previous decisions, this is fatal to the appeal. See Abo Land Co. v. Dunlavy, 27 N. M. 202, 199 P. 479; Hernandez v. Roberts, 24 N. M. 253, 173 P. 1034; Hubert v. American Surety Co., 25 N. M. 131, 177 P. 889.

[2] It appears that appellant was a party to the proceeding below, both individually and as executrix of the will of Elmer Veeder, deceased, but the appeal was taken and allowed to her in her individual capacity only. This being true, bond was required. Baca v. Winters, 26 N. M. 342, 192 P. 479; In re Henriques,

[1] 3CJ p. 1178 n. 59. [2] 3CJ p. 1119 n. 66.

5 N. M. 169, 21 P. 80.

It follows that the appeal must be dismissed and the cause remanded, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3250, Aug. 26, 1927]

STATE v. NABORS.

[259 Pac. 616]

SYLLABUS BY THE COURT

1. Where the requirements of the statute, section 5573, Code 1915, have been met by an application for a change of venue, the court has no discretion to deny the motion.

Watson, J., dissenting.

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

William Nabors appeals. Reversed and remanded, with direction.

Thos. J. Mabry, of Albuquerque, for appellant.

Robert C. Dow, Atty. Gen., and Frank H. Patton, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

PARKER, C. J. The only error assigned is the refusal of the court to grant appellant's motion for change of venue. The motion itself was purely formal, and was based upon the following affidavit containing the grounds of the motion and specific facts:

"Comes now William Nabors, who, being first duly sworn, upon his oath deposes and says: That he is the defendant in the above entitled and numbered cause; that he believes, and therefore makes oath and affirms, that he cannot obtain a fair trial in the county of Bernalillo wherein this cause is now pending, for the following reasons:

"(a) Because the inhabitants of such county (meaning Bernalillo county) are prejudiced against this defendant.

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[1] 16CJ p. 216 n. 16. [2] 16CJ p. 203 n. 55; p. 213 n. 82.

"(b) Because, by reason of public excitement and local prejudice in such county (meaning Bernalillo county) in regard to the case and the questions involved therein, an impartial jury cannot be obtained in such county (meaning Bernalillo county) to try the same.

"(c) That, immediately after the arrest of this defendant charged with the offense under which he is to be tried herein, a great deal of notoriety and publicity was given in all of the newspapers of said county, in both English and Spanish, touching upon the alleged crime for which this defendant is charged, and the said publicity has continued to be given down to and at the present time.

"(d) That on or about the 12th day of March, 1927, considerable notoriety was given in all of the daily newspapers published in Bernalillo county, N. M., and in the weekly Spanish language newspapers, to an alleged abortive effort of this defendant to secure his freedom through an alleged prison breach and jail break, one of said newspapers at least employed a five-column headline to break the story to the public that this defendant, a dangerous character and held in jail without bond upon a most serious offense, was about to break prison and be and become at large upon the local community; whereas in truth and in fact no effort on the part of the defendant or any confederate was ever made for any such break, the said publicity in this connection having been the pure and simple invention of special officers of the Santa Fe Railway Company, which corporation is making itself vitally interested in the prosecution of this case, and said report and stories are all entirely and wholly without any foundation whatsoever; nevertheless and notwithstanding the same has inflamed passion and aroused the prejudice of a great and large number of people of Bernalillo county, which has made it impossible for defendant to obtain and secure a fair and impartial jury in Bernalillo county to try his said cause."

The supporting affidavit is as follows:

"Come now Al Mathieu and Edward Nunlist, who being first duly sworn, upon their oath, each for himself and not one for the other, depose and say: That he has read the above and foregoing motion and affidavit of defendant for change of venue in the above entitled and numbered cause, and that he believes the facts stated in said motion and also the foregoing facts stated and set out in the affidavit of defendant and all of said facts therein stated to be true, and that he believes that on account of and because of the facts stated in said affidavit of defendant, an impartial jury cannot be obtained in Bernalillo county, N. M., to try the defendant upon the within charge; and affiants say further under oath and each for himself and not one for the other that he is a disinterested person and has no interest in said cause of any kind or character, and that in fact he is not acquainted with and does

not know either the said defendant or his family or any of them."

The material part of the order denying the motion is as follows:

"And the defendant having produced two disinterested witnesses, Al Mathieu and Edward Nunlist, being the two supporting witnesses to the said motion for change of venue, and said witnesses having testified in support of and their testimony fully supporting said motion and affidavits, and there being no other evidence introduced, the court decides nevertheless that the granting of the motion is in the discretion of the court, and the court being fully advised, holds that the motion ought not to be granted, and holds that the granting of the motion is not mandatory upon the court."

In a stipulation relating to the inclusion of certain matters in the record, and signed by the district attorney and by counsel for appellant, and approved by the trial judge, appears the following recital:

"It being desired to review only the question of whether upon the prima facie showing made in motion and supporting affidavits herein, and this fully supported by the uncontradicted testimony of the supporting witnesses, change of venue is nevertheless discretionary."

The right was claimed and the motion was based upon Code 1915, § 5573, reading as follows:

"The venue in all civil and criminal cases shall be changed whenever the judge is interested in the result, or is related to, or has been counsel for either party, or when the party moving for a change shall file in the case an affidavit of himself, his agent or attorney, stating that he believes such party cannot obtain a fair trial in the county wherein the cause is then pending, either because the adverse party has an undue influence over the minds of the inhabitants of such county or the inhabitants of such county are prejudiced against such party, or because by reason of public excitement or local prejudice in such county in regard to the case or the questions involved therein, an impartial jury cannot be obtained in such county to try the same. Such affidavit must be supported by the oaths of two disinterested persons that they believe the facts therein stated are true." Laws 1889, c. 77, § 1.

[**1, 2**] The question is clearly defined by the above stipulation of the parties and assented to by the court. The stipulation and the finding of the court bring the case plainly within the terms of the statute. No ques-

tion is made that the statutory grounds have not been fully made out. The court took the position, however, that, notwithstanding the complete statutory showing, it had "discretion" to disregard the showing and to refuse the change of venue. The word "discretion" is an inappropriate word in this connection, although it has been frequently used in a general and loose manner in some of our former decisions. No discretion is confided to the district judge by the statute. When the showing is made, it becomes the duty of the court to grant the change. The so-called discretion of the court comes into play only in determining the existence of the grounds of the motion (that is, whether the requirements of the statute have been met), but is not discretion at all. It is a plain and ordinary judicial determination of a fact, the same as any other fact in a case. Hence we have held that the court may examine the witnesses offered in support of the grounds of the motion to ascertain who they are, whether they have knowledge of the conditions about which they have made affidavit, and whether they are fair, impartial, and trustworthy. This is proper and not contrary to the letter or spirit of the statute and is necessary to enable the court to judicially determine as to the existence of the statutory grounds. Further than this, our court has never gone. Where the court finds from such an examination, as it has found in this case, that the grounds for the change of venue have been established by competent compurgators, there is nothing left for the court but to grant the change. This court has never held otherwise, although, as heretofore pointed out, loose expressions about discretion of the court have sometimes been used. These expressions, no doubt, misled the court below.

It may be said that this conclusion renders the statute mandatory to the great detriment of the due administration of justice. The answer is plain. If it is deemed best to submit the question to the discretion of the district court, the remedy is to be had by legislative enactment, not by judicial construction.

It follows that the judgment of the court below is erroneous and should be reversed, and the case remanded, with direction to award a new trial, and it is so ordered.

BICKLEY, J., concurs.

WATSON, J. (dissenting). I do not concur with the majority as to the function of the trial court in passing upon motions for change of venue. I agree that "discretion" does not correctly describe it. I agree also that "it is a plain and ordinary judicial determination of a fact." But what fact? As I understand, the majority hold that the fact to be determined is merely whether two disinterested persons, having a general knowledge of conditions, do, in good faith, believe in the existence of one of the conditions set forth in the statute and entitling the moving party to the change. I find myself unable to yield the view that the fact to be determined is whether such condition exists. This I think results from correct interpretation of the statute and application of principles to which this court is committed.

In my opinion, the trial judge, in claiming a "discretion," merely employed the word in the loose sense which the majority criticize, and for which this court is responsible. It is a familiar principle that findings are to be liberally construed in support of the judgment or action taken. Certainly the trial judge did not intend to record that he arbitrarily denied a right to which appellant had shown himself entitled. He simply held that the specific facts alleged and proven were insufficient to support the conclusions of popular prejudice and of the impossibility of obtaining an impartial jury in Bernalillo county.

So I feel constrained to dissent.

[No. 3265, Sept. 3, 1927.]

Ex parte ARMIJO.

[259 Pac. 820.]

SYLLABUS BY THE COURT

Section 3528, Code 1915, is not repealed as to its criminal provisions by chapter 162, Laws 1919.

Criminal application of Juan Armijo for a writ of habeas corpus. Petition dismissed, and petitioner remanded to custody.

Hanna & Wilson, of Albuquerque, for relator.

Frank H. Patton, Asst. Atty. Gen., for respondent.

OPINION OF THE COURT

PARKER, C. J. The petitioner was tried and convicted of usury and fined by a justice of the peace of Bernalillo county. In default of payment of the fine he was committed to the county jail. He thereupon sued out a writ of habeas corpus in this court to secure his release.

The proceedings against the prisoner were prosecuted under the provisions of section 3528, Code 1915. This section is section 1, c. 80, Laws 1884, and is strictly a criminal statute.

The first statute on the subject of usury was the act of January 25, 1866 (Prince's Gen. Laws, p. 421), which made it a crime to exact more than the legal rate of interest. By chapter 19, Laws 1872 (Prince's Stats. p. 414), the plea of usury was abolished. By chapter 25, Laws 1882, the act of 1872 was expressly repealed, and the legal rates of interest on open accounts and contracts were fixed, and provision was made that no recovery could be had at a greater rate.

In Milligan v. Cromwell, 3 N. M. 557, 9 P. 359, the territorial court examined these statutes, and held that the act of 1872 repealed the act of 1866, and that the

[1] 39CYC p. 1096 n. 98.

repeal of the act of 1872 by the act of 1882 did not revive the act of 1866. In 1884 the territory returned to the criminal feature as a punishment for usury and enacted chapter 80, Laws 1884, which now appears as section 3528, Code 1915. By chapter 162, Laws 1919, a civil consequence of usury rather than any criminal consequence is indicated. The title of the act is "An act fixing the maximum rate of interest, defining usury and prescribing the penalty for exacting the same." Section 1 of the act prescribes the maximum lawful rate of interest. Section 2 of the act is as follows:

"If a greater rate of interest than is hereinbefore, in section 1, allowed, shall be contracted for or received or reserved, the contract shall not therefore be void; but in any action on such contract, proof may be made that a greater rate of interest has been directly or indirectly contracted for or taken or reserved, and the plaintiff shall recover only the principal less the amount of interest accruing thereon at the rate contracted for, and the defendant shall recover costs; and if interest shall have been paid, judgment shall be for the principal less twice the amount of interest paid and less the amount of all accrued and unpaid interest."

Section 5 of the act is a general repealing clause of all acts in conflict with the chapter.

The argument is put forward in behalf of the petitioner that the act of 1919 covers the whole subject-matter, and therefore repeals section 3528, Code 1915, by necessary implication.

It is to be noted that the act of 1884 fixes the maximum rate of interest at 12 per cent., while the act of 1919 fixes the rate at 10 per cent. It is not criminal under either of these acts to charge more than 10 per cent., under the act of 1884 because not within its terms, and under the act of 1919 because such consequence does not follow from a violation of its provisions. It thus appears that the two acts do not cover the same field, and are not necessarily antagonistic. Counsel for petitioner relies much upon the title of the act of 1919 as indicating a legislative intention to cover the whole subject of usury. The argument is not without force. But the fact remains that the title, when it is

broader than the provisions of the act, cannot be held to broaden its provisions beyond their terms. Under the provisions of these two acts if interest is charged in excess of 10 per cent., the party is subject to certain forfeitures, and if interest is charged in excess of 12 per cent., the party is liable criminally. The well understood canon of construction that repeals by implication are not favored operates in this case. The other principle of construction that a later statute covering the whole subject repeals a former statute, although no absolute inconsistency between the two acts exists in all particulars, has no application here, because the later statute does not cover the same field as the earlier one and does not purport to be a complete system.

It follows that the petition should be dismissed and the petitioner remanded to custody, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3024, Sept. 5, 1927]

BOARD OF TRUSTEES OF TOWN OF CASA COLORADO LAND GRANT v. POOLER, U. S. District Forester, et al.

[259 Pac. 629]

SYLLABUS BY THE COURT

A complaint alleging that plaintiff owns lands, which defendants, in official capacities, have seized and are administering as national forest, and praying injunction, states a cause of action against individuals, and not one against the United States.

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

Suit by the Board of Trustees of the Town of Casa Colorado Land Grant against Frank C. W. Pooler, United States District Forester, and others, for an injunction. From a judgment of dismissal, plaintiff appeals. Reversed and remanded, with direction.

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[1] 39Cyc p. 775 n. 19.

Reid, Hervey & Iden, of Albuquerque, for appellant.

John W. Wilson, of Albuquerque, for appellees.

OPINION OF THE COURT

WATSON, J. Appellant, by its complaint alleged that it was the owner of certain described lands which had been patented to it by the United States in 1909; that appellees were, respectively, United States forester, forest supervisor of Manzano national forest, and forest ranger of said forest; and that appellees, "in their respective capacities hereinbefore stated, have entered into possession of the lands described * * * and are administering said lands as part of the Manzano national forest collecting income therefrom, and denying plaintiff (appellant) the use thereof, to the great damage of plaintiff.' Claiming irreparable injury, for which there was no adequate remedy at law, appellant prayed "that this court grant a writ of perpetual injunction commanding said Frank C. W. Pooler, United States district forester, K. C. Kartchner, forest supervisor Manzano national forest, and L. H. Laney, forest ranger, Manzano national forest, and all persons claiming to act under their authority, or the authority, direction, or control of either of them, to absolutely desist and refrain from entering upon or administering as part of the Manzano or other national forest, or collecting income from the lands described. * * * "

On the ground that, as it appeared upon the face of the complaint that the defendants were in possession of the lands only as agents of the United States, the suit was in reality one against the United States, and so one of which the court had no jurisdiction, appellees' demurrer was sustained. Final judgment was rendered dismissing the complaint. The appeal raises the single question of the correctness of the ruling on the demurrer.

Appellant, of course, does not contend that the United States can be sued unless it has, either by general enactment or by voluntary appearance, submitted itself to the jurisdiction. Its position is that the complaint

does not state a cause of action against the United States, nor one to which the United States is an indispensable party, and that the judgment prayed for would not bind nor conclude the United States should it see fit thereafter in any manner to litigate its rights or title with appellant.

The demurrer admits that the title to the lands in question is in the plaintiff. The demurrer also admits a trespass, which, as private individuals, appellees could not defend. It is, of course, not contended that the United States by any of its agencies, even by Congress itself, could constitutionally authorize the taking of private lands to be administered as national forests, without making compensation therefor. But it is contended that although such wrong be admitted, there is no remedy in the courts because of the immunity of the United States from suit.

Whether a suit nominally against individuals is really against the state is not always easy to decide. The question has given the courts much trouble, and in some situations its consideration has disclosed contrariety of opinion. See case notes 108 Am. St. Rep. 830 and 44 L. R. A. (N. S.) 189. Fortunately the principles controlling in the case at bar seem to be well established. This court has dealt with the question on at least three occasions: Locke v. Board of Trustees, 23 N. M. 487, 169 P. 304; State ex rel. v. Field, 27 N. M. 384, 201 P. 1059; American Trust & Savings Bank v. Scobee, 29 N. M. 436, 224 P. 788. If appellees, in seizing the land in question, had acted as agents of this state, it may be that the decision would be ruled by Locke v. Board of Trustees, supra. Whether this is a suit against the United States involves the same principles. Yet it is, no doubt, a federal question, concerning which the decisions of the United States Supreme Court are controlling.

The leading case is United States v. Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171. It was a suit to recover possession from individual officers actually in charge of land in Virginia occupied by the government as a

national cemetery and for military purposes; the government's title and right of possession resting upon a tax sale which the court found to be void. The principle or import of that decision is well stated by Mr. Justice Harlan in his dissenting opinion in Cunningham v. Macon & B. R. Co., 109 U. S. 446, 3 S. Ct. 292,609, 27 L. Ed. 992, where he said:

"Upon examination of the doctrine that, except where Congress has provided, the United States cannot be sued, we held that it had no application to officers and agents of the United States, who, holding possession of property for public uses, are sued therefor by a person claiming to be the owner thereof or entitled thereto; but the lawfulness of that possession and the right or title of the United States to the property may, by a court of competent jurisdiction, be the subject-matter of the inquiry, and adjudged accordingly."

Appellees comment on the fact that a different conclusion was reached only a year later in Cunningham v. Macon & B. R. Co., supra—both opinions having been delivered by Mr. Justice Miller. That very fact is enough to suggest that there must have been a distinction in principle. That distinction is not hard to find, and we think that the case at bar is clearly in a class with the Lee Case rather than with the Cunningham Case. In the latter case it was remarked that the questions raised when the contention is that a suit is one against the state "have rarely been free from difficulty, and the judges of this court have not always been able to agree in regard to them;" and it was said that it is not "an easy matter to reconcile all the decisions of the court in this class of cases." Classifying the decisions, it was said:

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him."

To this class, as Mr. Justice Miller said, United States v. Lee, supra, belongs—not that it was an action in tort, but because it was "in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment." He then said, still speaking of the United States v. Lee:

"* * * The defendants, Strong and Kauffman, being sued individually as trespassers, set up their authority as officers of the United States, which this court has held to be unlawful, and, therefore, insufficient as a defense. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession."

In Poindexter v. Greenhow, 114 U. S. 270, 5 S. Ct. 903, 962, 29 L. Ed. 185, an action of detinue was held to lie against a Virginia tax collector who had seized plaintiff's office desk to satisfy a tax; his defense being a law of Virginia which the court held to impair the state's contract with the plaintiff. Such a case was held to be within the principle of United States v. Lee, supra. Mr. Justice Matthews, who delivered the opinion, said:

"The ratio decidendi in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it."

Pennoyer v. McConnaughy, 140 U. S. 1, 11 S. Ct. 699, 35 L. Ed. 363, is an instructive case. There the Governor and other state officers of Oregon, comprising the board of land commissioners, were enjoined from selling state lands for which the plaintiff had a contract of purchase, which the board, acting under unconstitutional legislation, had assumed to cancel. Mr. Justice Lamar, classifying the cases, said:

"The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in be-

half of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not within the meaning of the Eleventh Amendment, an action against the state."

There the court applied the principle of the Lee case, that the mere assertion of an authority delegated by a state is not sufficient defense. Justification must be found in a valid authority.

Tindal v. Wesley, 167 U. S. 204, 17 S. Ct. 770, 42 L. Ed. 137, is quite in point and strongly sustains the principles of United States v. Lee. There Mr. Justice Harlan, speaking for a unanimous court, said:

"So that the question is directly presented, whether an action brought against individuals to recover the possession of land of which they have actual possession and control, is to be deemed an action against the state within the meaning of the Constitution, simply because those individuals claim to be in rightful possession as officers or agents of the state, and assert title and right of possession in the state. Can the court, in such an action, decline to inquire whether the plaintiff is, in law, entitled to possession, and whether the individual defendants have any right, in law, to withhold possession? And if the court finds, upon due inquiry, that the plaintiff is entitled to possession, and that the assertion by the defendants of right of possession and title in the state is without legal foundation, may it not, as between the plaintiff and the defendants, adjudge that the plaintiff recover possession?"

The first of the questions stated was answered in the negative and the other in the affirmative, upon a review of the decisions and in reliance upon United States v. Lee, considered the leading case.

In Fitts v. McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. Ed. 535, the opinion being again by Mr. Justice Harlan, it was decided that the suit was one against the state, but the principles of United States v. Lee and Tindal v. Wesley, supra, were given full approval.

A later pronouncement in point is Scranton v. Wheeler, 179 U. S. 141, 21 S. Ct. 48, 45 L. Ed. 126—another opinion by Mr. Justice Harlan. There a suit to recover damages was instituted by the owner of property who,

by government works in the St. Mary's river, had been cut off from his access to navigable waters. The suit was against the superintendent of the works. There it was said:

"* * * The suit was not to be deemed one against the United States because in the consideration of that question [whether the defendant could have any authority in law to do what he had done] it would become necessary to ascertain whether the defendant could constitutionally acquire from the United States authority to obstruct the plaintiff's access to navigable water in front of his land without making or securing compensation to him. The issue, in point of law, was between the individual plaintiff and the individual defendant, and the United States not being a party of record a judgment against Wheeler will not prevent it from instituting a suit for the direct determination of its rights as against the plaintiff."

In Hopkins v. Clemson Agricultural College, 221 U. S. 636, 31 S. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243, Mr. Justice Lamar thus stated the question:

"* * * Whether a public corporation can avail itself of the state's immunity from suit, in a proceeding against it for so managing the land of the state as to damage or take private property without due process of law."

Speaking to the subject generally, it was said:

"The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the state, they—though not exempt from suit—could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. Cunningham v. Macon & B. R. Co., 109 U. S. 446, 452, 3 S. Ct. 292, 609, 27 L. Ed. 992, 994. But if it appeared that they proceeded under an unconstitutional statute, their justification failed, and their claim of immunity disappeared on the production of the void statute. Besides, neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of agency has no application—the wrongdoer is treated as a principal, and individually liable for the damages inflicted, and subject to injunction against the commission of acts causing irreparable injury."

Philadelphia Co. v. Stimpson, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570, was a suit against the Secretary of War to set aside certain harbor lines so far as they en-

croached upon lands owned by the complainant, and to restrain the secretary from instituting criminal prosecution because of the reclamation and occupation by complainant of its lands outside the prescribed limits. Mr. Justice Hughes, delivering the opinion, said:

"If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded [citations]. And in case of an injury threatened by his illegal actions, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments [citations]. And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred [citations].

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which the complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

In Lane v. Watts, 234 U. S. 525, 34 S. Ct. 965, 58 L. Ed. 1440, the suit was to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from proceeding in the matter of attempted entries, under the public land laws, upon lands which complainant claimed to own. The court passed upon the conflicting claims of title of the complainant and of the United States, deciding that title was in complainant. The opinion (by Mr. Justice McKenna) then proceeds:

"The suit is one to restrain the appellants from an illegal act under color of their office which will cast a cloud upon the title of appellees.

"This disposes of the contentions of appellants that this is a suit against the United States, or one for recovery of land merely, or that there is a defect of parties, or that the suit is an attempted direct appeal from the decision of the Interior Department, or a trial of a title to land not situated within the jurisdiction of the court 'wherein an essential party is not present in the forum and is not even suable—the United States.' "

The foregoing cases satisfy us that the case at bar is not a suit against the United States. Decisions in the state courts are numerous, but it seems unnecessary to notice them. We merely cite Prall v. Burckhartt, 299 Ill. 19, 132 N. E. 280, 18 L. R. A. 992, which is recent and directly in point. We mention also that this court, in American Trust & Savings Bank v. Scobee, supra, though holding the suit to be one against the state, fully recognized the principle which appellant here invokes. The Chief Justice, writing the opinion, said:

> "It is true that a person having title to real estate or personal property may maintain an action against any person claiming to have rights therein under the authority of the state and may maintain an action against such person notwithstanding the rights of the state may be indirectly involved. Of this class of cases, Tindal v. Wesley, 167 U. S. 204, 17 S. Ct. 770, 42 L. Ed. 137, and United States v. Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171, are examples."

We need not review here the many decisions cited by appellees. We find none of them in conflict with the foregoing, and none to support the ruling of the trial court.

The general result is that where state or United States agents are sued for recovery of, damages to, or to restrain injury to, property, the suit is not one against the state or the United States unless such agents can establish a valid title or authority under which they act. This is the rule where defendants assert, but fail to establish, the title or authority. It must be the rule where, as here, they admit that no such title exists, so that their claimed authority is necessarily void. To justify, they must answer the complaint and assert and establish title in the United States.

Appellees urge that in this case they did not assert the official capacity in which they acted, but that this fact is introduced by the complaint. They contend, therefore, that the fact that they are mere agents of the government is admitted. So it is. But that fact, as we have found, is of no consequence unless connected with a right of the government to direct them to do the

act complained of. Such a right is excluded by the allegation and admission that the lands entered by appellees are appellant's private property. It cannot matter whether their agency—by itself an immaterial matter—is admitted by complaint or asserted by answer. The cases make no such distinction, and we perceive none.

It seems, therefore, that the trial court erred. The judgment must be reversed and the cause remanded, with direction to overrule the demurrer, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3027, Sept. 5, 1927]

ARMIJO v. PETTIT et al.

[259 Pac. 620]

SYLLABUS BY THE COURT

1. Evidence **held** not to support claim of breach of landlord's agreement to consent to assignment of lease to responsible party.

2. Evidence **held** not to support damages for breach of covenant to repair.

3. Efforts of landlord to minimize damages by securing tenant for remainder of term do not release abandoning tenant from liability for rent, even though they result in securing a tenant for a longer term.

4. Making a lease for future occupancy does not of itself release the abandoning tenant from liability.

5. Provision in lease construed as creating a lien on lessees' property in nature of chattel mortgage.

6. Conventional lien on lessees' property **held** not void for uncertainty of description.

7. A conventional lien on the lessees' property to secure covenants of the lease is not, as between the original parties, lost by lessor's consent to removal of property from the demised premises.

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[1] 35CJ p. 988 n. 47 New. [2] 36CJ p. 165 n. 79. [3] 35CJ p. 1093 n. 75. [4] 35CJ p. 1094 n. 93; 36CJ p. 343 n. 22. [5] 35CJ p. 1175 n. 91; 36CJ p. 481 n. 48. [6] 36CJ p. 482 n. 54. [7] 36CJ p. 484 n. 88.

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

Action by Mrs. N. T. Armijo against R. Fred Pettit and another to recover rent, damages, and to establish a lien. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with direction.

H. B. Jamison and Hanna & Wilson, all of Albuquerque, for appellants.

Simms & Botts and Henry G. Gatling, all of Albuquerque, for appellee.

OPINION OF THE COURT

WATSON, J. October 1, 1921, appellee (plaintiff) leased certain premises to appellants to be used for a confectionery store for a term of two years, reserving rent in the sum of $7,800 payable monthly in advance, $300 monthly for the first year, and $350 monthly for the second year. The lessees covenanted that they had received the premises in good condition, and to yield them up in the same condition as when taken, loss by fire, or inevitable accident, or ordinary wear excepted, and to keep the premises in repair during their occupancy. The lessees also agreed not to underlet the premises, or assign the lease without the written consent of the lessor; but the lessor agreed on her part "to consent to the transfer of this lease to any responsible party, the premises to be used for the same business as that of the lessees."

Shortly before December 1, 1922, the lessees moved their stock and trade fixtures from the building, leaving it unoccupied. They paid the rent up to December 1, 1922. February 19, 1923, the lessor made a new lease to one Farley for a term of five years, to commence on April 1. The rent reserved was the same as appellants would have been required to pay for the remainder of their term. The new lease required appellee to make certain changes and repairs to fit it for occupancy by the new tenant.

This suit was instituted to recover the rent from De-

cember 1, 1922, to April 1, 1923, to recover damages for breach of appellants covenant to repair, to establish a lien upon the trade fixtures which appellants had removed from the building, and for an attorney's fee under a provision of the lease for the payment of costs and attorney's fee incurred in enforcing the terms of the lease. The court made findings of fact and conclusions of law, and rendered judgment for $1,452.50 damages and an attorney's fee of $100. The damages comprised $1,225 for rent and $227.50 for repairs to the premises. The amounts adjudged were declared to be a lien upon the property removed from the building. The lien was foreclosed, and the property ordered sold by a special master.

[**1**] For defense by way of new matter, appellants set up a breach on the part of the appellee of her agreement to consent to an assignment of the lease to a responsible party. They urge that the trial court erred in finding against them in this respect. A careful reading of all the evidence relating to this attempted transfer of the lease leaves us somewhat in doubt as to whether Gibbons, the prospective assignee, was actually ready and willing to take over the remainder of appellants' term, without concessions on the part of the appellee or an agreement as to renewal at the expiration of the term. It is also to be doubted whether Gibbons did not himself discontinue negotiations because of trouble in getting concessions and of anticipated trouble in getting a renewal. Such being the state of the record, the findings of the trial court must stand. After the failure of the negotiations with Gibbons, appellants remained in possession and paid the rent for several months. Appellee contends that this amounted to a waiver, even if there was a breach of the agreement. But this proposition we need not consider.

[**2**] The damages allowed for breach of covenant to repair consisted of three items, namely, $7.50 for carpenter work, $145 for plastering, and $75 for papering. There was total failure of proof as to the $7.50 item. No doubt some plastering was properly chargeable to

appellants. It is equally clear, however, that some of the plastering was not so chargeable. The proof merely shows that $145 was paid for plastering as a whole; so that there was no proof upon which the court could properly arrive at the amount of damages recoverable under this item. Appellants would not, under the lease, be chargeable for the papering, if the necessity for it was due to fire, inevitable accident, or ordinary wear. We find no evidence to show anything more than ordinary wear, except that the paper had been blackened by smoke from a fire in adjoining premises. This damage would seem, under the lease, to fall upon the lessor. We conclude, therefore, that there was no substantial evidence upon which to base damages for breach of covenant to repair; and that the court erred in including them in the judgment.

The court, found, in substance, that, upon the abandonment of the premises, December 1, 1922, appellee took possession merely to protect the property, and did not accept or take exclusive possession until March 15, 1923, when she commenced installing repairs and making changes for the in-coming tenant. Appellants make several attacks upon this finding. They first urge that the evidence shows an acceptance of surrender on or about December 1, 1922. At that time appellee's tenant apparently accepted the keys. Counsel do not exactly agree as to the circumstances or conditions of the acceptance. Appellants, however, do not rely upon the fact as being determinative, in itself, of a surrender, but claim that such accepted surrender is shown by this and other facts. It appears that for perhaps two months prior to the making of the lease on February 19, 1923, appellee's agent had been negotiating with Farley, as a prospective tenant, for a long-term lease. So it is urged, being in possession of the building and of the keys, it thus appears that her possession was for her own advantage and benefit rather than for that of the appellants, or merely for protection of the premises.

[3] It was undoubtedly proper for appellee to minimize her damages by procuring, if she could, a tenant

for the remainder of the term. We do not understand appellants to contend that efforts to that end would constitute acceptance of surrender. If such efforts resulted in securing a tenant for a long term, does that fact vary the rule? The long-term lease to Farley was as beneficial to appellants as a lease merely for the remainder of the term would have been. It does not appear that the remainder of the term would have been taken by Farley, or could have been disposed of to any one else. It does not appear that any tenant could have been found to occupy prior to April 1. We do not think, therefore, that the trial court was in error in refusing to find that there was an immediate acceptance of surrender.

[4] We do not think either that the making of the lease on February 19 necessarily terminated appellants' liability for the rent. It is seldom that conditions permit immediate taking of possession by the lessee. Conceding that the landlord may minimize damages by procuring a tenant for the remainder of the term, and considering, as we do, that this rule of law is greatly to the advantage of the defaulting or abandoning tenant, it would restrict the operation of that rule and be to the tenant's disadvantage to hold that his liability for rent terminates upon the mere making of a contract for future occupancy.

The trial court, as seen, held that appellants' liability for the rent ended when appellant commenced to make the changes and repairs called for by the new lease. Appellants contend that the court erred in fixing March 15 as the date. The evidence as to when these repairs and changes commenced is quite uncertain. Appellee contends that it appears that the work was done during the month of March, and that the court was justified in selecting March 15 as the date. As proof that the work commenced earlier, appellants point to the bill of Chauvin for the $75 item for papering, which bill is dated March 2, 1923. It would appear from this that appellee was in possessoin, fitting the premises for her new tenant, at least as early as March 1. There is no

evidence whatever to the contrary. We assume that the date upon this bill was overlooked by the trial judge in making his finding, as a result of which the award for rent is $175 too much.

[5] The lien, established by the decree, upon appellee's property, was not based upon the statute, as is apparent from the fact that other items besides the rent were included in the amount. Appellee does not attempt to sustain her lien under the statute, but relies upon a paragraph of the lease which, omitting nonessentials, read as follows:

"* * * If the rent * * * or any part thereof shall be * * * unpaid * * * or if default * * * be made in any of the covenants or agreements herein contained to be kept by the lessees, * * * it shall be lawful for the lessor * * * at lessor's election * * * to declare said term ended and into the said premises * * * to re-enter and the said lessees * * * to * * * put out * * * and the said premises again to repossess * * * as in its former state. And to distrain for any rent that may be due thereon upon any property belonging to the said lessees; * * * **meaning and intending hereby to give the said lessor * * * a valid and first lien upon any and all goods, chattels, and other property belonging to the said lessees as security for the payment of said rent and fulfillment of the faithful performance of conditions in manner aforesaid, anything hereinbefore mentioned to the contrary notwithstanding.** And if * * * said term shall be ended at such election of said lessor * * * the lessees * * * do * * * agree to surrender * * * said * * * premises * * * to the lessor * * * immediately, * * * and, if lessees shall remain in possession * * * ten days after notice of such default, * * * lessees shall be deemed guilty of a forcible detainer. * * * And **it is** further * * *agreed * * * that the lessees shall pay and discharge all costs and attorney's fees and expenses that shall arise from enforcing the covenants of this indenture by the lessor. **The lessees** shall have the same right to terminate and cancel this lease for any default made in any of the covenants or agreements herein contained to be kept by the lessor. * * *"

The italicized portion of the foregoing provision is relied upon by appellee as sustaining the judgment. Appellants contend that the lien there attempted to be created was merely to secure the rent due, in case it became necessary for the appellee to re-enter and cancel the lease for default on the part of appellants, and that it has no application in a case like this, where the les-

sees themselves abandon the premises without the consent, and contrary to the wishes of the lessor. The contention is thus stated:

"* * * If this lien is valid at all, it may be asserted only in distraint proceedings where the lessor declares the term ended and re-enters the premises."

This contention is based upon the fact that what precedes the particular language in question has to do with the landlord's right to reenter and forfeit the lease on default in payment of rent, distraining for any rent then due, and upon the further fact that, in regard to the "valid and first lien * * * as security for the payment of said rent and fulfillment of the faithful performance of conditions, * * *" the language used is more appropriate to define the right already contracted for than to create an independent one. In support of this interpretation, appellants point out also that this clause furnishes security only for "said rent," and urge that "said rent" means "any rent that may be due thereon," as expressed in the preceding clause relating to distraint. Since distraint was a common-law remedy, available only for the rent due when the landlord re-entered and forfeited the term, it is contended that there is no agreement here for security for rent accrued between abandonment by the tenant and reentry by the landlord.

We might find it difficult, if we felt it necessary, to meet these technical objections to the trial court's interpretation of the lease. Counsel for appellee have not attempted it. However involved the language, or inconsistent the expressions, it is the real intent of the parties that is to be sought. They undoubtedly had the right to stipulate for security. A lien thus agreed upon is contractual or conventional. See Tiffany on Landlord and Tenant, § 322 et seq. The provision, construed as a whole, satisfies us that the word "distraint" was used in a popular, rather than a technical, sense, and that what follows, rather than being limited by it, defines the meaning which the parties gave to it. Holding otherwise, we must disregard an expression, easily

understood by laymen, which seems to contemplate a lien broader either than the common-law right of distress, or than the statutory lien.

[6] Appellants also contend that, if the lease be construed as an attempt to create a conventional lien, it must be held void for uncertainty in the description of the property. 16 R. C. L. 987, § 490, is cited. The statement here found is taken from Borden v. Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23. That case involved the sufficiency of a description to include after-acquired property. Argumentatively, the court remarked that the description might well be held void for uncertainty, even as to property owned at the time. In the case at bar, however, we think it fairly appears that the property upon which the court impressed the lien was the trade fixtures of the appellants, generally described in another paragraph of the lease, actually on the premises when the lease was executed, and removed when appellants abandoned the premises. In the case cited, the rights of creditors were involved. That is not true here. We see no occasion to deny the application of this lien to the very property which, it is evident to us, it was intended to cover.

[7] Appellants contend, finally, that appellee's agent is shown to have been aware of the removal of the property at the time, and that his failure to protest against it amounts to consent to such removal, and to a waiver of the lien. Tiffany says (Landlord and Tenant, § 322g):

"The landlord does not, it has been held, waive his conventional lien on property belonging to the tenant by failing to object to its removal from the premises. * * * "

The author cites Wisner v. Ocumpaugh, 71 N. Y. 113, where it was said:

"The point that the defendant voluntarily abandoned his lien, by not objecting when he saw the property in the cart, after it had been taken from the premises, is not tenable. The lien was not dependant upon absolute possession in the defendant, but rested in contract, and attached to the property when in possession of the lessee, or any one standing in his place."

Appellants cite Merrill v. Ressler, 37 Minn. 82, 33 N. W. 117, 5 Am. St. Rep. 822. It was there decided that such a lien as we have here, being in the nature of a chattel mortgage, would not be good as against creditors, unless filed as the statute required chattel mortgages to be filed. Such holding is consistent with Tiffany's view as to the nature of the conventional lien. He says:

"A provision in the instrument of lease, giving a lien on personalty in favor of the lessor, is frequently assimilated by the courts to a chattel mortgage, and the rights of the lessor thereunder determined accordingly. In jurisdictions where the common-law view of a mortgage, as involving a conveyance of the legal title, subject to a defeasance, no longer prevails, such a lien provision is, it seems neither more nor less than a mortgage, and it has been so referred to."

In New Mexico the lien theory of mortgages prevails. Possession by the mortgagee is not requisite to the preservation of his lien. Nor need he have possession when resorting to equity for foreclosure. Wathieu v. Roberts, 31 N. M. 469, 247 P. 1006. The question arising only between the original parties to the instrument, we do not think that their relation has been changed even if it be considered that the property was removed from the demised premises with appellee's consent.

It seems, therefore, that, because of the two errors pointed out, the judgment is excessive to the extent of $402.50, but otherwise correct. It should therefore be reversed, and the cause remanded, with direction to the district court to enter judgment for the proper amount. It is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3049, Sept. 7, 1927.]

BAILEY v. GREAT WESTERN OIL CO.

[259 P. 614.]

SYLLABUS BY THE COURT

1. A judgment is a "contract," within the meaning of Code 1915, § 4116, providing that, in an action arising on contract, any other cause of action arising on contract may be pleaded as a counterclaim.

2. A counterclaim, being an independent cause of action, is not within the rule that a judgment is res adjudicata as to defenses which were or might have been made.

3. A proceeding to revive a judgment is a new and independent action, under Code Procedure.

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

Suit by the Great Western Oil Company against R. C. Bailey, who set up a counter claim. From a judgment sustaining a demurrer to the counterclaim, defendant appeals. Reversed and remanded, with direction.

Medler & Whatley, of El Paso, Texas, for appellant.

R. L. Young of Las Cruces, for appellee.

OPINION OF THE COURT

WATSON, J. Appellee (plaintiff) recovered a money judgment against appellant (defendant) May 26, 1918, in the district court of Dona Ana county. It not having been satisfied, appellee commenced suit April 17, 1923, upon that judgment in the same court. Appellant filed a counterclaim for services performed for appellee before recovery of the original judgment, but which claim which was not set up nor litigated in the earlier suit. Appellee demurred to the counterclaim as being a collateral attack upon the judgment, as setting up a new defense to the original cause of action, and as being a claim which might have been set up in the earlier suit, and hence res adjudicata. The demurrer was sustained and that action is assigned as error.

[1] 34CJ p. 716 n. 33. [2] 34CJ p. 864 n. 15. [3] 34CJ p. 663 n. 18.

[1] The counterclaim is an invention of the Code. Among other matters which may be the subject-matter of a counterclaim, it specifies:

"In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." Code 1915, § 4116.

A judgment is a contract within the meaning of this provision. Rose v. N. W. F. & M. Ins. Co. (C. C.) 71 F. 649; Way v. Colyer, 54 Minn. 14, 55 N. W. 744; Miller v. Murphy, 186 Cal. 344, 199 P. 525; Green v. Conrad, 114 Mo. 651, 21 S. W. 839; Taylor v. Root, 43, N. Y. (4 Keyes) 335; Folsom v. Winch, 63 Iowa, 477, 19 N. W. 305. No decision to the contrary has been brought to our attention. Other decisions hold similarly under statutes with which we are not familiar. Malony v. Waddle, 55 N. H. 227; Rankin v. Barnes, 5 Bush (Ky.) 20; Fiske v. Steele, 152 Mass. 260, 25 N. E. 291; Bannister v. Jett, 83 Ind. 129; Roach v. Privett, 90 Ala. 391, 7 So. 808, 24 Am. St. Rep. 819. The St. Louis Court of Appeals has said:

"The test by which to determine whether a particular demand arises on contract, within the meaning of the statute of counterclaims, is this: If the demand could have been redressed at common law by any of the forms of action which might be resorted to to recover damages for breaches of contract, then it is the proper subject of a counterclaim, under the provision of the statute we are considering; otherwise not. If this defendant could have maintained at common law against Kreiger, for the breach of contract in question, an action of covenant, debt, or assumpsit, then the counterclaim which is here set up must be sustained. But if he could not have enforced this liability of Kreiger without resorting to one of the forms of action used at common law for the redress of injuries sounding in tort or to a bill in equity, then the demand is not the subject of the set-off." Board of President and Directors of St. Louis Public Schools v. Estate of Broadway Savings Bank, 12 Mo. App. 104; affirmed 84 Mo. 56.

An action upon a judgment was at common law an action of debt. Black on Judgments (2d Ed.) § 958.

[2] Appellee invokes the rule that a judgment is res adjudicata as to defenses which were, or might have been, interposed or litigated. But the counterclaim of

the Code is not a defense within the meaning of that rule. It is an independent cause of action which the defendant may, but need not, interpose. Bliss on Code Pleading (3d Ed.) § 368; Freeman on Judgments (5th Ed.) §§ 675, 774, 786, 1075; Fiske v. Steele, supra; Weaver v. Brown, 87 Ala. 533, 6 So. 354; Roach v. Privett, supra; Brower v. Nellis, 6 Ind. App. 323, 33 N. E. 672; Secor v. Siver, 165 Iowa, 673, 146 N. W. 845; Dudley v. Stiles, 43 Wis. 371; Stillwell et al. v. Hill, 87 Or. 112, 169 P. 1174; Bishop's Adm'r. v. Bishop, 162 Ky. 769, 173 S. W. 130.

[3] Appellee contends that his suit, although founded on a live judgment, on which he could have had execution for the asking (Code 1915, §§ 3085, 3086), is one to revive a judgment; and that in such a case no defenses are available except lack of jurisdiction, payment and satisfaction. It is probably true that no other defenses could be pleaded to the writ of scire facias—the former mode of reviving a dormant judgment. The reason was that such writ, although it might be pleaded to, was not considered an action, but rather a proceeding in the original cause. The Code has changed this. The proceeding to revive a judgment is "a new and independent action." Browne and Manzanares v. Chavez, 9 N. M. 316, 54 P. 234, affirmed 181 U. S. 68, 21 S. Ct. 514, 45 L. Ed. 752. Under these decisions, we are constrained to hold that, even though the purpose of the suit be to revive the judgment, it is an action arising on contract within the meaning of Code 1915, § 4116, to which a cause of action arising also on contract and existing at the commencement of the action may be pleaded by way of counterclaim.

The judgment must therefore be reversed and the cause remanded, with direction to the district court to overrule the demurrer to the counterclaim, and after the joinder of issue thereon to proceed with the cause.

It is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3065, Sept. 8, 1927.]

SCHAEFER v. WHITSON.

[259 P. 618.]

SYLLABUS BY THE COURT

In replevin of automobile, it being alleged and denied that defendant bought it with knowledge that plaintiff held title under conditional sale contract, and proof of knowledge being essential to recovery, judgment for plaintiff in the absence of such proof violates a fundamental right which this court will protect, though the question is first raised on appeal.

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

Replevin by Emma C. Whitson, trading under the name of the Whitson Music Company, against W. A. Schaefer. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

See, also, 241 P. 31.

Thomas J. Mabry, of Albuquerque, for appellant.

George S. Klock and M. J. McGuinness, both of Albuquerque, for appellee.

OPINION OF THE COURT

WATSON, J. Plaintiff, suing in replevin for the recovery of an automobile, alleged in her complaint that, being the owner of it, she made a written contract in September, 1923, to sell it to one Shepard upon payments, retaining the title in herself until the payments should have been made; that in April, 1924, Shepard sold and delivered the car to defendant; and that he took the car, with knowledge of the contract and of Shepard's default in the payments. Defendant, by answer, denied that he bought, received, or took the car "with knowledge of any claim, mortgage, lien or contract of the plaintiff concerning said automobile."

The cause was set for trial, and defendant failed to

[1] 3CJ p. 839 n. 36. [2] 35 Cyc. p. 690 n. 76. [3] 35Cyc p. 709 n. 41 New.

appear. A jury was impaneled and evidence introduced. At the close of the evidence the jury, by direction of the court, returned a verdict for plaintiff, assessing the value of the property at $500. Judgment was entered pursuant to the verdict. Motions for a new trial and to vacate the judgment were interposed and overruled, and this appeal was taken.

[**2**, **3**] The only error urged in this court is that the evidence fails to support the judgment. It is pointed out that there was no evidence whatever to prove the fact alleged by the complaint and denied by the answer, that appellant took the car with knowledge of appellee's rights. This, of course, was an essential fact, since, under chapter 8, Laws 1923, the conditional sales contract, not having been recorded, was void against purchasers for value without notice.

[**1**] Appellee does not contend that there was any proof of knowledge on the part of appellant, and the record shows that there was none. She contends, however, that the error, not having been brought to the attention of the trial court by exception or otherwise, is unavailable here. She also contends that there was no sufficient denial of knowledge to put her to proof of the fact. The latter contention, however, is without merit.

Laws of 1917, c. 43, § 37, provides as follows:

"Exceptions to the decisions of the court upon any matter of law arising during the progress of a cause must be taken at the time of such decision and no exceptions shall be taken in any appeal to any proceeding in a district court except such as shall have been expressly decided in that court; provided, that no exception shall be required to be reserved in the trial of equity cases or cases before the court in which a jury has been waived."

This section has been many times considered by this court. Appellant relies upon the leading case of State v. Garcia (on rehearing), 19 N. M. 421, 143 P. 1012. The present Chief Justice, speaking for the court, there said that this section precludes a party from insisting upon relief as to matters not decided by the trial court because not brought to his attention, but that the sta-

tute does not affect the inherent power of this court to see that a man's fundamental rights are protected in every case. The fundamental right involved in that case was the right not to be deprived of liberty upon uncontradicted evidence affirmatively showing innocence.

In a later opinion of this court, also written by Chief Justice Parker, it was held, upon the same principle, that a judgment quieting title upon a void tax deed violated a fundamental right which this court should intervene to protect, even though the question was raised here for the first time. Crawford v. Dillard (on motion for rehearing), 26 N. M. 295, 191 P. 513. So property as well as liberty may be the subject matter of a fundamental right; and where the undisputed evidence affirmatively shows the violation of that right, the inherent power of this court may be invoked. In the case at bar, it is property in an automobile that is involved. There can be no fundamental difference between taking land under a void tax sale and taking an automobile under a void conditional sale contract.

It may be suggested that the present case differs from State v. Garcia and Crawford v. Dillard, since in those cases the undisputed evidence affirmatively showed the unlawful taking of liberty in the one case and of property in the other, while in the case at bar there is a mere failure of proof to justify taking the automobile. But that situation is covered by the recent case of State v. Taylor (N. M.) 252 P. 984. There a conviction of statutory rape was set aside because the state, being under the burden of corroborating the prosecutrix's inherently improbable testimony, failed to do so. Failure of proof essential to conviction was held, like uncontroverted and affirmative proof of innocence, a matter for notice by this court, even though here first suggested. So it seems that the distinctions between the case at bar and State v. Garcia are of no importance, as held in other decisions of this court, and that the present case is controlled by them.

In State v. Garcia, it was said that our inherent power

to protect fundamental rights is discretionary and to be guardedly used. The general principles governing its exercises were thus stated:

> " * * * Only where some fundamental right has been invaded, and never in aid of strictly legal, technical, or unsubstantial claims; nor will we consider the weight of evidence if any substantial evidence was submitted to support the verdict. If substantial justice has been done, parties must have duly taken and preserved exceptions in the lower court to the invasion of their legal right before we will notice them here."

Appellant's right to be protected in the possession of his property is fundamental. His objection is not strictly legal, technical or unsubstantial. It goes to the very right itself. It does not involve weight but total lack of evidence. It does not appear that substantial justice has been done. On the contrary, considering where the burden of proof rested, it appears that the property has been taken from its owner and given to one without lawful claim upon it. So our discretion seems to be properly invoked.

There is one other distinction between this case and those cited. The defendant was not present or represented at the trial. Counsel for appellee seems to think the rule should be different in such a case. The default was not one of pleading, by which alleged facts, not denied, are to be considered admitted. The fact in question on this appeal was denied under oath. It seems to us that a party not present at all, and thus, though by his own default, unable to object, should not be in a worse position to have facts reviewed than one who was actually present and stood by without objecting, thus contributing to the error.

The error in this case was, of course, inadvertant. Had the attention of the learned trial judge been called to the condition of the evidence, he would undoubtedly have directed a verdict for the defendant rather than one for the plaintiff. It is to be regretted that the matter was not specifically called to his attention in the motions for a new trial and to vacate the judgment, so that appellant's fundamental right could have been

protected without the delay and expense of this appeal. In this connection it is fair to say that appellant's present counsel did not represent him in the trial court.

The judgment must be reversed and the cause remanded for a new trial, and it is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3292, Sept. 8, 1927.]

STATE v. GRAHAM.

[259 P. 623.]

SYLLABUS BY THE COURT

1. By virtue of the 1921 constitutional amendment (article 9, § 16 [see Laws 1921, p. 478], debentures to anticipate proceeds of gasoline excise tax, authorized by Laws 1927, c. 20, do not constitute such state borrowing or debt as requires popular referendum.

2. Debentures to anticipate proceeds of gasoline excise tax, authorized by Laws 1927, c. 20, are eligible as an investment for permanent school fund, by virtue of Laws 1927, c. 4, though the provisions of chapter 20 to render them so eligible failed of passage by a vote of three-fourths of the members elected to each house, as required by Constitution, art. 12, § 7.

BICKLEY, J., dissenting.

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

Suit by the State against Warren R. Graham for an injunction. From a judgment sustaining a demurrer to the complaint, the State appeals. Affirmed and remanded.

Robert C. Dow, Atty. Gen., and Frank H. Patton, Asst. Atty. Gen., for the State.

Carl H. Gilbert, of Santa Fe, for appellee.

OPINION OF THE COURT

WATSON, J. [1] Chapter 20, Laws of 1927, imposes an excise gasoline tax, to be paid into the state treas-

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[1] 36 Cyc p. 989 n. 98 New. [2] 35 Cyc p. 827 n. 32.

ury and covered into the state road fund, "to be used for maintenance, construction and improvement of state highways and to meet the provisions of the Federal Aid Road Law." Section 2. In anticipation of this revenue, the state highway commission is authorized to issue interest-bearing debentures, not to exceed one and a quarter million dollars in any one year. The debentures are to be signed by the president of the commission, to be attested by its secretary, to bear the commission's seal, and to be countersigned by the state treasurer. They are to constitute an irrevocable contract, between the state and the holders, against any repeal or reduction of the tax, and that the state will cause prompt collection of the same and the setting aside of sufficient of the proceeds thereof to pay principal and interest.

The state board of finance having given its approval of an investment of the permanent school fund of the state in these debentures, this suit was commenced by the state, by its attorney general, to enjoin such investment. The state's objections are that the proposed issuance of debentures would be in violation of Constitution, Art. 9, §§ 7, 8, requiring a popular referendum before the creation of a state debt in such an amount, and that the proposed investment of permanent school funds therein would be in violation of Constitution, art. 12, § 7, requiring legislative authorization by a three-fourths vote of the members elected to each house, except in the case of certain enumerated bonds.

The state treasurer demurred to the complaint, and the state appeals from a final judgment entered upon the sustaining of the demurrer.

Constitution, art. 9, §§7, 8, provide as follows:

"Sec. 7. The state may borrow money not exceeding the sum of two hundred thousand dollars in the aggregate to meet casual deficits or failure in revenue, or for necessary expenses. The state may also contract debts to suppress insurrection and to provide for the public defense.

"Sec. 8. No debt other than those specified in the preceding section shall be contracted by or on behalf of this state, unless authorized by law for some specified work

or object; which law shall provide for an annual tax levy sufficient to pay the interest and to provide a sinking fund to pay the principal of such debt within fifty years from the time of the contracting thereof. No such law shall take effect until it shall have been submitted to the qualified electors of the state and have received a majority of all the votes cast thereon at a general election; such law shall be published in full in at least one newspaper in each county of the state, if one be published therein, once each week, for four successive weeks next preceding such election. No debt shall be so created if the total indebtedness of the state, exclusive of the debts of the territory, and the several counties thereof, assumed by the state, would thereby be made to exceed one per centum of the assessed valuation of all the property subject to taxation in the state as shown by the preceding general assessment."

In 1921 article 9 was amended by the adoption of section 16. See Laws 1921, p. 478. The amendment provides as follows.

"Section 16. Laws enacted by the Fifth Legislature authorized the issue and sale of state highway bonds for the purpose of providing funds for the construction and improvement of state highways and to enable the state to meet and secure allotments of federal funds to aid in construction and improvement of roads, and laws so enacted authorizing the issue and sale of state highway debentures to anticipate the collection of revenues from motor vehicle licenses and other revenues provided by law for the state road fund, shall take effect without submitting them to the electors of the state, and notwithstanding that the total indebtedness of the state may thereby temporarily exceed one per centum of the assessed valuation of all property subject to taxation in the state. Provided, that the total amount of such state highway bonds payable from proceeds of taxes levied on property outstanding at any one time shall not exceed two million dollars. The Legislature shall not enact any law which will decrease the amount of the annual revenues pledged for the payment of state highway debentures to any other purpose so long as any of the said debentures issued to anticipate the collection thereof remain unpaid."

Article 12, § 7, of the Constitution provides as follows:

"The principal of the permanent school fund shall be invested in the bonds of the state or territory of New Mexico, or of any county, city, town, board of education or school district therein. The Legislature may by three-fourths vote of the members elected to each house provide that said funds may be invested in other interest-bearing securities. All bonds or other securities in which any portion of the school fund shall be invested must be first ap-

proved by the Governor, Attorney General, and secretary of state. All losses from such funds, however occurring, shall be reimbursed by the state."

Chapter 20, Laws 1927, contains as a separate paragraph in section 2 the following provision:

"The state treasurer may, with approval of the state board of finance and other officials whose approval is required by law for investment of public funds, purchase such debentures at par and accrued interest for such investment without advertising or offering them for sale or after rejection of bids for all or part of any issue."

This act was not passed by a three-fourths vote of the members elected to each house. But chapter 4, Laws of 1927, was enacted by such three-fourths vote. Section 1 of that chapter reads as follows:

"The principal of the permanent school fund and any other public funds may be invested in interest bearing state highway debentures authorized by law issued before or after the passage of this act to anticipate the collection of tax levies, licenses, motor vehicle registration fees, gasoline taxes or other revenues or income at any time provided for the state road fund or for construction or maintenance of public highways or bridges in this state.

"Upon approval by the state board of finance and other officials whose approval is required by law for such investment, the state treasurer may purchase such debentures at par and accrued interest without advertising or offering them for sale notwithstanding that the law authorizing their issue may have provided that they be sold to the highest bidder after advertising."

Upon the facts above stated and the several constitutional and legislative provisions above set forth, counsel, by their arguments and briefs, raise the following questions: (1) Do the debentures proposed to be issued constitute a borrowing of money by the state, or the contracting of a debt by or on behalf of the state, within the meaning of Constitution, art. 9, §§ 7, 8? (2) If so, is the necessity of submitting the questions of their issuance to the electors of the state obviated by Constitution, art. 9, § 16, the 1921 amendment? (3) Is the fact that Laws 1927, c. 20, failed to receive a three fourths vote of the members elected to each house fatal to the proposed investment of the permanent school fund?

We find that we may dispose of this case without deciding the first question. We assume, merely for the purposes of this decision, that the debentures do constitute a borrowing of money by the state and a contracting of a debt by or on behalf of the state.

This brings us to the second question. The Attorney General contends that the only effect of the constitutional amendment (article 9, § 16) was to ratify "laws enacted by the Fifth Legislature" (1921). If he is correct, the second question must receive a negative answer:

The general purpose of the amendment was obviously to except certain laws from the operation of article 9, §8, requiring popular approval of the creation of state indebtedness, and limiting the total indebtedness to be created to 1 per centum of assessed valuation. The question is whether chapter 20, Laws 1927, falls within the exception.

This being a constitutional provision, we should expect a care in drafting and an exactness in expression not always to be found in ordinary legislation. We should expect to be able to refer to "laws" (more than one), enacted by the Fifth Legislature, authorizing the issuance and sale of state highway bonds, and also to "laws" (more than one) authorizing the sale of debentures. In fact, we find one law (chapter 167) authorizing the issuance and sale of bonds, and one law (chapter 153) authorizing the sale of debentures. Chapter 153, however, authorizes such debentures, not "to anticipate the collection of revenues from motor vehicle licenses," but to anticipate the proceeds of tax levies; and, so, if contemplated at all by the amendment, included only in the expression "other revenues provided by law for the state road fund." So we find that the exact meaning of the words employed cannot be relied upon in interpreting this constitutional amendment.

Since chapters 153 and 167 seem to be the only acts of the Fifth Legislature which could be affected by the amendment, we should take notice of the conditions call-

ing for the passage of these acts. At that time some $4,000,000 was available for allotment to New Mexico as federal aid in the construction of roads. To get it, the state and the several counties to be benefited must raise like amounts. The state must conduct a large borrowing operation at once, or suffer a large loss of prospective benefit. Chapters 153 and 167 represent the financial measures taken by the state to meet this situation.

Chapter 167 provided for a state bond issue of $2,000,000. As the bonds were authorized to be marketed from time to time as the money was required, no provision was needed for anticipating the proceeds of the sale, and none was made. By chapter 153 the several boards of county commissioners were authorized and directed to make a 2-mill levy in each of the years 1921, 1922, and 1923; the proceeds of which were to go into the state road fund, and to be used for the same purposes for which the proceeds of the sale of state bonds authorized by chapter 167 were to be used. Since these tax collections were spread over a period of three years, it was necessary to provide that the state highway commission might issue debentures in anticipation of them.

It may well be contended that the language, "Laws enacted by the Fifth Legislature authorized the issue and sale of state highway bonds for the purpose of providing funds for the construction and improvement of state highways and to enable the state to meet and secure allotments of federal funds to aid in construction and improvements of roads," has special and particular reference to chapter 167 enacted by the Fifth Legislature. On the other hand, the language, "Laws so enacted authorizing the issue and sale of state highway debentures to anticipate the collection of motor vehicle licenses and other revenues provided by law for the state road fund," does not aptly or correctly describe any law enacted by the Fifth Legislature. It does, in fact, describe an enactment of the Fourth Legislature, Laws 1919, c. 154. This chapter amended chapter 38 of the Laws of 1917 by which a certain tax levy and one-

half the net revenues derived from motor vehicle licenses were set aside for the state road fund. Among the provisions of chapter 154 was this:

"The state highway commission is hereby authorized to anticipate the proceeds of the collection of the said tax levies and licenses, or other revenues or income at any time provided for the state road fund, by the issuance and sale * * * of certificates or debentures. * * * " Section 2.

So it would seem that if the language of the amendment now under consideration had reference or application to any existing enactment, it was to an act of the Fourth Legislature.

The Attorney General argues that the term "so enacted," referring to debentures, means enacted just as the state bonds provision was enacted—that is, by the Fifth Legislature. That is an admissible and perhaps preferable conclusion, if grammatical construction only is to be considered. But when we find that there have been no laws "so enacted," another interpretation must be sought. Some law, either past or future, must have been in contemplation providing for the anticipation of the proceeds of revenues from motor vehicle licenses. No law of the Fifth Legislature answers that description. The Fourth Legislature is not mentioned. There is no reason to say that "so enacted" refers to any act of the Fourth or any other particular Legislature except the Fifth. If it does not refer to the Fifth, it may as well refer to the Legislature or any Legislature.

If the word "so" had been omitted there would be no difficulty in interpreting the amendment as applying to laws at any time enacted. The word "so" may simply refer to "laws enacted by the * * * Legislature." We attach that meaning to it, because otherwise the mere inclusion of the word renders inapplicable an important and deliberately included provision of the amendment.

This conclusion is strengthened by consideration of the fact that the method employed to effectuate the purpose was that of amending the Constitution. Unless

permanency and future application were desired, the Constitution required no amendment. A mere popular ratification of the particular act was all that was needed. Under the conditions then to be foreseen and since existing, it would often be necessary to make expenditures for highway construction and maintenance in advance of the actual collection of the revenues dedicated to that purpose. It would greatly handicap such operations if each must receive popular approval at a referendum.

If ratification only was intended, it would have been sufficient to say that the laws enacted by the Fifth Legislature, or theretofore enacted, authorizing the issue and sale of bonds and debentures for road purposes, were ratified. Why, then, the complex provision we have, when a much simpler one would have accomplished the purpose?

It may be that section 16 was intended to perform the double office of ratifying the particular bond issue authorized by chapter 167, and of establishing a new constitutional policy as to sales of highway debentures in anticipation of the collection of revenues. It is not unreasonable that the people should be willing to relinquish control over anticipatory debentures while retaining control over bonds. The former are short-time obligations to be retired from revenues already assured. The latter are real and permanent additions to the public debt. There is an important practical distinction.

There is an objection to the theory that, as to highway bonds, the amendment was intended merely to ratify chapter 167. It is found in the provision that:

> "The total amount of such state highway bonds payable from proceeds of taxes levied on property outstanding at any one time shall not exceed two million dollars."

Unless future operations were contemplated, what was the purpose of this provision? However, we are here concerned with anticipatory debentures only. We can only decide the bond question when it shall reach this court. As to "debentures to anticipate the col-

lection of revenues from motor vehicle licenses and other revenues provided by law for the state road fund," we hold that there need be no referendum.

[2] We still have the third question. The Attorney General's position is this. Although article 12, § 7, of the Constitution permits investment of the permanent school fund in any "other interest-bearing securities," if the Legislature shall so provide "by three-fourths vote of the members elected to each house," and although the Legislature did, by the requisite vote, by chapter 4, Laws 1927, provide for such investment in debentures such as these, yet the application of chapter 4 to these particular debentures is prevented by the fact that a substantially similar authorization was included in chapter 20, Laws of 1927, and failed to become operative or effective because that act did not receive the requisite three-fourths vote of the members elected to each house.

It is not, and could not be, contended that chapter 4 has been repealed. Such a contention would involve the proposition that a minority, opposing the passage of chapter 20, could effect the repeal of chapter 4, passed by the extraordinary majority, and the proposition that a provision of chapter 20 which failed of enactment, and is a nullity, could yet react on chapter 4, to repeal it. The Attorney General's argument is that, as to the particular debentures authorized by chapter 20, reliance was not placed on chapter 4 to render them eligible as an investment for the permanent school fund; that, by including the provision in the bill, the question was presented to the Legislature whether the particular debentures should be so eligible and the proposition was defeated.

Of course, the Legislature was not bound by the general policy adopted by chapter 4, so that it could not have provided differently by chapter 20 as to the particular debentures there authorized. But it did not provide differently. The bill sought, unnecessarily, to repeat or renew the same provision. The vote was

on the bill as a whole, not on any particular provision. The principal difference of opinion, as was well known, was as to the wisdom of levying a 5-cent tax on gasoline. The vote does not necessarily indicate any opposition to a policy of investment of public funds which had already been adopted by the same Legislature. If the provision in question had been submitted to a separate vote by a separate bill, the Attorney General's contention would have been sound. We do not wish to be understood as suggesting that this court may inquire into the particular motives which may have induced individual legislators to vote for or against a proposed measure. We merely illustrate the fallacy of the reasoning. The Attorney General concedes, we think correctly, that, in the absence of later legislative action, chapter 4 would have been sufficient authority for the investment. There has in fact been no later action. Chapter 4 stands unimpaired and is sufficent legislative warrant for the proposed investment.

It follows that the district judge properly denied the injunction. The judgment will be affirmed and the cause remanded.

It is so ordered.

PARKER, C. J., concurs.

BICKLEY, J. (dissenting). I regret that I am unable to agree with the decision of my associates.

The language of a Constitution is to be construed in its popular sense. In Crick v. Rash, 190 Ky. 820, 229, S. W. 63, it is said:

"The rule for the interpretation of Constitutions, as universally applied, is that the language therein is to receive its plain and ordinarily understood meaning by the generality of the people. Constitutions are many times actually, and always in theory, adopted by the people, and their language is presumed to contain the meaning which the people generally attribute to the words employed. In this respect the rules for the interpretation of Constitutions diff r from the ones applied in the construction of statutes."

See, also, State v. Lister, 91 Wash. 9, 156 p. 858, and Cooley's Constitutional Limitations, p. 92. Applying

these well-settled rules to the present case, what is the meaning of the phrase "so enacted" in the Eleventh Amendment to our Constitution? The majority refer to chapter 153, "An act authorizing and directing boards of county commissioners to levy taxes for each of the years 1921, 1922 and 1923 for construction and improvement of public highways and to meet dollar for dollar allotments to the state of federal funds under the Federal Aid Road Act, and for other purposes," and chapter 167 of the same legislative session (1921) "An act authorizing the issue and sale of state highway bonds in the sum of two million dollars to provide funds for the construction and improvement of state highways and to enable the state to meet and secure allot ments of federal funds to aid in construction and im provements of roads: providing a tax levy for payment of interest and principal of said bonds."

It is to be noted that each of those acts was approved on March 12, 1921, which was the day upon which the Legislature adjourned. It appears that both acts were house bills, and chapter 167 bears an earlier number than chapter 153. Section 10 of chapter 167 provides that:

"This act shall take effect on the first day of December 1921, in case the amendment to the Constitution of the state of New Mexico proposed by the Fifth Legislature, providing that laws enacted authorizing the issue and sale of bonds as provided by this act shall take effect without submitting them to the electors of the state, shall be ratified by a majority of the electors voting thereon at the special election to be held on constitutional amendments. If such amendment should not be ratified then this act shall be submitted to the qualified electors of this state," etc. "Provided, that no bonds or debendtures shall be issued or sold under this act until the people of New Mexico shall have voted upon and ratified a constitutional amendment which will permit this act to become effective."

So, it seems that the amendment in question had already been proposed by the Fifth Legislature prior to the enactment of chapter 167. If it is true that the amendment was proposed prior to the enactment of either chapters 153 or 167, the argument of the majority loses some of its force. I presume that a constitu-

tional amendment could be proposed, having for its purpose the ratification of acts done by the Legislature after such proposed amendment was introduced and authorized by the Legislature. Under such circumstances, the Legislature proposing the amendment would not know whether the Legislature would direct that the state highway debentures should be paid through the anticipation of the collection of revenues from motor vehicle licenses, or through revenues provided by law for the state road fund.

By the rules of interpretation, "and" may be, and often should be ,read as "or" according to the context. The majority say:

"Chapter 153, however, authorizes such debendtures, not 'to anticipate the collection of revenues from motor vehicle licenses,' but to anticipate the proceeds of tax levies; and, so, if contemplated at all by the amendment, included only in the expression 'other revenues provided by law for the state road fund.' So we find that the exact meaning of the words employed cannot be relied upon in interpreting this constitutional amendment."

I have no reason to doubt that chapter 153 was contemplated by the amendment. This court so held in Lopez v. State Highway Commission, 27 N. M. 300, 201 P. 1050. That case was decided on September 24, 1921, only four days after the election at which the Eleventh Amendment was adopted. If any significance is to be attached to the historical element, it is assumed that the court at that time was equipped with full knowledge of the history of the measures. Some of the same questions were raised in that case as are raised in this, and the court's conclusion was that chapter 153 was validated and ratified by the adoption of the amendment. The court there thought that the language of the amendment did aptly and correctly describe chapter 153, enacted by the Fifth Legislature. If the court had been of the opinion that the debentures therein provided for must be paid by anticipating "the collection of revenues from motor vehicles licenses and other revenues provided by law for the state road fund." it would doubtless have concluded that such words did not aptly or correctly describe said chapter

153.

It seems reasonable that the Legislature by the proposed amendment intended to validate, ratify, and cause to "take effect" the laws on the subject enacted by the Fifth Legislature, whether they authorized state highway bonds or state highway debentures, to anticipate the collection of revenues from motor vehicle licenses or (and) other revenues provided by law for the state road fund. As the majority have pointed out, both methods had previously been in use, and there is no reason to suppose that the Legislature intended the language of the amendment to require that both must be used at the same time and in the same act.

The word "so" is defined by the Lexicographers as:

"In that manner; in such manner."

"(c) In the manner previously noted or understood."

"5. In such way as aforesaid; in the aforesaid state or condition; the same; a pronominal adverb used especially for the sake of avoiding repetion." Century Dictionary.

See, also, Words and Phrases, First and Second Series.

My brethren agree that the Attorney General's contention that the term "so enacted," referring to debentures, means enacted just as the state bond provision was enacted; that is, by the Fifth Legislature, is an admissible and perhaps preferrable conclusion, if grammatical construction only is to be considered, but they say when we find there have been no laws "so enacted" another interpretation must be sought. It would seem that such argument proceeds partly upon the theory that the amendment was proposed after the Fifth Legislature had finished with its enactments and referred therefore to what had been enacted. This does not necessarily follow, and the contrary seems likely.

The majority say:

"The word 'so' may simply refer to 'laws enacted by the * * * Legislature.'"

This seems hardly likely, because the Legislature is

the only body which can enact laws .and there would be no reason for using the word "so" if the reference were simply to the Legislature.

The majority think that this conclusion is strengthened by a consideration of the fact that the method employed to effectuate the purpose was that of amending the Constitution, and that unless permanent and future application was desired, the Constitution required no amendment, a mere popular ratification of the particular act was all that was needed. I do not so understand it. Section 8 of article 9 of the Constitution provided a debt limitation of 1 per centum of the assessed valuation of all the property subject to taxation in the state. Apparently it was contemplated that the enactments of the Fifth Legislature for state highway bonds and state highway debentures would exceed these debt limitations, and therefore the constitutional amendment was necessary in order to validate such enactments.

The majority think that it is not unreasonable that the people should be willing to relinquish control over anticipatory debentures while retaining control over bonds, for the reason that the former are short-time obligations, to be retired from revenues already assured, and the latter being real and permanent addition to the public debt. This is speculation. There is nothing in the amendment which limits the length of time which either form of indebtedness is to run. If the Legislature could create an irrevocable contract for the payment of highway debentures from the revenues from motor vehicle licenses and (or) other revenues provided by law for the state road fund for a period of five years, there is nothing in the amendment which would prevent the Legislature from making such a contract to run for ten years or a longer period.

The word "debenture" is defined as:

"An instrument in the nature of a bond, given as an acknowledgment of debt, and providing for repayment out of some specified fund or source of income." Standard Dictionary.

It seems probable that the amendment under consideration and chapter 167 and chapter 153 were all a part of one plan for raising revenues to meet the federal aid funds. It is to be noted that in section 10 of chapter 167 the Legislature spoke of bonds or debentures as being in the same class; that is, they used the words interchangeably in providing that no such **bonds** or **debentures** should be issued or sold under that act until the people of New Mexico had voted upon and ratified the constitutional amendment.

It seems to me that the Legislature was of the opinion that the constitutional amendment was necessary in order to validate both state highway bonds and state highway debentures to be issued without submission to the qualified electors and in excess of the 1 per centum limitation even with such submission, regardless of the source from which the money was to be derived to pay them, in the absence of a vote of the electors, and in the event of exceeding the debt limitations therefore provided.

This court seemed to be of the opinion in 1921, in Lopez v. State Highway Commission, supra, that the amendment was of a validating and ratifying character, and for that reason found it unnecessary to consider the assault made on the debentures. Such seems a reasonable conclusion. In the proposed amendment is associated together the state highway bonds and the state highway debentures in taking them out of the 1 per per cent debt limitation of section 8. art. 9, "notwithstanding that the total indebtedness of the state may thereby temporarily exceed one per centum of the assessed valuation of all the property subject to taxation in the state." The use of the word "temporarily" indicates that the amendment purported to deal with the road-financing program of the Fifth Legislature, and not the establishment of a permanent policy.

The Legislature also associated the two forms of securities together in respect to dispensing with the requirement of submission to the electors for approval. It seems plain that as to state highway bonds the am-

endment contemplated those authorized by the **fifth Legislature**, and I am unable to find plain and clear reasons for separating what the amendment by language as ordinarily understood associated together; and I am unwilling, by interpretation, to hold that the amendment established a new constitutional policy of a permanent character as to sales of highway debentures in anticipation of the collection of revenues belonging to the road fund. It seems to me that the constitutional amendment was proposed on the basis of the laws which might be enacted by the Fifth Legislature and was adopted by the people on the basis of what had been done, and that the electors were not committing themselves to a permanent policy of relinquishing control over the public debt, even though such debt is to be paid out of excise taxes or revenues to be derived from special levies or taxes, to anticipate the payment of the debt.

[No. 3120, May 2, 1927. Rehearing Denied Sept. 10, 1927]

STATE v. Massey.

[258 Pac. 1009]

SYLLABUS BY THE COURT

1. Any evidence that tends to show that the defendant had a motive for killing the deceased is always relevant as rendering more probable the inference that he did kill him.

2. While circumstances immediately or shortly preceding the homicide are competent as part of the res gestae, nevertheless what facts may be shown under this rule depends upon their nature and connection with the fatal act and the other circumstances determining their relevancy. No effort was made to show the trial court the relevancy or materiality of the excluded evidence. A mere exception on the ground that the statement was a part of the res gestae was made. For this and other reasons it is **held** that the trial court did not err in excluding the evidence.

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[1] 30CJ p. 179 n. 37. [2] 16CJ p. 373 n. 43; 574 n. 45, 46; p. 577 n. 79; 30 CJ p. 193 n. 53; p. 199 n. 29. [3 4] 30CJ p. 816 n. 19; p. 817 n. 20, 21; 16CJ p. 874 n. 99; p. 879 n. 56; p. 880 n. 74; 17CJ p. 56 n. 16; p. 58 n. 24; p. 71 n. 47. [5] 17CJ p. 58 n. 29 New. [6] 30CJ p. 317 n. 69. [7] 16CJ p. 984 n. 37; p. 1013 n. 46; p. 1063 n. 85; 30 CJ p. 336 n. 70.

3. As a general rule, an objection to the admission of evidence must be taken at the time the evidence is offered or introduced, or it will be deemed waived, and will not be considered on appeal. It should always be made at the earliest opportunity after the objection becomes apparent.

4. If the evidence, apparently inadmissible when introduced, might be made admissible by other testimony, and the party offering the objectionable testimony fails to connect it up so as to show its admissibility, it is incumbent upon the objecting party to direct the attention of the trial court to this fact and renew his motion to strike the objectionable testimony.

5. Objections not made in the trial court to a question propounded to a witness will not be considered on appeal.

6. The record examined, and **held**, that the verdict is supported by substantial evidence.

7. The requested instructions of defendant examined, and **held** to be properly refused; they being sufficiently covered by the court's general instructions.

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

W. C. Massey was convicted of voluntary manslaughter, and he appeals. Affirmed.

O. E. Little, of Roswell, for appellant.

Fred E. Wilson, Atty. Gen., and Jas. N. Bujac, Asst. Atty. Gen., for the State.

OPINION OF THE COURT

BICKLEY, J. The appellant, W. C. Massey, together with his son Cecil Massey, was charged with the murder of Jim Taylor. At the close of the evidence, the court instructed the jury to return a verdict of not guilty as to the defendant Cecil Massey. The jury returned a verdict that the appellant was guilty of voluntary manslaughter, requesting the clemency of the court.

The appellant with his family resided in Roswell, as did also the deceased, Jim Taylor. The appellant owned a ranch and some live stock. Deceased also owned live stock, and during a period of drought induced appellant to permit him to put his stock upon appellant's

ranch; it being apparently a temporary arrangement. Eventually the appellant requested the deceased, Jim Taylor, to move his stock from the ranch. There was heated controversy between the deceased and the appellant on this subject, as well as other difficulties between them concerning the administration of affairs on the ranch. Appellant was indebted, which indebtedness was secured by mortgage upon appellant's cattle. It is in evidence that some one had killed some of these mortgaged cattle, and that deceased had pointed out certain heads and paunches to inspectors representing the mortgagee. The State sought to show by a witness that appellant was uneasy concerning knowledge by the deceased and was apprehensive that the deceased would be a witness against him in case of an investigation relative to the destruction of this mortgaged property. There was testimony of a witness who claimed to have eavesdropped upon a conversation between appellant and his son Cecil Massey, in which the appellant said that he guessed they would have to kill Jim Taylor before they got him away, or he would get them in trouble about the hides. This witness varied his testimony somewhat in different portions of his testimony, but in substance testified as heretofore stated. Some effort was also made to impeach this witness. There is evidence that Taylor had threatened to kill appellant, and that this threat had been communicated to appellant. There was also testimony to the effect that Massey when in a fit of anger was a very dangerous man. A number of witnesses qualified to testify as to the general reputation of the deceased in the community in which he lived for being a quarrelsome, violent, turbulent, and dangerous man, and that such reputation was bad. A number of witnesses testified as to the general reputation of the appellant, W. C. Massey, in the community in which he lived for being a quiet, peaceable, and law-abiding citizen, and that such reputation was good.

The only eyewitness as to what transpired upon the fatal occasion was the defendant, W. C. Massey. Massey testified in substance: That he was 49 years old,

and had a family consisting of himself and wife and 4 children. That he had been for some years in the stock business, and that he was in very bad financial condition. That Jim Taylor, the deceased, and Mrs. Taylor had persuaded him to permit their cattle to be brought to defendant's ranch, upon the assurance that arrangements would be made shortly to take them to another place. That Jim Taylor had taken possession of four calves belonging to defendant, and that he (the defendant) took two of the calves, and put them back with their mothers. That at that time and place Jim Taylor said that any time defendant put him to any trouble or notified the authorities about what he did "he would never ask me what I done it for, he would kill me." That about the 1st of February, 1924, he (the defendant) was preparing breakfast about 6 o'clock a. m., and Jim Taylor came into the room and said:

"You have been pouring it on to me. I says, 'Jim, what do you mean?' He says, 'You have been going on about the horses I ride; you talk about me riding your horses.' I says, 'I never said anything to you about riding any of my horses; you can ride them.' He says, 'You are God damn right I will,' he says, 'You are the God-damnedest son of a bicth I ever saw.'"

That at that time and place, after passing around the defendant, Jim Taylor continued:

"I have killed three men. When I killed Allen, when he was astruggling, dying, I walked up and put my foot on his arm, and told him to roll over, you damn son of a bitch, and die like a man. I will do anybody that way; it don't make any difference who they are. I would just as soon shoot a man in the back as in the belly; don't make no difference. I shot a Mexican in the back up here in the Salt river, and they don't know where he is yet. I love to kill men to see them kick anyway."

That at that time and place Jim Taylor cursed and abused him further ,and run all the cartridges through his six shooter to see if it was in good shape. That the defendant never said anything, but remained silent. That about 10 days thereafter, in the ranchhouse of the Massey ranch, Jim Taylor was talking with defendant concerning dogs and cats that had been poisoned out on the ranch, and, after indicating that he (Jim Taylor)

believed that the defendant had destroyed his dog and cat, said:

"Any time I can find out that anybody poisoned one of my dogs, he will die just like the dog did."

That thereafter, on Monday, March 23, 1925, the defendant left his house at Roswell, and went out to his ranch. That about 4 o'clock Cecil Massey and Jim Taylor came to the ranchhouse. That Cecil Massey was in the house with appellant when Jim Taylor came to the ranch and put his horse in the lot. That Jim Taylor came to the house where the defendants were. That at that time W. C. Massey gave to Jim Taylor a letter which Taylor's wife had written the day before (in this letter Mrs. Taylor stated she was glad that Taylor and Massey had made up their differences, and also told about some of the domestic and family affairs at home, and that she had been struck by a car.) That after reading the letter Jim Taylor said:

"The God damn son of a bitch never said who run over her with a car. I wish she had broke her God damn neck."

This testimony was excluded by the court, and will be further referred to hereafter. The deceased then said:

"You God damn white-collared sons of bitches, the undertakers won't know who to come and get when they come and get you."

And:

"Your God damn bellies will look like a pepper box when I get through with you."

And, referring to defendant's family, said:

"Them God damn white-collared high society woman folks of yours, I will put them in the washtub."

Then, speaking to Cecil Massey, son of the defendant:

"You God damn long-headed son of a bitch, I will shoot you like I would a dog."

That Cecil Massey replied:

"Jim, what have I ever did to you"

That at that time and place the deceased repeatedly pulled his gun from his pocket and put it back and pulled it out and put it back. That defendant W. C. Massey slipped by Jim Taylor, and went into another room, and picked up a Winchester, and wrapped it up in a wagon sheet, and carried it to defendant's automobile, and said:

"Come, Cecil, let's go. Let's go now, right now."

That at that time Jim Taylor got between him and the door, and would not let him pass for a while. That the car to which the defendant had gone was about 30 feet from the house. That Jim Taylor then came out of the house through the gate near the car, and passed where the defendant was sitting in the car. That Taylor cursed him again as he passed the car. Then Taylor went on to the lot, which was about 30 or 40 steps away, and passed through the gate, and was rubbing his horse.

That the defendant called to his son:

"Come, Cecil, let's go as quick as we can."

That at that time this defendant had gotten out of the car, and was standing by the side of the car. That there was a trough about 16 feet long and 2 feet wide just in front of the lot gate through which Taylor had just gone. That, when this defendant had said, 'Come, Cecil, let's go as quick as we can,'' Jim Taylor whirled, and came back through the lot gate, and was coming around the trough with his hand back of his right side where this defendant had seen his gun a few seconds before. That as Jim Taylor came toward the defendant he said.

"You God damn son of a bitch, you will never get away from me alive."

That at this time the defendant took the rifle he had placed in the bottom of the Ford car and shot Taylor as quickly as he could. That when he shot Taylor he (Taylor) was passing around, or had passed around, the end of the feed trough near the lot gate through which he had just come. That Taylor was coming in a stooping position with his right hand on his pistol. That

Jim Taylor fell forward on his face, and turned over to the left on his back. That at that time he (the defendant) knew his life was in immediate danger; that the next day he and his son Cecil Massey took a turkey gobbler to the home of Jim Taylor; and that he did this because he did not want those boys coming to his house, as he was afraid they would kill him.

Defendant denied that he had said to Cecil at any time that they were going to have to kill Taylor, or he would get them in trouble about the hides; that he did not go to the sheriff's office and report the killing of Jim Taylor or tell any one about it because he had never been in any trouble before, and he did not know what to do, and was afraid; that he was afraid of Jim Taylor's boys and brothers and his wife.

There was testimony by witnesses for the state to the effect that the bullet which had killed Taylor went through the aorta, shattered the backbone and spinal cord, and was of such a character as to produce complete paralysis from the hips down, and opinion evidence to the effect that Taylor could not have rolled over after being so wounded, and also to the effect that, if he had fallen forward, blood would have flowed from the wound in the chest, and that there was no evidence of such flow.

Other evidence will be discussed in connection with the errors assigned and relied upon by the appellant.

[**1**] 1. Appellant complains that the court erred in permitting testimony to be introduced over the objection of the defendant and to his prejudice pertaining to other crimes than the crime with which the defendants were charged. This has reference to certain testimony tending to show that the defendants had unlawfully disposed of mortgaged cattle and unlawfully branded the offspring of certain mares which were mortgaged. In this connection the state also introduced testimony to the effect that appellant and his codefendant, upon discovery that the deceased had been riding around the ranch with representatives of the

mortgagee pointing out heads and paunches of slaughtered animals, had gone into a room and locked the door and engaged in a whispered conversation, in which the appellant said to his son that he guessed they would have to kill Jim Taylor before they got him away, or he would get them in trouble about the hides, or words to that effect. The state also introduced testimony of the wife of the deceased to the effect that appellant was apprehensive that he was going to be indicted on account of the slaughter and otherwise improper disposal of mortgaged animals, and was eagerly concerned as to whether or not Jim Taylor would stand by him, and said:

"They are going to try to get a bill against me, and I am 55 years old and broke. * * *They will send me off if there ain't something done, if Jim don't stay with me."

The court let in this testimony on the theory that it tended to show a motive for the crime of which defendant was accused.

"Any evidence that tends to show that the defendant had a motive for killing the deceased is always relevant as rendering more probable the inference that he did kill him." Underhill's Crim. Ev. (3d Ed.) § 503.

When viewed in the light of other testimony offered by the state and the circumstance that defendant had not, until after the testimony was received, admitted the killing, we think the testimony objected to was properly admitted.

[2] 2. Appellant next complains of the action of the court in excluding the testimony of the defendant concerning what deceased said after reading the letter which Massey had brought to him from his wife. The defendant was detailing the incidents immediately prior to and leading up to the homicide:

".Q Did he take the letter? A. Yes, sir.

"Q. Did he read it? A. Yes, sir.

"Q. What did he do at the time he read the letter? A. He looked at the letter, read it, and, after he got through reading the letter, I suppose he was through reading it, he says, 'The God damn son of a bitch never said who run over

her with a car. I wish she had broke her God damn neck.'

"Mr. Wyatt: We object to that, and ask that it be stricken.

"The Court: Mr. Osborn, can't you prevent your witness putting in such stuff as this?

"Witness: That is exactly the words he stated.

"The Court: I know, but that is not evidence in the case. Gentlemen of the jury, you are not to consider that as evidence in the case at all. What the deceased said about some third person is not material in this case.

"Mr. Osborn: I would like the privilege, your honor, just a minute—

"The Court: I will just make this statement: Confine your testimony to matters between the defendant and the deceased, not what the deceased said about third persons.

"Mr. Osborn: It will be limited to the defendant himself, or things that was said about the defendant's family?

"Mr. McClure: Is the other taken from the jury?

"The Court: Yes.

"Mr. McClure: We note an exception for the reason this testimony is part of the res gestae."

It is very earnestly argued by appellant that this declaration of the deceased concerning his wife was admissible as a part of the res gestae. It has often been said that the doctrine of res gestae is one difficult of application. It is not every statement or declaration even of the parties which is admissible in evidence because a part of the res gestae. While circumstances immediately or shortly preceding the homicide are competent as part of the res gestae, nevertheless what facts may be shown under this rule depends upon their nature and connection with the fatal act and the other circumstances determining their relevancy. See 11 Encyc. of Evidence, pp. 405, 406.

"All the relevant and material circumstances and particulars thereof may be shown." 6 Encyc. of Evidence, p. 611.

"The idea of res gestae presupposes a main fact or principal transaction, and the res gestae mean the circumstances facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its

character. In Stephen's Digest we find the rule crystallized in these words: 'Whenever any act may be proved, statements accompanying and explaining that act made by or to the person doing it may be proved if they are necessary to understand it.' * * * * Thus, conversations contemporaneous with the facts in controversy and explaining such facts are admissible. It is not a condition of the admission of such evidence that no other can be obtained. The declarations are admitted when they appear to have been made under the immediate influence of some principal transaction, relevant to the issue, and are so connected with it as to characterize or explain it." 2 Jones, Comm. on Ev., vol. 2, § 344.

It is noted that immediately following the exclusion of this evidence counsel for defendants were permitted to show the language used by the deceased toward the defendant or any member of his family. The district attorney objected, and the court inquired of defendant's counsel:

"What light, except what was said to him, what light would it throw on this case if it was said to any other person or about any other person?"

Counsel for defendant replied:

"If he vented his vile language upon members of this defendant's family, that would be calculated to create a state of excitement on the part of this defendant and show the state of feeling of the deceased at the time he made it, and it is part of the res gestae."

The court then permitted that line of questioning. However, no effort was made by counsel for defendant to show to the court the relevancy or materiality of the evidence excluded. As we see it, the main fact sought to be established by the defendant was the hostile attitude of the deceased toward him as shown by threats to take his life or do him great bodily harm as subsequently followed by a demonstration of an intention to carry such threats into execution. We are unable to see how the language of the deceased toward his wife, although profane and violent, would characterize or explain the subsequent act of the deceased or of the defendant. We find no error with respect to the admission of this testimony.

3. Appellant complains of the action of the court in excluding the following testimony of the appellant.

The defendant was being interrogated concerning threats made by deceased against him prior to the day of the homicide, and testified:

"He told me if anybody done him any harm, or bumped him off or anything, that his boys and his brothers would kill them, and his wife was just as bad."

This was objected to as not being responsive to the question and as not being a threat by the deceased, and the court withdrew the answer of the witness from the consideration of the jury on the theory that it was not a threat by the deceased. We see no error in the ruling of the trial court in this respect.

Appellant sought to introduce testimony of a witness that he had a conversation about 2 weeks before the homicide; that the deceased told him he was never going to get off of the Massey ranch; and that witness told Taylor that he (Taylor) and Massey were both broke; and that they had better settle their differences; and have no trouble; and that the witness told Massey the same thing. The court denied the tender because it tendered hearsay, and because it related to a collateral matter which could not be litigated in the case on trial.

We see no fault with the ruling.

[3, 4] 4. We shall consider appellant's assignments of error Nos. 4 and 13 together. Kirk Johnson, a deputy sheriff, witness for the state, testified concerning a conversation between him and a woman in the residence of appellant, Massey, after the homicide, which conversation was not shown to have been in the presence of the defendant. The portion of the record involved in these assignments is as follows:

"Q. Just tell the jury what you did when you got up there. A. Mr. Zumwalt didn't know where Mr. Massey lived, and it just happened that I knew the place, and he asked me to go with him, so we drove on there, and drove in a little driveway into the house, between the houses up there, on north hill and it happened I was outside and next to the house, and Jodie said: 'You can get out and see if Mr. Massey is there, and see if he wants to go out with us tonight.' And I knocked two or three times, and finally a woman's voice answered, and wanted to know who it was, and I told her it was L. L. Johnson, and that I wanted to

know if Mr. Massey was there, and she said, 'No, he is not here.' I asked where he was, and she said: 'He went to the ranch this morning,' and I made the remark, 'You say he went to the ranch this morning?' Then she waited, whoever it was talking, and waited just a brief time, and says: 'No, he didn't go to the ranch; he went to the mountains.' And I says: 'When will be be back?' And she says: 'I don't know.' Then I called to Jodie, and asked him if there was any other questions he wanted to ask, and he said there wasn't.

"Mr. McClure: Move to strike that and object to it because it has not been shown this was in the presence of the defendant, and is hearsay.

"The Court: It is left for the jury to determine whether it was or not. Overrule the objection.

"Mr. McClure: Exception.

"A. (Continued). So I just came and got in the car, and we came on to town. Then we left after that, then we went out to the Massey ranch.

"A. Whom did you see after you got there? A. No one at all.

"Q. And you say you found no one? A. I saw no one.

"Q. Well, whom did you find, if any one? A. I don't know. It was just a lady's voice talking from the inside of the house. I don't know who she was.

"Q. Did you hear any other voice than this lady's voice? A. No, sir.

"Q. And, so far as you know, there was no one present except this lady? A. All I know is the one voice I heard speak from the inside of the house.

"Mr. McClure: We renew our motion in behalf of both of the defendants to strike this testimony from the jury, for the reason it is hearsay, and not in the presence of the defendants or either of them.

"The Court: Overruled.

"Mr. McClure: Exception."

There are several reasons why the judgment of the trial court could not be reversed on account of any error in this regard, if, indeed, it was error. In the first place, no timely objection was made to the testimony.

"As a general rule, an objection to the admission of evidence must have been taken at the time the evidence was offered or introduced, or it will be deemed waived and will not be considered on appeal. It should always be made at the earliest opportuntiy after the objection becomes appar-

ent. If apparent when offered, either by question to the witness or otherwise, it should be made then. If the evidence, apparently admissible when offered, is shown by subsequent developments to be exceptionable, the objection should then be made in the form of a motion to strike out, or by a request for an instruction that its effect be limited, or that it be withdrawn from the consideration of the jury." 3. C. J. Appeal and Error, § 731.

It is the theory of appellant that it was incumbent upon the state to prove that the statements here complained of were made in the presence of the defendant before the statements could become admissible. The objection that the statements were not made in the presence of the defendant would have been apparent several questions and answers prior to the time the motion to strike out and objections were made. We have held that, where no objection is made to the introduction of testimony, it is within the discretion of the court to sustain or refuse a motion to strike the alleged objectionable testimony. It is not clear from the record whether the court exercised his discretion to refuse to strike or treated the matter as though a timely objection had been made. Attempting to analyze the language of the court in making his ruling, we find that it is susceptible of the construction that it would be for the jury to determine whether the statement was made in the presence of the defendant after all of the evidence was in. If the state had afterwards adduced testimony that the defendant was present at the time, the statement would not be objectionable. We do not discover any further evidence on behalf of the state as to the presence of the defendant, although a daughter of appellant, testifying in his behalf, said that, when the witness Johnson came to her father's house upon the occasion heretofore narrated, and during the conversation, she was alone, and her father, the appellant, was not there at the time. However, we discover no subsequent effort of the appellant to renew their motion to strike the alleged objectionable testimony.

In State v. Orfanakis, 22 N. M. 107, 157 P. 674, complaint was made of the refusal of the trial court to strike certain portions of the testimony of a witness

who testified concerning a conversation between himself and one of the defendants jointly indicted with the appellant, which occurred on the night of the homicide, and which was not held in the presence of the appellant. After the entire conversation referred to had been detailed by the witness, a motion was made by counsel for defendant that the testimony be stricken out. Whereupon the district attorney suggested that the state had a right to prove a conspiracy between the three parties indicted. It would seem that the court and counsel assumed that the testimony would be connected up in order to show that a conspiracy existed. No further objection was interposed by counsel for defendant, and it was said that, if the state failed to prove the conspiracy which it had suggested, it was incumbent upon the defendants to direct the attention of the trial court to this fact, and renew his motion to strike the objectionable testimony. We think the ruling in that case is applicable in the case at bar, and we conclude, therefore, that the appellant is in no position to urge his objection in this respect. Also it may be remembered that it is doubtful if any prejudice resulted to the appellant from this testimony. State v. Holley, 136 S. C. 68, 134 S. E. 213, presents a similar situation.

The court there decided:

"Admission of testimony as to conversation with woman in charge of defendant's home during his absence **held** not prejudicial, where only reference to defendant was inquiry as to whereabouts."

In the case at bar an inquiry was made as to the whereabouts of the defendant, and his daughter stated in the evidence objected to that he had gone to the mountains. and it subsequently appeared in the testimony of this daughter and also of the defendant that he had gone to the mountains at the time in question

It is also objected that the language of the court in overruling the objection to the declaration as not being shown to be in the presence of the defendant that, "It is left for the jury to determine whether it was or not," was improper, and a comment on the evidence. We do

not think it was necessarily a comment on the evidence, as what the court doubtless meant was that it was for the jury to determine from the evidence in the case whether or not the declaration was made in the presence of the defendant. In any event, we could not consider that objection which is now made for the first time; no exception having been taken to the language used by the court. The exception was taken to the ruling of the court on the objection.

As to the other alleged improper remark of the court in giving his reasons for admitting a part of a conversation, a portion of which had been brought out by the defense, we see no error therein, particularly in view of the fact that the court instructed the jury in the usual form that by nothing which the court had said in ruling on the evidence offered in the trial did the court express any opinion whatever as to any controverted fact in the case; all such facts being reserved to the jurors to determine.

5. On the state's rebuttal, the witness Will Roberts testified that he had known the defendant Massey for a good long time; had known him in Texas and also in New Mexico; had worked with him in Texas, and had seen him handle and shoot his Winchester. The witness was permitted to testify, over objection of the defendant, that defendant "could handle it pretty fast, pretty good;" that he knew Jim Taylor during his lifetime; had observed him handle his gun; had worked with Jim Taylor; had been with him a good deal on the ranch; had seen him draw and handle his pistol. Then the following question was propounded:

"Mr. Roberts, knowing about how the defendant W. C. Massey handled his gun, and knowing how Jim Taylor handled his pistol, I will ask you to state to the jury your opinion as to whether or not it would be possible for the defendant W. C. Massey to get his Winchester up to his shoulder and shoot Jim Taylor, if Jim Taylor had his hand on his pistol at the time W. C. Massey started to get his gun?"

The answer was:

"No, sir: I don't believe he could do it."

The objection was as follows:

"Mr. McClure: We object to that as immaterial, incompetent, and irrelevant, no proper foundation laid for its introduction, which renders it incompetent, and for the further reason that it is not rebuttal testimony, and does not tend to contradict any evidence offered by the defendants or either of them, as to ——— during the trial of this case, and for the further reason that the answer could be no more than a guess, unless it was based upon conditions, and that conditions would have very much to do with the determination of the hypothetical question propounded to the witness."

[5] The testimony would tend to rebut the narrative of the defendant, and upon the objection that it was not rebuttal testimony we find that the trial court was not in error. It is here argued that the evidence was also objectionable as being mere opinion evidence, and it is claimed that such objection was urged upon the trial court, and we are referred to the pages of the transcript containing the foregoing objection. We do not deem it necessary to go into a discussion of the so-called "opinion rule" of exclusion of testimony, because we are of the opinion that the objection was not sufficient to invoke a ruling by the trial court upon the question here argued that is, that the evidence was objectionable as being opinion evidence. Neither do we think that the question or the answer elicited was such an invasion of the defendant's rights that the trial court was required to notice it in the absence of specific objection. Objections not made in the trial court to a question propounded to a witness will not be considered on appeal. See James v. Hood, 19 N. M. 234, 142 P. 162.

[6] 6. Assignments of error Nos. 6, 7, 8, 11, and 14 all challenge the sufficiency of the evidence to support the verdict. With respect to this contention it is sufficient to say that we have carefully read the record, and find substantial evidence to support the verdict.

[7] 7. We will consider assignments of error Nos. 9 and 10 together. They relate to the refusal of the court to give appellant's requested instructions Nos. 2 and 3, which are as follows:

"(2) You are instructed that the laws of the state of New Mexico do not make it incumbent upon the person who has killed an assailant in self-defense to give notice or inform any one of the fact, and if you find from the evidence in this case that the defendant ——— failed to give such notice or information, then I charge you that such conduct on his part raises no presumption of guilt, but you may in arriving at your verdict in this case consider such conduct on the part of the accused and his explanation thereof, if any, in connection with all other facts proved in the case in determining his guilt or innocence.

"(3) You are instructed that, while you may consider the manner, demeanor, and interest, or want of interest, of any witness when testifying in this, I charge you that the laws of New Mexico make it the duty of every sheriff, deputy sheriff, constable, and every other peace officer to co-operate with and assist the district attorney in the investigation of all violations of the criminal laws of the state of New Mexico, and, if you find in this case that any witness has acted as such peace officer, and co-operated with and assisted the district attorney in investigating the facts of the case on trial, then it becomes your duty to scrutinize and weigh the testimony of such witness, and determine, if you can, whether or not the interest and service of such witness has influenced him to an extent which would affect his testimony, and then give his evidence such weight, and such weight only, as under all the facts proved you deem it entitled to receive."

While requested instruction No. 2 probably states the law, i. e., that there is no presumption of guilt from the silence of the appellant when he was under suspicion of having committed the crime, yet we deem the subject sufficiently covered by the instruction given by the court, and particularly the usual one concerning the presumption of innocence of the defendant, and that such presumption of innocence remains with him throughout the trial of the case, etc. Likewise as to the defendant's requested instruction No. 3. The court's instruction No. 25 advised the jury that they were the sole judges of the credibility of the witnesses and of the weight to be given to their testimony, and that in determining the credibility of the witnesses and of the weight to be given to their testimony, and that in determining the credibility of such witnesses, the jury should take into consideration their interest in the result of the case, their motive for testifying, etc. The sheriff had testified that he was interested in the case from the start, and was still interested. The law makes

it the official duty of every sheriff and other peace officers to investigate all violations of the criminal laws of the state. No duty is imposed upon such officers to file complaints, unless the circumstances are such as to indicate to a reasonably prudent person that such action should be taken, and they are required to co-operate with the prosecutors only in reasonable ways. We think the instruction given by the court opened the door wide enough for argument as to the interest which a peace officer co-operating with the district attorney's office might have in the outcome of the case, and that no error was committed by the court in refusing the requested instruction No. 3.

8. Assignment of error No. 12 relates to the overruling of the motion of defendant for a new trial. This assignment is not argued. The disposition of the other assignments substantially disposes of this point.

Counsel have shown great zeal and ability in presenting appellant's contentions. In many respects it is a close case; yet, after careful consideration, we find no error in the record, and the judgment is therefore affirmed, and it is so ordered.

PARKER, C. J., and WATSON, J., concur.

[No 3210, Sept. 21, 1927]

CARMAN et al. v. BOARD OF COMMISSIONERS OF McKINLEY COUNTY et al.

[259 Page 821]

SYLLABUS BY THE COURT

This court will not decide moot questions.

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

Suit by J. M. Carman and others against the Board of County Commissioners of McKinley County and others for an injunction. From a judgment for defend-

[1] 4CJ p. 649 n. 35. [2] 4CJ p. 579 n. 19.

ants. plaintiffs appeal. Appeal dismissed, and cause remanded.

George C. Taylor, of Albuquerque, for appellants.

H. C. Denny, of Gallup, and Simms & Botts, of Albuquerque, for appellees.

OPINION OF THE COURT

PARKER, C. J. [**1, 2**] A suit for injunction was brought by the appellants against the board of county commissioners to enjoin the issuance of bonds of the county for the purpose of obtaining funds for the construction and repair of roads and bridges in the county. The court below denied the injunction, and the appellants brought the case here by appeal. Since that time it is made to appear by the appellees that the said bonds have been sold, and the proceeds thereof have been received by the county. A showing is attempted to be made by one of appellants that the sale of said bonds has not been effected, but the showing is so vague and uncertain that it is not entitled to consideration.

It follows that the question in the case as to the power and authority of the county commissioners to issue these bonds has become moot and requires no consideration by this court. See Yates v. Vail, 29 N. M. 185, 221 P. 563.

It follows from the foregoing that the appeal should be dismissed on the motion of appellees, and the cause remanded, and it is so ordered.

BICKLEY and WATSON, JJ., concur.

[No. 3068, Sept. 17, 1927]

FORD v. NORTON et al.

[260 Page 411.]

SYLLABUS BY THE COURT

1. Where, as a controlling consideration for a lease of a filling station, the lessee covenanted, in addition to payment

[1] 13CJ p. 623 n. 80. [2-4] 13CJ p. 647 n. 24; p. 648 n. 25; 17CJ p. 410 n. 40; 22CJ p. 187 n. 10; 38CJ p. 1261 n. 8 New; 35Cyc p. 104 n. 88; p. 105 n. 4; p. 106 n. 13 New; p. 249 n. 51.

of rent, to purchase gas exclusively from the lessor, the latter covenanting to supply it at current market prices, a rescission of the lessee's covenant to buy because of a breach of the lessor's covenant, leaving the lease otherwise in force, is inequitable; the contract not being so separable as to permit of partial rescission.

2. The parties being bound by a mutual covenant to buy and sell gasoline, during a long period, at current market prices—

(a) The seller is obligated to deliver at the price current in the market when the buyer demands delivery.

(b) The best proof of such price is actual sales made.

(c) The seller's obligation is not affected by the fact that the current market price is the result of a temporary trade war.

(d) The seller's obligation is not affected by the fact that the buyer encouraged the trade war to the extent of purchasing of a concern invading the market and breaking the price, he having first given the seller an opportunity to meet the price.

(e) The buyer, by the encouragement mentioned in (d), has not rendered the seller's obligation impossible of performance.

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

Suit by C. N. Ford against William Norton and another, copartners doing business as Norton & Wood, for an injunction and for damages. From a decree for defendants, plaintiff appeals. Reversed and remanded, with directions.

Crampton & Darden, of Raton, for appellant.

Easterwood & Thompson, of Clayton, for appellees.

OPINION OF THE COURT

WATSON, J. C. N. Ford, plaintiff below, is the owner of a wholesale oil and gasoline business at Springer. He is also the assignee of the lessee's interest in a lease made in January, 1922, of land in Springer for a period of 10 years, for the purpose of erecting and maintaining a retail oil and gasoline filling station to be constructed by the lessee according to specifications set forth, and to revert to the lessor at the end of the term. He is also the assignee of the lessor's inter-

est in a sublease of the same premises. The sublessee, appellees' assignor, undertook performance of all the covenants assumed by his sublessor (lessee in the original lease), including the erection of the filling station and payment of the monthly rent and for the whole of the original term. In addition to these covenants and others usual to leases, the sublease contained paragraphs 9 and 10, which are particularly in question here, and which are as follows:

"IX. That said lessee covenants and agrees with said lessors that during the life of this lease he will purchase all gasoline, oil, and greases usually handled by an automobile station from said lessors, which are or shall be used or sold on said demised premises in and about the operation of the said automobile filling station, and will pay to the said lessors the current market price therefor, and that he will not directly or indirectly buy, use, handle, distribute, or sell any gasoline, oil, or greases usually handled by an automobile filling station at, about, or on said premises which are not purchased from said lessors, nor will he suffer or permit the same to be used, handled, distributed, or sold thereon.

"X. That the said lessors covenant and agree with the said lessee that said lessors will, at all times during the life of this lease, reasonably endeavor to keep and maintain a supply of gasoline, oil, and greases usually handled by a wholesale oil station, and will sell and deliver to the said lessee such items and quantities thereof as may be reasonably required by said lessee for use and sale upon said demised premises and in and about the operation of said automobile filling station at current market prices."

Though both parties are assignees, their rights may be here determined as if they were the original contracting parties.

Up to September 24, 1924, Norton and Wood, the defendants, purchased all of their gasoline, etc., from the plaintiff according to the agreement; but on that date, and thereafter, until the hearing, they purchased a substantial portion of their gasoline from the Clayton Coal & Oil company. This led to the filing of a complaint by Ford October 6, 1924, in which he set forth the contracts above mentioned; alleged that he had always been able and willing to furnish gasoline, etc., to the defendants according to the contract, and that he had

in all respects performed the terms of the contract binding upon him, notwithstanding which, defendants had ceased to purchase their supplies of gasoline, etc., entirely from him, and were buying a substantial portion of such supplies from others, and praying that the defendants be enjoined from so doing, and for damages for the breach of the contract. The defendants, by their answer, treated by court and counsel as a counter claim, defended as against the claimed breach by them on the ground that the plaintiff, in violation of paragraph 10 of the contract, had refused to sell them gasoline at the current market price, but, on the contrary, had demanded from 3 to 5 cents per gallon in excess of such market price. They prayed that the plaintiff "be required to perform and carry out the said contract, or that paragraphs 9 and 10 of the said lease be decreed null and void and be stricken from the said contract," and that defendants recover damages.

The trial court, after hearing, found that the current market price of gasoline at Springer during the time in question was 17 cents per gallon, and that the plaintiff had refused to sell the same to defendants at such price, but had demanded, and had received, for such quantities as he had sold them during that time, from 18 1-2 to 20 cents per gallon; denied any relief to plaintiff; and, because of the breach of paragraph 10 of the contract, decreed that "the said defendants are hereby relieved from buying gasoline, oil, or greases from the plaintiff for use and distribution in and about their filling station at Springer." No damages were awarded. From this decree plaintiff has appealed.

Appellees do not deny that they made large purchases of gasoline from the Clayton Coal & Oil Company during the time in question, nor question that such fact, standing alone, would have entitled appellant to the injunction which he sought. They seek to support the decree entirely upon the proof and finding that plaintiff had breached the contract by demanding more than the current market price for gasoline.

[**1**] It will be convenient, first, to consider the af-

firmative relief awarded to the defendants. The effect of this action was to leave the sublease in full effect and the defendants in possession of the premises for a long term of years, relieved of the obligation contained in paragraph 9. Appellant contends that, as the parties contemplated no such situation as this, the result is to make a new contract, which the court was without power to do. He urges that for a breach of the contract by appellant, appellees are limited to the remedies of rescission in toto or of damages.

Appellees take the position that the contract is divisible; that paragraphs 9 and 10 constitute a subsidiary or collateral agreement, separable from the remaining covenants; and that in such a case partial rescission, as here awarded, is a recognized and proper remedy. They first cite 6 R. C. L. 926, to the proposition that under the facts in the present case they were not entitled to rescission in toto. This may be conceded without affecting the result. They next cite 6 R. C. L. 936, where it is said:

"As a general rule the right to rescind must be exercised in toto. The contract must stand in all its provisions, or fall together. Accordingly, a party cannot repudiate a contract or compromise so far as its terms are unfavorable to him and claim the benefit of the residue. As a partial rescission is not allowed by law, one who has sufficient cause to rescind a contract for fraud must rescind the whole or none. But it is not to be overlooked that this is a rule of construction, based upon the intention of the parties to the contract, and not a rule of law controlling that intention. A partial rescission may therefore be allowed where the contract is a divisible one."

The illustrative case cited to this text is Bank of Antigo v. Union Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611. It was there held that the transaction of discounting three notes was separable, so that there might be a rescission as to one without a total recission. Johnson Forge Co. v. Leonard, 3 Pennewill, 343, 51 A. 305, 94 Am. St. Rep. 86, 57 L. R. A. 225, and Kauffman v. Raeder (C. C. A.) 108 F. 171, 54 L. R. A. 247, the decisions cited by appellees, are clearly not in point. It is unnecessary to question the abstract proposition that, if paragraphs 9 and 10 constituted an independent

or collateral contract, separable from the remainder of the lease, the judgment would be correct. Appellees themselves admit that, if not so separable, the judgment is erroneous. They advance no argument to support their view of the divisibility of the contract, except to say:

"Covenants 9 and 10 of the lease contract are not the entire consideration for which said contract was given."

That is true. But the fact does not aid appellees. The contract itself (paragraph 1) shows that the obligation assumed by appellees in paragraph 9 was "a controlling consideration for the giving of this lease." Its importance as consideration is obvious. The other duties assumed by appellees were obligations which appellant was himself required to perform by the terms of his own lease. The plain purpose of the whole transaction was to procure for appellant, during a long term of years, an outlet and assured market for the goods he had for sale. Otherwise there was no profit for him in the transaction, and he simply incurred responsibility without compensation. The judgment results in leaving appellees in possession of all the benefits and relieved of the substantial obligation. It wipes out the controlling consideration flowing to appellant and results in a forfeiture of his property. Practically speaking, appellant is in far worse situation than if the court had awarded appellees that which they did not ask and here contend they were not entitled to—a rescission in toto. The latter would have been comparatively harmless, because appellent then would have had restored to him the possession of the demised premises, and might have found others to contract with him and to assume the obligation from which appellees have been relieved. It is clear to us that the present result is inequitable, and that the affirmative relief awarded to appellees cannot be sustained.

This brings us to the question of the correctness of the court's refusal to grant the injunctive relief demanded by appellant. Of course, to warrant enjoining violation of paragraph 9, appellant must be found to

have observed paragraph 10, wherein he agreed to hold himself ready to sell gasoline, etc., to appellee at current market prices. Although it is admitted that the purchases by appellees of which appellant complains were made at 17 cents a gallon, and that appellant was at the same time demanding from 18 1-2 to 20 cents, he insists that his demanded prices were market prices. He contends that the evidence shows that at the time in question a so-called gas war was in progress at Clayton, a somewhat distant point, by reason of which dealers at that place were procuring their gasoline much under the market price at Springer; that appellees, with competing dealers at Springer, wishing to take advantage of the situation, induced a Clayton wholesaler to bring gasoline to Springer in trucks; that this gasoline war was a temporary and abnormal conditon, and that it was carried on at a loss; that the wholesaler who sent his gasoline from Clayton to Springer operated at a loss; that he never sent enough gas to supply the local market, so that frequently, during the period in question, the retail dealers at Springer were compelled to purchase from appellant and from Continental Oil company, also wholesaling in Springer, at from 18½ to 20 cents per gallon. Upon these claimed facts appellant bases two main propositions: First, That the court erred in finding that the current market price during the period in question was 17 cents. Second. That if, indeed, the market price was 17 cents, appellees' contract obligations prevented them from taking advantage of it and supplying themselves with gasoline at such price.

Contending ,as is probably true, that during the time in question there was not enough 17-cent gas to supply the demand at Springer, and that sales were made by appellant and by Continental Oil Company at 18½ cents to 20 cents, appellant urges the doctrine, often stated, that the expression "market price" means the highest market price; that admitting 17 cents to have been a market price, 18½ and 20 cents were also market prices; that appellees, by their contract, were obligated to pay the highest market price. The many cases cited

by appellant were doubtless correctly disposed of upon the facts. Although, technically speaking, the terms "highest" or "lowest" market prices, as referring to the same time, would seem to be misnomers, they are correct enough as applied to particular cases, for instance, in assessing damages for a conversion, as in Bradley v. Hoker et al., 175 Mass. 142, 55 N. E. 848; in assessing damages for breach of contract to purchase a specific article, as in Stanley v. Sumrell (Tex. Com. App.) 163 S. W. 697; in condemnation of real estate, as in Little Rock Junction R. R. Co. v. Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; for breach of contract to convey land, as in Dady v. Condit, 209 Ill. 488, 70 N. E. 1088; in assessments for taxation purposes, as in Winnipiseogee Lake Cotton and Woolen Mfg. Co. v. Laconia, 68 N. H. 284, 35 A. 252, and Mass. General Hospital v. Inhabitants of Belmont, 233 Mass. 190, 124 N. E. 21; or damages for loss under fire insurance policy, as in Prussian National Insurance Co. v. Lawrence (C. C. A.) 221 F. 931, L. R. A. 1915 E, 489. But in the case at bar we are not to assess damages for a wrongful act, or to fix compensation for the taking of property against the owner's will. We are to decide from the language used what was the reasonable intention of parties who contemplateed a course of dealing involving daily purchases and sales extending over a term of years.

The contract did not specify that appellees were to pay the "highest" market price. It is safe to say that, if a contract containing such a provision had been tendered for appellee's signature, it would not have been signed. The word "highest" would have suggested endless disagreement between the parties and the danger of being undersold by competitors who might be foresighted enough to supply themselves at the "lowest" market price. It is much more reasonable to suppose that the contracting parties intended to sell and buy, respectively, at the "lowest" market price, Appellees, bound for ten years, and themselves compelled to compete in the retail market, must, if their business was to prosper and survive, be able to buy as cheaply

as competitors could. Of course, section 10 was for their benefit and should be so construed as to give them such advantage as may reasonably have been intended. So, if the expressions used were deemed ambiguous, calling for consideration of the conditions existing and the situation of the contracting parties and the bringing in of a qualifying adjective, we should prefer "lowest" to "highest."

[2-4] We do not think, however, that there is ambiguity. "Current market price" in a case of this kind, means that the contract shall run or flow with the market, following its fluctuations. The market price of a commodity is the exchange value. It is determined by the demand for it in relation to the supply, and is proved, when possible, by actual sales. Appellant argues that market price is to be determined by certain imaginary normal conditions of trade. This is unsound. Low markets are usually the result of being glutted by the anxiety or necessity of some owners to dispose of their goods, even at a loss. The costs of production and of doing business, of course, have their influence in establishing price. But it is only in the long run. Immediately, market price is fixed by supply and demand. The Clayton Coal & Oil Company, in order to move gasoline, put it on the market at 17 cents. So long as that supply lasted, the market price was 17 cents. We cannot see that it matters whether its motive was to destroy competition or quickly to raise money to meet pressing obligations, or whether it lost or profited by its transactions. When that supply was exhausted, the relation between supply and demand changed. Gasoline was then unobtainable in Springer at less than 18½ cents. So that became the market price.

Both counsel seem to make the mistake of assuming that some figure is to be found to represent a market price during the period in question. Appellant seizes upon the proof of sales made at 20 cents and contends that such sales establish "highest market price," and that such is the contract price. Appellees rely on sales

at 17 cents as establishing "lowest market price," and contend that such is the contract price. The truth is that both of those prices prevailed at different times during the period. They were "highest" and "lowest" market prices for the period, possibly for particular days of the period. But those prices did not coexist. They succeeded each other. The court's finding that the market price was 17 cents during the period is inaccurate. It is of no consequence, however, since appellees always purchased of appellant except when the latter refused to meet the then market price.

Appellant finally contends that, even though the market price was 17 cents during the period in question, as the court found, it was still appellees' duty to buy from appellant at 18½ to 20 cents. He argues that the parties contemplated a long period of mutual dealing; that each must have expected and intended that the other should enjoy a profit from their transactions; that in fixing "current market prices" as the contract prices, it was not intended that appellant should be required, at a loss to himself, to meet the competition caused by temporary and abnormal conditions; but that, on the contrary, they contemplated a normal, conservative course of dealing which in the long run would be advantageous to both. This contention has some plausibility, but cannot be admitted. If it were given effect, a provision obviously for appellees' protection would be so warped as to inure to the sole advantage of appellant. It would be just as ruinous to require appellees to pay 18½ cents for gasoline when their competitors were buying for 17 cents as it would be to require appellant to meet that price at a loss. The parties might have contracted as appellant contends they did, but they have, in fact, made use of a well understood and unambiguous expression, to which they are to be held.

But it is urged that because, as appellant claims, the appellees interested themselves in the trucking of gas from war territory, and encouraged it, they are estopped from setting up a subnormal market price thereby established. It is sufficient answer to this contention

to say that it is not clearly shown that appellees did more in the way of encouragement than to buy the gas when offered to them, and after first giving appellant an opportunity to meet the price. That does not amount to an impossibility of performance brought about by appellees' conduct, within the rule laid down in 2 Williston on Contracts, § 677, 6 R. C. L. 1020, 13 C. J. 647, and the numerous decisions cited by appellant. We need not speculate as to what extent, if at all, the relations of the parties and the obligations of the contract should be deemed to restrain the liberty of appellees to interfere with or influence the wholesale market price of gasoline. The argument does not warrant it. Appellant takes the advanced position that appellees' conduct made appellant's covenant impossible of performance. The case is far outside the legal principle invoked. No authority has been cited, and we know of none, to sustain the contention.

We are persuaded, therefore, that the court properly denied the injunction asked by appellant, but that he erred in granting appellees' prayer for a partial recission. The judgment is reversed. The cause will be remanded with direction to dismiss, both as to the complaint and as to counterclaim.

It is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

[No. 3072, Sept. 17, 1927.]

SLEASE et al. v. D. M. MILLER & CO.

[260 P. 408]

SYLLABUS BY THE COURT

Ambiguous contract for sale of goods of a specified value from a larger stock, construed in light of circumstances and conduct of parties, and **held**, that the privilege given the buyer to reject unmerchantable goods gave him the free and exclusive right of selection.

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[1] 35Cyc p. 98 n. 19; p. 229 n. 55.

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

Suit by Wm. D. Slease and others against D. M. Miller & Co., a copartnership composed of D. M. Miller and others for specific performance, consolidated with an action by D. M. Miller & Co. against Wm. D. Slease and others for damages. From the judgment below, D. M. Miller & Company appeals. Affirmed and remanded.

See, also, 31 N. M. 52, 240 P. 811.

James G. Fitch, of Socorro, H. A. Wolford, of Hillsboro, and D. H. Wolford, of Brawley, Cal., for appellant.

Edward D. Tittman, of El Paso, Tex., for appellees.

OPINION OF THE COURT

WATSON, J. This litigation arises out of the following contract:

"This agreement, made the 10th day of August, 1922, between D. M. Miller & Co., of Hillsboro, N. M., by D. M. Miller, party of the first part, and Wm. D. Slease, Marie Knight, Gertrude Knight Gardner, and W. A. Gardner, parties of the second part.

"The party of the first part, for and in consideration of the sum of $3,000 (three thousand dollars) doth agree to sell, convey, and guarantee title of the following described real estate:

"The D. M. Miller & Co. store buildings, property with fixtures as is (with truck and truck accessories omitted) siutated in the town of Hillsboro, N. M.

"The party of the first part further agrees to sell, convey, and guarantee title thereto, to the following described stock of merchandise, at present stored in the above-described buildings.

"Stock of general merchandise as is subject to daily sales between the date of this contract and date of inventory herein after mentioned, for the consideration of seven thousand dollars ($7,000).

"Further agreed the amount of the above merchandise to be transferred shall be determined by an inventory taken jointly by the parties of the first part and the parties of the second part, said inventory to begin on or before August 22, 1922.

"All merchandise over and above the above mentioned shall be subject to the removal or disposal of the party of the first part within sixty days from completion of this contract. Value of individual articles of above merchandise shall be determined by present replacement value.

"The parties of the second part shall have the right to reject any merchandise of the above stock that they may deem unmerchantable. The above stock taken by the parties of the second part shall be subject to a 5 per cent. discount.

"The above consideration shall be paid by the surrender of two promissory notes (described as follows) made by D. M. Miller & Co. on November 17, 1919, for eight thousand dollars and made on November 17, 1920, for four thousand dollars less payments and plus unpaid interest to Wm. D. Slease.

"This agreement is subject to acception or rejection of Mrs. Gertrude Knight Gardner.

"Signed this date

"D. M. Miller & Co.,
"By D. M. Miller,
"Party of the First Part.
"Wm. D. Slease,
"Marie Knight,
"Gertrude Knight Gardner,
"W. A. Gardner,
"Parties of the Second Part.

"Witness: Minnie E. Slease.

"Witness: Fred V. Connoff.

"Any amount due parties of the second part over the above mentioned ($10,000.00) ten thousand dollars is payable at completion of this agreement by party of the first part. Cash not to exceed $200.00 balance in merchandise."

After the making of this contract, D. M. Miller and Wm. D. Slease, who acted, respectively, for themselves and their associates, on August 12, proceeded to take an inventory of the stock. During its progress, a considerable portion of it was, for one reason or another, rejected by Slease, with the consent of Miller, set apart from the rest, and not included in the inventory. For the most part, the articles which found their way into the inventory were not priced at the time; their "replacement value" being left to future determination. As to some articles, an agreement as to price was reached. Such agreed prices were carried into the inventory. During the three or four days occupied in

listing the stock, the store was, generally, open for business. The proceeds of sales made during that time were appropriated by Slease, or by Miller; by the former, if the articles sold had been listed, otherwise by the latter. When the listing was completed, Slease was left in possession of all the stock, except such as had been definitely rejected and set apart, and he continued the business.

The ascertainment of "replacement values" seems to have been left almost entirely in the hands of Miller and one Conniff, who acted for Slease. There was great delay in this work, and it was not until June, 1923, that the final figures were available. It then appeared, and is now agreed, that the total "replacement value" of the stock carried into the inventory, and delivered to Slease, with the $3,000 for real estate, buildings, and fixtures, with an agreed freight allowance, and less the agreed discount, exceeded the amount of the note indebtedness by $4,428.11. To that extent, stock had been delivered to Slease in excess of what he had paid for, or agreed to buy, and was "subject to the removal or disposal" of Miller. During ten months this stock had been in Slease's possession and offered to the public for sale. It is this situation which has caused the controversy. The parties were unable to make division of the stock, and the courts were called upon to do so.

When the question arose, the parties disclosed widely divergent views as to the meaning of the contract and as to their rights thereunder. Miller's theory was that Slease had, during the listing of the stock, exhausted his right to reject any of it as unmerchantable; that, under the contract, and by the practical construction to be found in the conduct of the parties, the stock, in the order in which it was carried into the inventory, passed to Slease; and that, when the listing had reached the point necessary to meet the indebtedness, the sale had been accomplished, and that the stock thereafter listed did not pass to Slease, but remained his, subject to removal and disposition by him. Acting upon this theory, he prepared a deed of the real estate, buildings,

and fixtures, and a bill of sale covering specific portions of the stock which, under his theory, he claimed had passed to Slease. These documents he tendered to Slease, and demanded the right to remove the remainder of the stock. This Slease refusd.

Slease's theory was that he did not, during the listing, exhaust his right to reject unmerchantable stock, but rejected such as he was unwilling to consider at any price; that the stock not absolutely rejected was listed merely for inventory purposes, and was, after inventory, to be reduced to the correct size and amount by his cutting it back under his privilege of rejecting any of it deemed unmerchantable. Acting upon his theory, he listed stock to the amount of $3,267.80, which he offered to allow Miller to remove, and offered to pay him cash $1,160.31, thus satisfying the excess of the inventoried stock over the indebtedness. So offering, he demanded a deed of the real estate, building, and fixtures, and a bill of sale of the retained stock. This Miller refused.

Slease then commenced suit, setting up the contract, the proceedings thereunder, and his offer to Miller, and praying that the latter be required specifically to perform. Miller answered. He later instituted suit himself, setting up Slease's refusal to allow him to remove what he claimed to be his portion of the stock, relying upon that fact as a conversion, and praying for damages of $4,428.11, the agreed amount of the excess. Slease answered this complaint. These two causes were consolidated; Miller's complaint in conversion being considered as a cross-complaint.

The consolidated cause was tried to the court, who, except as to minor matters not necessary to mention, rejected Miller's findings of fact and found generally for Slease. By the judgment, Miller was required to convey the real estate, buildings, and fixtures, and also to convey the stock which had been inventoried, less that part of it cut back by Slease and included in another inventory attached to his offer to Miller; the latter inventory being reduced by certain items which

the court found to have been improperly cut back. Slease was required to deliver to Miller the remainder of the merchandise, and to surrender his notes, and to pay him the sum of $1,283. The judgment is perhaps not entirely clear, and some question is raised regarding it. We cannot doubt, however, that its meaning is as stated.

Counsel seem to agree that the written contract, ambiguous in many respects, particularly fails to provide for the situation which arose when it was found that the stock was larger than necessary to satisfy the indebtedness. Both parties have endeavored, by evidence of circumstances, conduct and conversations, to sustain their respective views as to the understanding of the parties when they contracted, and the practical construction which they afterward adopted.

As to the theory upon which Miller acted, not much need be said. His counsel have expressly abandoned it. Requesting the trial court to find numerous specific facts, they asked him to conclude as a matter of law that upon the completion of the inventory, when the total "replacement value" was finally ascertained, the parties were owners in common of the stock in the proportions of $7,634.69 and $4,428.11, that neither party had the right by himself to make the division, and that Slease's refusal to permit Miller to "participate in the division" constituted a breach of the contract and a conversion of Miller's share. Such is the contention here.

The argument is that, in the absence of contract provision for division, in the event of an excess of stock over the indebtedness, the parties became owners of undivided interests; that, as they expressly admit, Slease's contention that he did not exhaust his right to reject as unmerchantable, at the time of listing, is correct; but that the mere right to reject as unmerchantable did not warrant rejecting stock simply because he did not want it, or warrant retaining more than the amount agreed upon because he did want it, particularly after he had been in possession, and had been selling

the stock for ten months, nor warrant the claim of right, without agreement with Miller, to determine upon the division. It is urged that the relations of the parties are analogous to the situation arising out of a voluntary confuson of goods; and authorities are cited to the propostion that, in such a case, the party refusing the other participation in the distribution is guilty of a conversion.

The trouble with this, as with most theories adopted after the event, is that the facts cannot be made to sustain it. Neither party so understood the contract. Miller did not demand, nor did Slease refuse him, participation in the division of common goods. He himself made a division of them, on paper, and demanded that Slease accept it. That is all that he was refused. Had it been intended to sell an undivided interest in the stock, even the inexperienced draftsmen of this contract would have been able to express the intent. It was the unusualness of the trade, and its compexity, to which their powers of expression proved unequal.

The judgment is based upon Slease's theory of the contract. Appellants attack it in two respects: First, that appellees had not the right to retain merchandise in excess of the indebtedness, even though offering to pay for it at the inventory price; and, second, that appellees had no right, after accepting the merchandise as inventoried, and after possessing it for ten months, and selling from it as their own, to reject portions of it as unmerchantable.

Counsel make much of the admitted fact that the result of this judgment is to leave in appellant's hands shelf-worn and damaged goods, as well as odd sizes and remnants, and that the stock to be returned to them is worth no more than 25 per cent. of the inventory price. But it is to be remembered that appellees were to have some $7,000 worth of goods. It would be equally a hardship to unload this undesirable merchandise upon them. It nowhere appears that the goods retained by appellees are of greater value than the inventory

prices. It is very significant that the parties seem always to have considered "replacement value" the term used in the contract, as meaning the then wholesale price of new goods of the same kind. So the merchandise was finally valued in the inventory without regard to age or condition. The stock was the accumulaton of several years. Naturally there would be numerous articles, for one reason or another, worth much less than the sum for which they could be replaced with new. Considering this fact, it does not seem so unreasonable to have agreed to leave such goods in appellants' hands. It would have been a poor bargain, indeed, had appellees agreed to take them. This lends color to the Slease contention that a real cut-back was contemplated rather than the more limited right to reject goods strictly unmerchantable. It is also to be noted that appellees did not agree to take any particular goods, and did reserve the right to reject. They were to have some choice. There is nothing to indicate that appellants were to have a voice in selecting the goods to be transferred. During the listing of the stock, Miller never questioned Slease's right to reject as he saw fit. Some of the rejected goods were no doubt merchantable, according to the definition contended for by appellants.

So, as to who had the right of selection, we are not disposed to disturb the construction which the court put upon the contract, in the light of circumstances and the conduct of the parties . Indeed, we see nothing so unreasonable or inherently improbable in such construction, as applied to the time when the parties by their contract and conduct settled their relations to the property. It is the lapse of ten months, during which appellees held the stock and sold from it, that gives the result the appearance of injustice and hardship. During that time odd sizes and remnants of course accumuated and goods became more soiled and less desirable. But the delay was probably not contemplated. Explanations appear in the evidence; but we cannot say that it was unavoidable or to have been anticipated. Miller was at least as much at fault as Slease. It would seem that, by greater diligence, the

result might have been determined much more promptly. The unfortunate consequences to appellants, the court had no power to mitigate.

Holding that appellees were within their rights in selecting the goods they were to keep, what of the contention that they wrongfully selected more than enough to satisfy the indebtedness? As an independent proposition, it is of minor importance. It is not thought that appellants were prejudiced by it. It would have been to their advantage if appellees had selected more, rather than less. If a technical conversion, the damages for it would have been the inventory price, which they offered, and are required to pay. Appellants recognize this in laying their damages for the alleged conversion. The contention could be of advantage to appellants only in case it served to put appellees in the wrong and in the position of having converted the whole of their remnant, so that they might recover $4,428.11, instead of goods worth only 25 per cent. of that sum. The contention is sufficiently answered by saying that there was substantial evidence to sustain the trial court in upholding the right. The goods were left in appellees' possession, clearly for sale. If some could be sold, all might be. In such case, the inventory price would determine what appellants were entitled to receive in lieu of the goods. There was also evidence that the parties contemplated from the first that an indebtedness to appellants might result.

Appellants have rightly stated in their brief that the case depends upon correct construction of the contract. The document itself being dubious, it was necessary to look elsewhere for its meaning. The questions presented to the trial court were mostly of fact. He could no doubt have made a better contract and perhaps devised a fairer trade. Such is not the business of the courts. We must take the contract as we find it. Practically the trial court was limited to one of the theories advanced by the parties. He could hardly take middle ground. We find appellees' theory, which the court adopted, supported by substantial evidence.

Therefore we affirm the judgment, and remand the cause for its enforcement. It is so ordered.

PARKER, C. J. and BICKLEY, J., concur.

[No. 3086, Sept. 27, 1927.]

KAHNT v. JONES McKEEN MERCANTILE CO. et al.

[260 P. 673.]

SYLLABUS BY THE COURT

A debtor's mere promise to pay out of a particular fund is insufficient to charge the fund with an equitable lien.

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

Suit by F. P. Kahnt against Fred Lant and others, in which the Jones McKeen Mercantile Company and Louis Jones intervened. From part of the judgment in favor of the interveners establishing equitable liens in their favor, plaintiff appeals. Reversed and remanded, with direction.

Hanna & Wilson, of Albuquerque, for appellant.

James G. Fitch, of Socorro, for appellees.

OPINION OF THE COURT

WATSON, J. This litigation arises out of the following contract:

"This memorandum of agreement, made this 30th day of September, 1920, between Fred P. Kahnt, party of the first part, of the county of Bernalillo and state of New Mexico, and Fred Lant, of Reserve, Socorro county, state of New Mexico, witnesseth:

"That, whereas the said Fred P. Kahnt is contemplating purchasing from Walter Jones all of the certain cattle described in a certain chattel mortgage recorded in volume 83 of Chattel Mortgages recorded at pages 548, 549 of the records of Socorro county, which cattle are located in the Frisco district, Socorro county, N. M., which cattle are described in said chattel mortgage as being all of the cattle in

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[1] 5CJ p. 913 n. 35; p. 914 n. 36, 37; 21CJ p. 118 n. 35; p. 119 n. 47, 51; 37CJ p. 317 n. 86, 87; p. 318 n. 92.

FXO brand ranging and being in the Frisco district, Pleasonton community allotment, together with all increase thereof; and, whereas, if the said Fred P. Kahnt, party of the first part, carries through the aforesaid transaction, then the said Fred Lant, party of the second part, agrees to operate, manage, and care for the aforementioned cattle on the ranch aforementioned, and as a salary he shall not receive any money, but shall have his expense and family support out of the steer money, and the steer money shall be all the money out of which the said party of the second part shall have any money, and of this money he shall keep up all the expenses of the entire equipment.

"It is further agreed by and between the parties hereto that whatever salary that the party of the second part may have shall come out of whatever profit that may accrue out of the aforementioned equipment in the event of a sale, and in that event the party of the second part agrees to take as his part one-half of the amount of the price acquired above $17,850 and accrued interest."

Following the making of this contract Kahnt purchased the cattle mentioned, and Lant took over the management of the outfit.

June 4, 1923, Kahnt commenced suit, alleging that Lant had, without plaintiff's authority, sold steers and other cattle, and applied the proceeds to his own use; that he had failed and refused to keep up the expense of said ranch and cattle, and that plaintiff had been compelled to pay large sums as taxes and grazing charges; that, although often requested by plaintiff to pay such expenses, and to account to plaintiff for the receipts from sales and the expenses of the ranch paid by him, Lant had refused so to do; that Lant had contracted to certain buyers approximately 225 head of steers, upon which $900 of the purchase price had been paid to, and was then held by, the American National Bank, of Silver City; and that, unless restrained, Lant would appropriate to his own use the full amount of the purchase price of said steers; that, if Lant were allowed to continue in control of the ranch and cattle, the same would suffer from neglect and abuse. Upon these allegations plaintiff prayed for an accounting for an injunction to restrain the buyers and the American National Bank from paying over to Lant any of the proceeds from the sale of steers; that Lant be restrained from exercising further control over the prop-

erty, or from interferring with plaintiff in taking complete charge and control of the same, and for judgment for such sum as might be due plaintiff upon accounting.

Upon this complaint a temporary injunction was issued as prayed, and later a receiver was appointed to take charge of the property. Upon final hearing, the issues were found in favor of the plaintiff, and all of the rights of defendant Lant under the contract were terminated. None of the defendants have appealed.

Petitions in intervention were filed by Jones McKeen Mercantile Company and Louis Jones, praying for equitable liens upon the proceeds of the sale of the steers, and that, in case such proceeds should be insufficient, they be given equitable liens upon all steers unsold. The basis of the claims of the interveners was that, in reliance upon the contract, and upon the promise of both Lant and Kahnt to pay them out of the sales of steers, they had furnished family and ranch supplies to Lant, for which they had not been paid. The court gave judgment in favor of the interveners, requiring the proceeds of the sale to be paid into court, and thence pro rata to the interveners; and decreed, further, that, if such proceeds should be insufficient to meet their claims, the receiver sell all remaining steers at public sale, and that the proceeds thereof be applied in satisfaction of the interveners' claims. From this part of the judgment the plaintiff has appealed.

In disposing of the case at the conclusion of the hearing, the court remarked:

> "As to the interveners, I am not at all sure that the circumstances in this case are sufficient to impose an equitable lien. However, the court is inclined to believe that an equitable solution of this situation requires that these creditors be taken care of. The court bases that on all the circumstances of the case, not on any particular circumstance, perhaps."

So the court pointed to no particular facts and to no definite principle which he considered as entitling the interveners to liens. For the theory of the judgment we turn to appellees' brief. The only decision cited is

Williams v. Harlan, 88 Md. 1, 41 A. 51, 71 Am. St. Rep. 394, which counsel consider "directly in point on one phase of the present case." What phase he does not state. As we read that decision, it is concerned more with the principle of subrogation; it not being doubted that the complainant's debtor, had he asserted the right, would have been entitled to an equitable lien. Counsel also cite general statements as 3 Pom. Eq. Jur. (4th Ed.) §§ 1235, 1237, 1238, and 1239; Stories' Eq. Jur. § 1234; 17 R. C. L. "Liens," §§ 12 and 14; 21 C. J. "Equity" 96. As we understand their contention, it is that appellant had appropriated a fund to be derived from sales of steers to the purpose of maintaining Lant's family and meeting the ranch expenses. Equity has, of course, long recognized that a debtor may make an assignment or appropriation of a particular fund which will give rise to a lien upon it in favor of his creditor.

We may assume, for the purpose of this case, that the written contract was a sufficient appropriation of the steer money, so that Lant himself, had he performed his contract, might have claimed a lien upon it for the security of payments made by him for the specified purposes, or even that one in privity with him might have done so. But, so far as Lant is concerned, his rights have been forfeited. It seems to us that those claiming under him are in no better position than he. Appellees do not contend otherwise, and seem to base their claims on some duty owed them by Kahnt or obligation assumed by him.

Appellees, however, are strangers to the contract by which the fund was appropriated, if it was appropriated. They dealt with Lant, just as appellant did, in the faith that he would perform his obligations. Both have been disappointed. There is no equity in holding appellant responsible for Lant's default.

So there is nothing to support this judgment, except the alleged facts that appellant promised to pay for the supplies before they were furnished, and that he named a particular source of a future fund from

which payment should be made. The equitable consideration is that the supplies furnished were beneficial to appellant, and contributed more or less to the creation of the fund. It is doubtful under the findings and evidence whether any such promise was made. But, considering that it was made, the facts are not sufficient. A mere promise to pay out of a particular fund does not amount to an equitable assignment or create an equitable lien. There must be also an appropriation of the fund, placing it beyond the control of the promisor, and conferring a complete and present right in the promissee, and such that the holder may not only safely pay, but may be compelled to pay, though forbidden by the promisor. Smedley v. Speckman (C.C.A.) 157 F. 815 This is the rule even in cases where "the fund was created through efforts and outlays of the party claiming the lien." See the following texts and the authorities they cite: 37 C. J. "Liens," § 21; 3 Pomeroy's Equity Jurisprudence (4th Ed.) §§ 1280, 1282; Jones on Liens, §§ 48-52. Upon these principles and authorities, invoked by appellant, we find nothing to cast doubt. From them it seems clear that the court erred in establishing liens in favor of the interveners.

The judgment must therefore be reversed, and the cause remanded, with a direction to the trial court to dismiss appellees' petitions in intervention.

It is so ordered.

PARKER, C. J., and BICKLEY, J., concur.

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In suit to quiet title in which defendant set up tax deed, whether description on tax roll was sufficient will be considered on appeal, even in absence of formal exceptions.
King v. Doherty, 431

Law question, which was necessarily decided, may be reviewed on appeal, even in absence of formal exceptions.
King v. Doherty, 431

ISSUES AND QUESTIONS IN LOWER COURT.

Where pleading is susceptible of two constructions, appellate court will be inclined to adhere to construction of trial court.
Cassell Motor Co. v. Gonzales, 259

OBJECTIONS AND MOTIONS, AND RULINGS THEREON.

Error is not available on appeal, unless called to attention of trial court (Laws 1917, c. 43, § 37).
State v. Board of Trustees of Town of Las Vegas, 182

Judgment for seller against purchaser from con-

ditional sale will be reversed, though question was first raised on appeal (Laws 1917, c. 43, § 37).
Schaefer v. Whitson, 481

Theories of the case, not brought to the attention of the trial court, cannot be considered, on appeal.
Albuquerque Lumber Co. v. Tomei, 5

QUESTIONS OF FACT, VERDICTS, AND FINDINGS.

In case tried without jury, excluding newspaper items, offered as bearing on owner's knowledge of improvement, held not prejudicial error, in view of owner's testimony.
Albuquerque Lumber Co. v. Tomei, 5

QUESTIONS PRESENTED FOR REVIEW

Appellant cannot question sufficiency of evidence, where bill of exceptions omits evidence, and questions to be reviewed are not in praecipe. (Appellate Procedure Act [Laws 1917, c. 43, §§ 30-32]).
Mersfelder v. Roberts, 94

RECORD AND PROCEEDINGS NOT IN RECORD.

ABSTRACTS OF RECORD.

Appellee has duty of supplying omitted portion of record (Laws 1917, c. 43, § 32).
Williams v. Kemp, 233

AUTHENTICATION AND CERTIFICATION.

Purported statement of facts, bearing no authenticity from court's order, cannot be considered on appeal.
Clark v. Maisen, 246

Requested findings and exceptions to findings made, not certified by trial judge as part of bill of exceptions, may not be considered on appeal.
King v. Doherty, 431

DEFECTS, OBJECTIONS, AMENDMENT AND CORRECTION.

Certiorari by appellee to bring up portions of record, omitted from partial record brought up by appellant, will be denied. (Laws 1917, c. 43, § 32).
Williams v. Kemp, 233

MAKING, FORM, AND REQUISITES OF TRANSCRIPT OF RETURN.

On failure to state in praecipe for record questions desired to be reviewed, no question is presented for review (Laws 1917, c. 43, §§ 30-32).
Southern Surety Co. v. Colburn, 243

Praecipe for record must be filed within 30 days from taking appeal only if extension of time to settle bill of exceptions is desired (Laws 1917, c. 43, § 36).
Williams v. Kemp, 233

MATTERS TO BE SHOWN BY RECORD.

Exceptions to findings must be brought up on appeal in bill of exceptions.
King v. Doherty, 431

SCOPE AND CONTENTS OF RECORD.

Findings and conclusions, made and refused, are no part of record proper, unless ordered to be filed in clerk's office.
Clark v. Maisen, 246

Proposed findings must be brought up on appeal in bill of exceptions.
King v. Doherty, 431

TRANSMISSION, FILING, PRINTING, AND SERVICE OF COPIES.

Findings and conclusions, not part of the record proper, and statement of facts, having no authenticity, should be stricken from transcript on motion.
Clark v. Maisen, 246

REQUISITES AND PROCEDURE FOR TRANSFER OF CAUSE.

PAYMENT OF FEES OR COSTS, AND BONDS OR OTHER SECURITIES.

Appeal will be dismissed where no cost bond has been filed (Laws 1917, c. 43).
Hunker v. Veeder, 452

On appeal by party in individual capacity from judgment in which he was party as executor, cost bond is necessary (Laws 1917, c. 43).
Hunker v. Veeder, 452

REVIEW.

DISCRETION OF LOWER COURT.

Fee allowed receiver's attorney is not reviewable, except for error of law or clear abuse of discretion.
Oldfather v. Tyler, 247

PARTIES ENTITLED TO ALLEGE ERROR.

Appellant, having treated his demand as tort, cannot sustain it on appeal on theory that it was good as arising on contract.
Cassell Motor Co. v. Gonzales, 259

PRESUMPTIONS.

If trial court's failure to make specific findings of fact and conclusions of law is not made basis for remand, Supreme Court will indulge every presumption in favor of correctness and regularity of trial court's decision.
Board of Trustees of Town of Torreon Land Grant v. Garcia, 124

It will be presumed, in absence of contrary showing, that settlement of bill of exceptions was regular, and that judge who signed and settled it had requisite authority.
First State Bank of Alamogordo v. McNew, 225

On doubtful or deficient record, every presumption is indulged in favor of correctness and regularity of trial court's decision.
Cassell Motor Co. v. Gonzales, 259

SCOPE AND EXTENT IN GENERAL.

Supreme Court will not decide moot questions.
Carman v. Board of Com'rs of McKinley County, 517

ATTORNEY AND CLIENT

THE OFFICE OF ATTORNEY.

SUSPENSION AND DISBARMENT.

Attorney's wrongfully retaining money collected for client held to require disbarment.
In re Fleming, 442

BAILMENT

Bailee, gratuitous or otherwise, may sue stranger and wrongdoer and recover entire damages to bailed property.
Yrisarri v Clifford, 1

BANKS AND BANKING

BANKING CORPORATIONS AND ASSOCIATIONS

COLLECTIONS.

Instruction to return proceeds of collection according to banking custom authorizes bank remitting by draft to appropriate money collected.
State v. McKinley County Bank, 147

Whether bank is debtor or trustee of proceeds of paper held for collection depends on agreement as to disposition of proceeds.
State v. McKinley County Bank, 147

INSOLVENCY AND DISSOLUTION.

Deposit in insolvent bank, whose officers know of insolvency and have fixed time for suspension, may be followed as trust.
State v. McKinley County Bank, 147

Indictment alleging receipt of deposit "then and there having knowledge of the fact that such bank was insolvent" sufficiently alleges insolvency (Laws 1915, c. 67, § 41).
State v. Nance, 158

Insolvency of bank at time of receiving deposit is essential element in prosecution for such receipt of deposit (Laws 1915, c. 67, § 41).
State v. Nance, 158

CERTIORARI

NATURE AND GROUNDS.

Taking of second appeal operated as abandonment of first, and certiorari to show taking of first appeal should be denied.
Moore v. Brannin, 249

Where issuance of certiorari would be futile, it will be denied.
Moore v. Brannin, 249

CHATTEL MORTGAGES

REQUISITES AND VALIDITY.

LIEN AND PRIORITY.

Recording chattel mortgage, without filing or minuting, is sufficient constructive notice thereof (Laws 1915, c. 71, § 2, as amended by Laws 1917, c. 74; Code 1915, § 567; Laws 1923, cc. 8, 14).
Spurgeon v. Hughes, 436

COLLEGES AND UNIVERSITIES.

Approval of voters need not be had for issuance of statutory bonds by University of New Mexico (Laws 1927, c. 47; Const. Art. 9, § 8; art. 12, §§ 11, 12).
State v. Regents of University of New Mexico, 428

Provision for taxation to provide interest and sinking fund of statutory bonds issued by University of New Mexico need not be made (Laws 1927, c. 47; Const. art. 9, § 8, §§ 11, 12).
State v. Regents of University of New Mexico, 428

Slight misnomer of University in statute or contract is immaterial as to validity of University bonds, where its identity appears or can be made to appear by parol. (Laws 1927, c. 47; Code 1915, § 5117 et seq).
State v. Regents of University of New Mexico, 428

Statute authorizing "The Board of Regents of the University of New Mexico" instead of "the Regents of the University of New Mexico" is to issue bonds held not to render bonds invalid (Laws 1927, c. 47; Code 1915, § 5117 et seq.).
State v. Regents of University of New Mexico, 428

Statutory bonds issued by University of New Mexico held not obligations of state (Laws 1927, c. 47; Const. art. 9, § 8, art. 12, §§ 11, 12).
State v. Regents of University of New Mexico, 428

Statutory bonds of University of New Mexico, when issued, will be valid obligations of University (Laws 1927, c. 47; Enabling Act, § 10).
State v. Regents of University of New Mexico, 428

CONSTITUTIONAL LAW

DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

LEGISLATIVE POWERS AND DELEGATION THEREOF.

Legislature may give probate court original jurisdiction in administration of estates, and district court appellate jurisdiction only, except where equitable intervention is required (Comp. Laws 1884, § 562; Code 1915, § 1430).
First National Bank v. Dunbar, 419

Legislature may regulate respective jurisdiction of probate and district courts (Comp. Laws of 1884, § 562; Organic Act of New Mexico, Rev. St. U. S., § 1874 [U. S. Comp. St., § 3464]; Code 1915, § 1430).
First National Bank v. Dunbar, 419

DUE PROCESS OF LAW.

Statute prohibiting more than one agent of fire insurance company in each town violates due process and special privileges clauses (Laws N. M. 1925, c. 135, § 69; Const. U. S. Amends 5, 14; Const. N. M. art. 2, § 18, and article 4, § 26).
Franklin Fire Ins. Co. v. Montoya, 88

PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

Statute prohibiting more than one agent of fire insurance company in each town violates due process and special privileges clauses (Laws N. M. 1925, c. 135, § 69; Const. U. S. Amends, 5, 14; Const. N. M. art. 2, § 18, and article 4, § 26).
Franklin Fire Ins. Co. v. Montoya, 88

RETROSPECTIVE AND EX POST FACTO LAWS.

Constitutional amendment, requiring 8 of grand jury of 12 to concur in indictment, held not ex post facto as to prior offenses (Const. N. M. art.

2, § 14, as amended [See Laws 1923, p. 351]; Const. U. S. art. 1, § 10).
State v. Kavanaugh, 404

CONTRACTS

REQUISITES AND VALIDITY.

LEGALITY OF OBJECT AND OF CONSIDERATION.

Action on contract, void as against public policy, cannot be maintained, where both parties are equally culpable.
State v. Capital City Bank, 369

Contract, consideration and performance of which involves no illegality, may be enforced if incidental aid in evasion or violation of law is not required to be proven.
State v. Capital City Bank, 369

Contract held not enforceable because paper involved was indorsed without recourse to enable bank to violate banking laws.
State v. Capital City Bank, 369

RESCISSION AND ABANDONMENT.

Breach of lessor's covenant to sell gasoline at market price held not to entitle lessee to rescission of covenant to buy, leaving lease otherwise in force.
Ford v. Norton, 518

COUNTIES

FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES AND TAXATION.

Statute authorizing county to issue bonds without directing denomination and rate of interest and other details held inoperative (Laws 1917, c. 11, § 17; Const. art. 9, § 10).
State v. Board of Com'rs of De Baca Co., 309

COURTS

COURTS OF PROBATE JURISDICTION.

District court, exercising jurisdiction under federal Constitution and laws, had probate jurisdiction, but did not have such jurisdiction in cases arising under territorial laws (Organic Act of New Mexico; Rev. St. U. S. § 1874 (U. S. Comp. St. § 3464)).
First Nat. Bank v. Dunbar, 419

ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

RULES OF DECISION, ADJUDICATIONS, OPINIONS, AND RECORDS.

Distinct decision of question fairly raised is not dictum, though decision might have been placed on other grounds.
Baca v. Chavez, 210

"Stare decisis" rule upholds rule that mortgagee's power of sale is not revoked by death of mortgagor.
Baca v. Chavez, 210

CRIMINAL LAW

APPEAL AND ERROR, AND CERTIORARI.

Evidesce cannot be attacked on appeal for reasons not stated in trial court at time of objection.
State v. Martin, 48

DETERMINATION AND DISPOSITION OF CAUSE.

Where accessories before the fact in murder were sentenced to improper punishment, case should be remanded with directions.
State v. Archer, 319

FORM OF REMEDY, JURISDICTION, AND RIGHT OF REVIEW.

State may not appeal from judgment, sustaining

plea of former conviction and dismissing indictment (Laws 1917, c. 43, § 50).
State v. Ashcroft, 209

PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

Conviction of statutory rape based on prosecutrix' improbable uncorroborated evidence will be set aside on appeal, though insufficiency of evidence was not urged at the trial.
State v. Taylor, 163

Objection, not made below, will not be considered on appeal.
State v. Archer, 319

Objection to admission of confession not made below cannot be considered (Code 1915, § 1521; Laws 1917, c. 43, § 37).
State v. Layton, 188

Objection to cross-examination of defendants as to fight with state's witness as proving distinct offence not connected with prosecution for larceny held unavailable, where not made below.
State v. Riley, 83

Objections not made at trial to question to witness will not be considered on appeal.
State v. Massey, 500

Objections not made in trial court are not available on appeal (Laws 1917, c. 43, § 37).
State v. Knowles, 189

PROCEEDINGS FOR TRANSFER OF CAUSE, AND EFFECT THEREOF.

Court cannot review ruling that record of offense, relied on to impeach witness, was violating city ordinance and was a civil matter, where ordinance and proceedings are not in transcript (Laws 1923, c. 10; Code 1915, § 2179).
State v. Knowles, 189

REVIEW.

Conviction not supported by substantial evidence will be set aside on appeal; (Code 1915, § 1613, as amended by Laws 1921, c. 123).
State v. Curry, 219

Instruction that court had followed legal rules to promote justice in submission of facts to jury held not harmful error.
State v. Archer, 319

Trial court's discretion in overruling motion for new trial because of disqualification of juror is not reviewable.
State v. Nance, 158

ARGUMENTS AND CONDUCT OF COUNSEL.

Comment by prosecuting attorney on failure of defendant to produce witness competent and cognizant of material facts is, ordinarily, not error.
State v. Martin, 48

ASSIGNMENT OF ERRORS AND BRIEFS.

Assignment of error based on refusal of answer to question to witness, on cross-examination, must show that counsel stated to court either what he expected to prove or what he desired to prove.
State v. Martin, 48

EVIDENCE.

FACTS IN ISSUE AND RELEVANT TO ISSUES, AND RES GESTAE.

Circumstances immediately or shortly preceding homicide are competent as res gestae.
Facts admissable under res gestae rule depend on their nature and connection with fatal act and other circumstances determining relevancy.
State v. Massey, 500

In prosecution for larceny from dwelling, per-

mitting burglary part of same transaction to be proved was not error.
State v. Riley, 83

In prosecution for murder, excluding remark of deceased, after reading letter from his wife, given him by defendant, on mere exception that it was part of res gestae.
State v. Massey, 500

OTHER OFFENSES, AND CHARACTER OF ACCUSED.

Where defendant claims false instrument was result of mistake, another forgery is competent as bearing on intent.
State v. Smith, 191

MOTIONS FOR NEW TRIAL AND IN ARREST.

Motion in arrest of judgment was not available to defendant charged as principal in second degree murder and accessory before fact and convicted as accessory.
State v. Archer, 319

NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

First clause of Code of 1915, § 1481, relating to assault with intent to murder, is not void for uncertainty or indefiniteness.
State v. Martin, 48

OBJECTIONS TO EVIDENCE, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

Refusing to strike testimony of two cases within knowledge of medical expert wherein results were in accord with results likely to occur, as stated in opinion evidence, was not error.
State v. Martin, 48

PARTIES TO OFFENSES.

Instruction that "accessory before fact" must have been absent at time of offense held not er-

roneous, where indictment did not allege his absence.
State v. Archer, 319

REVIEW.

Error in admitting evidence is not cause for reversal, if not prejudicial to complaining party.
State v. Martin, 48

TRIAL.

COURSE AND CONDUCT OF TRIAL IN GENERAL.

Demonstration by audience at close of district attorney's address to jury was not cause for reversal, in view of instruction to jury to disregard it.
State v. Archer, 319

NECESSITY, REQUISITES, AND SUFFICIENCY OF INSTRUCTION.

Instruction that jury should consider all evidence which they believe true held not erroneous.
State v. Archer, 319

Refusing correct instructions, applying law to defendant's theory supported by evidence held error.
State v. Smith, 191

Where state's case was circumstantial, refusal to instruct to acquit if evidence pointed to some other than defendant as guilty party was error, regardless of abstract charge on circumstantial evidence.
State v. Smith, 191

OBJECTIONS TO EVIDENCE, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

Generally, objection to admission of evidence must be made when it is offered or introduced, or it will be deemed waived.

State v. Massey, 500

In prosecution for murder, admitting testimony of statement not made in defendant's presence, not objected to at earliest opportunity, held not reversible error.
State v. Massey, 500

Objection to evidence should always be made at earliest opportunity after objection becomes apparent.
State v. Massey, 500

On failure to connect objectionable testimony with testimony showing its admissability, objecting party should call court's attention thereto, and renew motion to strike.
State v. Massey, 500

RECEPTION OF EVIDENCE.

Exclusion of incompetent matters mingled with competent matters making offer as whole incompetent is not error.
State v. Archer, 319

Refusal to permit cross-examination of state's witness as to whether he did not shoot certain person, and whether such person died from blood poisoning, was not error.
State v. Archer, 319

REQUESTS FOR INSTRUCTIONS.

After fully charging as to elements of larceny, refusal to instruct, if defendants committed burglary, to be convicted, they must have also committed larceny, was not error.
State v. Riley, 83

In prosecution for murder, instruction that presumption of innocence remains throughout the trial held to render refusal to instruct that silence of defendant under suspicion of offense raises no presumption of guilt proper.
State v. Massey, 500

In prosecution for murder, refusal of instruc-

tions covered by court's general instructions held not error.
State v. Massey, 500

In view of instruction to consider interest of witnesses, refusal of cautionary instruction as to evidence of sheriff and peace officers held not error.
State v. Massey, 500

VENUE.

CHANGE OF VENUE.

Stipulation and court's finding that defendant and two others filed affidavits that fair trial could not be had held to require change of venue (Code 1915, § 5573).
State v. Nabors, 453

Venue may be changed on state's application over defendant's objection, where excitement and prejudice would prevent fair trial (Const. art. 2, § 14; Code 1915, § 5573).
State v. Archer, 319

DEDICATION

NATURE AND REQUISITES.

Public highway can be established pursuant to law by dedication.
Board of Com'rs of San Miguel County v. Friendly Haven Ranch Co., 342

DISTRICT AND PROSECUTING ATTORNEYS

Statute permitting allowance of district attorney's expenses held not repealed by statute creating office of state comptroller (Code 1915, § 1369, and section 1869, as amended by Laws 1921, c. 139; Laws 1921 c. 206, § 7; Laws 1923, c. 48; Laws 1925, c. 120, § 1; Const. art. 4, § 16).
State v. Romero, 178

DIVORCE

JURISDICTION, PROCEEDINGS, AND RELIEF.

JUDGMENT OR DECREE.

Equity will vacate divorce decree, obtained by service by publication, based on statement that defendant's residence was unknown when it was readily ascertainable (Code 1915, §§ 4095, 4096).
Owens v. Owens, 445

ELECTIONS

CONTESTS.

Judgment in election contest can be reviewed only by appeal, and writ of error does not lie (Code 1915, § § 2066-2080; Laws 1917, c. 43, §§ 1, 2, 4).
Hannett v. Mowrer, 231

COUNT OF VOTES, RETURNS, AND CANVASS.

Relator in mandamus, holding certificate of election from duly constituted canvassing board, who has qualified for office, has prima facie title where prior incumbent's term has expired.
Jaramillo v. State, 20

EMBEZZLEMENT

Evidence held to sustain conviction of embezzlement (Laws 1919, c. 120, § 13).
State v. Gaunt, 17

ESTOPPEL

EQUITABLE ESTOPPEL.

GROUNDS OF ESTOPPEL.

Party assuming and maintaining position in legal proceeding may not assume contrary position to prejudice of party acquiescing in former position.
In re Maddison, 252

EVIDENCE

BEST AND SECONDARY EVIDENCE.

Best proof of current price of gasoline is actual sales made.
Ford v. Norton, 518

EXCEPTIONS, BILL OF

SETTLEMENT, SIGNING AND FILING.

District Judge has power to designate another judge to sign and seal bill of exceptions (Const. art. 6, § 15).
First State Bank of Alamogordo v. McNew, 225

District judge, sitting in county outside district at request of resident judge, may settle and sign bill of exceptions.
State v. Stewart, 242

EXECUTORS AND ADMINISTRATORS

ACCOUNTING AND SETTLEMENT.

STATING, SETTLING, OPENING, AND REVIEW.

Probate court's order approving executor's final report cannot be set aside in equity, remedy by appeal to district court being adequate (Laws 1915, c. 99).
First Nat. Bank v. Dunbar, 419

EXEMPTIONS

NATURE AND EXTENT.

NATURE, CREATION, DURATION, AND EFFECT IN GENERAL.

Exemption statutes should be liberally construed.
McFadden v. Murray, 361

PROPERTY AND RIGHTS EXEMPT.

Exemption in lieu of homestead may be claimed out of current wages garnished (Code 1915, § § 2192, 2311-2329, 2521-2552; Laws 1919, c. 153, § 1; Comp. Laws 1897, § 2698 et seq.).
McFadden v. Murray, 361

FORGERY

Evidence of forgery of note held sufficient on motion to direct acquittal.
State v. Smith, 191

"Forgery" is making false instrument with intent to defraud.
State v. Smith, 191

General intent to injure or defraud is sufficient for conviction of forgery (Code 1915, §§ 1590, 1604).
State v. Smith, 191

Indictment for forgery of note set forth in haec verba, including signature, need not allege it purports to be such party's signature.
State v. Smith, 191

Jury should be permitted to consider fact that no one was injured or defrauded by forgery as bearing on intent.
State v. Smith, 191

Refusal to instruct defendant could not be convicted for forgery because of possession of forged instrument unless he made it or caused it to be made or participated therein held error.
State v. Smith, 191

FRAUDULENT CONVEYANCES.

TRANSFERS AND TRANSACTIONS INVALID.

INDEBTEDNESS, INSOLVENCY, AND INTENT OF GRANTOR.

Husband's conveyance to wife cannot be set

aside in absence of allegation and proof of insolvency then and at suit to set it aside.
Field v. Otero, 338

PREFERENCES TO CREDITORS.

Insolvent husband may convey property to wife to pay debt, regardless of intention to prevent other creditors from reaching it.
Field v. Otero, 338

GAMING

CRIMINAL RESPONSIBILITY.

That slot machine returns to player value of money in chewing gum does not prevent its violating anti-gambling laws (Laws 1921, c. 86).
State v. Apodaca, 80

GRAND JURY

Constitutional amendment, requiring 8 of grand jury of 12 to concur in indictment, held not to disparage any constitutional guaranty as to prior offenses (Const. N. M. art. 2, § 14, as amended [see Laws 1923, p. 351]; Const. U. S. art. 1, § 10).
State v. Kavanaugh, 404

GUARDIAN AND WARD

LIABILITY ON GUARDIANSHIP BONDS.

Guardian's sureties relying on settlement unchallenged for two years ten months, incurring new obligations and losing opportunity for indemnification, held discharged.
State Trust & Savings Bank v. Otero. 99

HIGHWAYS

CONSTRUCTION, IMPROVEMENT, AND REPAIR.

Materialman may sue on highway contractor's bond to state containing obligation to pay for materials.
Southwestern Portland Cement Co. v. Williams, 68

State highway commission may require bond from contractors to indemnify state and for benefit of laborers and materialmen (Laws 1917, c. 38, § 9).
Southwestern Portland Cement Co. v. Williams, 68

Surety on highway contractor's bond to state containing obligation to pay for material is liable to materialmen.
Southwestern Portland Cement Co. v. Williams, 68

ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

ESTABLISHMENT BY PRESCRIPTION, USER, OR RECOGNITION.

Mere permissive use of private way by public does not establish public highway by prescription (Code 1915, § 2626).
Board of Com'rs of San Miguel County v. Friendly Haven Ranch Co., 342

Public highway can be established pursuant to law by recognition and maintenance by public authorities (Code 1915, § 2626).
Board of Com'rs of San Miguel County v. Friendly Haven Ranch Co., 342

HOMICIDE

EVIDENCE.

ADMISSIBILITY IN GENERAL.

After allowing wife, prosecuted as accessory before the fact in murder of husband, to testify she intended to accompany husband on removal, and why, exclusion of evidence of deceased's intention to move to avoid trouble was not error.
State v. Archer, 319

After offer to allow testimony as to sanity of defendant during time of alleged conspiracy to

murder, refusal to allow testimony of insanity three years before was not error.
State v. Archer, 319

Any evidence tending to show defendant had motive for killing deceased is always relevant.
State v. Massey, 500

In prosecution for murder, admitting testimony that defendants had unlawfully disposed of mortgaged cattle, and unlawfully branded colts, and feared deceased would expose them, held proper.
State v. Massey, 500

In prosecution for murder, excluding testimony that state's witness, armed with revolver, visited home of deceased, was not error.
State v. Archer, 319

WEIGHT AND SUFFICIENCY.

Evidence held to support conviction of voluntary manslaughter.
State v. Massey, 500

INDICTMENT AND INFORMATION.

"Then," used in alleging, inducing and hiring person to commit murder, means at any time within statute of limitations.
State v. Archer, 319

MURDER

Defendant may be accessory before fact and principal in second degree to same murder.
State v. Archer, 319

SENTENCE AND PUNISHMENT.

Accessory before fact in murder should have been sentenced to imprisonment for not less than three months and not sentenced to death (Code 1915, § 1454; Laws 1925, c. 145).
State v. Archer, 319

In prosecution for assault with intent to murder,

framed on statute fixing punishment therefor, another statute relating to assault with intent to commit felony has no application (Code 1915, §§ 1476, 1480, 1481, Laws 1915, c. 51 as amended; Laws of the Territory of New Mexico, 4th Leg. Session, 1853, c. 3, §§ 25-31, 33-37).
State v. Martin, 48

Penitentiary sentence of from 7 to 10 years for assault with intent to murder held not excessive (Code 1915, §§ 1476, 1480, 1481, Laws 1915, c. 51 as subsequently amended; Laws of the Territory of New Mexico, 4th Leg. Session, 1853, c. 3, §§ 25-31, 33-37).
State v. Martin, 48

INDICTMENT AND INFORMATION

FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

Indictment for forgery alleging, in language of statute, act was unlawfully, falsely, and maliciously done, sufficiently excludes authorization thereof (Code 1915, § 1590).
State v. Smith, 191

INJUNCTION

SUBJECTS OF PROTECTION AND RELIEF.

Laundry employee, learning lists of customers, in absence of contract, may not be enjoined from soliciting old customers for new employer.
Excelsior Laundry Co. v. Diehl, 169

INSURANCE

ACCIDENT AND HEALTH INSURANCE.

Death from "milk sickness" or alkali poisoning from drinking milk from cows which had eaten goldenrod is within life policy with double indemnity for death from "injury through external, violent and accidental cause."
Buel v. Kansas City Life Ins. Co., 34

ACTIONS ON POLICIES.

Medical diagnosis made during treatment, and adhered to at the trial, is substantial evidence to support a finding as to cause of death.
Buel v. Kansas City Life Ins. Co., 34

ADJUSTMENT OF LOSS.

Where policy provided double indemnity for accidental death, acceptance of amount named in policy in full settlement was not "accord and satisfaction," barring recovery of double indemnity for accidental death.
Buehl v. Kansas City Life Ins. Co., 34

CONTROL AND REGULATION IN GENERAL.

Statute prohibiting more than one agent of fire insurance company in each town held unconstitutional (Laws N. M. 1925, c. 135, § 69).
Franklin Fire Ins. Co. v. Montoya, 58

MUTUAL BENEFIT INSURANCE.

CORPORATIONS AND ASSOCIATIONS.

Insured member of benefit society is entitled to notice of specific offense as ground for expulsion.
Clevenger v. Sulier, 115

JUDGMENT

MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

CAUSES OF ACTION AND DEFENSES MERGED, BARRED, OR CONCLUDED.

Counterclaim may be made in suit on judgment, regardless of rule that judgment is res judicata as to defenses which were or might have been made.
Bailey v. Great Western Oil Co., 478

PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.

Judgment is "contract" within statute permitting action arising on contract to be pleaded as counterclaim in action based on contract (Code 1915, § 4116).
Bailey v. Great Western Oil Co., 478

SUSPENSION, ENFORCEMENT AND REVIVAL.

Proceeding to revive judgment is new and independent action and subject to counterclaim based on contract (Code 1915, §§ 3085, 3086, 4116).
Bailey v. Great Western Oil Co., 478

JURY

COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

Right to peremptorily challenge juror after acceptance is not absolute but may be allowed in discretion of court.
State v. Martin, 48

RIGHT TO TRIAL BY JURY.

Defendant held not entitled to complain of nonsubmission of case to jury.
Porter v. Alamocitos Land & Live Stock Co., 344

Demurrer to complaint to quiet title is inadequate to present question of right to jury trial (Const. Art. 2, § 12).
Knaebel v. Escudero, 311

LANDLORD AND TENANT

PREMISES AND ENJOYMENT AND USE THEREOF.

REPAIRS, INSURANCE, AND IMPROVEMENTS.

Evidence held not to support damages for breach

of tenant's covenant to repair.
Armijo v. Pettit, 469

RENT AND ADVANCES.

ACTIONS.

Evidence held not to show breach of landlord's agreement to consent to assignment of lease.
Armijo v. Pettit, 469

LIEN.

Landlord's lien on tenant's property is not, as between original parties, lost by landlord's consent to removal of property from premises.
Armijo v. Pettit, 469

Lease giving landlord first lien on tenant's goods for rent held to create lien in nature of chattel mortgage.
Armijo v. Pettit, 469

Lien on tenant's property, described in subsequent paragraph as trade fixtures, held not void for uncertainty in description.
Armijo v. Pettit, 469

RIGHTS AND LIABILITIES.

Landlord's efforts to secure tenant for remainder of term held not to release abandoning tenant from liability for rent, even though tenant for longer term was secured.
Armijo v. Pettit, 469

Leasing for future occupancy does not of itself release abandoning tenant from liability.
Armijo v. Pettit, 469

LARCENY

OFFENSES AND RESPONSIBILITY THEREFOR.

"Larceny." which is felonious stealing and carrying away of another's personal property cannot exist unless property was in possession

of one from whom it is charged to have been stolen (Code 1915, § 1613, as amended by Laws 1921, c. 123).
State v. Curry, 219

PROSECUTION AND PUNISHMENT.

EVIDENCE.

Evidence held to support conviction for larceny.
State v. Riley, 83

Evidence of larceny of cow held insufficient to support conviction (Code 1915, § 1612, as amended by Laws 1921, c. 123).
State v. Curry, 219

LIENS

Debtor's mere promise to pay out of particular fund is insufficient to charge it with equitable lien.
Kahnt v. Jones McKeen Merc. Co., 537

LIMITATION OF ACTIONS

OPERATION AND EFFECT OF BAR BY LIMITATION.

Execution of power of sale in mortgage is not barred by limitation barring suit or action on debt or security (Code 1915, §§ 3346, 3348).
Baca v. Chavez, 210

MANDAMUS

SUBJECTS AND PURPOSES OF RELIEF.

ACTS AND PROCEEDINGS OF PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES.

Commission to officer issued by Governor to fill vacancy created through lawful removal by him,

if he has power to fill vacancy, is prima facie title to office, as respects mandamus.
Jaramillo v. State, 20

Exercise of Governor's power to remove officer must be taken as conclusive of existence of vacancy and end of term of prior incumbent, as respects mandamus to fill vacancy.
Jaramillo v. State, 20

If Governor has power to remove from office, exercise thereof is not reviewable by mandamus to fill vacancy.
Jaramillo v. State, 20

Mandamus to fill office is granted to relator, if he shows prima facie title and office is unfilled.
Jaramillo v. State, 20

Prima Facie title to public office concludes court as to issuance of mandamus, which is not remedy to try title to office.
Jaramillo v. State, 20

Where office is occupied by de facto officer holding under color of right, mandamus in relation to right to office will be refused, especially where de facto officer is not party to suit.
Jaramillo v. State, 20

MAYHEM

"Mayhem" at common law, is unlawfully and violently depriving another of use of such of his members as may render him less able, in fighting, either to defend himself or annoy his adversary.
State v. Martin, 48

MECHANICS' LIENS

ENFORCEMENT.

Finding that purchaser was builder, when not using "building" in statutory sense, did not ne-

cessitate finding that he was vendor's agent (Code 1915, § 3319).
Albuquerque Lumber Co. v. Tomei, 5

RIGHT TO LIEN.

AGREEMENT OR CONSENT OF OWNER.

Purchaser's interest under executory contract of sale, in which title is reserved, is not fixed or determinable undivided interest as respects materialman's lien (Code 1915, § 3321).
Albuquerque Lumber Co. v. Tomei, 5

Rescission of executory contract reserving legal title, for purchaser's default after materialman's lien has attached to equitable interest, does not extend lien to fee.
Albuquerque Lumber Co. v. Tomei, 5

Statute requiring disclaimer of liability by owner of interest in land applies only to particular contract or scheme of improvement in progress or contemplated at time (Code 1915, § 3327).
Albuquerque Lumber Co. v. Tomei, 5

Where purchaser under executory contract causes improvement to be made, he is not agent of vendor, so as to bind him or his property (Code 1915, §§ 3319, 3321, 3327).
Albuquerque Lumber Co. v. Tomei, 5

MINES AND MINERALS

PUBLIC MINERAL LANDS.

RESERVATION AND DISPOSAL IN GENERAL.

Notice prior to due date that, unless rental be paid within thirty days, oil lease would be canceled without further notice is sufficient.
Orcutt v. Nichols, 382

MORTGAGES

FORECLOSURE BY ACTION.

Holder of note secured by mortgage may suc-

cessively or concurrently sue thereon against the person or property of debtor or foreclose mortgage.
Porter v. Alamocitos Land & Livestock Co., 344

PLEADING AND EVIDENCE.

Mortgagor's ownership of premises is implied, without express allegation in foreclosure complaint (Code 1915, § 2181).
Franklin v. Harper, 108

FORECLOSURE BY EXERCISE OF POWER OF SALE.

Mortgagee's power of sale is coupled with interest and is not revoked by death of mortgagor.
Baca v. Chavez, 210

Power of sale in mortgage construed not to require entry or demand for possession prior to giving notice of sale.
Baca v. Chavez, 210

Third party, owner of undivided interest in land when mortgaged and now owner of whole, may not enjoin sale for failure of notice to exclude his interest which was not excluded in mortgage.
Baca v. Chavez, 210

MUNICIPAL CORPORATIONS

PUBLIC IMPROVEMENTS.

ASSESSMENTS FOR BENEFITS AND SPECIAL TAXES.

Franchise held to require street railroad to pave track zone, and cost might be collected by ordinary suit or by foreclosing lien (Laws 1919, c. 152).
City Electric Co. v. City of Albuquerque, 397-401

Legislature may make lien for special assess-

ments paramount to prior liens by contract (Laws 1919, c. 152).
City Electric Co. v. City of Albuquerque, 397-401

Power to levy special assessments is branch of taxing power.
City Electric Co. v. City of Albuquerque, 397-401

OFFICERS

APPOINTMENT, QUALIFICATION, AND TENURE.

DE FACTO OFFICERS.

De facto officer claiming under color of right before expiration of term, in absence of removal by authorized court or tribunal, has prima facie title to office.
Incumbent, whose term has expired, when another has certificate of election and has qualified for office, is not de facto officer.
Jaramillo v. State, 20

OFFICES, AND POWER TO APPOINT TO AND REMOVE FROM OFFICE.

Governor may remove any officer appointed by him, including those appointed by and with consent of Senate (Const. art. 5, § 5).
State v. Sanchez, 265

RESIGNATION, SUSPENSION, OR REMOVAL.

Governor in removing from office need not make charges, give notice, or accord hearing (Const. art. 4, §§ 35, 36, art. 5, §§ 4, 5, and art. 20 §§ 2, 4. 9, Code 1915, § 5022).
State v. Sanchez, 265

Governor is without power to remove elective officer.
Jaramillo v. State, 20

TERM OF OFFICE, VACANCIES, AND HOLDING OVER.

Commission by Governor to fill vacancy in office, reciting that vacancy exists, carries presumption of existence of vacancy at time of appointment.
Jaramillo v. State, 20

Governor is without power to remove elective officer and may appoint to fill vacancy only when one, in fact, exists.
Jaramillo v. State, 20

TITLE TO AND POSSESSION OF OFFICE.

Incumbent, whose term has expired, when another has certificate of election and has qualified for office, is not de facto officer, but mere intruder.
Jaramillo v. State, 20

PARTNERSHIP

RETIREMENT AND ADMISSION OF PARTNERS.

Attempt to collect debt from continuing partner, who assumed it, and receiving checks, held not dealing as though debt were his alone.
Michelin Tire Co. v. Akers, 233

Creditor's failure to answer retiring partner's communication, claiming release because of continuing partner's assumption of debts, does not effect release.
Michelin Tire Co. v. Akers, 233

Forbearance to collect partnership debt does not release retiring partner, though changed situation may prevent his enforcing indemnity against continuing partner.
Michelin Tire Co. v. Akers, 233

PLEADING

DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

Complaint to quiet title in language of statute

is not demurrable (Code 1915, §§ 4387, 4388).
Knaebel v. Escurdo, 311

DEFECTS AND OBJECTIONS, WAIVER, AND AIDER BY VERDICT OR JUDGMENT.

Error in overruling demurrer is unavailable on appeal, unless stood on.
State v. Board of Trustees of Town of Las Vegas, 182

PRINCIPAL AND SURETY

NATURE AND EXTENT OF LIABILITY OF SURETY.

Liability of professional paid surety is not construed strictissimi juris.
Southwestern Portland Cement Co. v. Williams, 68

PROPERTY

"Chose in action" is "personal property."
McFadden v. Murray, 361

"Real or personal property" is commonly used to denote property of all kinds.
McFadden v. Murray, 361

QUO WARRANTO

NATURE AND GROUNDS.

Quo warranto is proper proceeding to test right to public office.
Jaramillo v. State, 20

RAILROADS

LOCATION OF ROAD, TERMINI, AND STATIONS.

Order re-established, and discontinued without commission's permission, must be based on showing public interest demands service (Const. art. 11, §§ 7, 8).
State Corporation Commission of N. M. v. A. T. & S. F. Ry. Co., 304

RAPE

PROSECUTION AND PUNISHMENT.

EVIDENCE.

Improbable evidence of prosecutrix, uncorroborated by fact pointing to guilt, held not to support conviction of statutory rape.
State v. Taylor, 163

SALES

CONDITIONAL SALES.

Seller replevying automobile sold under unrecorded conditional contract must prove purchaser from buyer had knowledge (Laws 1923, c. 8).
Schaefer v. Whitson, 481

Unrecorded conditional sale contract held void as to bona fide purchaser for value (Laws 1923, c. 8).
Schaefer v. Whitson, 481

CONSTRUCTION OF CONTRACT.

Covenant to sell and buy gasoline held to require seller to deliver at current prices at time of demand.
Ford v. Norton, 518

"Current market price" means that contract price shall run or flow with market, following its fluctuations.
Ford v. Norton , 518

Sale of goods from larger stock, with right to reject unmerchantable goods, held to give buyer free and exclusive right of selection.
Slease v. D. M. Miller & Co., 528

PERFORMANCE OF CONTRACT.

DELIVERY AND ACCEPTANCE OF GOODS.

Covenant to sell gasoline at market price held

not affected by buyer's encouraging trade war by buying of concern invading market after first giving seller opportunity to meet price.
Ford v. Norton. 518

Lessee's buying gasoline of concern invading market held not to render covenant of lessor to sell at market price impossible of performance.
Ford v. Norton, 518

Obligation under covenant to sell gasoline at current price held not affected by fact that such price was result of temporary trade war.
Ford v. Norton. 518

SCHOOLS AND SCHOOL DISTRICTS

PUBLIC SCHOOLS.

ESTABLISHMENT, SCHOOL LANDS, AND FUNDS, AND REGULATION IN GENERAL.

Debentures anticipating proceeds of gasoline excise tax held eligible as investment for permanent school fund (Laws 1927, cc. 4, 20; Const. art. 12, § 7).
State v. Graham, 485

SET-OFF AND COUNTERCLAIM

SUBJECT-MATTER

Counterclaim sounding in tort is not available in action on account (Code 1915, § 4116).
Cassell Motor Co. v. Gonzales, 259

STATES

FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

Debentures anticipating proceeds of gasoline excise tax do not constitute state borrowing or debt requiring popular referendum (Const. art. 9, §§ 7, 8, 16; Laws 1917, c. 20).
State v. Graham, 485

GOVERNMENT AND OFFICERS.

State comptroller's authority to audit expenditures is limited to disbursements of legislative appropriations, and does not include expenses of district attorneys paid from court fund (Code 1915, § 1369, and section 1869, as amended by Laws 1921, c. 139, § 1; Laws 1921 c. 206, § 7; Laws 1923, c. 139, § 1; Const. art. 4, § 16).
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REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

General statute will not repeal by implication earlier specific statute, unless such construction is absolutely necessary (Code 1915, § 1369, and section 1869 as amended by Laws 1921, c. 139, § 1; Laws 1921 c. 206, § 7; Laws 1923, c. 48;

Laws 1925, c. 120, § 1; Const. art. 4, § 16).
State v. Romero, 158

TAXATION

COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

COLLECTORS AND PROCEEDINGS FOR COLLECTION IN GENERAL.

Authority of special collector of delinquent taxes held not restricted by statute to taxes assessed since January 1, 1910 (Laws 1925, c. 26).
State v. Montoya, 314

SUMMARY REMEDIES AND ACTION.

In action by state for taxes, ruling that assessments were illegal for insufficiency of description not objected to at trial cannot be attacked on appeal (Laws 1917, c. 43, § 37).
State v. Board of Trustees of Town of Las Vegas, 182

In state's action for taxes, judgments should include statutory penalties and interest, regardless of lack of proof as to amount thereof.
State v. Board of Trustees of Town of Las Vegas, 182

Statute creating presumption of payment of old taxes held unconstitutional, in so far as attempting to discharge personal liability for taxes (Laws 1921, c. 133, § 474; Const. art. 4, § 32).
State v. Montoya, 314

Statute, if construed as barring suit to enforce personal liability for taxes, held unconstitutional (Laws 1921, c, 133, § 474; Const. art. 4, § 32).
State v. Montoya, 314

LEVY AND ASSESSMENT.

ASSESSMENT ROLLS OR BOOKS.

Assessments describing land as undisposed part of L. Grant and naming boundaries of grant held

sufficient. (Code 1915, § 5437; Laws 1921, c. 133, § 203).
State v. Board of Trustees of Town of Las Vegas, 182

Description of land in tax assessment is good, if it would be sufficient in deed (Code 1915, § 5437; Laws 1921, c. 133, § 203).
State v. Board of Trustees of Town of Las Vegas, 182

Statutory assessment of realty held to require description sufficient in itself to identify land (Laws 1899, c. 22, §§ 18, 25).
King v. Doherty, 431

REVIEW, CORRECTION, OR SETTING ASIDE OF ASSESSMENT.

Prior to statute, district court had no authority to lower tax assessment merely because exceeding cash value (Laws 1921, c. 133, § 431).
State v. Board of Trustees of Town of Las Vegas, 182

TAX TITLES

TITLE AND RIGHTS OF PURCHASER AT TAX SALE.

Tax deed, based on assessment describing land as 160 acres owned by certain person, giving merely section, township and range, held insufficient as defense in suit to quiet title (Comp. Laws 1897, § 4032; Laws 1899, c. 22, §§ 18, 25).
King v. Doherty, 431

TRIAL

ARGUMENTS AND CONDUCT OF COUNSEL.

Denial of right to address jury through counsel is reversible error (Code 1915, § 4467).
Conner v. Flaska, 162

RECEPTION OF EVIDENCE.

OBJECTIONS, MOTIONS, TO STRIKE OUT, AND EXCEPTIONS.

If evidence is admitted "subject to objection" and later ruled out without objection by the party offering it, he is deemed to acquiesce in the ruling.
Albuquerque Lumber Co. v. Tomei, 5

REMEDIES OF VENDOR.

LIEN AND RECOVERY OF LAND.

An executory contract for the sale of land, reserving legal title in the vendor until payment, does not create a vendor's lien.
Albuquerque Lumber Co. v. Tomei, 5

USURY

USURIOUS CONTRACTS AND TRANSACTIONS.

NATURE AND VALIDITY.

Usury statute providing criminal consequences held not repealed by subsequent usury statute providing civil consequences (Code 1915, § 3528; Laws 1919, c. 162).
Ex parte Armijo, 458

VENDOR AND PURCHASER

PERFORMANCE OF CONTRACT.

PAYMENT OF PURCHASE MONEY.

Equity will not consider land purcheser in default for interest, if, previously, vendor has converted large sum of vendee's funds.
Calvert v. Joseph, 384

REMEDIES OF PURCHASER.

RECOVERY OF PURCHASE MONEY PAID.

Decree rescinding purchase fixing recovery at amount of notes owned by third parties with credit for those delivered up, held equitable.
Calvert v. Joseph, 384

On vendor's wrongful declaration of forfeiture purchaser's right to restitution is not defeated by failure to tender interest due under contract.
Calvert v. Joseph, 384

Purchaser may accept vendor's wrongful declaration of forfeiture as abandonment of contract and recover payments as upon mutual rescission.
Calvert v. Joseph, 384

WITNESSES

COMPETENCY.

CONFIDENTIAL RELATIONS AND PRIVILEGED COMMUNICATIONS.

State's witness may be cross-examined as to whether, in giving statement to district attorney concerning case, he disclosed important facts to which he testified at trial.
State v. Archer, 319

CREDIBILITY, IMPEACHMENT, CONTRADICTION AND CORROBORATION.

CHARACTER AND CONDUCT OF WITNESS.

Excluding cross-examination showing witness had opportunity to speak where it was natural or his duty to speak and failed to do so was error.
State v. Archer, 319

Witness may be impeached by showing failure to make important disclosures on former occasion.
State v. Archer, 319

INCONSISTENT STATEMENTS BY WITNESS.

In prosecution for assault with intent to murder, on showing that alleged victim received four bullet wounds and testimony by defendant that he was unconcious during shooting, permitting state to elicit from witness testimony relating

to statements which witness had theretofore made concerning whereabouts of one of pistols immediately prior to shooting inconsistent with testimony of such witness at time of trial was not prejudicial (Code 1915, § 2180).

State v. Martin, 48

It may be shown that witness establishing alibi, on examination before grand jury, failed to make disclosures testified to on trial.

State v. Archer, 319

Striking testimony of impeaching witness that witness stated to him that he recognized defendants either at 200 or 400 yards was proper, where foundation laid stated distance was 400 yards.

State v. Riley, 83

Striking testimony of the impeaching witness, where testimony was not same as that anticipated in foundation for impeachment, was not error.

State v. Riley, 83

Witness testifying on cross-examination he could not state whether handwriting was that of other than defendant having opportunity to sign note may be impeached by showing contrary statement on former occasion.

State v. Smith, 191

EXAMINATION.

CROSS-EXAMINATION AND RE-EXAMINATION.

Right of thorough and sifting cross-examination should not be abridged.

State v. Martin, 48

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